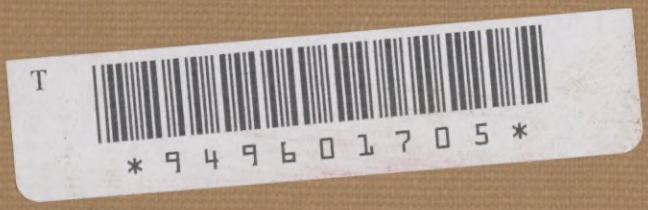

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

DECEMBER TERM, 1856.

By BENJAMIN C. HOWARD,
COUNSELLOR AT LAW AND REPORTER OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

VOL. XIX.

WASHINGTON, D. C.
WILLIAM M. MORRISON AND COMPANY,
LAW PUBLISHERS AND BOOKSELLERS.
1857.

BUELL & BLANCHARD, PRINTERS.
MORELAND & WHEELER, STEREOTYPERS.
WASHINGTON, D. C.

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. PETER V. DANIEL, Associate Justice.
HON. SAMUEL NELSON, Associate Justice.
HON. ROBERT C. GRIER, Associate Justice.
HON. BENJAMIN R. CURTIS, Associate Justice.
HON. JOHN A. CAMPBELL, Associate Justice.

CALEB CUSHING, ESQ., Attorney General.

WILLIAM THOMAS CARROLL, ESQ., Clerk.

BENJAMIN C. HOWARD, ESQ., Reporter.

JONAH D. HOOVER, ESQ., Marshal.

Mr. Chief Justice Taney made the following remarks:

"Gentlemen of the Bar: You are already, I presume, apprized of the calamity which has befallen our Brother, Judge Daniel, in the sudden and painful death of his wife. Our respect and regard for him, and the sincere sympathy we feel for him personally, as well as our sense of what is due to him as a member of this tribunal, will prevent the court from proceeding to-day with the business of the term. The funeral of Mrs. Daniel will take place to-morrow, which the members of the court will attend. We shall therefore adjourn until Wednesday, to meet at the usual hour and proceed with the duties of the court."

January 5th, 1857.

Mr. Chief Justice Taney remarked as follows:

"Gentlemen of the Bar: Mr. Carroll, the Clerk of this court, has suffered a painful domestic affliction in the sudden and unexpected death of a son who had just grown up to manhood. The members of the court, as a mark of their respect and sympathy, propose to attend the funeral, which will take place to-day at one o'clock. We shall, on that account, adjourn at half-past twelve."

January 23d, 1857.

LIST OF ATTORNEYS AND COUNSELLORS

ADMITTED DECEMBER TERM, 1856.

Percy Walker,	*Alabama.*
Philip S. Cottle,	*New York.*
John Willard,	*New York.*
James E. Munford,	*Missouri.*
Josiah Collins, Jr.,	*North Carolina.*
William H. Crabbe,	*Pennsylvania.*
Daniel S. Printup,	*Georgia.*
James H. Scott,	*New York.*
R. C. Gilchrist,	*South Carolina.*
N. Richardson,	*New York.*
Charles S. Bryant,	*Ohio.*
Harvey Officer,	*Minnesota Territory.*
Augustus Hall,	*Iowa.*
Joseph C. Knapp,	*Iowa.*
Joshua L. Brown,	*New York.*
Samuel W. Bates,	*Massachusetts.*
Henry C. Hutchins,	*Massachusetts.*
David Thaxter,	*Massachusetts.*
W. Fletcher Sapp,	*Ohio.*
William A. Groves,	*Illinois.*
Thomas Turner,	*Kentucky.*
Lymon B. Smith,	*New York.*
Samuel N. Salomon,	*New York.*
Frederick A. Lane,	*New York.*
L. M. Closs,	*Nebraska Territory.*
Walter H. Smith,	*Ohio.*
Charles P. Curtis, Jr.,	*Massachusetts.*
R. C. Parsons,	*Ohio.*
William H. Tucker,	*Wisconsin.*
E. S. Lowman,	*New York.*
Henry L. Moss,	*Minnesota Territory.*
Cyrus K. Lord,	*Wisconsin.*
A. D. La Due,	*Minnesota Territory.*
James M. Cavanaugh,	*Minnesota Territory.*
John B. Onstine,	*Minnesota Territory.*
George R. Fairbanks,	*Florida.*
Morris S. Miller,	*New York.*

William R. Dickerson,	*Pennsylvania.*
Alexander C. Morton,	*New York.*
J. C. Spencer,	*New York.*
William Ware Peck,	*Vermont.*
R. Rose,	*District of Columbia.*
J. Wagner Jermon,	*Pennsylvania.*
P. G. Webster,	*New York.*
J. D. B. De Bow,	*Louisiana.*
John McCrackan,	*California.*
W. A. Talbott,	*Maryland.*
Lewis B. Reed, Jr.,	*New York.*
Henry H. Anderson,	*New York.*
Abraham Payne,	*Rhode Island.*
C. L. Vallandigham,	*Ohio.*
A. V. Hofer,	*Missouri.*
Isaac Fisher,	*Pennsylvania.*
P. Della Torre,	*California.*
David Barclay,	*Pennsylvania.*
R. S. Blackwell,	*Illinois.*
Carlos Tracy,	*South Carolina.*
Harvey T. Cleveland,	*New York.*
George W. Gayle,	*Alabama.*
S. M. Bowman,	*California.*
Andrew M. Blair,	*Wisconsin.*
H. P. Vrooman,	*Michigan.*
William G. Bryan,	*New York.*

LIST OF CASES REPORTED.

THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

DECEMBER TERM, 1856.

JEAN LOUIS PREVOST, PLAINTIFF IN ERROR, *v.* CHARLES E. GRENEAUX, TREASURER OF THE STATE OF LOUISIANA.

The laws of Louisiana impose a tax of ten per cent. on the value of all property inherited in that State by any person not domiciliated there, and not being a citizen of any State or Territory of the United States.

In 1853, a treaty was made between the United States and France, by which Frenchmen were placed, as regards property, upon the same footing as citizens of the United States, in all the States of the Union whose laws permit it.

This treaty has no effect upon the succession of a person who died in 1848.

THIS case was brought up from the Supreme Court of the State of Louisiana by a writ of error issued under the 25th section of the judiciary act.

The facts in the case were very few, and are stated in the opinion of the court. See also 8 Howard, 490, and 18 Howard, 182.

It was argued by *Mr. Janin* for the plaintiff in error, and by *Mr. Benjamin* for the defendant.

Mr. Janin made the following point:

The plaintiff in error submits—and that is the only point in the case—that his heirship was only recognised in 1854; and that when the law imposing a tax or penalty is repealed before that tax is collected, the right to recover it is lost.

This principle was recognised by the former Supreme Court of Louisiana.

In the case of the city of New Orleans *v.* Mrs. Grailhe, decided December 4, 1854, it was contended that the right to

collect the tax levied by the ordinance of 1852 was lost by the repeal of that ordinance under the 5th condition of the 2d section of the acts of the Legislature of March 15, 1854, page 73, authorizing the city of New Orleans to subscribe to the Opelousas and Jackson railroads. This position was taken under the authority of the principles recognised in three decisions: one in the case of Cooper *v.* Hodge, 17 L., 476, and two others referred to in that decision. Judge Martin was the organ of the court in these three cases. In that of Cooper *v.* Hodge, the principle is expressed in this form:

"We have held, that if a judgment be correctly given under a law which is repealed pending the appeal, this court is bound to reverse it."

The Supreme Court of the United States have acted on this principle in cases of much more difficulty than that now before the court.

The Legislature of Virginia, by an act passed in 1779, during the war, had authorized Virginia debtors of British subjects to discharge the debt by payment into an office existing under the State Government. The defendants in error, under this act, had paid into this office a portion of their indebtedness to the plaintiffs, and pleaded their discharge *pro tanto* under the act. The plaintiffs replied the 4th article of the definitive treaty of peace between Great Britain and the United States, of September 3, 1783, in which it was stipulated that creditors on either side should meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted.

The State was held to have had full power to make the law, but it had been annulled by the treaty, and the defendants in error were liable to the full amount, notwithstanding partial payment to the State.

1 Cranch, 103. The United States *v.* The Schooner Peggy. The schooner Peggy was captured by a United States armed vessel, and libelled as prize, ordered to be restored by the District Court, condemned by the Circuit Court on appeal as lawful prize, when the owners of the Peggy prosecuted a writ of error to the Supreme Court. She had been captured as sailing under the authority of the French Republic. On the 30th of September, 1801, pending the writ of error, a convention was signed between the United States and the French Republic, and was ratified on the 21st of December, 1801, which provided for the restoration of property captured, but not yet definitively condemned.

It was urged that the court could take no notice of the stipulation for the restoration of property not yet definitively

condemned; that the judge could only inquire if the sentence was correct or erroneous when delivered; and that if it was then correct, it could not be rendered otherwise by anything subsequent to its rendition. It was held by the court, in the opinion delivered by Chief Justice Marshall, that if, subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied; that, where a treaty is the law of the land, and, as such, binds the rights of parties litigating in court, to condemn a vessel, the restoration of which was directed by it, would be a direct infraction of that law, and of consequence improper; that if the law was constitutional, and no doubt of it had been expressed in this case, no court could contest its obligation. The effect upon civil rights acquired under a statute, of the repeal of the statute, was most fully considered in the case of Butler *v.* Palmer, (1 Hill's Rep., 324,) in an elaborate opinion of Judge Cowen. In speaking of the effect of a repeal upon inchoate rights, he says: "I understand the rule of the writers on the civil law perfectly to agree with that acted on by our courts in all their decisions, ancient and modern. Those writers speak of rights which have arisen under the statute not being affected by the repeal, but the context shows at once what kind of rights they mean. The amount of the whole comes to this: that a repealing clause is such an express enactment as necessarily divests all inchoate rights which had arisen under the statute it destroys. These rights are but incidents to the statute, and fall with it unless saved by the express words of the repealing clause." He reviews the case of Miller, (1 W. Blackstone's Rep., 451,) and gives a much fuller statement of it from some other reporter. See, also, Smith's Commentaries on Statutory Construction, pp. 888, 889, for the same case, and the English decisions in affirmance of it. The result of these decisions is, that not only in penal and jurisdictional matters, but in civil matters, where rights that are inchoate and set up under a repealed statute, they are divested as fully as if the statute had never existed.

But can it with any propriety be said in any case that the State acquires a vested civil right to a tax? To impose, levy, and collect a tax is an exercise of the sovereign power, as much as the levying and collecting a fine for a misdemeanor. The repeal of the statute imposing one or the other at once stops all action under it. A sovereign never pleads a vested civil right to a tax; he simply takes it by virtue of his inherent power. A statute is simply an exertion of that power; its repeal, the withdrawal of the application of the power. The

machinery for its collection provided by the statute is paralyzed by the repeal.

We are entitled to the benefit of a strict construction of the statute, as being not only partial and odious, even as it regards citizens of the State, but, as was held by the Supreme Court of the State of Louisiana in the case of the widow and heirs of Benjamin Poydras de la Lande against the Treasurer of the State, even penal in its character.

So far as statutes for the regulation of trade impose fines or create forfeitures, they are doubtless to be construed strictly as penal, and not liberally as remedial laws. Mayor *v.* Davis, 6 Watts and Serg., 269.

Statutes levying duties or taxes upon subjects or citizens are to be construed most strongly against the Government, and in favor of the subjects and citizens, and their provisions are not to be extended by implication beyond the clear import of the language used. U. S. *v.* Wigglesworth, 2 Story, 369.

No judgment can be rendered for a penalty given by a statute after the statute is repealed, although the action was commenced before the repeal. Pope *v.* Lewis, 4 Ala., 487.

From these principles and authorities it follows, that the right of the State to claim or recover the foreign succession tax of 1842 is lost from the moment of the promulgation of the consular convention of 1853, although the tax might have been claimed and recovered, if proceedings had been instituted, perfected, and executed, before that convention.

Mr. Benjamin stated the points as follows:

The case is clearly within the jurisdiction of this court; and the only question is, whether the court of Louisiana has rightfully construed the treaty. Its decisions under it have been—

First. That wherever the rights of the heir vested *after* the consular convention went into effect, the tax could not be recovered. Succession Dufour, Annual, 392.

Secondly. That wherever the right of the heir vested anterior to the date of the treaty, the right of the State vested *at the same time.*

The latter proposition is the one now in dispute.

I. At what time, under the laws of Louisiana, did the rights of the State to the tax of ten per cent. vest?

Fortunately, the response to this question is entirely free from difficulty, as the point had been settled by a series of adjudications long prior to the controversy in this cause.

The Supreme Court of that State has held, ever since the year 1831, that, under the State statute, the rights of the heir

and of the State both vested at the instant of the testator's death. Armand's Heirs *v.* His Executors, 3 L. R., 337; Quessart's Heirs *v.* Canonge, 3 L. R., 561; Succession of Oyon, 6 Rob. R., 504; Succession of Blanchard, 17 Annual, 392; Succession of Dufour, 18 Annual, 392; Succession of Deyraud, 9 Rob. R., 358.

The question had arisen in Louisiana under every aspect.

In the first two cases cited, the law imposing the tax had been repealed *before* the collection of the tax, but *subsequent* to the death of the party under whom the heirs claimed. The court held, that the title of the State had *vested* at the death, and that the tax could be collected, notwithstanding the repeal of the statute.

In the two cases next cited, the law imposing the tax was passed *after* the testator's death, but *before* the heirs had received the succession. The court held, that the right of the heirs had vested in the whole of the estate at the death of the testator, and that the tax could *not* be collected.

In the fifth case cited, the convention with France was passed *before* the testator's death; and the court held, that the tax could *not* be collected, because the heir's right vested at the death.

In the sixth case, the death occurred *before* the passage of the convention; and the court held, that the right of the State had accrued at the death, and the tax *could* be collected.

And the whole series of adjudications on the construction of a State statute, during a period of twenty-five years, is unbroken by a single contradicting case, or even by the dissent of a single judge.

Under the rules, then, which this court has established for itself, it will take it for granted, without further inquiry or examination, that a right to one-tenth of Prevost's succession had *vested in the State of Louisiana* anterior to the date of the treaty in question.

II. The only remaining question is, whether the treaty was intended to divest any title acquired prior to its passage.

The terms of the treaty are entirely prospective, and its language appears too plain to require any reference to canons of construction.

Frenchmen, after its date, are to be considered, for all the purposes of the treaty, as citizens of Louisiana. But the claim of the State would be good against its own citizens after the repeal of the taxing law, because vested prior to the repeal, as already shown by the authorities cited. *Ergo*, that claim is good against the Frenchman.

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

This is a writ of error to the Supreme Court of the State of Louisiana. It appears that a certain François Marie Prevost, an inhabitant of that State, died in the year 1848 intestate and without issue, and possessed of property to a considerable amount. He left a widow; and, as no person appeared claiming as heir of the deceased, the widow, according to the laws of the State, was put in possession of the whole of the property by the proper authorities, in December, 1851. She died in March, 1853.

In January, 1854, Jean Louis Prevost, a French subject residing in France, presented himself by his agent in Louisiana as the brother and sole heir of François Marie Prevost, and established his claim by a regular judicial proceeding in court.

The laws of Louisiana impose a tax of ten per cent. on the value of all property inherited in that State by any person not domiciliated there, and not being a citizen of any State or Territory of the United States.

This tax is disputed by the plaintiff in error, upon the ground that the law of Louisiana is inconsistent with the treaty or consular convention with France. This treaty was signed on the 23d of February, 1853, ratified by the United States on the 1st of April, 1853, exchanged on the 11th of August, 1853, and proclaimed by the President on the 12th of August, 1853.

The 7th article of this treaty, so far as concerns this case, is in the following words:

"In all the States of the Union whose laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfers, inheritance, or any others, different from those paid by the latter, or to taxes which shall not be equally imposed."

Proceedings were instituted in the State courts by the plaintiff in error to try this question, which were ultimately brought before the Supreme Court of the State. And that court decided that the right to the tax was complete, and vested in the State upon the death of François Marie Prevost, and was not affected by the treaty with France subsequently made.

We can see no valid objection to this judgment. The plaintiff in error, in his petition to be recognised as heir, claimed title to all the separate property of François M. Prevost and his widow, then in the hands of the curator, and of all his portion of the community property, and of all the fruits and revenues of his succession from the day of the death of his brother. And, in adjudicating upon this claim, the court recognised the rights of the appellant, as set forth in his petition, and decided that he became entitled to the property, as heir, immediately upon the death of Fr. M. Prevost.

Now, if the property vested in him at that time, it could vest only in the manner, upon the conditions authorized by the laws of the State. And, by the laws of the State, as they then stood, it vested in him, subject to a tax of ten per cent., payable to the State. And certainly a treaty, subsequently made by the United States with France, could not divest rights of property already vested in the State, even if the words of the treaty had imported such an intention. But the words of the article, which we have already set forth, clearly apply to cases happening afterwards—not to cases where the party appeared, after the treaty, to assert his rights, but to cases where the right afterwards accrued. And so it was decided by the Supreme Court of the State, and, we think, rightly. The constitutionality of the law is not disputed, that point having been settled in this court in the case of Mayer *v.* Grima, 8 How., 490.

In affirming this judgment, it is proper to say that the obligation of the treaty and its operation in the State, after it was made, depend upon the laws of Louisiana. The treaty does not claim for the United States the right of controlling the succession of real or personal property in a State. And its operation is expressly limited "to the States of the Union whose laws permit it, so long and to the same extent as those laws shall remain in force." And, as there is no act of the Legislature of Louisiana repealing this law and accepting the provisions of the treaty, so as to secure to her citizens similar rights in France, this court might feel some difficulty in saying that it was repealed by this treaty, if the State court had not so expounded its own law, and held that Louisiana was one of the States in which the proposed arrangements of the treaty were to be carried into effect.

Upon the whole, we think there is no error in the judgment of the State court, and it must therefore be affirmed.

BENJAMIN F. MORGAN, PLAINTIFF IN ERROR, *v.* ALFRED G. CURTENIUS AND JOHN L. GRISWOLD.

Where there appears to be an omission in the record of an important paper, which may be necessary for a correct decision of the case of the defendant in error, who has no counsel in court, the court will, of its own motion, order the case to be continued and a certiorari to be issued to bring up the missing paper.

THIS case stood upon the trial docket, coming from the State of Illinois. It was submitted on a printed argument by *Mr. Washburne* for the plaintiff in error, no counsel appearing for the defendant.

Whereupon, upon an inspection of the record, the court expressed the following opinion:

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

Upon examining the transcript of the record filed in this case, we find that it is imperfect, and that a paper has been omitted which may be important to the decision of the matter in controversy between the parties.

The bill of exceptions upon which the cause is brought before this court, after stating that the defendants read in evidence the deed from Bogardas, to Underhill, under which they claim title, proceeds in the following words:

"The defendants next offered in evidence to the jury a certificate of the register of the land office at Quincy, dated ————, which is in the words and figures following, to wit."

But the certificate thus referred to is not inserted in the exception, nor its contents stated in any part of the transcript. And as this paper was offered in evidence by the defendants, it must have been deemed material to their defence; and the court think it would not be just to them to proceed to final judgment, without having this paper before us.

And as the defendants have no counsel appearing in their behalf in this court, the court of its own motion order the case to be continued, and a certiorari issued in the usual form to the Circuit Court, directing it to supply the omission above mentioned, and return a full and correct transcript to this court, on or before the first day of the next term.

Order.

Upon an inspection of the record of this cause, it appearing to the court here that the bill of exceptions states that "the defendants offered in evidence to the jury a certificate of the

register of the land office at Quincy, dated ————, which is in the words and figures following, to wit;" and that the said certificate, thus referred to, is not inserted in the exception, nor its contents stated in any part of the transcript, on consideration whereof, it is now here ordered by this court, that a writ of certiorari be and the same is hereby awarded, to be issued forthwith, and to be directed to the judges of the Circuit Court of the United States for the district of Illinois, commanding them to supply the omission above mentioned, and return a full and correct transcript to this court, with this writ, on or before the first day of the next term of this court.

Ex Parte, in the Matter of David A. Secombe.

By the rules and practice of common-law courts, it rests exclusively with the court to determine who is qualified to become or continue one of its officers, as an attorney and counsellor of the court; the power being regulated, however, by a sound and just judicial discretion—guarding the rights and independence of the bar as well as the dignity and authority of the court.

The local law of the Territory of Minnesota has regulated the relation between courts and attorneys and counsellors, but has not essentially changed the common-law principle.

The Minnesota statute authorizes the court to dismiss an attorney or counsellor if he does not maintain the respect due to courts of justice and judicial officers, or for not conducting himself with fidelity to the court.

The Supreme Court of the Territory dismissed the relator from the office of counsellor and attorney of the court, stating in the sentence of dismissal that he was guilty of the offences above mentioned, but not specifying the act or acts which, in the opinion of the court, constituted the offence.

The order of dismissal is a judicial act done in the exercise of a judicial discretion vested in the court by law; and a mandamus cannot be issued by a superior or appellate court, commanding it to reverse its decision and restore the relator to the office he has lost.

This was a motion for a mandamus to be directed to the judges of the Supreme Court of the Territory of Minnesota, commanding them to vacate and set aside an order of the court, passed at January term, 1856, whereby the said Secombe was removed from his office as an attorney and counsellor of that court.

The subject was brought before this court by the following petition and documents in support of it:

To the Hon. the Judges of the Supreme Court of the United States:

The petition of David A. Secombe respectfully showeth:

That he resides in the city of St. Anthony, in the Territory of Minnesota; that on the ninth day of July, 1852, he was duly admitted and sworn to practice as an attorney and coun-

sellor at law and solicitor in chancery of the said Supreme Court of the Territory of Minnesota, and was thereby entitled also to practice as such in the various District Courts of said Territory, as will appear by the certificate of the clerk of the said Supreme Court, hereunto annexed and made part of this petition; that from the said time up to the 5th day of February, 1856, he was a practising attorney and counsellor as aforesaid in the said courts, and solely thereby obtained the means of support for himself and his family; that on the said 5th day of February, an order of the said Supreme Court was made, and entered of record, to remove him from his said office of attorney and counsellor, and to forbid and prohibit him from practising as such attorney and counsellor in any of the said courts, an exemplification of which said order, with the certificate of the clerk of the said court accompanying the same, is hereunto annexed, and made part of this petition; that, previously to the making and entry of said order, no notice or information whatever was given to or had by him, that any accusation whatever had been made or entertained, or any proceedings had or were about to be made, entertained, or had, against or in relation to him, in the said premises; that he was not present in court at the time of the making and entry of said order, nor did he have any knowledge whatever of the same until several days thereafter, and then only by rumor; that there existed no good cause whatever, as your petitioner believes, for the making of the said order; that he has no knowledge or information, or means of obtaining either, save by rumor, of the alleged cause of the making of the said order; that in consequence of the making and entry of the said order, he has been and now is hindered and prevented from practising as such attorney and counsellor in any of the said courts, and thereby has lost the said means of providing for the support of himself and his family; that he believes that the said order of court is not only *in fact* entirely without cause, but also *in law* wholly null and void; and that in the said premises "he has been deprived of his liberty and property without due process of law."

Wherefore, your petitioner prays that this honorable court will allow and cause to be issued the United States writ of mandamus to the judges of the Supreme Court of the Territory of Minnesota aforesaid, commanding them to vacate, set aside, and disregard, the said order of court by them made and entered, that thereby speedy justice may be done to your petitioner in this behalf; and thus will your petitioner, as in duty bound, ever pray. DAVID A. SECOMBE.

Dated May 30, 1856.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Then comes before me, personally, David A. Secombe, the above and foregoing named petitioner, and being by me duly sworn, deposes and says, that the statements made in the above and foregoing petition, by him subscribed, are true of his own knowledge, except to those matters therein stated on his information or belief; and as to those matters, that he believes them to be true.

[SEAL.] N. CALLAN, J. P.

SUPREME COURT,
Territory of Minnesota:

Ordered, That Isaac Van Etten, Theodore Parker, De Witt C. Cooley, David A. Secombe, William H. Welch, Charles L. Willis, Lucas R. Stannard, Edward L. Hall, Warren Bristol, and William H. Wood, be sworn and admitted to practice as attorneys and counsellors at law and solicitors in chancery of this court.

I, George W. Prescott, clerk of the Supreme Court above named, certify that the above is a true copy of an order of said court, entered of record upon the "minutes of court" for and upon the 9th day of July, A. D. 1852, being the 4th day of the general term of said court for said year.

In testimony whereof, I have hereunto set my hand [SEAL.] and affixed the seal of said Supreme Court, at St. Paul aforesaid, this 7th day of May, A. D. 1856.

GEORGE W. PRESCOTT, *Clerk.*

SUPREME COURT,
Territory of Minnesota:

JANUARY GENERAL TERM, A. D. 1856, 17TH DAY, TUESDAY MORNING, FEBRUARY 5, 1856.

Court met pursuant to adjournment.

Present, Chief Justice Welch and Justice Chatfield.

It appearing to this court that David A. Secombe, one of the attorneys thereof, has by his acts as such in open court, at the present term thereof, been guilty of a wilful violation of the second subdivision of section seven of chapter ninety-three of the revised statutes of this Territory, and also of a violation of that part of his official oath as such attorney by which he was sworn to conduct himself with fidelity to the court: It is therefore

Ordered, That the said David A. Secombe be and he hereby is removed from his office as an attorney and counsellor of this

court, and of the several District Courts of this Territory, and that he be henceforth forbidden and prohibited from practising as such attorney in any of said courts. It is further

Ordered, That the clerk of this court deliver to said David A. Secombe a copy of this order.

A true record. Attest: GEORGE W. PRESCOTT, *Clerk.*

I, George W. Prescott, clerk of the Supreme Court in and for the Territory of Minnesota, certify the foregoing to be a true and complete copy of the order of court made and entered of record as above set forth on said 5th day of said February, A. D. 1856; and I further certify, that the above and foregoing is the whole and entire record in any way or manner relating to the said order of court at the said term or at any other term; and that the said order was made and entered of record in the following and no other manner, to wit: On the said day, the said David A. Secombe not being present in court, as the said judges rose to leave the court room after having fixed the adjournment day for holding said court, one of the said judges delivered to the undersigned clerk the said order in writing, directing the same to be entered of record as the order of said court, and the said court was thereupon immediately adjourned to the 15th day of July then next. And no further or other order whatever in relation to the subject matter of the said order was made at the said term.

In testimony whereof, I have hereunto set my hand
[SEAL.] and affixed the seal of said court, at St. Paul, this 7th day of May, A. D. 1856.

GEORGE W. PRESCOTT, *Clerk.*

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES *ex relatione* DAVID A. SECOMBE *v.* THE JUDGES OF THE SUPREME COURT OF MINNESOTA TERRITORY.

To the Judges of the Supreme Court of the Territory of Minnesota:

Please to take notice, that I shall move the Supreme Court of the United States, on Friday of the first week of the next term thereof, to be held at the Capitol in the city of Washington, in the District of Columbia, on the first Monday of December next, at the going in of the court, or as soon thereafter as counsel can be heard, for a rule, or order, upon the judges of the Territory of Minnesota, requiring them to vacate, annul, an order made by that court on the 5th day of February, 1856, removing David A. Secombe from his office as attorney and counsellor of said court and of the District Courts of said Territory, or show cause before the said Su-

preme Court of the United States why a writ of mandamus should not be issued to compel the said judges so to do.

And the said motion will be made upon the petition of the said David A. Secombe, hereto annexed. C. CUSHING,

Dated May 30, 1856. *Attorney for Petitioner.*

The case was argued by *Mr. Badger* in support of the motion.

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

A mandamus has been moved for, by David A. Secombe, to be directed to the judges of the Supreme Court of the Territory of Minnesota, commanding them to vacate and set aside an order of the court, passed at January term, 1856, whereby the said Secombe was removed from his office as an attorney and counsellor of that court.

In the case of Tillinghast *v.* Conkling, which came before this court at January term, 1829, a similar motion was overruled by this court. The case is not reported; but a brief written opinion remains on the files of the court, in which the court says that the motion is overruled, upon the ground that it had not jurisdiction in the case.

The removal of the attorney and counsellor, in that case, took place in a District Court of the United States, exercising the powers of a Circuit Court; and, in a court of that character, the relations between the court and the attorneys and counsellors who practise in it, and their respective rights and duties, are regulated by the common law. And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself.

It has, however, been urged at the bar, that a much broader discretionary power is exercised in courts acting upon the rules of the common law than can be lawfully exercised in the Territorial court of Minnesota; because the Legislature of the Territory has, by statute, prescribed the conditions upon which a person may entitle himself to admission as an attor-

ney and counsellor in its courts, and also enumerated the offences for which he may be removed, and prescribed the mode of proceeding against him. And the relator complains that it appears by the transcript from the record, and the certificate of the clerk, which he filed with his petition for a mandamus, that in the sentence of removal he is not found guilty of any specific offence which would, under the statute of the Territory, justify his removal, and had no notice of any charge against him, and no opportunity of being heard in his defence.

It is true that, in the statutes of Minnesota, rules are prescribed for the admission of attorneys and counsellors, and also for their removal. But it will appear, upon examination, that, in describing some of the offences for which they may be removed, the statute has done but little, if anything, more than enact the general rules upon which the courts of common law have always acted; and have not, in any material degree, narrowed the discretion they exercised. Indeed, it is difficult, if not impossible, to enumerate and define, with legal precision, every offence for which an attorney or counsellor ought to be removed. And the Legislature, for the most part, can only prescribe general rules and principles to be carried into execution by the court with judicial discretion and justice as cases may arise.

The revised code of Minnesota, (ch. 93, sec. 7, subdivision 2,) makes it the duty of the attorney and counsellor "to maintain the respect due to courts of justice and judicial officers."

The 19th section of the same chapter enumerates certain offences for which an attorney or counsellor may be removed; and, among others, enacts that he may be removed for a wilful violation of any of the provisions of section 7, above mentioned. And, in its sentence of removal, the court say that the relator, being one of the attorneys and counsellors of the court, had, by his acts as such, in open court, at the term at which he was removed, been guilty of a wilful violation of the provision above mentioned, and also of a violation of that part of his official oath by which he was sworn to conduct himself with fidelity to the court.

The statute, it will be observed, does not attempt to specify the acts which shall be deemed disrespectful to the court or the judicial officers. It must therefore rest with the court to determine what acts amount to a violation of this provision; and this is a judicial power vested in the court by the Legislature. The removal of the relator, therefore, for the cause above mentioned, was the act of a court done in the exercise of a judicial discretion which the law authorized and required

it to exercise. And the other cause assigned for the removal stands on the same ground.

It is not necessary to inquire whether this decision of the Territorial court can be reviewed here in any other form of proceeding. But the court are of opinion that he is not entitled to a remedy by mandamus. Undoubtedly the judgment of an inferior court may be reversed in a superior one which possesses appellate power over it, and a mandate be issued, commanding it to carry into execution the judgment of the appellate tribunal. But it cannot be reviewed and reversed in this form of proceeding, however erroneous it may be or supposed to be. And we are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion.

These principles apply with equal force to the proceedings adopted by the court in making the removal.

The statute of Minnesota, under which the court acted, directs that the proceedings to remove an attorney or counsellor must be taken by the court, on its own motion, for matter within its knowledge; or may be taken on the information of another. And, in the latter case, it requires that the information should be in writing, and notice be given to the party, and a day given to him to answer and deny the sufficiency of the accusation, or deny its truth.

In this case, it appears that the offences charged were committed in open court, and the proceedings to remove the relator were taken by the court upon its own motion. And it appears by his affidavit that he had no notice that the court intended to proceed against him; had no opportunity of being heard in his defence, and did not know that he was dismissed from the bar until the term was closed, and the court had adjourned to the next term.

Now, in proceeding to remove the relator, the court was necessarily called on to decide whether, in a case where the offence was committed in open court, and the proceeding was had by the court on its own motion, the statute of Minnesota required that notice should be given to the party, and an opportunity afforded him to be heard in his defence. The court, it seems, were of opinion that no notice was necessary, and proceeded without it; and, whether this decision was erroneous or not, yet it was made in the exercise of judicial authority, where the subject-matter was within their jurisdiction, and it cannot therefore be revised and annulled in this form of proceeding.

Upon this view of the subject, it would be useless to grant a rule to show cause; for if the Territorial court made a return stating what they had done, in the precise form in which the sentence of dismissal now appears in the papers exhibited by the relator, a peremptory mandamus could not issue to restore him to the office he has lost.

The motion must therefore be overruled.

WILLIAM A. SHAFFER, PLAINTIFF IN ERROR, *v.* JAMES A. SCUDDAY.

IN 1841, Congress granted to the State of Louisiana 500,000 acres of land, for the purposes of internal improvement, and in 1849 granted also the whole of the swamp and overflowed lands which may be found unfit for cultivating.

In both cases, patents were to be issued to individuals under State authority.

In a case of conflict between two claimants, under patents granted by the State of Louisiana, this court has no jurisdiction, under the 25th section of the judiciary act, to review the judgment of the Supreme Court of Louisiana, given in favor of one of the claimants.

THIS case was brought up from the Supreme Court of Louisiana by a writ of error issued under the 25th section of the judiciary act.

The case is fully stated in the opinion of the court.

It was argued by *Mr. Benjamin* for the plaintiff in error, and *Mr. Taylor* for the defendant.

Upon the question of jurisdiction, *Mr. Benjamin's* point was as follows:

The Supreme Court of Louisiana decided, by a decree reversing the judgment of the District Court, that the Secretary of the Interior *had no authority to make the decision revoking Scudday's location*, and held his title superior to Shaffer's, who claimed under an entry made on the authority of the Secretary's decision.

The case is therefore before the court under that clause of the 25th section of the judiciary act which empowers it to take appellate jurisdiction from the highest State courts, where "is drawn in question the validity of an authority exercised under the United States, and the decision is *against* the validity," and is fully within the principles decided in Chouteau *v.* Eckhart, 2 Howard, 344.

The sole question in the cause, then, is, whether the Secretary had authority to decide, and did rightly decide, that Scudday's location was null, and must be revoked.

This is hardly an open question in this court.

The 8th section of the act of 1841, under which Scudday claims, directs the locations to be made on "any public land,

except such as is or may be reserved from sale by any law of Congress."

This court has decided in the cases above cited, and particularly in that in 15 Howard, that the act of 1841 vested no present title in the State of Louisiana, but was a mere authority to enter lands in the same manner as individuals could enter them; and that the entry under a location made by virtue of a State warrant, and backed by a State patent, did not confer the fee in the land, which is only divested by a patent issued by the United States.

Now, although the Secretary of the Interior approved the location, he did so under the mistaken supposition that the land was "public land," whereas, in point of fact, Congress had already conveyed title to it by the grant in the swamp-land law of 1849.

Before any patent was issued by the United States, therefore, Scudday's entry was revoked under the authority which has been universally conceded to exist in the offices of the Land Office, since the decision of this court, made thirty years ago, and never subsequently called in question. Chotard *v.* Pope, 12 Wheaton, 587.

The case may be summed up in few words, as follows:

1st. Shaffer claims title under a grant made by statute of the United States, vesting the fee in him as fully as a patent would, if issued directly to him. Strother *v.* Lucas, 12 Peters, 454; Chouteau *v.* Eckhart, 2 Howard, 344.

2d. Scudday claims under an inchoate title from the United States, not only still incomplete, but which it is impossible ever to render complete, and his title has been erroneously preferred by the Supreme Court of Louisiana, only because he holds a patent from the State.

But no State authority can confer a right in land sufficient to eject a patentee under the United States. Bagnell *v.* Broderich, 13 Peters, 436.

Mr. Taylor objected to the jurisdiction of this court, upon the following ground:

1. By reference to the decision of the Supreme Court of Louisiana, it will be seen that the question raised as to the construction of the act of 1849 was not decided by the court. The court expressly said that they did "not consider it necessary to decide that question." "The construction of the act of 1849, by the Secretary of the Interior, may be strictly correct, and yet it does not follow that the location of a warrant, under the internal-improvement law of 1841, which had been approved by the proper department of the Government, and for which

a patent had been subsequently issued by the State, could be revoked, so as to destroy the title conferred by the patent. The question would have been different, if, after the passage by Congress of the act of 1849, the United States had granted the land away from the State of Louisiana. Such was not the case; and as both the acts of 1834 and of 1849 were grants of land to the State, we cannot go behind the patent which the State has granted." From this it is clear that there was no decision against the validity of a treaty or statute of, or an authority exercised under, the United States, &c., &c., in the highest court of Louisiana; and that inasmuch as no error can be assigned or regarded as a ground of reversal, other "than such as appears on the face of the record, and immediately respects the questions of validity or construction," &c., therefore, there was no right to a writ of error in this case, and that the case must be dismissed for want of jurisdiction. 1 Statutes at Large, p. 85, sec. 25; Almonester *v.* Kenton, 9 Howard, 1.

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

This is a writ of error to the Supreme Court of the State of Louisiana.

It appears that a petitory action was brought by Scudday, the defendant in error, against Shaffer, the plaintiff in error, to recover a quarter section of land described in the pleadings.

The defendant in error derives his title in the following manner: By the eighth section of an act of Congress of the 4th September, 1841, the Government of the United States granted to each of the several States specified in the act, and among them to Louisiana, 500,000 acres of land, for the purposes of internal improvement. The act provided that the selections of the land were to be made in such manner as the Legislature of the State should direct, the locations to be made on any public lands, except such as were or might be reserved from sale by any law of Congress, or proclamation of the President of the United States. The ninth section of the act provided that the net proceeds of the sales of the lands so granted should be applied to objects of internal improvement within the State, such as roads, railways, bridges, canals, and improvement of water-courses and draining of swamps. An act of the Legislature of Louisiana of 1844 provided that warrants for the location of the lands should be sold in the same manner as the lands were located; and it was made the duty of the Governor to issue patents for the lands located by warrants, whenever he should be satisfied that they had been properly located. The defendant in error, being the holder of such a warrant, located it on

the land claimed in the suit. The location having been approved by the Secretary of the Interior, and a certificate to that effect granted by the register, the Governor of Louisiana issued a patent to the plaintiff, bearing date 12th November, 1852.

The opposing title of plaintiff in error is derived under an act of Congress of March 2d, 1849, and certain acts of the Legislature of the State, passed to carry into effect the act of Congress. The first section of the act of Congress of 1849 declares, "that to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of the swamp and overflowed lands which are or may be found unfit for cultivating, shall be, and the same are hereby, granted to the State."

The second section provides, that as soon as the Secretary of the Treasury shall be advised by the Governor of Louisiana that the State has made the necessary preparations to defray the expenses thereof, he shall cause a personal examination to be made, under the direction of the surveyor general thereof, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation, and a list of the same to be made out and certified by the deputies and the surveyor general to the Secretary of the Treasury, who shall approve the same, so far as they are not claimed and held by individuals; and on that approval the fee simple to said lands shall vest in the State of Louisiana, subject to the disposal of the Legislature thereof, provided, however, that the proceeds of said lands shall be applied exclusively, as far as necessary, to the construction of the levees and drains aforesaid.

On the 21st of March, 1850, the Legislature of Louisiana passed an act to enable the Governor to have the swamp and overflowed lands selected; and, in 1852, they passed an act, giving a preference in entering such lands to those in possession of or cultivating them, and the time of entering them was further extended by an act of 1853. The plaintiff in error entered this land on the 18th day of July, 1853, by virtue of a preference-right claimed under that act of the Legislature. He was permitted to make this entry at the State land office, in consequence of the Secretary of the Interior having, on the 14th of April, revoked his approval to the State under the act of 1841, of this and other lands which had been located under warrants sold by the State, in conformity to the act of the Legislature of 1844.

The reason assigned by the Secretary of the Interior was, that these locations had been made subsequent to the passage of the act of Congress of 1849, granting to the State all the swamp and overflowed lands. He states, in his opinion, that he considered the words used in the first section of that act as

importing a grant *in presenti*, and as confirming a right to the land, though other proceedings were necessary to perfect the title; and that when the title was perfected, it had relation back to the date of the grant. His approval to the State, of the location of the land in controversy, under the internal-improvement law of 1841, was revoked, but the land was at the same time approved to the State, as having a vested title to it, under the act of 1849, and taking effect from the date of the passage of the act.

The controversy between the parties arises upon these two patents, both granted by the State of Louisiana—the one to Scudday, under the grant made by the act of Congress of 1841, for the purposes of internal improvement; the other to Shaffer, under the grant made by the act of 1849, for the purpose of draining the swamp lands.

The case came regularly before the Supreme Court of the State; and that court, after stating that it was unnecessary to decide whether the construction placed upon the act of 1849, by the Secretary of the Interior, under which he revoked his approval of Scudday's location, was erroneous or not, proceeded to express their opinion as follows:

"It is certain (say the court) that the Legislature could not have disposed of the land as belonging to the State, under the provisions of that act, [the act of 1849,] until she had complied with the conditions imposed on her by the act of Congress, and until the approval of the Secretary of the Treasury; but if she had not chosen to avail herself of the right given to her to appropriate these lands as swamp lands by defraying the expenses of locating them, she had still the right of locating them under the internal-improvement law of 1841, which was unconditional. The construction of the act of 1849, by the Secretary of the Interior, may be strictly correct; and yet it does not follow that the location of a warrant, under the internal-improvement law of 1841, which had been approved by the proper department of the Government, and for which a patent had been subsequently issued by the State, could be revoked, so as to destroy the title conferred by the patent. The question would have been different, if, after the passage by Congress of the act of 1849, the United States had granted the land away from the State of Louisiana. Such was not the case; and as both the acts of 1841 and of 1849 were grants of land to the State, we cannot go behind the patent which the State has granted. The patent can only be attacked on the ground of error or fraud. It is true that a patent issued against law is void; but in the present case the patent and all the proceedings on which it was based were in conformity to

the laws. As between the Government of the United States and the State of Louisiana, a question will arise, whether the State is not entitled to an additional quantity of land, to be located under the act of Congress of 1841, in consequence of the swamp lands having been appropriated for locations of warrants issued under the internal-improvement act; but we are of opinion that the title which the State has granted to the plaintiff, and for which she has been paid, is unaffected by the acts of the officers of the United States Government and of the State Government, done since the patent was issued."

Upon these grounds, the Supreme Court of the State gave judgment in favor of Scudday, and this writ of error is brought to revise that decision.

It does not appear from the opinion of the court, as above stated, that any question was decided that would give this court jurisdiction over its judgment. The land in dispute undoubtedly belonged to the State, under the grants made by Congress, and both parties claim title under grants from the State. The construction placed by the Secretary upon the act of 1849, and the revocation of his order approving the location of Scudday, did not and was not intended to re-vest the land in the United States. On the contrary, it affirmed the title of the State; and its only object was to secure to Louisiana the full benefit of both of the grants made by Congress, and leaving it to the State to dispose of the lands to such persons and in such manner as it should by law direct. It certainly gave no right to the plaintiff in error. He admits the title of the State, and claims under a patent granted by the State. Now, whether this patent conveyed to him a title or not, depended altogether upon the laws of Louisiana, and not upon the acts of Congress or the acts of any of the officers or authorities of the General Government. It was a question, therefore, for the State courts. And the Supreme Court of the State have decided that this patent could convey no right to the land in question, because the State had parted from its title by a patent previously granted to Scudday, the defendant in error. The right claimed by the plaintiff in error, which was denied to him by the State court, did not therefore depend upon any act of Congress, or the validity of any authority exercised under the United States, but exclusively upon the laws of Louisiana. And the Supreme Court of the State have decided that, according to these laws, he had no title, and that the land in question belonged to the grantee of the elder patent.

We have no authority to revise that judgment by writ of error; and this writ must therefore be dismissed for want of jurisdiction.

WILLIAM THOMAS, SOUTHWORTH BARNES, NATHANIEL RUSSELL, AND OTHERS, OWNERS OF THE BARQUE LAURA, APPELLANTS, *v.* JAMES W. OSBORN.

The master of a vessel has power to create a lien upon it for repairs and supplies obtained in a foreign port in a case of necessity; and he does so without a bottomry bond, when he obtains them, in a case of necessity, on the credit of the vessel.

It is not material whether the implied hypothecation is made directly to the furnishers of repairs and supplies, or to one who lends money, on the credit of the vessel, in a case of necessity, to pay such furnishers.

This power of the master extends to a case where he is charterer and special owner *pro hac vice.*

But this authority only exists in cases of necessity, and it is the duty of the lender to see that a case of apparent necessity for a loan exists.

Hence, where the master had received freight money, and, with the assistance of the libellants, invested it in a series of adventures as a merchant, partly carried on by means of the vessel, the command of which he had deserted for the purpose of conducting these adventures, and money was advanced by the libellants to enable the master to repair and supply the vessel, and purchase a cargo to be transported and sold in the course of such private adventures; and the freight money earned by the vessel was sufficient to pay for the repairs and supplies, and might have been commanded for that use if it had not been wrongfully diverted from it by the master, with the assistance of the libellants, it was held that the latter had no lien on the vessel for their advances.

THIS was an appeal from the Circuit Court of the United States for the district of Maryland.

It was a libel filed in the District Court by James W. Osborn, of the city of Baltimore, against the barque Laura, her tackle, apparel, and furniture, Osborn being the assignee of Loring & Co., merchants in Valparaiso. The barque Laura belonged to Plymouth, in Massachusetts, and the lien claimed was for supplies and repairs furnished to the vessel at Valparaiso. The District Court decreed that there was due to the libellant the sum of $2,910.23, with interest from the 1st of April, 1852, which decree was affirmed in the Circuit Court.

The case was argued at the preceding term, and held under a *curia advisare vult* until the present.

The circumstances of the case are set forth with great particularity in the opinion of the court, and need not be repeated.

It was argued by *Messrs. Brune* and *Brown* for the appellants, and by *Messrs. Wallis* and *J. H. Thomas* for the appellee.

Some of the points made by counsel related to particular items in the accounts between the parties, which it is not deemed necessary to notice in this report. Those which re-

ferred to the points decided by the court were the following, viz:

First. That no lien on the Laura was created for the expenses paid and supplies furnished by Loring & Co., as per their account, and that Phineas Leach, on whose order or request they were paid and furnished, was not then the master of the barque, and no one but the master can create an implied lien on a vessel. Conkling's Admiralty, 59; Flanders on Shipping, 181; Flanders's Maritime Law, 174, 175, 186; Story on Agency, sects. 116 to 124; Curtis on Merchant Seamen, 76—165 to 185; The St. Jago de Cuba, 9 Wheaton, 409, 416; The Phebe, Ware, 275; Sarchet *v.* Sloop Davis, Crabbe, 199, 200, 201; Jones *v.* Blum, 2 Richardson, 475, 476, 479, 480; Thorn *v.* Hicks, 7 Cowen, 700; James *v.* Bixley, 11 Mass., 37, 38, 40, 41; Sproat *v.* Donnell, 20 Maine, 187, 188; Thompson *v.* Snow, 4 Maine, 268, 269; Mann *v.* Fletcher, 1 Gray, (Mass.,) 128, 129, 130; Webb *v.* Peirce, 1 Curtis C. C. R., 105 to 113; Reeve *v.* Davis, 1 Ad. and E., 312; Minturn *v.* Maynard, 17 Howard, 477; The Aurora, 1 Wheaton, 103; Greenway *v.* Turner, 4 Md., 296, 303, 304; Young *v.* Brander, 8 East., 12; Frazer *v.* Marsh, 13 ib., 238; Bogart *v.* The John Jay, 17 Howard, 401; Abbot on Shipping, 128; 1 Bell's Com., 506; The Jane, 1 Dod., 461; 2 Starr's Institutions, 953, 955, 962, 966; Gilpin, 543.

Second. At the time when the supplies in question were furnished, Leach had ceased to be captain, and had become a merchant, doing business in Valparaiso, in the counting-room of Loring & Co. As to the Laura, he was a wrong-doer, improperly detaining her from her owners, and using her as his own. And the facts which came to the knowledge of Loring & Co. were sufficient to have put them on the inquiry as to the legality of the right which Leach claimed to exercise over the Laura, and such an inquiry would have enabled them to ascertain that he had no such right. They had therefore constructive notice of all the facts to which such an inquiry might have led. Curtis on Seamen, 151 to 153; Carr *v.* Hector, 1 Curtis C. C. R., 393, and cases there cited; Ringgold *v.* Bryan, 3 Md. Ch. R., 493; Magruder *v.* Peter, 11 G. and J., 243; Baynard *v.* Norris, 5 Gill, 468; Oliver *v.* Piatt, 3 How., 479, 495; Harrison *v.* Vose, 9 How., 372.

The points made on the part of the appellee, so far as they were included in the decision of the court, were:

1. That whether Leach, by the terms of the contract under which he navigated the barque, was or was not to be regarded as her temporary owner at the time when the repairs and supplies in controversy were furnished, and whether the gen-

eral owners were or were not bound personally by his contracts for necessaries, he was at all events master of the barque, and imposed a lien *in rem*, by ordering and receiving such repairs and supplies for her in a foreign port. His relation to the vessel, so far as this legal consequence of his acts is involved, was not altered by his having temporarily intrusted Easton, his mate, with her navigation, nor was the responsibility of the vessel herself to Loring & Co., for repairs and supplies, at all affected by the secret agreement between Leach and the owners, of which Loring & Co. were ignorant. The General Smith, 4 Wheaton, 438; The Brig Nestor, 1 Sumner, 78; The Schr. Tribune, 3 Sumner, 149, 150; Arthur *v.* Schr. Cassius, 2 Story, 92 to 94; The Barque Chusan, ib., 467; The William and Emmeline, 1 Blatchford and Howland, 71; Webb *v.* Pierce, 1 Curtis, 110; Arthur *v.* Barton, 6 Mees. and Wellsby, 142; The St. Jago de Cuba, 9 Wheaton, 409; Rich *v.* Coe, Cowper, 636; Reeve *v.* Davis, 1 Adol. and Ellis, 315; Sarchet *v.* Sloop Davis, Crabbe, 201; Story on Agency, sects. 36, 120; Scofield *v.* Potter, Davis, 397; North *v.* Brig Eagle, Bee's Rep., 78; L'Arina *v.* Brig Exchange, ib., 198; 1 Bell's Com. 525, 526; The Virgin, 8 Peters, 552, 553; Hays *v.* Pacific Steamboat Co., 17 Howard, 598, 599; Peyroux *v.* Howard, 7 Peters, 341; Bevans *v.* Lewis, 2 Paine's C. C. Rep., 207.

2. That even if Easton is to be regarded as master, at the time when the repairs and supplies were furnished, the fact that they were so furnished, with his knowledge and consent and under his superintendence, is sufficient to charge the barque with the usual maritime lien, notwithstanding that Leach may have ordered or directed them. Stewart *v.* Hall, 2 Dow, 32; Voorhees *v.* Steamer Eureka, 14 Missouri Rep., 56.

3. That the *onus* of showing a waiver of the customary maritime lien, by giving credit to Leach, rests on the appellants, and they must not only show that such credit was given, but that it was exclusive, and with the intent to forego all recourse *in rem*. It will be argued that there is not only an entire failure of proof to that effect on the part of the appellants, but that the circumstances of the transaction, the mode of making the charges, and the certificates required from Leach, to the validity of the accounts against the "barque and owners," all establish affirmatively that the credit of the vessel was especially looked to, and the usual remedy against her particularly reserved. Ex parte Bland, 2 Rose, 92; Stewart *v.* Hall, 2 Dow, 29, 37, 38; The Barque Chusan, 2 Story, 468; Peyroux *v.* Howard, 7 Peters, 344; The Brig Nestor, 1 Sumner, 75; North *v.* Brig Eagle, Bee, 78.

4. That even if the relation of Leach to the vessel was not such as necessarily to raise an implication of lien, from his mere contract for repairs and supplies, he had, nevertheless, the right to pledge the vessel expressly. The proof shows that he did this, and the lien, thus expressly imposed, being of a maritime nature, became, *proprio vigore*, enforceable in admiralty. Alexander *v.* Ghiselin, 5 Gill, 182; Sullivan *v.* Tuck, 1 Md. Chan. Rep., 62, 63; The Brig Nestor, 1 Sumner, 78; The Schooner Marion, 1 Story, 73; The Hilarity, 1 Blatchford and Howland, 92, 93; Bogart *v.* The John Jay, 17 Howard, 401; The Brig Draco, 2 Story, 177, 178.

5. That Captain Leach was introduced to the confidence of Messrs. Loring & Co. by his position as master of the Laura, and derived his credit with them altogether from that position; that they were ignorant of his contract with his owners, and of his violation of it, and the dissatisfaction of the owners therewith; that Leach was held out to the world by the appellants as master of the Laura, with the usual right to bind her by his proper contracts; that Messrs. Loring & Co., by the repairs and supplies in controversy, not only improved the vessel as the property of the owners, but enabled her to earn freights for their benefit; that such was the result of all their dealings with Leach in regard to the barque, which were fair, liberal, and in good faith; that the misconduct and insolvency of Leach, and his failure to pay over the balance of freights, furnish no justification to the owners in repudiating the responsibilities of the barque, especially after their adoption of the very voyage for which the repairs and supplies were furnished, by the act of their agent, Weston, in receiving a part of the proceeds of the cargo, and diminishing to that extent the security of Loring & Co.

Mr. Justice CURTIS delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the district of Maryland, sitting in admiralty. A libel was filed in the District Court by the appellee, as assignee of Loring & Co., merchants in Valparaiso, asserting a lien on the barque Laura, of Plymouth, in the State of Massachusetts, for the cost of repairs and supplies furnished to that vessel at Valparaiso. The District Court decreed for the lien, the Circuit Court affirmed that decree, and the claimants have brought the cause here by appeal.

It appears that in January, 1849, Phineas Leach, who had previously been in command of the barque, contracted with her owners to take her on what is termed "a lay." There does not appear to have been any written contract of affreight-

ment between them, nor are the terms of their agreement fully described by any witness. But this mode of employing vessels is so common, and its terms and legal effect so well settled by long usage, it has been so often before the courts and the subject of adjudication, that no embarrassment is felt by us concerning the terms and conditions on which Leach took the vessel.

We understand from his testimony, as well as from known usage, ascertained and adjudicated on in the courts, that the master had the entire possession, command, and navigation of the vessel; that he was to employ her in such freighting voyages as he saw fit; that he was to victual and man the vessel at his own expense; that the owners were to keep the vessel in repair; that from the gross earnings were to be deducted all port charges, and the residue was to be divided into two equal parts, one of which was to belong to the owners, the other to the master; and that this agreement could be terminated by the restoration of the vessel to the owners by the master, or by their intervention to displace him, at the end of any voyage, but not while conducting any one which he had undertaken.

Having possession and command of the vessel under such a contract, Leach sailed from New Orleans in January, 1849, and after making a voyage to Rio de Janeiro, he sailed for and arrived at Valparaiso in November, 1849.

It is necessary to state with some particularity the voyages made after his arrival at Valparaiso. He sailed thence in December, 1849, with a cargo of Chili produce, on a freight amounting to about $7,000, for San Francisco, where he arrived and delivered the cargo. He went thence to Talcuhana in ballast; and, having an intention to buy a cargo there on his own account, he wrote to Loring & Co., from San Francisco, to obtain from them a credit, on which to raise money to pay for the balance of the cost of this cargo, after appropriating towards it the frieght money in his hands. Loring & Co. granted him a credit for $3,000, to be reimbursed by Leach's draft on himself at San Francisco, at five per cent. premium. At Talcuhana, Leach drew on Loring & Co. for $7,000, and bought doubloons; but, not being able to procure a cargo there, or at Maule, he sailed to Valparaiso, where he arrived in July, 1850. He handed over to Loring & Co. the doubloons and the proceeds of his freight money, which was in gold dust, and they supplied the vessel and purchased a cargo for Leach's account, charging a guaranty commission of five per cent. on their advances, and also a commission of two and a half per cent. on their purchases. They rendered Leach

an account, in which he is charged with the supplies of the barque and the cost of the cargo, and their commissions, and credited with the moneys received from him.

Leach carried this cargo to San Francisco; and, having sold it, made an arrangement with the mercantile house of Flint, Peabody, & Co., established at San Francisco, that he would go to Valparaiso, and ship cargoes thence to them on their and his joint account, drawing on them for the cost. This arrangement was not limited to cargoes by the Laura, but was to extend to such other vessels as Leach might take up for the purpose.

From San Francisco, Leach sailed in the Laura to Talcuhana, where he saw one of the firm of Loring & Co., who gave him a credit for $10,000 to buy a cargo there. He purchased part of a cargo; but, not being able to complete it, went to Valparaiso, where he arrived in May, 1851. He then informed Loring & Co. of his arrangement with Flint, Peabody, & Co., and they agreed to advance him funds, to enable him to carry the arrangement into effect—to be reimbursed by remittances from San Francisco, with five per cent. commission, and one per cent. a month for interest. He accordingly left the vessel, putting Easton, his mate, in command; and Loring & Co. purchased the residue of the cargo for the Laura, charging its cost to the joint account of Leach, and Flint, Peabody, & Co., and the Laura sailed in May, 1851, for San Francisco. She returned in ballast to Valparaiso in March, 1852; and at that time the principal bills for repairs and supplies, claimed in this case, were incurred. In March, 1852, the Laura again sailed, under Easton's command, for San Francisco, *via* Peyta, where she touched to complete her cargo, and Easton there drew a bill on Loring & Co. to reimburse advances made to him in that port—partly to pay for cargo purchased there, and partly to pay for supplies and port charges.

The Laura returned to San Francisco in September, 1852, where she was taken possession of by Captain Weston, who had been sent there by the owners to bring her home. The owners gave no consent to the above-described proceedings of Leach in respect to the use and employment of the barque. From the time when Leach left the command of the Laura, in May, 1851, he remained in Valparaiso, and by means of funds furnished by Loring & Co., and with their assistance, he purchased and made six shipments of cargoes by vessels other than the Laura, under his arrangement with Flint, Peabody, & Co., and Loring & Co. He had a desk in the counting-house of Loring & Co., and there transacted his business.

Setting aside all the special facts of this case, and viewing it

only as an ordinary transaction, by which the master of an American vessel procured repairs and supplies, and advances of money to pay for repairs and supplies, in a foreign port, the first question which arises is, whether he had power to hypothecate the vessel as a security for their payment, otherwise than by a bottomry bond, which must make the payment dependent on the arrival of the vessel, and creates no personal liability of the owners.

We understand it to be definitely settled by the cases of Stainbank *v.* Fleming, 6 Eng. L. and Eq., 412, decided by the Court of Common Pleas in 1851, and Stainbank *v.* Shephard, 20 Eng. L. and Eq., 547, on writ of error in the Exchequer Chamber, so late as 1853, that by the law of England the master of a ship has not power to create a lien on the vessel as security for the payment for repairs and supplies obtained in a foreign port, save by a bottomry bond; that he can only pledge his own credit and that of his owners, but cannot, by any act of his, give the creditor security on the vessel; while, at the same time, the personal liability of the owners continues. Neither of those learned courts considered—perhaps there was no occasion for them to consider—(Pope *v.* Nickerson, 3 Story's R., 465,) what should be the effect, in an English tribunal, of the law of the place where the repairs and supplies were obtained, if that law tacitly created a lien on the vessel. See Story's Con. of Laws, § 322 *b*, 401–'3. These decisions rest merely upon the want of authority in the master, according to the law of England, to create, by his own act, an absolute hypothecation of the vessel as security for a loan. But the maritime law of the United States is settled otherwise—in harmony with the ancient and general maritime law of the commercial world. The master of a vessel of the United States, being in a foreign port, has power, in a case of necessity, to hypothecate the vessel, and also to bind himself and the owners, personally, for repairs and supplies; and he does so without any express hypothecation, when, in a case of necessity, he obtains them on the credit of the vessel without a bottomry bond. The ship General Smith, 4 Wheat., 488; Peyroux *v.* Howard, 7 Peters, 324, 341; The Virgin, 8 Peters, 538; The Nestor, 1 Story, 73; The Chusan, 2 Story, 455; The Phœbe, Ware's R., 263; Davis *v.* Child, Daveis's R., 12, 71; The William and Emeline, 1 Blatch. and How., 66; Davis *v.* A New Brig, Gilpin's R., 487; Sarchet *v.* The Davis, Crabbe's R., 185.

It is not material whether the hypothecation is made directly to the furnishers of repairs and supplies, or to one who lends money on the credit of the vessel, in a case of necessity, to pay such furnishers. "Through all time," says Valin, "by the

use and custom of the seas, it has been allowable for the master to borrow money, on bottomry or otherwise, upon the hull and keel of the vessel, for repairs, provisions, and other necessaries, to enable him to continue the voyage;" Com. on Art. 19, Ord. of 1681; and this assertion rests upon sufficient authority. The Roman law, de exercitoria actionê, D. 14, 1, authorized a simple loan, and does not confine the master to borrow on bottomry. The Consulat del Mare, ch. 104, 105, 236, the laws of Wisby, art. 13, the laws of Oleron, art. 1, Le Guidon, ch. v, art. 33, the French ordinance of 1681, art. 19, as well as the present French code de commerce, art. 234, concur in allowing the master to contract a simple loan, in a case of necessity, binding on the vessel. A difference of opinion exists between Valin and Emerigon, concerning the power of the master also to bind the owner to accept bills of exchange for the sum borrowed; but they concur in opinion that the master has power to contract a loan to pay for repairs and supplies, and to give what we term a lien on the ship as security, in a case of necessity. See Valin's Com., art. 19; Emerigon's Con. à la Grope, ch. 4, sec. 11; vol. 2, pp. 484, &c. In another place, ch. 12, sec. 4, Emerigon observes, "It matters little whether one has lent money or furnished materials." The older as well as the more recent commentators are of the same opinion. Kuricke, 765; Loccenius, lib. 3, ch. 7, n. 6; Stypmannus, 417, n. 107; Boulay Paty Cours de Droit, Com. tit. 1, sec. 2, vol. 1, p. 39, and tit. 4, sec. 14, vol. 1, pp. 151–'3; Pardessus Droit Com., vol. 3, n. 631, 644, 660; Pardessus Col., vol. 2, p. 225, note. The subject has been elaborately examined by Judge Ware, in Davis *v.* Child, Daveis's R., 75, and we are satisfied he arrived at the correct result.

Nor do we think the fact that the master was charterer and owner *pro hac vice* necessarily deprived him of this power. It is true it does not exist in a place where the owner is present. (The St. Jago de Cuba, 9 Wheat., 409.) But this doctrine cannot be safely extended to the case of an owner *pro hac vice* in command of the vessel. Practically this special ownership leaves the enterprise subject to the same necessities as if the master were master merely, and not charterer, and the maritime law gives him the same power to borrow to meet that necessity, as if he were not charterer. The Consulat de la Mer, ch. 289, (2 Par. Col., 337,) has provided for the very case, for it makes the interest of the general owner responsible for the contracts of the master who has received the vessel "*en commande;*" and one species of this contract was what we should term "a lay"—that is, a participation in profits. Vide

2 Par. Col., 186, note 3; 52, note 1; 49, note 4; and the chapters there referred to.

It is true the master cannot bind the general owners personally for supplies which he, as charterer, was to furnish. (Webb *v.* Pierce, 1 Curtis, 110.) Neither could he bind them beyond the value of their shares in the vessel, under the ancient maritime law. (Consulat, ch. 34, 239, and Pardessus's note, vol. 2, p. 225.) Emerigon is of opinion that the effect of the French ordinance is the same. (Con. à la Grope, ch. 4, sec. 11.) In our law, if the master is the agent of the owners, his contracts are obligatory on them personally. When he acts on his own account, he does not create any obligation on them. But it does not follow that he may not bind the vessel. In Hickox *v.* Buckingham, 18 How., it was held that contracts of affreightment entered into by the master, within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel; and whether the master be the agent of the general or special owner—and this upon the principle that the general owner must be presumed to consent, when he lets the vessel, that the master may make such contracts, which operate as a tacit hypothecation of the vessel. And so in this case, we think, the general owners must be taken to have consented that, if a case of necessity should arise in the course of any voyages which the master was carrying on for the joint benefit of themselves and himself, he might obtain, on the credit of the vessel, such supplies and repairs as should be needful to enable him to continue the joint adventure. This presumption of consent by the general owner is entertained by the law from the actual circumstances of the case, and from considerations of the convenience and necessities of the commercial world.

But the limitation of the authority of the master to cases of necessity, not only of repairs and supplies, but of credit to obtain them, and the requirement that the lender or furnisher should see to it, that apparently such a case of necessity exists, are as ancient and well established as the authority itself.

In some of the old sea laws, they are declared in express terms, as they were in the Roman law: Aliquam diligentiam in ea re creditorem debere præstare, D. 14, 1, 7; navis in ea causa fuisset ut refici deberet, D. 14, 1, 7. And in the Consulat del Mare, ch. 107, "But the merchant should assure himself that what he lends is destined for the use of the ship, and that it is necessary for that object."

A reference to the other codes cited above will show that a case of necessity was uniformly required; and the commenta-

tors all agree, that if one lend money to a master, knowing he has not need to borrow, he does not act in good faith, and the loan does not oblige the owner. Valin, art. 19; Emerigon, Con. à la Grope, ch. 4, sec. 8; and the older commentators cited by him. Boulay Paty Cours de Droit Com., tit. I, sec. 2, tit. IV, sec. 14; and see the authorities cited by him in note 1, p. 153.

To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit, to procure them. If the master has funds of his own, which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners, which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit; and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel.

We now come to the application of these principles to the case at bar.

The freight-money earned by the Laura was applicable, and ought to have been applied, by the master, to the necessities of the vessel; the one-half, (after deducting port charges,) which belonged to himself, should have been applied to pay the wages of the crew, and obtain supplies for the vessel; the other half, which belonged to the owners, to paying for necessary repairs.

The amount of this freight-money actually earned and received was about $12,000. Besides this, the Laura had made two voyages to San Francisco, with cargoes belonging to Leach and to him, and Flint, Peabody, & Co., before the bills now in question were incurred. We hesitate to declare that a master, who takes a vessel on "a lay," can use it to carry cargoes of his own. The practical difference to the owners is, that there can be no agreed rates of freight, and no such security on the cargo for its payment, as the marine law ordinarily provides, and as the owners may be reasonably considered to contemplate when they let the vessel. (Gracie *v.* Palmer, 8 Wheat., 605.) But this point has not been adjudicated on by the courts, nor does this case furnish any evidence of what the usage is in this particular. Waiving a decision of this question, it is, at all events, clear the vessel earns for the owners a reasonable freight by carrying cargo of the master; and, according to the evidence in this case, that reasonable freight must have been

set down for each of the two voyages on which the cargo of the master was carried, at the sum of $7,000, that being the sum earned on the preceding voyage between the same ports, and there being no evidence before us of a change in the price of freights in the intermediate periods; so that when these expenses, now in question, were incurred, the master had received in money, as freight, $12,000, and must be taken to have received, in the enhanced value of his own merchandise, through its carriage to San Francisco, $14,000 more. The amount previously expended by him for repairs and supplies, at Valparaiso, does not appear to have exceeded $3,000. The amount expended at San Francisco does not appear, but there is no reason to suppose it was considerable.

In July, 1850, Loring & Co. received from Leach his funds, supplied him with credit, and purchased a cargo for him. In May, 1851, they made themselves parties to an arrangement, under which Leach was to quit the command of the vessel, and become a merchant, resident at Valparaiso. Whether they did or did not know Leach had the vessel on a lay, this was obviously wrong as respected the owners; for though, under a lay, the master is owner *pro hac vice*, yet there is a personal confidence reposed in him as master, which he cannot delegate to another, except in case of necessity. Before the credit now in question was given by Loring & Co., they not only had notice that Leach had wrongfully deserted the command of the vessel, and had diverted the freight which the vessel had earned and ought to have earned into his business as a merchant, but they had actually assisted him to do so, by receiving freight-money, and mingling it with other funds in their hands, out of which and their own funds they made advances to enable him to pay for cargoes; and they acted as his agents in their purchase; and they had, moreover, profited largely by so doing, charging high rates of interest, as well as commissions.

It should be added, that the owners have received nothing for their part of the earnings of their vessel, during all these voyages; for though, since his return to this country, Leach has rendered his accounts to the owners, they refused to settle them, as rendered, and Leach testifies he has not the means to pay any balance due to them.

In such a state of facts, we are of opinion Loring & Co. had no right to lend Leach money, or furnish him with supplies on the credit of the ship, and cannot be taken to have done so.

Our opinion is, that inasmuch as the freight-money earned by the vessel was sufficient to pay for all the needful repairs and supplies, and might have been commanded for that use if they had not been wrongfully diverted, no case of actual

necessity to encumber the vessel existed; and as Loring & Co. not only knew this, but aided Leach to divert the freight-money to other objects, they obtained no lien on the vessel for their advances.

The cause must be remanded, with directions to dismiss the libel with costs.

Mr. Chief Justice TANEY, Mr. Justice McLEAN, and Mr. Justice WAYNE, dissented, and Mr. Justice McLEAN and Mr. Justice WAYNE concurred with the Chief Justice in the following dissenting opinion.

Mr. Chief Justice TANEY dissenting.

I dissent from the judgment of the court in this case, and adhere to the opinion I gave at the circuit.

The principal question is, whether certain repairs and supplies furnished to the barque Laura, of Plymouth, in the State of Massachusetts, while she was in the port of Valparaiso, in Chili, in February and March, 1852, are a lien upon the vessel.

The appellants are citizens of Massachusetts, and, at the time of making and furnishing these repairs and supplies, and until and after this libel was filed, were the owners of the barque. She was built for them at Newburyport, under the superintendence of a certain Phineas Leach, who was by profession a mariner. After the vessel was completed, she was placed under his command, as master; and, in the year 1847, he and the appellants agreed that he should sail the vessel on what, in the New England ship-owning States, is familiarly called "*a lay*"—that is to say, he was to victual and man her, pay one-half the port charges, and be entitled to one-half of the freights or earnings. This is the contract, as stated by Leach in his testimony. No written contract is produced. Indeed, contracts of this description, it would seem, are so well known and understood in the States above mentioned, that they are often made orally, and not in writing. And when the owners agree with a mariner that he shall sail the vessel on "*a lay*," both parties understand that the mariner is to take the command of her as master, to victual and man her, and pay half the port charges; the owner to keep the vessel in repair, and the freight and earnings to be equally divided between them. Upon a contract of this kind, the vessel, during its continuance, is under the exclusive control of the master, as respects her voyages and employment. He alone has the right to determine what voyages he will undertake—what cargo he will carry—upon what terms—and to

what ports he will sail in search of freight. His share of the earnings of the vessel are his wages, and he receives no other compensation for his services as master.

Before I proceed to state the facts out of which this controversy has arisen, it is proper to say that Leach states in his testimony that, in addition to the contract above mentioned, it was agreed, between the appellants and himself, that he should have the right to become a part owner of the vessel, to to the amount of one-eighth, whenever he paid for it. But he never paid anything on this account, and never, therefore, had any interest as part owner; and, upon his return to Plymouth, in 1852, as hereinafter mentioned, when his connection with the Laura ceased, this contract was cancelled. It was a written contract; but whether it was a part of his contract to sail the vessel upon "a lay," is not stated in the testimony.

As Leach never became part owner, his authority over the vessel was derived altogether from his contract to sail her upon the terms above mentioned. That contract, as stated by him, was indefinite as to its duration. No particular time was fixed for its termination, nor the happening of any particular event. And it was during the continuance of this contract that the voyages were made, and the acts done which have given rise to this controversy.

The material facts in the case are derived mainly from the testimony of Leach, who was produced as a witness by the owners, who are the appellants; and it requires a close and careful scrutiny to understand the bearing of different portions of his testimony upon the different points raised in the argument. The examination itself, under the commission to take testimony, which was executed at Boston, is singularly involved and confused; and the answers, I regret to say, often showing a disposition to prevaricate, and a desire to make the best case the witness could for the owners, and against the libellants.

His testimony begins by describing several voyages which he made in the year 1849, which are not material to the matter in issue, until he comes to the one from Rio to Valparaiso. This was his first voyage to the Pacific, and he arrived at Valparaiso in November, 1849, with a cargo consigned to Loring & Co., the libellants. This company was composed of citizens of Massachusetts, domiciled at Valparaiso for the purposes of commerce. In December, 1849, he sailed from Valparaiso to San Francisco, with a cargo on freight; the freight amounting to about seven thousand dollars. Being unable to procure a cargo on freight at San Francisco, he sailed for Tal-

cahuana in ballast, and, no freight offering at that place, he sailed for Maule in ballast, but was prevented from entering the port by bad weather and a bad bar, and proceeded to Valparaiso. He arrived there early in July, 1850. While there, he obtained advances from Loring & Co., which enabled him to purchase a cargo for the Laura on his own account, with which he sailed for San Francisco, where he arrived in November, 1850.

While he was in San Francisco, he made an arrangement with Flint, Peabody, & Co., of that place, by which, upon his return to Chili, he was to purchase cargoes on joint account, and ship or consign them to that house at San Francisco. He was to purchase cargoes by means of bills drawn on them, and they were to honor his drafts. There was no limit as to the time; but this agreement was conditional, and was to depend upon the ability of Leach to make arrangements in Chili, by which he could raise money on those drafts to purchase the cargoes; and if he succeeded in making those arrangements, he was to remain in Chili to make the purchases. The arrangement was not confined to cargoes by the Laura, but he was to buy and ship according to his judgment.

When he left San Francisco, he again proceeded to Talcahuana in ballast, where he arrived in February, 1851. He met there Mr. Bowen, one of the firm of Loring & Co., and told him that he wanted another cargo, but had not money to buy it, and Bowen thereupon gave him a letter of credit upon his house at Valparaiso, by which he was authorized to draw on them for ten thousand dollars, payable eight days after sight. Being unable to complete his cargo at Talcahuana, he proceeded to Valparaiso, where he arrived in the month of April or May following, and obtained the balance of his cargo by the aid of further advances from Loring & Co. He then mentioned to them his arrangement with Flint, Peabody, & Co., and asked if Loring & Co. would give him facilities in the way of funds to carry out this arrangement. They agreed to advance the funds, upon an interest account with him, charging five per cent. for advances, and one per cent. a month for interest, and they were to be paid by remittances from San Francisco without drawing bills. Leach acceded to this arrangement, and directed them to charge the cargo then on board the Laura at Valparaiso to the joint account of Flint, Peabody, & Co., and himself, Leach. He then, as he says, "put the mate, Reuben S. Easton, in as master," and sent him to San Francisco, Leach remaining at Valparaiso. This was in May, 1851, and he remained there until March, 1852, carrying on and superintending those transactions.

During this period, he engaged extensively in mercantile business, shipping cargoes by other vessels, as well as the one by the Laura, and obtaining the means of purchasing them by the arrangements he had made with Loring & Co., as hereinbefore stated; and he had a desk in their counting-house, at which he transacted his business.

The Laura did not return again to Valparaiso until February, 1852. It was then found that she needed repairs and supplies to a large amount to fit her for another voyage; and Leach also wanted funds to purchase another cargo for her. He had at that time, it seems, determined to return to Plymouth; but before he did so, he wished to despatch the Laura, under the command of Easton, on a voyage to Peyta and Panama, with a cargo purchased on his own account. He had no funds for either purpose. He states that he had but $500, and this, it appears, he needed for his personal expenses; and the repairs were made and the supplies furnished for the vessel by Loring & Co., at his request, to the amount of $2,707.69. Leach states that they were necessary, and made and furnished with economy; that he was himself on board, superintending and directing them; that Easton was also on board assisting him, but had nothing to do with ordering or directing them. He merely executed Leach's orders. The cargo was likewise purchased and paid for by Loring & Co. for Leach, and at his request.

The repairs were made and the supplies furnished in the latter part of February and early part of March, 1852, and the cargo put on board immediately afterwards. The invoice is dated Valparaiso, March 18th, and is headed, "Invoice of sundries purchased and shipped by Loring & Co., on board the barque Laura, for Peyta and Panama, on account and risk of Capt. Phineas Leach, consigned to his order, *for sales and returns to Loring & Co.*"—the aggregate amount being $5,779.81. The vessel sailed, as soon as the cargo was on board, under the command of Easton. And on the 20th of March, two accounts were stated by Loring & Co.; one for the repairs and supplies to the Laura, and the other their private or personal account against Leach; both of which were signed by Leach on that day, with a written admission that they were correct.

The first mentioned of these accounts is headed, "Barque Laura and owners to Loring & Co., Dr.," and states the particular items of repairs and supplies, amounting, as before mentioned, in the aggregate, to $2,707.69. This account is the matter now in dispute. The other is headed, "Dr., Capt. P. Leach in account with Loring & Co. to 20th of March, 1852," showing a balance due from Leach of $8,527.69. Among other

items, he is charged, in this account, with the amount of the account for repairs and supplies, and this item is charged thus—"*our ac. with barque Laura*"—and he is also charged with the amount of the invoice above mentioned thus—"*our invoice sundries for Laura due April* 12, 1852"—showing that the charge for the repairs and supplies was always kept separate and distinct from Leach's personal account.

On the day these two separate accounts were adjusted and signed by the parties, or in a day or two afterwards, Leach left Valparaiso for Panama, and from thence proceeded home. He states that he arrived at Boston on the 20th of April following, and it appears, by the documents in evidence, that, on the 9th of July next after his return, the appellants agreed with Francis H. Weston that he should proceed to Panama, or wherever the vessel was lying, and assume the command of her as master; and, after fulfilling any engagement she might be under, should proceed with her for a load of guano on freight, or any other freight that could be obtained, to an Atlantic port. Weston proceeded accordingly, and arrived at Valparaiso in September. The Laura arrived there about a fortnight afterwards, when he assumed the command, and Easton left her.

In the execution of his orders from the owners, Weston proceeded on the voyage directed by them, and then brought the vessel and cargo to Baltimore, where he arrived in June, 1853; and immediately after his arrival she was arrested upon the libel now under consideration.

This narrative of the facts in the case is necessary in order to understand how the questions discussed at the bar have arisen. There are other circumstances in evidence, relating to different points, which it will be material to advert to more particularly hereafter.

As I have already said, the principal matter in dispute is, whether the repairs and supplies furnished to the barque in the port of Valparaiso, as hereinbefore mentioned, in February and March, 1852, were a lien upon the vessel at the time this libel was filed.

In deciding this question, the first point to be considered is, in what relation did Leach stand to the vessel, while he was sailing her under this contract? Was he the owner for the time? And in determining the legal effect and operation of contracts made by him, are they to be regarded as the contracts of the owner, or the contracts of the master?

This is a question of the highest importance to the commercial interests of this country. It is well known that almost the whole of our immense coasting trade is carried on by vessels owned in the Northeastern States of the Union; and the far

greater part of them are sailing under contracts like this. And upon our coast, stormy and dangerous as it is at certain seasons of the year, very serious damage is often sustained by these vessels, and heavy amounts frequently required and obtained in the ports of other States for repairs and supplies to enable them to proceed on their voyages.

Now, if Leach is to be regarded as owner for the time when he was sailing the Laura under the agreement, then by the maritime law the repairs and supplies furnished at his request are presumed to have been furnished upon his personal credit, unless the contrary appears; and in that view of the subject, Loring & Co. have not, and never had, any lien upon the vessel; and the libel against her cannot be maintained. But if, on the contrary, Leach is to be regarded as master, and as making the contract by virtue of his authority over the barque in that character, then these repairs and supplies in a foreign port, if necessary to enable the vessel to proceed, are presumed to have been made on the credit of the vessel, unless the contrary appears, as well as on the credit of the owners and Leach; and in this aspect of the case, Loring & Co. had a lien upon her, which they may enforce in this proceeding unless it has been waived or discharged.

These are the established principles of maritime law in this country, as heretofore recognised and administered in the courts of the United States. And I do not deem it necessary to refer to English cases, or to the decrees or doctrines in the different nations on the continent of Europe, which have been cited in the argument, because I consider the rule, as I have stated it, to be conclusively settled in this country by an unbroken series of decisions in this court and at the circuits. The case of The General Smith, (4 Wheat., 443;) The St. Jago de Cuba, (9 Wheat., 416;) and the case of Ramsey *v.* Allegre, (12 Wheat., 611,) explained and commented on in the case of Andrews *v.* Wall and others, (3 How., 573,) may be regarded as the leading cases on this subject.

The case before us is one of the more interest, because it is the first in which the construction and legal effect of these contracts for sailing on a "*lay*" has come up for decision in this court. They are, as I have said, peculiar to a particular portion of the Union, and are scarcely ever to be found in the maritime contracts of any other part of the commercial world. They are also comparatively modern in their use. And if it is held, that a person furnishing necessary repairs and supplies in a foreign port, to a vessel sailing under a contract of this kind, has not a remedy against the owner, and also a lien on the vessel for such provisions and supplies, as well as for repairs

to the vessel—although they are both furnished at the request of a master who is without funds, and has no other means of obtaining them—then this class of cases will form an exception to the general maritime code of the United States, to which vessels belonging to the ports of other States, and sailing under the usual contract with the master, for certain wages, are subjected; and the parties making the repairs or furnishing the supplies will be deprived of the securities to which they have heretofore supposed themselves entitled, and upon which they have mainly relied; for the personal responsibility of the master, after he is suffered to leave the port, is most commonly of very little value. And it would exempt the ship-owners, in one portion of the United States, from the liabilities and burdens imposed upon those of other States, merely upon the ground that in the one the owner compensates his captain by allowing him a share of the nett amount of the freight earned by the vessel, and in the other by fixed and certain wages. For this, in truth, is the only difference between vessels sailing under a "lay" and those sailing under the usual and customary contract between the owner and master.

In making the inquiry whether Leach was owner while sailing under this contract, we shall find few if any cases in the English decisions to assist us. For contracts of this kind, as I have already said, are hardly if ever used there. And I can find no case where the question arose as to who was owner for voyage in which the contract is not clearly distinguishable from the one before us. And in all of the cases in which it has been held that the general owners were not responsible, it will be found that, by the terms of the contract, the entire and exclusive possession and control of the vessel was transferred for a certain time, or a particular voyage or voyages, and where the general owner, during the time stipulated, had no right to exercise any act of ownership over her. In other words, they are cases in which the court held, that the vessel was let or demised to the party for the time, so as to vest the right of property in the charterer, leaving in the general owners a reversionary interest, subject to the particular interest so let or demised. And whether this is the case or not, and whether there is a special and exclusive property in the charterer, does not depend upon any particular form of words or any particular facts. The general rule in relation to the construction of such contracts is laid down in Abb. on Ship., 61, (7th Am. Ed'n,) in the following words, as the result of the various decisions to which he refers: "From these cases (he says) it appears that the question whether or not the possession of a vessel passes out of the owner or charterer depends upon no single fact or

expression, but upon the whole of the language of the contract, as applicable to its attendant circumstances."

But although we find no case in the English reports that can be regarded as in point, contracts like the one before us, and indeed in the same words, have, on several occasions, been brought before the Circuit Court of the United States in the first circuit, where they have been carefully and deliberately considered by the learned judge who recently presided in that circuit. And it has been uniformly held in that court, by Mr. Justice Story, that the master sailing a vessel under such a contract as this is not the exclusive owner for the voyage; and, if regarded as owner at all, is a qualified and limited one; and his character and authority, and duty as master, is not merged in it; and that his contracts for repairs and supplies in a foreign port are made in that character, and are a lien upon the vessel.

One of these contracts came before him in the case of the Nestor, reported in 1 Sum., 73, and was decided in 1831. The claim was for a cable furnished to the vessel at Alexandria, in the District of Columbia, at the request of the master. The vessel belonged to Portland, in the State of Maine. And the court held that the vessel was liable, unless it was shown that the credit was exclusively given to the master. It is true that the article furnished in that case was for the use of the brig, which the owner was bound to keep in repair. But the principle decided applies directly to the case before us—that is, that the master, under one of these contracts, is not owner for the voyage, so far as to exclude his character and authority as captain. And that his contracts for repairs and supplies are presumed to be made in the latter character, and to create the usual maritime lien upon the vessel, and the usual liability of the owner, unless the presumption is repelled by proof that the credit was given to him. The whole subject is fully discussed in this case, and such will be found upon a careful examination the result of the opinion.

The case of the Cassius, 2 Story's Rep., 81, was a contract of the same description, between the master and owners; and in that case the rights of the master and the responsibility of the owners for his acts in a foreign port were fully considered; and the decision turned upon the question whether, under one of these contracts, the master was the owner for the time. And the learned judge, speaking of the case of Taggart *v.* Loring, 16 Mass. R., 336, says: "That case is distinguishable in its actual circumstances from the present. The argument in that case does not appear from the statements of the report to have been identical with the present. And if it were, I must say that I should have some difficulty in acceding to the authority of that

case, if it meant to establish that the master had an exclusive special ownership in the ship for the voyage. I should rather incline to the opinion, that if he had any ownership at all for the voyage, it was in common with the general owners." The contract in that case, upon which the libel was filed, was executed by him as master, and the court held that it bound the vessel.

Indeed, I do not see how, upon any fair interpretation of the terms of these contracts, a different construction could be given to them. There are no words in them which import that it is the intention of the owners to transfer the exclusive right of property in the vessel to the master for the time, nor anything in the character of the contract from which it can be implied—on the contrary, the right of possession remains necessarily in the owners. For they are to keep the ship in repair, and the master is only to man and victual her. The owners have therefore the right, while the contract continues, to take exclusive possession of her, from time to time, for the purpose of putting her in proper repair, and to have her properly equipped, so that she may always be seaworthy, and their property not be imprudently exposed to danger. And whatever Leach did, or was authorized to do, in this respect, was necessarily done as master, holding the possession for the time the repairs were making, not as owner of the vessel, but as agent for the owners, by virtue of his authority as master. And the owners, in a case like this, may, as in the case of an ordinary captain upon certain wages, displace him from the command whenever they think proper—being bound, however, in like manner, to fulfil the engagements into which he had lawfully entered.

Moreover, he had no connection with the vessel, except under his contract to sail her in the character of captain or master. He had no authority over her, nor any right of possession, nor any power to direct her voyages or movements, except in this character. All of his rights were inseparably connected with his official relation to the vessel, and depended upon it. The inducement to the contract was the confidence which the owners reposed in his seamanship, integrity, and capacity for business. It was a personal trust, which he could not delegate or assign to another. It was to be executed by himself; and the moment he ceased to be master, all right of possession, and all right to control her voyages and movements, ceased also. And if his right to the possession of the barque, and to man and victual her, and contract for freights, and to receive half her earnings, were all inseparably connected with his official relation to the vessel as master, and dependent upon it, I cannot understand

how his contract for repairs and supplies can be said to be made in any other character.

His relation to the vessel, and his rights in and over her, differ in no material respect, in a contract of this kind, from that of a master sailing in the ordinary mode, upon fixed and certain wages, from one port to another, under the direction of the owner, to carry or seek for freight. The only difference is, that a larger discretion as to the voyages to be undertaken is given to the master, and he receives half the earnings, instead of certain and fixed wages. And I cannot perceive how these two circumstances can give him any ownership of the vessel, or why the master's contracts for repairs and supplies in a foreign port shall be a lien upon the vessel in one case, and not in the other. The fact that he is to victual and man the vessel cannot of itself give a right of property in her. It is, undoubtedly, a circumstance to be considered in expounding these contracts, but nothing more. For the exclusive right for the voyage may as well and legally be transferred where the owners man and victual her, as where it is done by the charterer, provided the contract taken altogether shows that such was the intention of the parties. It does not, as I have already shown, depend upon any particular fact, but upon the entire agreement. And I can see nothing in agreements of this kind, as was said by Mr. Justice Story in the case of the Cassius, which indicates an intention to make the master the exclusive owner during the voyages he might make, or that would justify the court in giving it such a construction.

I am aware, that in some or all of the States where these contracts are usually made, there are cases in the State courts in which it has been held, that in these contracts the master is the owner, and that his contracts made in the port of another State are made in the character of owner and not of master, and that an action cannot be maintained upon them against the general owners.

I shall not stop to examine these cases, because the question here is not whether an action can be maintained against the owners for these repairs and supplies, but whether they were a lien upon the barque. I admit that I can perceive no distinction in principle between the personal liability of the general owners and the liability of the vessel. For whatever may be the rights and liabilities of the master and owners, as between themselves, upon their private contract, they cannot affect the rights of third parties dealing with him in his character of master, and furnishing necessary repairs and supplies in a foreign port at his request. They know him only as master, and deal with him in that character. And it is the rule of the

maritime law, as settled in my judgment by the decisions in the courts of this country, that in a case of that kind the owners personally, as well as the vessel, are liable for the amount. But if the owner is present, and they are furnished to him, it is equally well established, that the credit is presumed to have been given to him personally, and no lien on the vessel is implied. The decisions in the State courts cannot therefore, it would seem, be reconciled to the decisions of the Circuit Court of the United States, hereinbefore referred to.

But however this may be, the implied lien on the vessel in cases like the one before us has been maintained in the Circuit Court. And as the question of maritime lien, with which we are now dealing, belongs peculiarly to the admiralty courts, and the paramount jurisdiction in such cases is vested in them by the Constitution of the United States, it necessarily follows, that it must rest with them to interpret the contract, and to determine whether it created a lien or not, and how, and when, and against whom, it can be enforced.

In the case of the barque Chusan, 2 Story's Rep., 462, he says: "The Constitution of the United States has declared that the judicial power of the National Government shall extend to all cases of admiralty and maritime jurisdiction; and it is not competent for the States, by local legislation, to enlarge or limit or narrow it. In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress, and in the absence thereof by the general principles of maritime law. The States have no right to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer."

The opinions of the State tribunals to which I have referred are certainly entitled to very high respect, upon any question of law that may come before them; yet the question before us is not one of State law. It is a contract for maritime service, and belongs to the admiralty courts of the United States. And the State decisions, therefore, however highly we respect them, carry with them no binding judicial authority, when in conflict with the decisions of the courts of the United States upon questions belonging to the Federal courts. And I the more firmly adhere to the doctrines of the Circuit Court, hereinbefore stated, because, as I have already said, I can see nothing in the terms of the contract, or in its character and objects, that would justify a different construction. In my opinion, therefore, Leach had no ownership in the Laura, and in the contract in question exercised the powers of master, and nothing more.

Such being, in my judgment, the meaning and legal effect

of the contract between the owners and Leach, the next question to be considered is, was he still master when these repairs and supplies were furnished?

The appellants contend, that if he was not owner, but only master, while he was sailing the barque, he yet ceased to be master when he remained at Valparaiso, and placed the vessel under the command of Easton, and that from that time Easton was the master; and the contract of Leach for repairs and supplies would therefore create no lien. Undoubtedly, the conduct of Leach in this respect was a violation of his duty to the owners, if he acted without their consent. He was to sail the vessel himself, and this personal trust and confidence could not be transferred by him to another. Such a transfer would be a breach of his contract, and of his duty under it. But that is a question between him and his owners, and they might displace him or not, as they saw proper. The point here is, did his official relation as master cease when he engaged in commercial pursuits, and remained on shore at Valparaiso?

Certainly, the misconduct of a captain, while on a voyage or in a foreign port, does not, *ipso facto*, deprive him of his office. It would be a sufficient reason for the owners to dismiss him; but in this case it is not pretended that he was dismissed or suspended by them. No other person was appointed to the command until after he had voluntarily surrendered it to the owners, after his return to Massachusetts in the spring of 1852. And these supplies had been furnished, at his request, months before the new master was appointed.

Nor did he abandon his official relation to the vessel while he remained at Valparaiso; but, on the contrary, continued to hold possession in person or by his agent, and to exercise the rights and authority of master, according to the terms of his contract with the owners. He continued to man and victual her, direct her voyages, and receive the freights. Easton was paid by him, and not by the owners; he acted under the direction of Leach, as his agent and subordinate, and not under the direction of the owners. He was not even allowed to receive the freight; and when the supplies in question were furnished, Leach was actually on board, in actual command, and Easton acting as his subordinate, under his orders. And as Leach had no ownership whatever in the vessel, all of this must have been done by him as master, and could have been done in no other character; for if he had abandoned that official position, and Easton was master, he had no authority over Easton, nor any more right to interfere with him on the vessel than any other stranger.

Nor is his absence from the vessel by any means incompati-

ble with this official relation and authority. It is not necessary for the existence of such a relation, and the exercise of such an authority, that he should always be on her deck. He may be absent for a longer or shorter time, and at a greater or lesser distance, without forfeiting his authority; and when once appointed master by the owners, he continues master until displaced by them, or he himself surrenders the office. As respects a dismissal by the owners, Mr. Justice Story says, in the case of the Tribune, 3 Sum. Rep., 149, "Being once master, he must be deemed still to continue to hold that character until some overt act or declaration of the owners displaced him from the station." And certainly there was no such act or declaration while Leach continued in the counting-house of Loring & Co. And as to Leach himself, it is obvious, from the facts above stated, that he had not resigned or surrendered the command.

It is said that Easton was master. By what authority was he master? He was not agent of the owners; he was not appointed by them, nor authorized by them to exercise any control over the ship. Nor would they have been bound by his contracts if he had made any, nor responsible for his acts. There were none of the relations and trusts which exist between owners and master, for they had not confided the ship to him, and were not even responsible for his wages; and if Leach was not master, and authorized to bind the vessel and owners by his contract, the vessel was sailing without one, and without any lawful authority from those to whom she belonged. It is true, Leach says he appointed him master; but that does not clothe him with the authority which the maritime law annexes to that character, unless Leach had lawful power to appoint him. He might, no doubt, have properly sent him on the voyage, and placed the vessel under his command while he remained on shore, if the interest of the owners required or would justify it. And he might, if he pleased, call him master or captain; but by whatever name he chose to call him, he would be nothing more than his subordinate and agent. He would not, in respect to the owners or third persons, possess the authority of master.

The cases of L'Arina *v.* The brig Exchange, Bee's Reports, 198, and the same *v.* Manwaring, 199, are directly in point on this head. There the party was appointed by the master as captain, and cleared the vessel as such at Havana; yet this appointment was held by the court not to give him the legal relation of captain to the vessel, nor displace the master appointed by the owners; and it was held that the contract of the latter, within the scope of his authority as master, was still binding upon the owners. The fact, therefore, that Leach re-

mained on shore, and sent the vessel upon different voyages under the command of an agent appointed by him, did not of itself displace him; he was still master of the barque, with all the powers and responsibilities which are attached to that character. And if the fact that he remained on shore did not deprive him of his official character, the circumstance that he was engaged during that time in commercial pursuits cannot alter the case. It cannot make any difference, in this respect, whether he remained idle or employed himself in any particular pursuit.

But it is said that Leach was not only absent from the barque, but he was employing her in violation of the orders of the owners, who disapproved of his conduct, and had directed him to bring the vessel home, and that Loring & Co. knew it, and yet encouraged and enabled him to go on in the violation of his duty, by large advances of money. And it is insisted, that as Loring & Co. were aiding and encouraging him in this breach of duty, and the supplies in question were furnished to enable him to persevere in it, they were furnished in bad faith to the owners; and in a court of admiralty, acting upon equitable principles, can create no obligation upon them, nor any lien upon their vessel.

If the facts assumed were established by the testimony, I should not dispute the law as above stated. But I think the fact that the owners disapproved of his remaining on shore, and engaging in mercantile pursuits, is not only not established, but, on the contrary, the weight of the testimony is on the other side, and, notwithstanding the evasive and ambiguous answers of Leach, tends strongly to prove that his conduct in this respect met their approbation.

In examining the testimony in relation to this question of fact, it is necessary, in order to see the force to which it is entitled, to state it more minutely than I have done in the preceding part of this opinion, and to note particularly the dates as given by the witness.

The disapproval of the appellants is brought out by the following question, put by the appellants, the owners:

"Was your remaining in the Pacific and trading with the Laura done with the consent and approval of the owners?"

To this question Leach simply answers, "*No, sir.*"

Upon the cross-examination upon behalf of the libellants, the following interrogatories were put to him, to which he gave the following answers:

Question. "When was their (the owners) dissent made known to you?"

Answer. "I think it was the second time I was at Valparaiso, which, I think, was in the latter part of 1849."

Question. "At what period did the owners take efficient steps to displace you?—at any period before Captain Weston was sent out?"

Answer. "They did not take any efficient steps, any further than to request me to come home."

These answers constitute the entire proof of disapproval and dissent of the owners, of which so much has been said in the argument, and which has been so confidently assumed as a fact proved.

It will be observed that the question put by the owners does not point, and clearly was not intended to point, to any disapproval on their part of his remaining on shore, or engaging in trade at Valparaiso. It relates altogether to the employment of the barque in the Pacific, instead of the Atlantic. In fact, it could not have related to his remaining on shore, or engaging in trade, because the notice of disapproval appears to have been given but once, and was given and received while Leach was still sailing the vessel under the "*lay*," and seeking and carrying freights, and before he had purchased a single cargo for himself, or absented himself from her for a single voyage. It was never repeated, although he remained nearly two years afterwards, engaged in commerce, and on shore in the counting-house of the libellants nearly half the time.

The fact is clearly established by Leach's answers to the cross-interrogatories above given. It will be observed that in these answers he says he thinks their disapprobation was made known to him the second time he was at Valparaiso, which he thinks was in the latter part of 1849. Now, in the preceding part of his examination he had stated positively that he arrived at Valparaiso from Rio with a cargo on freight, consigned to Loring & Co., in November, 1849, and arrived there the second time in July, 1850. Without stopping to comment upon the hesitating language, and the vagueness and uncertainty of this answer in relation to a fact which it is obvious, from the preceding part of his testimony, was perfectly in his recollection, it is sufficient to say, that, give him either date, it is evident that the disapproval of the owners had no connection with his mercantile pursuits, and pointed merely to the employment of the Laura in freighting voyages on the Pacific, instead of the Atlantic; for if the notice was received by him in 1849, it was before he had engaged in that coasting trade, and must have been written by the owners in consequence of information given them by Leach from Rio, concerning the freight he had obtained there for Valparaiso, and of his intention to seek

freights on that coast; for this was his first voyage in the Laura to the Pacific. He had not then engaged in the coasting trade on that ocean, and had done nothing in that respect for the owners to disapprove of. And if he did receive the notice, as he says, in 1849, upon his arrival at Valparaiso, it must have been a disapproval of what he informed them he proposed to do; not of what he was doing or had done. Certainly it had no relation to his trading on his own account, for there is not the slightest evidence that he had any such design at that time, nor for nearly a year afterwards.

And if we take the other date, the argument is equally strong; for, if he received it on that occasion, it must have been written some time before. And it was on his second visit to Valparaiso, in July, 1850, that he for the first time engaged in mercantile pursuits on his own account, and obtained advances for that purpose from Loring & Co. If the notice reached him at that time, and before he commenced his commercial speculations, the dissent must have applied to the place at which he had been seeking freights, and not to his private speculations. Indeed, taking this as the date of the receipt of the notice, the inference is almost irresistible, that the owners must have been apprised of his intention to purchase cargoes on his own account, and approved of it; for he had been engaged, when he received this notice, in seeking freights in the Pacific for about nine months. He had not, it appears, been successful; and after his first cargo from Valparaiso to San Francisco, he sailed most commonly from port to port in ballast, or with very inconsiderable cargoes; and as Leach was in constant correspondence with the owners, they were of course apprised of his want of success, and would very naturally disapprove of his remaining in the Pacific, where the earnings of the vessel would give them very little for their share of the freights. But this notice, as I have said, does not appear to have been repeated. Leach does not pretend that any complaints of his conduct were subsequently made by the owners; and the natural inference is, that having confidence in Leach's prudence and judgment, when in reply to this communication they were apprised by him of his determination to purchase cargoes on his own account for the Laura, and thus insure constant employment for her and full freights, they were willing he should remain and carry out his plan. And this conclusion is strengthened by the circumstance that no measures were afterwards taken by the owners to compel or induce him to return, and that he remained without further complaint, engaged in these pursuits until he himself found them unprofitable, and determined to return home.

He is asked, in one of the interrogatories: "At what period did the owners take efficient steps to displace you?—at any period before Captain Weston was sent out?" And he answers: "They did not take any efficient steps, any further than to request me to come home." And in answer to another interrogatory he says, he did not yield to their wishes, because he thought he had a right to remain there if he chose. There was no order, therefore; no charge of misconduct; no notice that they would put an end to the contract; nothing more than a request which Leach did not comply with, because he thought that while the owners suffered the contract to continue, he had a right to select the theatre of his operations, and to act upon his own judgment. And undoubtedly he was right in this respect, unless the owners put an end to the contract, which they might have done at any moment, if they supposed him to be no longer acting in the line of his duty. But whatever might have been their opinion as to the soundness of his judgment in selecting the Pacific instead of the Atlantic for the employment of the vessel, when they requested him to return, they undoubtedly acquiesced in his opinion when they received his answer declining to return, and continued for nearly two years afterwards to sanction his conduct, by suffering him to remain there, receiving remittances from him, and paying his drafts, and settling his account, without making the slightest objection to allow him one-half the freights, according to the contract, for his services as master. And the charge of taking the vessel to the Pacific, and illegally detaining her there for his own benefit and advantage, was never heard of until payment for the repairs and supplies furnished to their barque was made by the libellants. And if such a defence had been founded in fact, it would have been easy for the owners to prove it conclusively by producing the correspondence between them and Leach. But no part of it has been offered in evidence. The fair inference from the testimony therefore is, that they assented to his proceedings, and approved of his remaining, after receiving his answer to the request for his return.

But if the case were otherwise in this particular, and it had been proved that Leach illegally and against their orders detained the Laura in the Pacific, I do not see how that would affect the claim of the libellants, unless in furnishing those supplies they knowingly aided and abetted him in his breach of duty to the owners. The argument is, that they did knowingly aid and abet him. But it would be a sufficient answer to it to say, that no such charge is made against them in the answer. It is made against Leach; but there is not the slightest intimation that Loring & Co. had any knowledge of it.

And as this defence is not taken in the answer, it cannot be relied on here, even if there was evidence in the record which would justify it.

But there is not the slightest evidence to prove it. On the contrary, it appears by Leach's testimony, that when he arrived at Valparaiso, with the cargo consigned to Loring & Co., he told them upon what terms he was sailing the vessel, and the deep interest he had in her earnings; and thinks it probable he mentioned the contingent right he had of purchasing one-eighth of the vessel, if he could raise the money to pay for it. The fact that he had been trusted with so much power over such a vessel as the Laura, and would even be received as a partner if he could raise the money, naturally induced Loring & Co. to think him worthy of confidence. And they appear to have aided him in procuring freights, while he confined himself to that business. They evidently had no knowledge of any dissatisfaction on the part of the owners, for Leach states positively that nobody but himself knew of it. And when, therefore, he proposed to purchase cargoes on his own account, which would give the Laura constant employment and full freights, they could have had no reason to suppose that his owners disapproved of it. And when these supplies were furnished, they had strong grounds for believing that his conduct in this respect was known to the owners, and met their approbation; for they had then seen him for nearly two years engaged in this business, during all that time in correspondence with his owners, and occasionally making remittances to them, and drawing bills on them, (as Leach himself states,) which appear to have been duly honored, and without the slightest token of disapproval, as far as Loring & Co. had an opportunity of seeing. There was nothing to create suspicion or put them on inquiry. The advances made to him were made in the regular course of their business, and at the usual rates for interest and commission in that quarter of the world; and they had every reason to believe that they were promoting the objects and advancing the interests of the owners, as the advances made to Leach enabled him to keep the Laura constantly employed with full cargoes, thereby earning large freights, of which the owners were entitled to the one-half. Loring & Co. had no knowledge of the state of his accounts with the owners; and no reason even for suspecting that he did not remit to them their share of the freights, or that he improperly used or withheld it.

The case then upon the points already examined may be summed up as follows:

1st. At the time these repairs were made and supplies fur-

nished, Leach was in full possession of the barque, exercising his authority as master, under his contract with the owners hereinbefore stated. 2d. He was recognised and paid as such by the owners. 3d. He was dealt with as such by Loring & Co., in good faith, without the slightest grounds for suspecting that the owners disapproved of his conduct, or had requested him to bring the vessel home. 4th. The repairs and supplies were necessary to enable her to go to sea, and she must have remained idle in the port if they had not been furnished; and they were made and furnished with prudence and economy, under Leach's own direction. 5th. He had no money except the five hundred dollars hereinbefore mentioned, which he needed for his personal expenses, and had no funds either of his own or the owners within his reach, with which he could make these repairs or obtain the necessary supplies.

These facts appear to me to be conclusively established by Leach's own testimony. And as it is admitted, on all hands, that the repairs were made and the supplies furnished at his request and by his order, it follows, from the decisions in this court, and at the circuits to which I have already referred, that, by the maritime code of the United States, Loring & Co. obtained an implied lien on the vessel for the amount, unless it can be shown that they were furnished on the personal credit of Leach or some other person.

An attempt has been made to offer such proof, and to show that the supplies were furnished upon the personal credit of Leach. But it is an obvious failure. He is asked by them whether the repairs and supplies were furnished upon his responsibility? or the credit of the vessel? or how otherwise? He answers, "I presume they were furnished on my responsibility." And this is the whole and only evidence offered by the appellants to show that they were furnished on the personal credit of Leach, and not on that of the vessel or owners. Certainly, such evidence can hardly be sufficient to remove the implied lien given by law. Whether the credit was given to him was a question of fact. If the fact was so, he must have known it, and could have sworn to it in direct terms. But instead of this, he merely expresses an opinion in general terms, and gives no reason for that opinion, and states no fact from which it might be inferred that this opinion was well founded. The answer is, in truth, no evidence; it is but the opinion or conjecture of the witness; and, even if there was no evidence in the record to contradict it, would leave the case upon the implied lien which the law creates.

But it is directly in conflict with the written instruments signed by the witness himself at the time of the transaction.

The account for those repairs and supplies is headed, as I have already said, "*Barque Laura and owners, to Loring & Co., Dr.*" It is signed by Leach, and admitted by him, in writing, to be correct. He of course read the account, and was undoubtedly a man of sufficient intelligence to understand the meaning of words. And how could the barque and owners be debtors for those supplies, if they were furnished exclusively on the credit of Leach? How could they be debtors to Loring & Co., unless they were furnished on their credit?

It is true, Leach says he signed the account only for the purpose of verifying the items. But this is evidently an afterthought; for he admits, by his signature, not only the correctness of the items, but the account itself—that is, the charge against the barque and owners, as well as the things charged.

Besides, if his signature was intended merely to verify the items, there was no necessity for this account. The items ought to have been inserted in the other account, signed by him at the same time, which contains the charges for which he was personally liable; and his admission of that account would have been quite sufficient to verify these items. And the fact that two accounts were stated, and signed and admitted by him on the same day, the one charging the repairs and supplies to the barque and owners, and the other charging him, as "Captain Phineas Leach," for other articles properly chargeable to himself, shows that both parties understood what they were about; and, to avoid future cavil, stated their accounts against the respective debtors, according to their mutual understanding at the time. And the insertion of the aggregate amount for repairs and supplies, in the account against Leach, coupled with the account against the barque and owners, proves conclusively that the parties intended to make no special contract with Leach for those repairs and supplies, nor to take any special hypothecation or bottomry on the vessel, but dealt with one another upon the established rules of maritime law, which, in the absence of any special contract, made the barque and owners, and Leach himself, responsible for the amount.

In order to give some color to his statement, that he presumes they were furnished on his credit, he says that his credit was at that time good. If he had shown that it was in fact good, it would be no reason for presuming that Loring & Co. relied upon it, and waived the other securities to which they were entitled. But the record shows that it was not good, and that Loring & Co., in the advances they made to him at the same time for the purchase of cargo on his private individual account, did not think it prudent to rely altogether upon

his credit. For the heading of the invoice of the cargo purchased upon that occasion, which I have already set forth in full, expressly required that the sales and returns should be made by the consignee to Loring & Co. And Leach admits that the cargo was to be insured, and the loss, if any, to be paid to Loring & Co. And from his own testimony, as well as the invoice, it is evident that it was understood by the parties that the proceeds of the cargo were to be remitted from Panama by the consignees to Loring & Co. For he is asked by the libellants, "Was there not an understanding that the proceeds should be remitted by your consignees to Loring & Co.?" and he answers, "I don't know that there was." But he is again pressed by the inquiry, "Will you reflect and see if you cannot answer that question directly that there was?" and he then answers, "There was no such understanding; it might be understood; there was nothing promised." I give the words of the witness; but I cannot be convinced by this nice casuistry of Captain Leach, in distinguishing an understanding between the parties from a promise, that his credit was still good with Loring & Co., notwithstanding the evidence to the contrary in the agreement in the heading of the invoice, and in the admitted agreement in relation to the insurance. It certainly does not prove it so high as to create a presumption that all other securities were waived, from their confidence in the personal responsibility of Leach; nor did his subsequent conduct show that he merited even the confidence they did repose in him. For he went to Panama and procured advances to himself, on account of the cargo, to the amount of $2,100, and authorized large disbursements to be made by his consignee to his agent, Easton, for the use of the Laura, and proceeded to Massachusetts without returning to Valparaiso; and after he came home, he drew on his consignees for $375 more to pay Weston's expenses, who was sent out by the owners, and during all that time rendered no account to Loring & Co., and left them under the impression that the proceeds would in good time be remitted to them. It seems they were not aware of the distinction which Leach took between the mutual understanding between them and an actual and formal promise.

The point, therefore, taken by the owners, that the repairs and supplies were furnished on the personal credit of Leach, cannot, in my judgment, be maintained. And, undoubtedly, the justice of the case is clearly with the libellants. The captain was without funds, and his owners had none in Valparaiso; and the barque must have remained in port a wasting hulk if the means had not been furnished by Loring & Co., which en-

abled her to sail. The owners have since received her, and now hold her in their possession, increased in value by those repairs, which enabled her to come home, and which were made by the money of Loring & Co. And they have also received the freights which those repairs enabled her afterwards to earn under the command of Weston. Justice, as well as the principles of the law, would seem to require that those who have reaped the profit of the advances should repay the party to whom they are indebted for their gains.

It remains to inquire whether the lien has been waived, by the delay in prosecuting it, or the debt been satisfied in any other way.

I shall dispose of those questions very briefly. For I am sensible that the great importance and delicacy of the points hereinbefore discussed, have compelled me to extend this discussion beyond the limits of an ordinary opinion in this court.

In relation to the alleged waiver by the delay, the mere statement of the evidence is an answer to the objection, and the evidence is this: The repairs were made and the supplies furnished in the spring of 1852. The barque returned to Valparaiso in the November following, when Weston immediately assumed the command. He was ordered by the owners to procure, if he could, a cargo of guano, and to bring the vessel to an Atlantic port. He did so; and he arrived in Baltimore in the June following, and the vessel was arrested on this libel a few days after her arrival.

The barque still belongs to the same owners. When Weston arrived at Valparaiso to take the command, he had no money, and was obliged to raise what he needed by a bill on his owners. At that time, Loring & Co. had no reason to suppose that the owners would refuse to pay this claim; and if they had then arrested the vessel, it would have broken up the voyage upon which she was destined, and subjected the owners to heavy losses by her detention. And it certainly ought not to be a matter of complaint on their part, that, under such circumstances, he did not arrest her, and took no measures to enforce his claim, until he found that payment was refused; and it is unnecessary to cite cases to prove that the omission to arrest her at Valparaiso under such circumstances cannot be regarded as a waiver of their lien, upon any principle of law. There was no unreasonable delay in notifying the owners of the claim, nor in filing the libel when they disputed it. The Laura in the intervening time remained in the possession and employment of the owners; no third party had become interested, and the owners were greatly benefited

by the omission to arrest her until she arrived in the United States.

It is said that Weston proves that nothing was said to him about their account, and hence it is inferred that nothing was due on it, or that it was not supposed by Loring & Co. to be a charge on the Laura. But it must be remembered that the house of Loring & Co., with whom Leach dealt, had dissolved partnership in the June preceding Weston's arrival, and a new one, with new partners in it, established under the same name. It is true, that Mr. Atherton, a partner in the first firm, remained there, and was attending to their business. But the transactions of Weston were with the new firm, and it would have been useless for Atherton to present this claim to Weston, unless he had determined to libel the vessel. For, as I have said, Weston had no money but what he obtained from the new house of Loring & Co., for his bill on his owners, and this Atherton knew. Besides, the proceeds of her cargo shipped to Peyta and Panama, as hereinbefore mentioned, at the time these repairs and supplies were furnished, were to be paid to Loring & Co.; and when Weston was at Valparaiso, the account of these proceeds had not been received. It was most probably supposed, by Loring & Co., that they might prove sufficient to pay their claim against Leach, including these supplies. And this, it appears, would have been the case if Leach had not improperly converted a large portion of them to his own use, and to satisfy the claims of his owners against him. Justice, therefore, required Loring & Co. to await the result. They did wait, and did receive some money from this source, but not enough to pay even the advances for the cargo itself.

This is admitted in the argument. But it is said the money received should be first applied to extinguish the lien: first, because there was a security bound for that item—that is, the vessel; and secondly, because it is the first item in the account.

Now, the conclusive answer to this objection is, that, if no specific application was made by either party at the time of payment, the law appropriates it according to the principles of equity. And, as the money received from Panama was the proceeds of goods purchased with the money advanced by Loring & Co. for that purpose, equity will apply it in the first place to the payment of that debt.

Indeed, there is enough in the invoice and the testimony of Leach to show that the proceeds were to be so applied by the agreement between Leach and Loring & Co., when the advances were made. And they were accordingly so applied, as

far as they would go, when the money was received by them. The fact that the claim now in question was secured by a lien on the Laura, can surely be no reason for applying the money in the first place to discharge it. On the contrary, it would be a sufficient reason against such an application, and would be a good ground for postponing it until all the claims for which the creditor had no security were first satisfied.

I do not comprehend how the argument that it is the first item in the account can apply. In point of fact, however, it is not the first or oldest item in the account, as I understand the transaction. And, if the lien on the vessel was originally valid, it is evident that it has never been discharged, or waived, or forfeited by unreasonable delay.

Some other items for necessaries furnished at Peyta, on the last voyage of the Laura to that port, and also a small charge for bread at Valparaiso, and which are not included in the account signed by Leach, were allowed by the Circuit Court, and are included in the amount decreed. These items, the counsel for the respondents insist, ought not to be allowed, even if those in the account are sustained. I think, when the whole testimony is examined, it will be evident that these charges stand on the same principles with those of which I have already spoken. But I forbear to extend this opinion by discussing that question; because, as the court have determined that the repairs and supplies furnished, at the request of Leach, are not a lien on the vessel, it is useless to examine particular items, when the opinion of the court goes to the whole.

From that opinion I respectfully dissent. And, after carefully reviewing the case in all of its bearings, and scrutinizing the evidence, I adhere to the opinion I held in the Circuit Court.

JAMES H. URE, CLAIMANT OF THE STEAMER GIPSEY, APPELLANT, *v.* JAMES M. COFFMAN AND CYRUS COFFMAN, OWNERS OF FLAT-BOAT AND CARGO.

Where a flat-boat, which was fastened to the bank of the Mississippi river at night, was run down and sunk by a steamer, the circumstances show that the steamer was in fault, and must be responsible for the loss.

It was not necessary for the flat-boat, in the position which it occupied, to show a light during the night.

When a boat or vessel of any kind is fastened for the night at a landing place to which other boats may have occasion to make a landing in the night, it is certainly prudent for her position to be designated by a light, on her own account,

as well as that the vessel making a landing may have light to do so. But when a vessel is tied to the bank of a river, not in a port or harbor, or at a place of landing, out of the line of customary navigation, there is no occasion for her to show a light, nor has it ever been required that she should do so.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana, sitting in admiralty.

It was a case of collision, which occurred in the Mississippi river, about fifty-five miles above New Orleans.

The narrative of the case is given in the opinion of the court.

The District Court decreed in favor of the owners of the flat-boat, who were the libellants, in the sum of $3,416.15, with five per cent. interest from the 24th of December, 1853, until paid, and costs.

Upon an appeal to the Circuit Court, this decree was affirmed, whereupon the claimants of the Gipsey appealed to this court.

It was argued by *Mr. Taylor* for the appellants, and by *Mr. Benjamin* for the appellees.

Mr. Taylor made the following points:

1st. That the appellant was engaged in a lawful business; that he exercised ordinary prudence in the prosecution of his voyage on the night in question; and that the collision was the result of an accident, and not from negligence, misconduct, or want of skill; and that he is in no way responsible for the loss sustained by the appellees. Va. In. Co. *v.* Millaudon, 11 L. R., 115; Stainbeach *v.* Rea, 14 Howard U. S. R., 532.

2d. That if there was any fault or want of care on the part of the appellant, there was also fault or want of care on the part of the appellees, inasmuch as they failed to make use of that common care and prudence which is required of all, in the public interest, by neglecting to keep any watch on the flat-boat, or to expose a light upon it, and that therefore they have no right to recover. Delaware *v.* Osprey, 2 Wallace, 273; Ward *v.* Armstrong, 14 Ill., 283, 285; Innis *v.* Steamer Senator, 1 Cal., 459, 460; Simpson *v.* Hand, 6 Wharton, 324; Murphy *v.* Diamond, 3 An., 441; Lesseps *v.* Pontchartrain R. R., 17 L. R., 261; Fleytas *v.* Pontchartrain R. R., 18 L., 339; Carlisle *v.* Holton 3 An., 48; The Alival, 25 Eng. Law and Equity, 604; 5 Statutes at Large, 306, sec. 10; Act of Louisiana of 1832.

3d. That if the appellant was at all in fault, and responsible in some degree because of that fault, then the appellees are only entitled to recover one-half of the amount of the damages

occasioned by the collision. Brickell *v.* Frisby, 2 R., 205; Schooner Catherine *v.* Dickinson, 17 Howard U. S. R., 170.

Mr. Benjamin made the following points:

The claimants and appellants do not deny that they ran into and sank the flat-boat, whilst she was lying tied up to the bank at night, but they seek to excuse themselves by urging:

First. That the flat was lying moored to the bank of the river, at a distance of only fifty feet below a wood-yard, in the way of steamboats taking wood, and in the way of steamboats landing freight or passengers, at the usual landing of Madame Trudeau, the owner of the plantation on which the wood-yard was situated; and

Secondly. That the flat-boat had no light out, and was so concealed by the shadows of the bank that she could not be seen.

I. To this first excuse, the short and ready answer is, that the Gipsey was not engaged in any attempt to land at the wood-yard, or at Mrs. Trudeau's landing place, when she ran into the flat-boat; but, on the contrary, was bound up the river for a landing at George Mather's plantation.

Yet the night was so dark and foggy, that whilst they thought they were running *up* the river, they ran directly into the bank, sinking the flat-boat.

They pretend that the night was not too dark to run, and that it was quite light enough for them to pursue their voyage with safety. The testimony is somewhat conflicting on this point; but on their own evidence they are in a fatal dilemma. By the evidence of her own officers, the Gipsey would have run directly into the bank of the river, if the flat-boat had not intervened. Now, if it was light enough to navigate with safety, the fact proves the grossest carelessness and negligence, sufficient to make the steamer responsible.

If, on the contrary, it was not light enough to navigate with safety, there was criminal imprudence in continuing the voyage, instead of lying up till the darkness was dissipated.

The district judge puts the dilemma very clearly in his opinion, and there is no escape from it.

II. To the second excuse, the answer is, that there was no obligation on the part of the flat-boat to exhibit a light.

She was moored in a nook or recess of the bank where it had caved, so as to leave a point of land jutting out into the river above and below her.

Whether near a wood-yard, or not, is a matter of no consequence. She was *not* at the wood-yard. She was nestled securely, as her owners had every reason to believe, beyond the

possibility of harm from ascending or descending boats, and she was not harmed by any boat that was ascending or descending by a proper course, but by a boat which, whilst its officers declare they were bound *up* the river, run straight *across* it, to a spot where they had no intention of going.

A steamboat running at night is bound to have lights, (act July, 1838, 5 Stat. at Large, 306,) and it would no doubt be held imprudent for a flat-boat, under the same circumstances, to neglect the same precaution; but it never has been even pretended, before, that a vessel of any kind, tied to the bank of a river, not in any port or harbor, or usual place of landing, is bound to show a light, still less when, as in the present case, the vessel was lying in a nook or recess of the bank, entirely out of the usual course of ascending or descending vessels.

Mr. Justice WAYNE delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the eastern district of Louisiana.

It appears from the record, that the steamer Gipsey was a packet on the Mississippi river, running from New Orleans to Lobdell's Store landing, above Bayou Sara, and, as all the other Mississippi steam river packets do, was in the habit of landing freight and passengers at all the intermediate points and plantations. She was making a trip up the river from New Orleans on the evening of the 21st December, 1853. The night was rainy and dark, and after midnight somewhat foggy. It was light enough, though, for the boats navigating the river to run and to distinguish and make all their landings. All of the witnesses say it was a proper night for running, and none of the packets, or other boats, laid up on that night on account of the weather. Alexander Desarpes, a witness for the claimant, says, "he was the pilot of the Gipsey, and was on watch at the wheel at the time the Gipsey struck the flat-boat. That the collision happened above the point at Trudeau's wood-yard, about fifty-six miles above New Orleans, between twelve and one o'clock at night, on the 22d December, 1853. He says it was a pretty bad night, rainy, dark, and smoky, rather than foggy, with a little fog. There was light enough, however, for the boat to distinguish landings, and she ran and made all of her's of freight and passengers as she went up. Her last landing before the collision was one of freight, at J. B. Armant's plantation, on the right-hand side of the river descending, about half a mile below Trudeau's wood-yard. We then crossed the river from there, to go to George Mather's plantation. At that time the night was dark and rainy, but the shore could be seen for some distance. There was a light

at Trudeau's wood-yard on the bank, which is pretty high there, at least fifteen feet above the water; I could see this light a long distance—three or four arpents from the shore; there was a point of land just below the wood-yard; I was looking out when the boat was approaching the shore, for the purpose of *going up that shore* to make a landing; *I could see an outline of the shore, or bank, all along, and distinctly, too;* I did not discover the flat-boat until we were right up against her; the flat-boat was lying close to the bank, and in its shadow, and having no light on her I could not see her; she was lying just at the foot of the wood-yard; the light on the bank was a good distance from the flat-boat, and did not shine upon her. As soon as we saw the flat-boat, we stopped the engine of the Gipsey, and backed. If there had been a light on the flat-boat, I could have seen it at a sufficient distance to have avoided the collision, but there was no light on her. As the flat-boat was low down in the water, if there had been a light on her, we should have known it was something down in the water. I saw nobody on watch on the flat-boat at the time of the collision, and heard no hail from her before it." The witness further states that he had been a pilot on the river for more than ten years, "running in this lower trade," and adds, at the time of and before the collision, the weather was such as boats are in the habit of running and making landings, and I, as a pilot, consider that it was safe and proper to run the boat. Mather's landing, where the Gipsey was going to land, was about a quarter of a mile above Trudeau's wood-yard. Upon the cross-interrogation of this witness, he does not give an intelligent or certain statement of the collision, or where or how the Gipsey struck the flat-boat; but says she was tied to a point, and her stern lay a little out from the bank; she laid up and down the river in the same direction with the current; there are curvings in along the bank; the flat was lying at a point fastened, and there are curvings both above and below that point, which was a mere jutting out of the bank in consequence of curvings above and below it. The direct examination being resumed, this witness says, on a clear starlight night, in *such a stage of water as prevailed at the time of the accident*, we could have seen a flat-boat at a good distance in time to prevent an accident. If there had been on the flat-boat such a light as is generally carried on deck by a steamboat, or a schooner, or on flat-boats *when they are running*, I could have seen it three or four arpents off, and this would have given me time to avoid the collision.

The evidence of this witness is not in any material particular changed by any other witness examined in the case. It is

rather confirmed; but the captain of the Gipsey, who was also sworn as witness, gives a more certain account of the collision, as to the part of the flat-boat which was struck by the steamer, and by what part of the steamer she was struck. The testimony is conclusive, that the flat being tied to the shore, at what might have been considered a proper and safe place, was struck by the steamer with sufficient force to cut a part of her down, and to sink her in a few minutes. There are three points to be noted in the testimony of Desarpes. The first is, that the steamer, being upward bound, had made a landing at Armant's plantation, about half a mile below Trudeau's wood-yard, and that her next place for making a landing was a quarter of a mile above that, on the opposite side of the river, at Mather's plantation, making the distance between the two places about three-quarters of a mile. Secondly, that in his opinion as an experienced pilot, and accustomed to the navigation of the river, there was nothing in the state of the weather to prevent the steamer from being run as usual, and put across the river to make a landing at Mather's plantation, but that she was run so close in shore as to be brought into collision with the flat-boat, and thereby that the witness admits that the only cause of it was, that the flat-boat was lying close to the bank, and so much in its shadow, and not having a light, he could not see her. His language is, that if there had been on the flat-boat such a light as is generally carried on deck by a steamboat or a schooner, or on a flat-boat when they are running, he could have seen it far enough off to have avoided the collision.

Captain Ure, then in command of the Gipsey, gives the same account, scarcely with a variance, of the navigation of his vessel from Armant's plantation until the collision had occurred, but says, with more positiveness than his pilot spoke, that the forward end of the Gipsey—some part of the bow pretty far forward—struck the flat-boat. His language is, that he "was on the roof of the steamer in front all the time, when they had made their landing at Armant's, up to the moment of the collision. From Armant's we ran the bend of the river on the same side a short distance, and then crossed over to make a landing at Mather's, above Trudeau's wood-yard. There was a light above the wood-pile, but I saw nothing but its glare before the collision, the wood-pile being between the light and my eyes. I could see the glare some three or five minutes before the collision took place. We had almost hit the flat-boat when I saw it. I was looking out and saw the boat, seeing its outline pretty clearly about the same time that I saw the glare of the light spoken of. It was the shadow of the bank, which is high there, which prevented me from seeing. *If there had*

been on the flat-boat any such light as flat-boats usually carry, I could have seen it in time to avoid hitting her." He further says, "the night was slightly foggy and bad, and it had been raining, but cannot recollect whether it was raining at the time of the collision. There was no fog until we came to Armant's, and after we left Armant's the fog came on, and I think that smoke was mixed with the fog. We did not lay up that night for fog, but ran all night." Other witnesses were examined by the claimants, but it is not necessary to notice their testimony further than to say, that neither of them give any additional facts concerning the navigation of the steamer from Armant's plantation, or concerning the collision, contradictory from what was said of both by Captain Ure and his pilot Desarpes.

Trying, then, the claimant's case only by the evidence introduced by himself, it is obvious that the steamer was put across the river from Armant's in a state of weather and on a night proper for running, without proper care to make her next landing at Mather's, which was at least a quarter of a mile above the wood-yard, a little below which the flat-boat was moored. Both the pilot and the captain attempt to indicate the place and the part of the steamer which was first in contact with the flat-boat, by mathematical figures. If that of the pilot's is taken as the fact of the case, it must be conceded that the Gipsey was put across the river a little below where the flat-boat laid, and so near the bank that she could not have been run above her, by pursuing that course, without a collision. Running so near to the bank, when there was ample channel-way further out in the river for the steamer to pass the point and curve made by it, at which and within which the flat-boat was fastened, was a want of proper care. Both pilot and captain knew that the wood-yard and its immediate vicinity was a point of the river at which boats were customarily moored at night, as a place of safety against collisions from ascending or descending boats, and should have run the steamer further out in the river to avoid all chance of collision with boats tied to the bank or wood-yard; and in this instance, there was no occasion for the steamer having been run so near to the bank of the river, as it was not intended to make a landing at the wood-yard, but to pass it to a landing higher up. The collision, according to the pilot's account of it, was caused by the steamer not having been kept on a course further out from the bank. That, of itself, is sufficient to make her answerable for all the consequences of it, without any regard to the fact that the flat-boat had not a light. A light upon her might, in the language of the witness, have enabled him to have avoided the collision by putting the steamer further out in the river, but

the want of a light was not the cause of it. The cause was, that the steamer's course was too near on shore. But if the captain's account of the collision is taken as the fact of the case, as we think it ought to be, the steamer is altogether without excuse, for she was put across the river without due care as to her course, and would have been run bow on into the bank, at the point where the flat-boat was fastened, if she had not been stopped by the collision. In such a view of the case as we have given from the testimony of the claimant's witnesses, it is not necessary for us to consider the point made by the witnesses, and by counsel in the argument, that the flat-boat had not a light to show herself or her mooring during the night. Tied, as she was, in a recess of the land, with a point of land extending into the river below the wood-yard, there was no necessity for her to show a light to protect her from boats ascending or descending the river, or from landing, which might be made at the wood-yard, as she was actually fastened to the bank, out of the line of a customary and safe navigation up or down the river. In other words, the steamer was either run closer into the bank than was necessary or usual at that point of the river, and out of what should have been her course to make her landing at Mather's, or she was run head upon the flat-boat, where the latter was tied to the bank. When a boat or vessel of any kind is fastened for the night at a landing place, to which other boats may have occasion to make a landing in the night, it is certainly prudent for her position to be designated by a light on her own account, as well as that the vessel making a landing may have light to do so. But when a vessel is tied to the bank of a river, not in a port or harbor, or at a place of landing, out of the line of customary navigation, there is no occasion for her to show a light, nor has it ever been required that she should do so.

After the best examination of this case, we are of the opinion that the steamer Gipsey was put across the river from Armant's, in the prosecution of the intention to make another landing with her at Mather's plantation, without skill or prudence, and that the collision with the flat-boat was the consequence of it, without any fault or want of care by those navigating it. There is, therefore, no ground for reducing the damages given by the District and Circuit Courts to the owners of the flat-boat.

Having examined the record very fully as to the items making up the aggregate of damage given by those decrees, we affirm the decree of the Circuit Court in the case.

JAMES STEVENS, PLAINTIFF IN ERROR, *v.* ROYAL GLADDING AND ISAAC T. PROUD, TRADING UNDER THE NAME AND FIRM OF GLADDING & PROUD, DEFENDANTS.

Where no error appears upon the record in the proceedings of the Circuit Court, the case having been left to a jury, and no instructions asked from the court, the judgment below must be affirmed.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Rhode Island.

The plaintiff in error, Stevens, was the same person who was the appellant in the case of Stevens *v.* Cady, reported in 14 Howard, 529.

In the present suit, he brought an action, being a citizen of Connecticut, against Gladding & Proud, booksellers of Providence, in Rhode Island. It was a qui tam action in which he claimed two thousand dollars, because the defendants published and sold two thousand copies of his map of the State of Rhode Island, for which he had obtained a copyright.

The defendants pleaded not guilty, and the case went on to trial before a jury, who found a verdict for the defendants. In the progress of the trial, there was no prayer to the court to instruct the jury upon a matter of law, nor any bill of exceptions whatever.

Stevens managed the case for himself, and it would be difficult to conjecture the reason for suing out a writ of error, if it were not for the following assignment of error which was attached to the record:

This was a qui tam action at law, in debt, for the forfeitures and penalties incurred by the defendants for the violation of a copyright granted to the plaintiff in error, on the 23d day of April, 1831, under an act of Congress entitled "An act to amend the several acts respecting copyrights, approved 3d February, 1831."

The plaintiff's title to this copyright is set forth in the declaration herein. The principal questions in this case are: Was the verdict and judgment correct? Was the sale of the engraved plates the sale of a copyright? Did such sale authorize the defendants, or any other person, to print and sell this literary production, still subsisting under a copyright in this complainant?

The very learned opinion of the Supreme Court of the United States, delivered by Mr. Justice Nelson, in bill in chancery, James Stevens *v.* Isaac H. Cady, 14 Howard, 528, is ample and decisive on this subject.

JAMES STEVENS,
For himself.

In this court, the following brief was filed by *Mr. Ames*, no counsel appearing for the plaintiff in error:

The record in this case shows, that at the November term of the Circuit Court for the district of Rhode Island, 1848, the plaintiff in error brought a *qui tam* action against the defendants in error, to recover penalties and forfeitures alleged to have been incurred by them under the act of Congress passed February 3d, 1831, entitled "An act to amend the several acts respecting copyrights;" that at the June term of said court, 1850, the cause was submitted, upon the general issue, to a jury, who, in due form, returned a verdict in favor of the defendants in error, of "not guilty;" whereupon judgment was entered, that they have and recover their costs of suit.

The record discloses no error in law, nor, to the knowledge of the defendants in error or of their counsel, was any error of law brought upon the record by the allowance of a bill of exceptions. The court has no choice, therefore, but to confirm the judgment below, with costs.

SAMUEL AMES,
For Defendants in Error.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Circuit Court for the district of Rhode Island.

An action was brought by the plaintiff in the Circuit Court, alleging that he was the author of a topographical map of the State of Rhode Island and Providence Plantations, surveyed trigonometrically by himself, the copyright of which he secured under the act of Congress of the 3d April, 1831, entitled "An act to amend the several acts respecting copyrights;" and he avers a special compliance with all the requisites of said act, to vest in him the copyright of said map or chart. And he charges the defendants with having published two thousand copies of his map, and sold them within two years before the commencement of the action, in violation of his right, secured as aforesaid, to his damage four thousand dollars.

The defendants pleaded not guilty. The case was submitted to a jury, who returned a verdict of not guilty. A judgment was entered against the plaintiff for costs.

A writ of error was procured, and bond given to prosecute it with effect.

The defendant in proper person assigns for error, "that the verdict and judgment were given against the plaintiff in error, whereas the verdict and judgment should have been given for the plaintiff, and he prays a reversal of the judgment on this ground."

In a very short argument, the plaintiff in error says, the

principal questions are: Was the verdict and judgment correct? Was the sale of the engraved plate, on execution, the sale of the copyright? Did such sale authorize the defendants, or any other person, to print and sell this literary production, still subsisting under a copyright in the plaintiff. And he refers to 14 Howard, 528, Stevens *v.* Cady. In that case this court held that a sale of the copperplate for a map, on execution, does not authorize the purchaser to print the map.

Two or three depositions, not certified with the record, were handed to the court as having been omitted by the clerk in making up the record; but it does not appear that they were used in the trial before the Circuit Court; and if it did so appear, no instructions were asked of the court to the jury, to lay the foundation of error.

It is to be regretted that the plaintiff in error, in undertaking to manage his own case, has omitted to take the necessary steps to protect his interest. There is no error appearing on the record which can be noticed by this court; the judgment of the Circuit Court is therefore affirmed with costs.

C. C. Lathrop, Plaintiff in Error, *v.* Charles Judson.

Where exceptions are not taken in the progress of the trial in the Circuit Court, and do not appear on the record, there is no ground for the action of this court.

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

The suit was commenced by Charles Judson, a citizen of New York, to recover from Lathrop the amount of a judgment rendered by the Supreme Court of Louisiana, in June, 1851, for $1,810, with interest from the 2d of May, 1845. The plaintiff attached to his petition a copy of the record of the judgment. The suit was commenced on 6th May, 1854.

On the 18th of May, the defendant filed the following exception and plea:

To the Hon. the Judges of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana:

The exception and plea to the jurisdiction of Charles C. Lathrop, of New Orleans, to the petition filed against him in this honorable court, by Charles Judson, of the State of New York.

This respondent alleges, that this honorable court has no jurisdiction of the suit instituted in this matter, the same

having been litigated and deceden in the courts of the State of Louisiana, and an execution having been issued on the judgment in said suit by the said Charles Judson against this respondent, under which execution a seizure has been made of certain property as belonging to this respondent, and which execution has not yet been returned; all of which will fully appear by reference to the suit No. 16,671, of the docket of the late Parish Court of New Orleans, transferred to the Third District Court of New Orleans, and to the notice of seizure, herewith filed. Wherefore, this respondent prays that his exception may be sustained, and that he may be excused from answering to said petition, and that he may be hence dismissed with his costs.

In June, 1854, the court ordered and adjudged that the said exception be dismissed at defendant's costs.

On the same day, Lathrop filed his answer, alleging that on the 11th of February, 1851, he had made a cession of all his property to his creditors, under the insolvent laws of Louisiana; that the plaintiff in the suit was placed on the list of creditors for the amount of the judgment; that the debt for which the judgment was rendered was contracted in Louisiana, and that the plaintiff bought the debt at the sale by the U. S. Marshal, &c., &c. To sustain this answer, the defendant produced the record in insolvency.

In November, 1854, the cause came on to be heard, and was submitted to the court, when judgment was entered in favor of Judson, against Lathrop, for $1,810.50, with interest from 2d May, 1845, till paid, and costs.

Lathrop sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Taylor* for the plaintiff in error, and *Mr. Benjamin* for the defendant.

Mr. Taylor assigned for error the following:

1st. That the exception and plea to the jurisdiction of the Circuit Court, founded on the fact that there was at the time an execution then in force, upon which a seizure had been made under the judgment sued on, was improperly overruled. And

2d. That the decision of the lower court, to the effect that the original cause of indebtedness was not a Louisiana contract, upon the facts set forth in the decision of the court, is erroneous, and contrary to law.

And then made the following points:

I. In Louisiana, only one execution can issue at a time on a judgment; and when a judgment is in the course of execution in one court, no judgment can be had on the same claim, unless subject to the condition that no execution issue until the result of the proceedings on the execution be ascertained. Hudson *v.* Dangerfield, 2 L. R., 66; Newell *v.* Morton, 3 R., 102; Hennen's Dig., p. 782, No. 9.

II. Contracts are governed by the law of the place where they are entered into, and an obligation contracted or incurred is payable at the domicil or residence of the obligor, in the absence of an express stipulation making it payable elsewhere. Lynch *v.* Postlethwaite, 7 M. R., 213; Hennen's Dig., 1,068. Com. of Laws, Nos. 4, 5, 10; Shamburgh *v.* Commugen, 10 M. R., 15; Hepburn *v.* Toledano, 10 M. R., 643; 2 N. S., 511.

Mr. Benjamin took the following view of the case:

This record exhibits a writ of error prosecuted from the judgment of the Circuit Court, but there is neither assignment of error nor bill of exceptions.

It has been so often decided by this court, that it cannot take cognisance of a cause presented in this shape, that plaintiff in error could not have taken the writ with any other design than that of obtaining delay. Wherefore it is prayed that damages be allowed under the 17th rule of court. Arthurs *and al. v.* Hart, 17 Howard, 6; Weems *v.* George *and al.*, 13 Howard, 190–'7; Bond *v.* Brown, 12 Howard, 254; Field *v.* United States, 9 Peters, 202; United States *v.* King, 7 Howard, 833; Zeller's Lessee *v.* Eckhart, 4 Howard, 289.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Circuit Court for the eastern district of Louisiana.

The action was brought on a judgment rendered by the Supreme Court of Louisiana; certain matters were set up in the Circuit Court, as a defence, all of which were overruled, and judgment was entered for eighteen hundred and ten dollars, with interest and costs. The only errors assigned in this court, on which a reversal of the judgment of the Circuit Court is prayed, are: 1, that at the time suit was brought on the judgment, in the Circuit Court, an execution had been issued on the same judgment in the State court, which was in full force, and on which a seizure had been made; and 2, that the Circuit Court erred in holding that the indebtment was not founded on a Louisiana contract.

These exceptions were not taken in the progress of the trial in the Circuit Court, and do not appear on the record. The

fact that an execution was issued and returned appears in the record of the State court, but it was not made a part of the record of the Circuit Court, by bill of exceptions, and it cannot now be noticed. There is no ground of error on the face of the record, for the action of this court. The judgment of the Circuit Court is affirmed with ten per cent. damages.

ELIZABETH MOORE, COMPLAINANT AND APPELLANT, *v.* RAY GREENE AND BENJAMIN W. HAWKINS.

In the present case, where a bill was filed to set aside titles for frauds alleged to have been committed in 1767, the bill does not make out a sufficient case; and the evidence does not even sustain the facts alleged. And the disability to sue, arising from coverture, is not satisfactorily proved.

In case of alleged fraud, it is true that the statute of limitations does not begin to run until the fraud is discovered. But then the bill must be specific in stating the facts and circumstances which constitute the fraud; and in the present case, this is not done.

Where property was sold under an administrator's sale, the presumption is in favor of its correctness; and after a long possession under it, the burden of proof is upon the party who impeaches the sale.

THIS was an appeal from the Circuit Court of the United States for the district of Rhode Island, sitting as a court of equity.

The bill was filed by Elizabeth Moore, a citizen of the State of New York, the great-grandchild of John Manton, of Rhode Island, who died in 1767. It alleged a series of frauds, beginning in 1757, when one of his sons-in-law prevailed upon him by fraud to make a deed; then that his three sons-in-law conspired together to have him declared *non compos mentis;* then that they fraudulently set aside his will; then that one of his sons-in-law cheated his own children out of their share of the estate, and the administrator became a party to the fraud; then that the Town Council, conniving with the sons-in-law, adjudged the paper not to be a lawful will, and that all the parties fraudulently prevented an appeal. These charges of fraud were made to include many other transactions which it is not necessary to specify. The claim of the complainant was, that she was entitled to a share of the lands held by the defendants; and the prayer was, that a partition might be decreed.

Hawkins filed his answer, saying that he had purchased property from Samuel W. King, who derived it from his father, Josiah King, who inherited it from his father, William B. King; and that he and the Kings had been in the uninter-

rupted and quiet possession of the property for more than twenty years before the filing of the bill, and therefore he pleaded the statute of limitations. He also denied all knowledge of the important facts stated in the bill.

Greene answered and explained the manner in which he had come into possession of the property, viz: from his father, Samuel Greene, who was a devisee of his father, Joshua Greene, who purchased it from Josiah King, administrator of John Manton, in 1770; since which time, it had been in the possession of the family. He also denied all knowledge of the alleged frauds, and pleaded the statute of limitations.

After taking much testimony, the cause came up for hearing in November, 1854, when the Circuit Court dismissed the bill with costs. The complainant appealed to this court.

It was submitted on printed arguments by *Mr. Randall* for the appellant, and *Mr. Bradley* for the appellee.

The argument of *Mr. Randall* covered a great deal of ground, as may be supposed, from the long period of time which his investigation included. But it is not deemed material to state all these points, or the reply of the opposing counsel. The manner in which *Mr. Randall* proposed to escape from the plea of the statute of limitations was by alleging a series of disabilities, in this manner:

John Manton died in 1767. Anna Waterman, his daughter, died before her father, leaving a daughter named Betty.

Betty was born in 1756. Betty was thus in her 17th year when her grandfather died, and came of age in 1777.

Betty married Carpenter before 1775, whilst she was yet a minor.

Betty died in 1784–'5, leaving Elizabeth, the present plaintiff.

Elizabeth married Heman Moore in 1804, in the 19th or 20th year of her age.

Moore died in 1840.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in chancery from the Circuit Court for the district of Rhode Island.

The bill was filed to set aside certain titles for frauds alleged to have been committed in the year 1767, by a father against his own children, for the benefit of strangers. The frauds are stated to have been investigated and sanctioned, directly or indirectly, by the court of probate, by referees chosen by the parties to determine their matters of controversy, and by the highest courts of the State.

The legal history of the case commences in July, 1767, by the execution of a deed by the administrator of John Manton to Waterman and Pearce. From this period, a series of events are detailed, genealogical and historical, sweeping over near a century. Acts are stated in the bill, as it would seem, from mere vague reports, and sometimes resting on conjectures. And many of the facts set forth, if proved, and were of modern occurrence, would not be sufficient to avoid the titles enumerated; but the facts are denied generally by the answers, and not sufficiently proved by the evidence.

The lands when sold were comparatively of little value, but, by the progress of time and the advance of improvements, they are now covered with large manufacturing establishments and flourishing villages. Generation after generation has risen up and passed away, of individuals connected with these titles, who increased the value of the property by their large expenditures; and the property, by deed or will, or by the law of descents, has been transmitted through the generations that have passed, without doubt as to the legal ownership.

The bill was filed in 1851; its averments of facts, by which the lapse of time and the statute of limitations are sought to be avoided, are loose and unsatisfactory. The adverse entry is alleged to have been made, under the deed of the administrator of Manton, in 1767; and it appears that Betty Waterman, the complainant's grandmother, through whom the title is claimed to have descended, was born in 1756. She was of age in 1777, and in ten years afterward her right was barred by the statute. It is true, the date of her coverture does not appear, but as she was only eleven years of age in 1767, she could not then have been married; and if her marriage occurred subsequently, it was a cumulative disability, which is not allowed by the statute of Rhode Island. The complainant became of age, as it appears, in 1815, and her ten years expired in 1825. Her disability of coverture, and it was cumulative, expired in 1840, more than ten years before the bill was filed.

The complainant avers that from the death of John Manton, in 1767, to 1822–'3, and '4, his estates were the subjects of legal controversy and litigation in courts of law; and that ever since, renewed and continued claims and demands, by the heirs of Lydia Thornton and Betty Carpenter, for their proportion of said estates, as his rightful heirs at law, upon the assignees of the Manton estate, and upon all persons deriving title under them, have been continuously prosecuted. But prosecutions to stop the operations of the statute must be successful, and lead to a change in the possession.

When fraud is alleged as a ground to set aside a title, the statute does not begin to run until the fraud is discovered; and this is the ground on which the complainant asks relief. But, in such a case, the bill must be specific in stating the facts and circumstances which constitute the fraud; and also as to the time it was discovered. This is necessary to enable the defendants to meet the fraud, and the alleged time of its discovery. In these respects the bill is defective, and the evidence is still more so.

The complainant's counsel seem to suppose, that as the defendants in their answer admit the property, at least in part, was originally acquired under a sale of Manton's administrator, they are bound to show the proceedings were not only conformable to law, but that they must go further, and prove the debts for which it was sold were due and owing by the deceased. So far from this being the legal rule, under the circumstances of this case, the presumptions are in favor of the present occupants, and the complainants must show the administrator's sale was illegal and void. After an adverse possession of more than eighty years, when the facts have passed from the memory, and, as in this case, the papers are not to be found in the probate court, no court can require of the defendants proof in regard to such sale. The burden of proof falls upon him who attempts to disturb a possession of ages, transmitted and enjoyed under the forms of law.

Whether we consider the great lapse of time, and the change in the value of the property, or the statutes of limitation, the right of the complainant is barred. The decree of the Circuit Court is affirmed.

BURR H. BETTS, APPELLANT, *v.* JOHN H. LEWIS, AND MARY M. F. LEWIS, HIS WIFE.

According to the practice prescribed for the Circuit Courts, by this court, in equity causes, a bill cannot be dismissed, on motion of the respondents, for want of equity after answer and before the hearing.

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

It was a bill filed by Betts against Lewis and wife, under the same circumstances which gave rise to the case of Lewis *v.* Darling, reported in 16 Howard, 1. It will be seen by a reference to that case, page 6, that Burr H. Betts was one of the legatees in the will of Samuel Betts.

It is not material in the present report to state the nature of the case.

It was argued by *Mr. Butler* for the appellant, and by *Mr. Johnson* for the appellees.

Mr. Justice CURTIS delivered the opinion of the court.

This is an appeal from the decree of the District Court of the United States for the northern district of Alabama, having the powers of a circuit court. The appellant filed his bill in that court to charge a legacy on property alleged to have come to the hands of the respondents, and to be chargeable with its payment. After answers had been filed, and while exceptions to one of the answers were pending, the respondents moved to dismiss the bill for want of equity, and the court ordered it to be dismissed. This was irregular, and the decree must be reversed. It is understood to be in conformity with the practice of the State courts of Alabama to entertain such a motion at any stage of the proceedings. But the equity practice of the courts of the United States is governed by the rules prescribed by this court, under the authority conferred upon it by the act of Congress, (McDonald *v.* Smalley, 1 Pet., 620,) and is the same in all the States. And this practice does not sanction the dismissal of the bill on a motion made while the parties are perfecting the pleadings. The question whether the bill contains any equity, may be raised by a demurrer. If the defendant answer, this question cannot be raised until the hearing. Non constat that a defect may not be removed before the hearing.

The case must be remanded to the Circuit Court, and if any defects exist in the bill capable of being cured by amendments, as no replication has been filed, it is within the rules of ordinary practice to allow them to be made.

THE UNITED STATES, PLAINTIFF IN ERROR, *v.* CHARLES LE BARON.

A deed speaks from the time of its delivery, not from its date.

The bond of a deputy postmaster takes effect and speaks from the time that it reaches the Postmaster General and is accepted by him, and not from the day of its date, or from the time when it is deposited in the post office to be sent forward.

The difference explained between a bond of this description and a bond given by a collector of the customs.

The nomination to an office by the President, confirmation by the Senate, signature of the commission, and affixing to it the seal of the United States, are all the acts necessary to render the appointment complete.

Hence, the appointment is not rendered invalid by the subsequent death of the President before the transmission of the commission to the appointee, even where it is necessary that the person appointed should perform certain acts before he can legally enter upon the duties of the office.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the southern district of Alabama.

It was an action of debt upon the bond of a deputy postmaster at Mobile, signed Oliver S. Beers, the officer, and Charles Le Baron and George N. Stewart, his sureties.

The statement of the case contained in the opinion of the court renders it unnecessary to recite the demurrers to the declaration and pleas, or the replications and rejoinders which were in the record. The point in controversy was found in the following charge given to the jury:

Upon this evidence the court charged the jury, that the recital in the condition of the bond sued on, "whereas Oliver S. Beers is deputy postmaster at Mobile," relates to the office he held when the bond was signed, and could not refer to a term of office not yet commenced.

The court further charged and said, that, according to the strict propriety of language, the said recital relates to the precise period of time when the recital was written, (speaking as it does of the present time,) and not to the time when it was executed by its delivery, which the admitted proof shows took place on a subsequent day.

That at the time said bond was signed, the said Beers was not in office under his appointment, by and with the advice and consent of the Senate, and therefore they, the jury, ought to find for the defendant.

To which charge of the court the plaintiffs, by their attorneys, then and there excepted, and asked the court to charge the jury that the bond related to, and was intended to provide, a security for the faithful discharge by Beers of the duties of the office of deputy postmaster at Mobile, under the appointment by and with the consent of the Senate; which charges the court refused to give; and plaintiffs then and there excepted, and asked the court to charge the jury that it was for them to determine to which term of said office the said bond related, and that the recital in it, that "Beers is deputy postmaster at Mobile," must be considered as made at the time when the bond was delivered and executed; which charge the court also refused to give; and the plaintiffs then and there

excepted to such refusal, and prayed the court to sign and seal this their bill of exceptions, which is done accordingly, in term time.

JOHN GAYLE, *Judge.* [SEAL.]

The case was argued by *Mr. Cushing* (Attorney General) for the United States, and by *Mr. Stewart* for the appellee.

Mr. Justice CURTIS delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the southern district of Alabama, in an action of debt, founded on an official bond of Oliver S. Beers, as deputy postmaster at Mobile, the defendant being one of his sureties.

It appeared, on the trial in the Circuit Court, that Beers was appointed to that office by the President of the United States, during the recess of the Senate, and received a commission, bearing date in April, 1849, to continue in force until the end of the next session of the Senate, which terminated on the thirtieth day of September, 1850.

It also appeared, that in April, 1850, Beers was nominated by the President to the Senate, as deputy postmaster at Mobile; and the nomination having been duly confirmed, a commission was made out and signed by President Taylor, bearing date on the twenty-second day of April, 1850; but it had not been transmitted to Beers on the first day of July, 1850, when the bond declared on bears date. Beers took charge of the post office at Mobile before his second appointment, and continued to act, without intermission, until he was removed from office in February, 1853. The default, assigned as a breach of the bond, was admitted to have occurred under his second appointment; and the principal question upon this writ of error is, whether the bond declared on secures the faithful performance of the duties of the office under the first or under the second appointment.

The condition of the bond recites: "Whereas the said Oliver S. Beers is deputy postmaster at Mobile aforesaid," &c.

The first inquiry is, to what date is this recital to be referred? The district judge, who presided at the trial, ruled that it referred to the office held by Beers when the bond was signed. The delivery of a deed is presumed to have been made on the day of its date. But this presumption may be removed by evidence that it was delivered on some subsequent day; and when a delivery on some subsequent day is shown, the deed speaks on that subsequent day, and not on the day of its date.

In Clayton's case, (5 Co., 1,) a lease, bearing date on the 26th of May, to hold for three years "from henceforth," was

delivered on the 20th of June. It was resolved, that "from henceforth" should be accounted from the day of delivery of the indentures, and not from the day of their date; for the words of an indenture are not of any effect until delivery—*traditio loqui facit chartam.*

So in Ozkey *v.* Hicks, Cro. Jac., 263, by a charter-party, under seal, bearing date on the 8th of September, it was agreed that the defendant should pay for a moiety of the corn which then was, or afterwards should be, laden on board a certain vessel. The defendant pleaded that the deed was not delivered until the 28th of October, and that on and after that day there was no corn on board; and on demurrer, it was held a good plea, because the word *then* was to be referred to the time of the delivery of the deed, and not to its date.

And the modern case of Steele *v.* March, 4 B. and C., 272, is to the same point. A lease purported on its face to have been made on the 25th of March, 1783, habendum from the 25th of March *now* last past. It was proved that the delivery was made after the day of the date, and the Court of King's Bench held that the word *now* referred to the time of delivery, and not to the date of the indenture.

At the trial in the Circuit Court, it appeared that on the day after the date of the bond, Beers, in obedience to instructions from the Postmaster General, deposited it, together with a certificate of his oath of office under his last appointment, in the mail, addressed to the Postmaster General at Washington.

In Broome *v.* The United States, 15 How., 143, it was held that a collector's bond might be deemed to be delivered when it was put in a course of transmisson to the Comptroller of the Treasury, whose duty it is to examine and approve or reject such bonds. But this decision proceeded upon the ground that the act of Congress requiring these bonds, and their approval, had allowed the collector to exercise his office for three months without a bond; and that consequently the approval and delivery were not necessarily simultaneous acts, nor need the approval precede the delivery; and the distinction between bonds of collectors and those of postmasters is there adverted to. The former may take and hold office for three months without a bond. The latter must give bond, with approved security, on their appointment; and there is no time allowed them, after entering on their offices, to comply with this requirement. The bond must therefore be accepted by the Postmaster General, as sufficient in point of amount and security, before it can have any effect as a contract. Otherwise, the postmaster might enter on the office merely on giving

a bond, which, on its presentation, the Postmaster General might reject as insufficient.

In other words, the person appointed might act without any operative bond, which, we think, was not intended by Congress. It is like the case of Bruce et al. *v.* The State of Maryland, 11 Gill and John., 382, where it was held that the bond of a sheriff took effect only when approved by the county court; because it was only on such approval that the sheriff was authorized to act.

The purpose of the obligee was to become security for one legally authorized to exercise the office; not for one who enters on it unlawfully, because he failed to comply with the requirement to furnish an approved bond; and this purpose can be accomplished only by holding that the appointee cannot act, and the bond cannot take effect, until it is approved. Our opinion is, therefore, that this bond speaks only from the time when it reached the Postmaster General, and was accepted by him; that until that time it was only an offer, or proposal of an obligation, which became complete and effectual by acceptance; and that, unlike the case of a collector's bond, which is not a condition precedent to his taking office, and which may be intended to have a retrospective operation, the bond of a postmaster, given on his appointment, cannot be intended to relate back to any earlier date than the time of its acceptance, because it is only after its acceptance that there can be any such holding of the office as the bond was meant to apply to.

Now, at the time when this bond was accepted by the Postmaster General, Beers had been nominated and confirmed as deputy postmaster; he had given bond in such a penalty, and with such security, as was satisfactory to the Postmaster General; he had taken the oath of office, and there was evidence that a certificate thereof had been filed in the General Post Office.

Upon this state of facts, we are of opinion that at that time his holding under the first appointment had been superseded by his holding under the second appointment; and when the bond says, "is now postmaster," it refers to such holding under the second appointment, and is a security for the faithful discharge of his duties under the second appointment.

It was suggested at the argument, that this bond was not, in point of fact, taken in reference to the new appointment, but was a new bond, called for by the Postmaster General under the authority conferred on him by the act of July 2, 1836. 5 Stat. at Large, 88, sec. 37.

To this there are several answers. No such ground appears to have been taken at the trial, and the rulings of the court,

which were excepted to by the plaintffs in error, precluded any such inquiry. These rulings were, that the holding to which the bond referred was a holding on the first day of July, and that Beers was in office on that day under the first appointment, and not under the second. This put an end to the claim, and rendered a verdict for the defendant inevitable.

But if this were otherwise, parol or extraneous evidence that the bond was not intended to apply to the holding under the second appointment, because it was a new bond taken to supersede an old one, would be open to the objections which the defendants in error have so strenuously urged.

There is no ambiguity in the bond. It refers to a holding at some particular date. The law determines that date to be the time when the bond took effect. Nothing remains but to determine upon the facts, under which appointment Beers then held; this also the law settles, and when it has thus been ascertained that he then held under the second appointment, evidence to show that the bond was not intended to apply to that appointment would directly contradict the bond, for it would show it was not intended to apply to the appointment which Beers then held, while the bond declares it was so intended. The defendant in error further insists, that Beers was not in office, under the second appointment, at the time this bond took effect, because the commission sent to him was signed by President Taylor, and was not transmitted until after his death.

When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the Executive; all that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete.

The transmission of the commission to the officer is not essential to his investiture of the office. If, by any inadvertence or accident, it should fail to reach him, his possession of the office is as lawful as if it were in his custody. It is but evidence of those acts of appointment and qualification which constitute his title, and which may be proved by other evi-

dence, where the rule of law requiring the best evidence does not prevent.

It follows from these premises, that when the commission of a postmaster has been signed and sealed, and placed in the hands of the Postmaster General to be transmitted to the officer, so far as the execution is concerned, it is a completed act. The officer has then been commissioned by the President pursuant to the Constitution; and the subsequent death of the President, by whom nothing remained to be done, can have no effect on that completed act. It is of no importance that the person commissioned must give a bond and take an oath, before he possesses the office under the commission; nor that it is the duty of the Postmaster General to transmit the commission to the officer when he shall have done so. These are acts of third persons. The President has previously acted to the full extent which he is required or enabled by the Constitution and laws to act in appointing and commissioning the officer; and to the benefit of that complete action the officer is entitled, when he fulfils the conditions on his part, imposed by law.

We are of opinion, therefore, that Beers was duly commissioned under his second appointment.

For these reasons, we hold the judgment of the Circuit Court to have been erroneous, and it must be reversed, and the cause remanded with directions to award a *venire facias de novo.*

THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* GEORGE N. STEWART. } *In error to the Circuit Court of the United States for the southern district of Alabama.*

Mr. Justice CURTIS.

The opinion of the court, in the preceding case, determines this, and the judgment of the Circuit Court must be reversed, in conformity with that opinion.

SEBASTIAN WILLOT, JOHN MCDONALD, AND JOSEPH HUNN, PLAINTIFFS IN ERROR, *v.* JOHN F. A. SANDFORD.

Where there are two confirmations by Congress of the same land in Missouri, the elder confirmation gives the better title; and the jury are not at liberty, in an action of ejectment, to find that the survey and patent did not correspond with the confirmation.

Titles to lands thus situated could be confirmed; nor were the lands affected by the act of March 3, 1811, providing for the sale of public lands and the final adjustment of land claims.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

It was an action of ejectment brought by Sandford, a citizen of New York, to recover the following-described premises, viz:

A certain tract of land, containing 750 arpens, more or less, which was claimed by one Antoine Lamarche, as derived to him from the Government of Spain, was surveyed for said Lamarche by John Harvey, a deputy surveyor under the Government of the United States, and the plat of said survey duly certified by said Harvey, under date of December 20, 1805, and the same received for record by Antoine Soulard, surveyor general under the Government of the United States for the Territory of Louisiana, February 27, 1806; which said tract is situate, lying, and being on Lamarche's creek, alias Spencer's run, in St. Charles county, Missouri, and the claim thereto was duly confirmed to the said Antoine Lamarche, or his legal representatives, by an act of Congress entitled "An act confirming claims to lands in the State of Missouri, and for other purposes," approved July 4, 1836.

It is unnecessary to recite the evidences of title set forth upon the trial by the plaintiff and defendants, as they are set forth on both sides in the opinion of the court.

Amongst other rulings of the Circuit Court were the following, viz:

5. That the survey made by the United States surveyor, and on which issued the patent certificate and patent, is evidence of a high character that the land included in the survey is the same as that included in the confirmation to the legal representatives of Dissonet.

6. That said survey is not conclusive evidence that the land confirmed to the legal representatives of Dissonet was correctly located and surveyed by said survey.

7. If the jury, therefore, believe that the land sued for is not within the confirmation to the legal representatives of Dissonet, although it may be within the survey and patent, then such confirmation, survey, and patent, cannot protect said defendants in this suit.

It is not necessary to mention any of the other instructions or rulings of the Circuit Court.

The case was argued by *Mr. Blair* for the plaintiffs in error, and *Mr. Lawrence* for the defendant, upon which side there was also a brief filed by *Mr. Glover.*

Mr. Justice CATRON delivered the opinion of the court.

Peter Chouteau, claiming under one Dissonet, laid before Recorder Bates a claim for 800 arpens of land, situate in St.

Charles county, Missouri. The evidence presented to the recorder was a certificate of a private survey embracing the claim as set up, with proof that Dissonet had inhabited and cultivated the land from 1798 to 1805. The recorder pronounced the claim valid as a settlement right to the extent of 640 acres, and declared that it ought to be surveyed as nearly in a square as might be, so as to include Dissonet's improvements; and, furthermore, that the land should be surveyed at the expense of the United States.

This report was confirmed by Congress, by the act of April 29, 1816. The land was surveyed in 1817, by authority of the United States. A patent certificate was forwarded to the General Land Office by the recorder of land titles at St. Louis, in 1823, and a patent issued on it in 1850. Protection is claimed by the defendants, under the survey and patent.

The jury was instructed by the Circuit Court, that the survey and patent were not conclusive evidence that the land they embraced was correctly located and surveyed according to the confirmation; and if they believed that the land sued for was not within the confirmation of the legal representatives of Dissonet, although it may be within the survey and patent, then the survey and patent would not protect the defendants.

Exceptions were taken to this ruling. The jury found that the official survey did not correspond to the confirmation, but that it was illegally extended so as to interfere with the claim on which the plaintiff relies. His claim is this: In 1805, Antoine Lamarche caused a private survey to be made by Harvey for 750 arpens of land, which he claimed by right of settlement. Lamarche laid his claim before the board of commissioners, but produced no evidence of inhabitation and cultivation; indeed, no evidence at all, except the surveyor's certificate. On coming before the board, in 1811, the claim was of course rejected; and thus it lay until 1833, when the board of commissioners organized under the act of July 9, 1832, took evidence which established the fact to their satisfaction, that Lamarche had inhabited and cultivated the land, and was entitled to a confirmation; and in 1835 they recommended to Congress that the claim ought to be confirmed according to Harvey's survey of 1805; and it was thus confirmed by the act of July 4, 1836.

Harvey's survey covers the land in dispute, which is overlapped on its eastern boundary by the survey and calls of the patent to Dissonet; and within this interference the defendants hold possession.

Up to the date of the confirmation of Lamarche's claim, in

1836, it had no standing in a court of justice. So this court has uniformly held. Les Bois *v.* Brommell, 4 Howard.

In the next place, the United States reserved the power to survey and grant claims to lands in the situation that these contending claims were when confirmed; nor have the courts of justice any authority to disregard surveys and patents, when dealing with them in actions of ejectment. This court so held in the case of West *v.* Cochran, and will not repeat here what is there said.

When the survey of 1817 for Dissonet's land was recognised at the surveyor general's office as properly executed, which was certainly as early as 1823, then Dissonet had a title that he could enforce by the laws of Missouri, and which was the elder and better; it being settled that where there are two confirmations for the same land, the elder must hold it. A more prominent instance to this effect could hardly occur, than that of rejecting the younger confirmation in the case of Les Bois *v.* Brommell, above cited.

The act of 1811, reserving lands from sale which had been claimed before a board of commissioners, has no application to such a case as this one. It was so declared in the case of Menard *v.* Massey, 8 Howard, 309, 310.

It is ordered, that the judgment of the Circuit Court be reversed, and a venire de novo awarded.

ROBERT J. VANDEWATER, APPELLANT, *v.* EDWARD MILLS, CLAIMANT OF THE STEAMSHIP YANKEE BLADE, HER TACKLE, &C.

Maritime liens are *stricti juris*, and will not be extended by construction.

Contracts for the future employment of a vessel do not, by the maritime law, hypothecate the vessel.

The obligation between ship and cargo is mutual and reciprocal, and does not take place till the cargo is on board.

An agreement between owners of vessels to form a line for carrying passengers and freight between New York and San Francisco, is but a contract for a limited partnership, and the remedy for a breach of it is in the common-law courts.

THIS was an appeal from the Circuit Court of the United States for the district of California.

It was a libel, filed originally in the District Court, by Vandewater, against the steamer Yankee Blade, for a violation of the following agreement:

"This agreement, made this twenty-fourth day of September, 1853, at the city of New York, between Edward Mills, as agent for owners of steamship Uncle Sam, and William H.

Brown, as agent for the owners of steamship America, witnesseth, that said Mills and Brown hereby agree with each other, as agents for the owners of said ships before named, to run the two ships in connection for one voyage, on terms as follows, viz:

"Of all moneys received from passengers, and for freight contracted through, between New York and San Francisco, both ways, the Uncle Sam shall receive seventy-five per cent., and the America shall receive twenty-five per cent. The money to be received here, by said E. Mills, and the share of the America to be paid over to William H. Brown, or to his order, (before the sailing of the ship,) and the share due the America, of moneys received on the Pacific side, to be paid over to said Brown, or to his order, immediately on the arrival of the passengers in New York, by E. Mills, who guaranties, as agent aforesaid, the true and honest return of all funds received by his agents on the Pacific. It is understood that this trip is to be made by the Uncle Sam, leaving San Francisco on or about the 15th of October, and the America leaving New York on or about the 20th of October next.

"Each ship is to pay all expenses of her running and outfits, and to be responsible for her own acts in every respect. Each ship is to retain all the money received for local freight or passengers; that is, for such freight and passengers as only pay to the ports the individual ship runs to, without any division with the other ship.

"No commissions are to be charged anywhere on any receipts for the America, by said Mills, in division, but the expense of advertising and the amount paid out for runners, at all points, are to be borne by each ship in the same proportion as receipts are divided between them.

"In consideration of all the above well and truly performed in good faith, Edward Mills, as agent for the steamship Yankee Blade, hereby agrees, that when the America arrives at Panama, on her voyage hence for the Pacific ocean, said ship Yankee Blade shall leave New York at such time as to connect with the America, conveying passengers and freight on the same terms as is hereinbefore agreed, (say 25 per cent. to the Yankee Blade, and 75 per cent. to the America.) Provided, only, that said connection shall be made at a time that will not prevent the Yankee Blade from making her connection with the Uncle Sam, at her regular time."

After the usual preliminary proceedings in cases of libel, the proctors for the claimant filed the following exceptions:

The exceptions of Edward Mills, claimant and sole owner of the steamship Yankee Blade, to the libel of Robert J. Van-

dewater, libellant, allege that the said libel is insufficient, as follows:

First Exception.—That, on the face of said libel, it appears that the alleged cause or causes of action therein set forth, are not within the admiralty and maritime jurisdiction of this honorable court.

Second Exception.—There is no cause of action set forth in said libel, whereby the said steamship Yankee Blade can be proceeded against *in rem* in this honorable court.

Third Exception.—On the face of said libel, it appears the libellant is not entitled to the relief therein prayed for, nor to any decree against the said steamship.

And, therefore, the said claimant prays that the said libel may be dismissed with costs.

In June, 1855, the district judge sustained the exceptions, and dismissed the libel, whereupon the libellant appealed to the Circuit Court.

In September, the Circuit Court affirmed the decree, and the libellant brought the case up to this court.

It was argued by *Mr. Cutting* for the appellant, and *Mr. Blair* for the appellee.

Mr. Cutting made the following points:

I. Agreements for carrying passengers and freight on the high seas are maritime contracts, pertaining exclusively to the business of commerce and navigation, and may be enforced specifically against the vessel by courts of admiralty proceeding *in rem.*

No express pledge is necessary in order to create the lien.

The jurisdiction *in rem* for breach of contracts of affreightments, by bills of lading or otherwise, is recognised by numerous cases. The ground of such jurisdiction rests upon the maritime nature and subject-matter of the contract. 6 How. U. S. R., 392.

Contracts to carry passengers are analogous in principle. They are of a maritime nature in their essence and subject-matter; and when entered into with a particular ship, they bind her to the due performance of the service. The Pacific, 1 Blatch. R., 576, and the cases and arguments there presented.

II. This court has recognised and adopted this principle.

1. Maritime torts to passengers may be redressed in the admiralty *in rem*, by reason of the vessel being *bound by the contract.* S. B. New World *v.* King, 16 How. U. S. R., 469.

2. The case of the New Jersey Steam Navigation Company *v.* The Merchants' Bank, 6 How. U. S. R., 392, establishes

that contracts to be executed on the seas are maritime in their nature, and within the admiralty jurisdiction, as well *in personam* as *in rem*. The principle of that case embraces the present.

III. The contract, by Mills, as agent of the owners of the Yankee Blade, to proceed from New York with passengers and freight, to carry them to Panama, and to deliver them to the America, to be carried by her to San Francisco, is for a maritime service, to be performed upon the sea, and within the jurisdiction of the District Court of the United States.

1. The mode or rate of compensation to be paid therefor does not affect the jurisdiction of the court. The action is for a non-performance of the contract—not for an accounting. The circumstance that the amount of damages might, in part, depend upon the number of passengers that would have been carried, is of no consequence.

2. The agreement did not constitute a partnership between the steamers. Neither party had any joint interest in the vessel of the other, or in the voyage; there was no sharing of losses; each ship was to pay her own expenses of running and of outfits, and was responsible for her own acts in every respect.

The agreement to divide gross receipts was merely a mode of ascertaining the compensation to each vessel, for her separate services.

3. Even if the agreement were to be treated as a mutual arrangement between two vessels, for a joint service, to be rendered by them, on the sea—the compensation therefor to be an apportionment between them, of the whole freight and passage money to be earned by both—it would be a maritime contract, over which the admiralty has jurisdiction. 3 How., 568.

4. The contract is not one merely preliminary to a charter-party, but is a complete arrangement, to be treated as a charter-party, containing in itself the substantial provisions of such an instrument—a definite voyage to be performed on one side, and a definite compensation to be paid therefor by the other side. 3 Sum. R., 144, 148, 149.

Each vessel hired the use and employment of the other, for the proposed adventure; each was to receive, as compensation for such hiring, a certain sum, proportioned to the receipts of both vessels, for that trip. The distinctive characteristics of a charter-party are found.

The question of jurisdiction does not depend upon the particular name or character of the instrument, but whether it imports a maritime contract or not. The Tribune, 3 Sum. R., 144, 148.

5. The objection of the Circuit Court, that the contract was made by the owners, at the home port, does not appear to be authorized by any fact established in the case. The allegation of residence in the claim, (p. 8,) was merely formal, and not issuable. It does not appear where the owner or owners of the Yankee Blade resided at the time of the contract, nor what was her home port.

6. But assuming that the Yankee Blade belonged to New York, and that her owners resided there at the time of the contract, the Circuit Court erred in supposing that there could be no lien for that reason. The existence of a lien depends on the nature of the contract; and if that be maritime, and creates a lien, the circumstance that it is executed by the owner in person does not affect it. 1 Valin Ord. de la Mar., 630, Liv. III, Tit. I, Art. II; 2 Boul. Pat. Droit Com., 298; 3 Pardessus Lois Mar., 159; Ib., 281, 427; 2 Boucher Consul., 379, sec. 675; p. 457, sec. 870; 4 Pardessus, p. 40.

Contracts of affreightment and to carry passengers are frequently (and in New York most generally) made by the owners, or their immediate agents, in the home port. When bills of lading are signed in the home port by the owner, the lien of the shippers exists equally, as if the master had signed them.

The following are cases of liens created by contracts made with the owners in the home port: The Pacific, 1 Blatch. R., 576; The Aberfoyle, Ib., 207; Bearse *v.* Pigs Copper, 1 Sto., 314; The Mary, 1 Paine R., 671; The Draco, 2 Sum., 179.

7. The conclusion of the learned circuit judge, that this was a personal agreement between the owners of the two ships, and that a personal credit existed, which excluded the idea of a lien on the vessels, is not authorized by the facts.

The contract describes each of the parties to it, "as agent" of the owners. The "agents" acted as representatives of the vessels; the owners are not named or referred to. The inference is, that a *mere* personal credit was not relied on, to the exclusion of a lien.

Mr. Blair made the following points:

1. That the contract on which this proceeding is founded, is not a maritime contract.

It is an agreement between the owners of two steamships, to run their vessels in combination, in the transportation of freight and passengers, between New York and San Francisco, and to divide the proceeds between them; and also an engagement, by one of the parties who is to receive all the money, to pay over to the other his proportion.

So much of this contract as relates to maritime service is but

preliminary. No maritime service is contracted for, one to the other. Such services are thereafter to be contracted for, and rendered to other persons by both the parties. In such case, there is no jurisdiction. Sheppard *v.* Essex Ins. Co., 3 Mason, 6.

There is no difference in principle in this, from the contract which this court considered in the case of Phœbus *v.* The Orleans, (11 Peters, 175.) The owners of the Orleans had an agreement to combine their means, and, as part owners, to run a single vessel for the public accommodation. Here is a combination, in which different vessels are run for the same purpose. The court would take no account between the owners of the Orleans. Whether one of the parties to the enterprise had failed to contribute his share, was not a subject of admiralty jurisdiction. There is no difference, as affects that question, whether it be alleged, as in the case of the Orleans, that one party had contributed more than the other towards the enterprise, or whether, as in this case, it be alleged that one party refused to contribute at all.

The similitude of the contracts would be obvious, if the claim here were for the earnings of the trip contemplated in the contract. But it is in right of such earnings that this suit is brought, and though no such earnings were received as were contemplated, it is alleged that this is the fault of the other party, and should not prevent an accounting as if they had been actually received.

Consortship, it is true, is treated as a class of maritime contracts by Judge Conkling, pp. 15, 236, 849, of his Admiralty Jurisdiction. But he says the case of Andrews *v.* Wall, 3 Howard, p. 568, is the only reported case relating to it. But the question there was, not whether consortship was a maritime contract, but related to the distribution of salvage among those entitled. The consort contract was incidental only, and was considered merely so far as to see whether it was subsisting at the time of the wreck. The nature of the consideration of the contract was not material.

The case of Cutter *v.* Roe, 7 Howard, 730, also shows that the nature of the consideration will not give character to a contract, or give jurisdiction even *in personam.*

2. But if this be regarded a maritime contract at all, it is certainly only partly so; the object, as between the parties, being to stipulate for the division of the proceeds to accrue to them from their services to others. It therefore falls within the case of Plummer *v.* Webb, 4 Mason, 380, and L'Arena *v.* Manwaring, Bee, 199, in which the court declined jurisdiction, because the whole contract was not of a maritime nature.

3. But the proceeding is *in rem*, and the advocates of the largest measure of admiralty jurisdiction for the district courts admit that they have not jurisdiction to enforce maritime contracts by such proceedings, unless the contract expressly or by implication creates a lien on the ship. The Draco, 2 Sumner, 180.

It is contended that this contract is in the nature of a charter-party, and therefore a lien is implied. See definition of charter-party, Abbott, p. 241.

It is certainly not a contract for the hiring of a ship, or any part of one; nor is it a contract for the transportation of persons or property. The parties to such contracts are carriers on one side, and freighters, charterers, or passengers, on the other. Here is merely an arrangement between carriers, in contemplation of making such contracts, to enable them to co-operate in fulfilling them, and for the division of the proceeds between themselves. No maritime service is rendered to each other. The relations to each other are those of employees of a common employer; and it is expressly stipulated that each is to render to their common employers the service contemplated, at their own cost and risk. The contracting parties are neither of them freighters or passengers, and there is not the remotest analogy upon which to found a claim for the remedies allowed such parties by the maritime law.

But even an express contract of affreightment creates no lien on the vessel till the cargo is shipped. Schooner Freeman *v.* Buckingham, 18 Howard, p. 188.

4. The case of Blaine *v.* Carter, 4 C., 331, shows that the law does not favor implied hypothecations of the ship in obligations executed by the owner in the home port; and this is admitted by Judge Story in the case of the Draco above cited. In the absence of any precedent or established usage creating a lien in like cases, with reference to which the parties could be presumed to have contracted, there ought to be explicit language in the contract itself to create such a lien. It would be mischievous to annex liens by implication to such contracts; there would be nothing to give notice of their existence; they are not accompanied by possession, and so are not lost by being out of possession; and they do not arise from any shipments, supplies, or services, or other transactions which can be seen or known—so there would be no safety to the purchaser of vessels, if liens can be so created.

Mr. Justice GRIER delivered the opinion of the court.

The libel in this case sets forth a contract between the owners of certain steamboats, of which the Yankee Blade was one,

to convey freight and passengers between New York and California. Among other things, it was agreed that the America should proceed to Panama, and the Yankee Blade should leave New York at such time as to connect with the America. The owner of the Yankee Blade refused to employ his vessel according to this agreement, and sent her to the Pacific under a contract with other persons. For this breach of contract the libellant demands damages, assuming that the vessel is subject, under the maritime law, to a lien which may be enforced *in rem* in a court of admiralty.

The Circuit Court dismissed the libel, being of opinion "that the instrument is of a description unknown to the maritime law; that it contains no express hypothecation of the vessel, and the law does not imply one."

In support of his allegation of error in this decree, the learned counsel for the appellant has endeavored to establish the following proposition:

"Agreements for carrying passengers are maritime contracts, pertaining exclusively to the business of commerce and navigation, and consequently may be enforced specifically against the vessel by courts of admiralty proceeding *in rem.*"

Assuming, for the present, the premises of this proposition to be true, let us inquire whether the conclusion is a legitimate consequence therefrom.

The maritime "privilege" or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a "*jus in re*," without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding *in rem.* This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the State courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore "*stricti juris*," and cannot be extended by construction, analogy, or inference. "Analogy," says Pardessus, (Droit Civ., vol. 3, 597,) "cannot afford a decisive argument, because privileges are of *strict right.* They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another."

These principles will be found stated, and fully vindicated

by authority, in the cases of The Young Mechanic, 2 Curtis, 404, and Kiersage, Ibid., 421; see also Harmer *v.* Bell, 22 E. L. and E., 62.

Now, it is a doctrine not to be found in any treatise on maritime law, that every contract by the owner or master of a vessel, for the future employment of it, hypothecates the vessel for its performance. This lien or privilege is founded on the rule of maritime law as stated by Cleirac, (597:) "Le batel est obligée à la marchandise et la marchandise au batel." The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges, (unless released by the covenants of the charter-party,) and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel. Where there is a charter-party, its covenants will define the duties imposed on the ship. Hence it is said, (1 Valin, Ordon. de Mar., b. 3, tit. 1, art. 11,) that "the ship, with her tackle, the freight, and the cargo, are respectively bound (affectée) by the covenants of the charter-party." But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter-party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases.

See 2 Boulay, Paty Droit Com. and Mar., 299, where it is said, "Hors ces deux cas, (viz: default in delivery of the goods, or damages for deterioration,) il n'y a pas de privilege à pretendre de la part du marchand chargeur; car si les dommages et intêrets n'ont lieu que pour refus de depart du navire, pour depart tardif ou precipité, pour saisie du navire ou autrement il est evident que a cet egard la créance est simple et ordinaire, sans aucune sorte de privilege."

Thus, in the case of the City of London, (1 W. Robinson, 89,) it was decided that a mariner who had been discharged from a vessel after articles had been signed, might proceed in the admiralty in a suit for wages, the voyage for which he was engaged having been prosecuted; but if the intended voyage be altogether abandoned by the owner, the seaman must seek his remedy at common law by action on the case.

And this court has decided, in the case of The Schooner Freeman *v.* Buckingham, 18 Howard, 188, "that the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it."

Now, the damages claimed by the libellant, in this case, are not for the non-delivery of merchandise or cargo at the time and place according to the covenants of a charter-party, or for their injury or deterioration on the voyage, but for a refusal of the owners to employ the vessel in carrying passengers and freight from New York, so as to connect with the America when she should arrive at Panama. The owners have not made it a part of their agreement that their respective vessels should be mutually hypothecated as security for the performance of their agreement; and, as we have shown, there is no tacit hypothecation, privilege, or lien, given by the maritime law.

We have examined this case from this point of view, because the libel seems to take it for granted that every breach of contract, where the subject-matter is a ship employed in navigating the ocean, gives a privilege or lien on the vessel for the damages consequent thereon, and because it was assumed in the argument, that if this contract was in the nature of a charter-party, or had some features of a charter-party, the court would extend the maritime lien by analogy or inference, for the sake of giving the libellant this remedy, and sustaining our jurisdiction. But we have shown this conclusion is not a correct inference from the premises, and that this lien, being *stricti juris*, will not be extended by construction. It is, moreover, abundantly evident that this contract has none of the features of a charter-party. A charter-party is defined to be a contract by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. (Abbott on Ship., 241.)

Now, by this agreement, the libellant has not hired the Yankee Blade, or any portion of the vessel; nor have the master or owners of the ship covenanted to convey any merchandise for the libellant, nor has he agreed to furnish them any. But the agent for the Yankee Blade "agrees that when the America arrives at Panama, the Yankee Blade shall leave New York, conveying passengers and freight," which were afterwards to be received by the America, and transported to San Francisco; and the passage money and freight earned was to be divided between them—25 per cent. to the Yankee Blade, and 75 to the America.

This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea, and not by land, will not be sufficient to give the court of admiralty jurisdiction of an action for a breach of the contract. It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application, and is the fit subject for the jurisdiction of the common-law courts.

The decree of the Circuit Court is therefore affirmed.

THE UNITED STATES, APPELLANTS, *v.* THE BRIG NEUREA, HER TACKLE, &c., WILLIAM KOHLER, CLAIMANT.

Where a libel for information, praying the condemnation of a vessel for violating the passenger law of the United States, states the offence in the words of the statute, it is sufficient.

THIS was an appeal from the District Court of the United States for the northern district of California.

The case presented a general demurrer to the following libel for information:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA. IN ADMIRALTY.

To the Hon. Ogden Hoffman, Jr., Judge of the District Court of the United States for the Northern District of California:

The libel of Samuel W. Inge, attorney of the United States for the northern district of California, who prosecutes on behalf of the said United States against the brig Neurea, and against all persons intervening for their interest therein, in a cause of forfeiture, alleges and informs as follows:

1. That Richard P. Hammond, Esq., collector of the customs for the district of San Francisco, heretofore, to wit, on the thirty-first day of August, in the year of our Lord eighteen hundred and fifty-four, at the port of San Francisco, and within the northern district of California, on waters that are navigable from the sea by vessels of ten or more tons burden, seized as forfeited to the use of the said United States the said brig Neurea, being the property of some person or persons to the said attorney unknown.

2. That one Kohler, master of the said brig Neurea, which is a vessel owned wholly or in part by a subject or subjects of

the kingdom of Sweden, did on the first day of June, in the year of our Lord eighteen hundred and fifty-four, at the foreign port of Hong Kong, in China, take on board said vessel two hundred and sixty-three passengers, which was a greater number of passengers than in the following proportion to the space occupied by them and appropriated for their use on board said vessel, and unoccupied by stores or other goods not being the personal luggage of such passengers, that is to say, on the lower deck or platform, one passenger for every fourteen clear superficial feet of deck, with intent to bring said passengers to the United States of America, and did leave said port with the same; and afterwards, to wit, on the twenty-sixth day of August, in the year of our Lord eighteen hundred and fifty-four, did bring the said passengers, being two hundred and sixty-three in number, on board the said vessel, to the said port of San Francisco, within the jurisdiction of the United States, and that the said passengers so taken on board of said vessel, and brought into the United States as aforesaid, did exceed the number which could be lawfully taken on board and brought into the United States as aforesaid, as limited by the first section of the act of Congress approved February 22, 1847, entitled "An act to regulate the carriage of passengers" "in merchant vessels," to the number of twenty in the whole, in violation of the act of Congress of the United States in such cases made and provided, and that by force and virtue of the said acts of Congress, in such case made and provided, the said vessel became and is forfeited to the use of the said United States.

And the said attorney saith, that by reason of all and singular the premises aforesaid, and by force of the statute in such case made and provided, the aforementioned vessel became and is forfeited to the use of the said United States.

Lastly, that all and singular the premises aforesaid are true, and within the admiralty and maritime jurisdiction of the United States and of this court.

Wherefore the said attorney prays the usual process and monition of this court in this behalf to be made, and that all persons interested in the said vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said vessel may be, for the causes aforesaid and other appearing, be condemned by the definitive sentence and decree of this court, as forfeited to the use of the said United States, according to the form of the statute of the said United States in such case made and provided.

The act of Congress referred to will be found in 9 Stat. at Large, 127.

The court below sustained the demurrer and dismissed the libel, from which decree the United States appealed.

It was argued for the United States by *Mr. Cushing*, (Attorney General.)

Mr. Justice GRIER delivered the opinion of the court.

The Swedish brig Neurea was seized by the collector of customs at San Francisco, as forfeited to the United States under the passenger act of 1847. The record in this case exhibits the libel for information, filed on behalf of the United States, a demurrer thereto by the claimant, and a decree of the court below dismissing the libel. The appeal, therefore, brings under review the question of the sufficiency of the libel.

The claimant sets forth the following grounds of demurrer:

1. That the said libel states no sufficient cause of condemnation of said ship.

2. Because the said libel states no offence against the laws of the United States.

3. Because the said libel does not aver that the excess of passengers carried or imported on said ship were so carried or imported on the lower deck of said brig, or the orlop deck thereof.

4. Because the facts stated in said libel do not constitute a violation of the passenger act of the United States of 1847, or any other law of the United States.

The first, second, and fourth, are but different forms of the same general assertion, "that the libel states no offence."

The third, which is more specific, objects to the libel for want of an averment that the passengers were carried on the lower deck.

An information for forfeiture of a vessel need not be more technical in its language, or specific in its description of the offence, than an indictment. As a general rule, an indictment for a statute offence is sufficient, if it describe the offence in the very words of the statute. The exceptions to this rule are, where the offences created by statute are analogous to certain common-law felonies or misdemeanors, where the precedents require certain technical language, or where special averments are necessary in the description of the particular offence, in order that the defendant may afterwards protect himself under the plea of *autrefois acquit* or *convict*. (See on this subject United States *v.* Gooding, 12 Wheaton, 474.)

The offence created by the statute on which this libel is founded has no analogy to any particular common-law crime. If, therefore, the libel sets forth the offence in the words of

the statute which creates it, with sufficient certainty as to the time and place of its commission, it is all that is necessary to put the claimant on his defence.

The object of the act in question is the protection of the health and lives of passengers from becoming a prey to the avarice of ship owners. In order to test the sufficiency of the libel, it will be necessary to set forth at length the two sections under which it was framed:

The first section provides, that no master "shall take on board such vessel, at any foreign port or place, a greater number of passengers than in the following proportion to the space occupied by them and appropriated to their use, and unoccupied by stores or other goods not being the personal baggage of such passengers, that is to say, on the *lower deck or platform*, one passenger for every fourteen clear superficial feet of deck, if such vessel is not to pass within the tropics during such voyage; but if such vessel is to pass within the tropics during such voyage, then one passenger for every twenty such clear superficial feet of deck; and on the orlop deck, (if any,) one passenger for every thirty such superficial feet in all cases, with intent to bring such passengers into the United States of America, and shall leave such port, or place, with the same, and bring the same, or any number thereof, within the jurisdiction of the United States aforesaid, or if any such master of vessel shall take on board of his vessel, at any port or place within the jurisdiction of the United States aforesaid, any greater number of passengers than the proportions aforesaid admit, with the intent to carry the same to any foreign port or place, every such master shall be deemed guilty of a misdemeanor, and upon conviction thereof before any circuit or district court of the United States aforesaid, shall, for each passenger taken on board beyond the above proportions, be fined in the sum of fifty dollars, and may also be imprisoned for any term not exceeding one year: *Provided*, that this act shall not be construed to permit any ship or vessel to carry more than two passengers to every five tons of such ship or vessel."

"Sec. 2. That if the passengers so taken on board such vessel, and brought into, or transported from, the United States aforesaid, shall exceed the number limited by the last section, to the *number of twenty in the whole*, such vessel shall be forfeited to the United States aforesaid, and be prosecuted and distributed as forfeitures are under the act to regulate duties on imports and tonnage."

Now, the libel conforms strictly to the requirements of this act.

It avers, that the master "took on board the Neurea at

Hong Kong, in China, on the 1st of June, 1854, two hundred and sixty-three passengers. That this was a greater number than in proportion to the space occupied by them, viz: "on the lower deck or platform" one passenger for every fourteen clear superficial feet, with intent to bring said passengers to the United States. That he afterwards, viz: on the 26th day of August, did bring them on said vessel to the port of San Francisco. That the passengers so taken on board and brought into the United States did exceed the number which could be lawfully taken, to the number of twenty in the whole, &c.

The act does not require an averment that the passengers "were carried or imported on the lower deck or the orlop deck."

The libel sets forth every averment of time, place, numbers, intention, and act, in the very words of the statute. It was not necessary to specify the precise measurement of the deck, or to show by a mathematical calculation its incapacity; nor to state the sex, age, color, or nation, of the passengers; nor how many more than twenty their number exceeded the required area on deck. All these particulars were matters of evidence, which required no special averment of them to constitute a complete and technical description of the offence.

The decree of the District Court is therefore reversed, and record remitted for further proceedings.

WILLIAM H. SEYMOUR AND LAYTON S. MORGAN, PLAINTIFFS IN ERROR, *v.* CYRUS H. MCCORMICK.

The act of Congress passed on the 3d of March, 1837, (5 Stat. at L., 194,) provides that a patentee may enter a disclaimer, if he has included in his patent what he was not the inventor of; but if he recovers judgment against an infringer of his patent, he shall not be entitled to costs, unless he has entered a disclaimer for the part not invented.

It also provides that if a patentee unreasonably neglects or delays to enter a disclaimer, he shall not be entitled to the benefit of the section at all.

In 1845, McCormick obtained a patent for improvements in a reaping machine, in which, after filing his specification, he claimed, amongst other things, as follows, viz:

"2d. I claim the reversed angle of the teeth of the blade, in manner described.

"3d. I claim the arrangement and construction of the fingers, (or teeth for supporting the grain,) so as to form the angular spaces in front of the blade, as and for the purpose described."

These two clauses are not to be read in connection with each other, but separately. The first claim, viz: for "the reversed angle of the teeth of the blade," not being new, and not being disclaimed, he was not entitled to costs, although he recovered a judgment for a violation of other parts of his patent.

Under the circumstances of the case, the patentee was not guilty of unreasonable neglect or delay in making the disclaimer, which is a question of law for the court to decide.

The facts that a similar machine was in successful operation in the years 1829 and 1853, do not furnish a sufficient ground for the jury to presume that it had been in continuous operation during the intermediate time.

The fifteenth section of the patent act of 1836, which allows the defendant to give in evidence that the improvement had been described in some public work anterior to the supposed discovery of the patentee, does not make the work evidence of any other fact, except that of the description of the said improvement.

THIS case came up, by writ of error, from the Circuit Court of the United States for the northern district of New York.

It was a suit brought by McCormick against Seymour and Morgan, for a violation of his patent right for reaping machines, which suit was previously before this court, and is reported in 16 Howard, 480.

It will be seen by reference to that case that McCormick obtained three patents, viz: in 1834, 1845, and 1847. The suit, as originally brought, included violations of the patent of 1845, as well as that of 1847; but the plaintiff, to avoid delay, proceeded then only in his claim for a violation of the patent of 1847, which consisted chiefly in giving to the raker of the grain a convenient seat upon the machine. When the case went back under the mandate of this court, the claim was for the violation of the patent of 1845, that of 1847 being mentioned only in the declaration, and not brought before the court upon the trial, the main question being the violation of the patent of 1845.

McCormick's claim in the patent of 1845 was as follows, viz:

I claim, 1st, the curved (or angled downward, for the purpose described) bearer, for supporting the blade in the manner described.

2d. I claim the reversed angle of the teeth of the blade, in manner described.

3d. I claim the arrangement and construction of the fingers, (or teeth for supporting the grain,) so as to form the angular spaces in front of the blade, as and for the purpose described.

4th. I claim the combination of the bow, L, and dividing iron, M, for separating the wheat in the way described.

5th. I claim setting the lower end of the reel-post, R, behind the blade, curving it at R 2, and leaning it forward at top, thereby favoring the cutting, and enabling me to brace it at top by the front brace (S) as described, which I claim in combination with the post.

The fourth and fifth claims were those which were alleged to have been infringed.

The defendants pleaded the general issue, and gave notice of various prior inventions and publications in public works, which they designed to give in evidence in their defence. The last trial was had in October, 1854, when the plaintiff obtained

a verdict for $7,750, and judgment was entered in June, 1855, for $10,348.30.

There were twenty exceptions taken in the progress of the trial, twelve of which were as to rulings upon points of evidence, which it is not material to notice. The remaining eight were to portions of the charge of the court to the jury.

The defendants, in addition to other matters of defence, alleged that the second claim was not new, and that as there had been unreasonable delay in the disclaimer of it, the plaintiff was not entitled to recover at all; and, at all events, was not entitled to recover costs.

Only such portions of the charge of the court to the jury will be here inserted, as were the subjects of the opinion of this court.

One part of the charge was as follows, viz:

"The claim in question is founded upon two parts of the patent. As the construction of that claim is a question of law, we shall construe it for your guidance. In the fore part of the patent, we have a description of the blade, and of the blade-case, and of the cutter, and of the mode of fastening the blade and the blade-case and the cutter, and of the machinery by which the arrangement is made for the cutter to work. We have also the description of the spear-shaped fingers, and of the mode by which the cutter acts in connection with those fingers. Then, among the claims are these: '2. I claim the reversed angle of the teeth of the blade in manner described. 3. I claim the arrangement of the construction of the fingers, (or teeth for supporting the grain,) so as to form the angular spaces in front of the blade, as and for the purpose described.' Now, it is insisted, on the part of the learned counsel for the defendants, that this second claim is one simply for the reversed angles of the sickle-teeth of the blade. These teeth are common sickle-teeth, with their angles alternately reversed in spaces of an inch and a quarter, more or less. The defendants insist that the second claim is merely for the reversed teeth on the edge of the cutter, and that the reversing of the teeth of the common sickle as a cutter in a reaping machine was not new with the plaintiff; and that if it was new with him, he had discovered it and used it long before his patent of 1845. The defendants claim that Moore had discovered it as early as 1837 or 1838; and it would also seem that the plaintiff had devised and used it at a very early day after his patent of 1834—that is, the mere reversing of the teeth. But, on looking into the plaintiff's patent more critically, we are inclined to think that when the plaintiff says, in his second claim, 'I claim the reversed angle of the teeth of the blade, *in manner described*,' he

means to claim the reversing of the angles of the teeth *in the manner previously described in his patent.* You will recollect that it has been shown, in the course of the trial, that in the operation of the machine, the straw comes into the acute-angled spaces on each side of the spear-shaped fingers, and that the angles of the fingers operate to hold the straws, while the sickle-teeth, being reversed, cut in both directions as the blade vibrates. The reversed teeth thus enable the patentee to avail himself of the angles on both sides of the spear-shaped fingers; whereas, if the sickle-teeth were not reversed in sections, but all ran in one direction like the teeth of the common sickle, he could use the acute angles upon only one side of the fingers, because the cutter could cut only in one direction. We are therefore inclined to think that the patentee intended to claim, by his second claim, the cutter having the angles of its teeth reversed, in connection with the angles thus formed by the peculiar shape of the fingers. And, as it is not pretended that any person invented that improvement prior to the plaintiff, the point relied on in this respect by the learned counsel for the defendant fails."

The other parts of the charge which were excepted to by the counsel for the defendants were thus specifically mentioned.

To so much of the charge of the court as instructed the jury, in substance, that the plaintiff, in his patent of January 31st, 1845, did not claim the reversed angle of the teeth of the blade as a distinct invention, but only claimed it in combination with the peculiar form of the fingers described in the same patent, the defendant's counsel excepted.

The defendant's counsel requested the court to instruct the jury, that if they should be satisfied that Hiram Moore was the first inventor of the reversed angle of the teeth of the blade, and that the plaintiff was notified of that fact by the testimony of Moore on the trial of this cause in June, 1851, and had not yet disclaimed that invention, then, in judgment of law, he has unreasonably delayed filing his disclaimer, and the verdict should be for the defendants.

The court declined so to instruct the jury, and the defendant's counsel excepted to the refusal.

The defendant's counsel further requested the court to instruct the jury, that if they should be satisfied that Hiram Moore was the first inventor of the reversed angle of the teeth of the blade, and that the plaintiff was notified of that fact by the testimony of Hiram Moore on the trial of this cause in June, 1851, and had not yet disclaimed that invention, then it was a question of fact for them to decide, whether the plaintiff had or had not unreasonably delayed the filing of a disclaimer;

and, if they should come to the conclusion that there had been such unreasonable delay, their verdict should be for the defendants.

The court refused so to instruct the jury, and the defendant's counsel excepted to the refusal.

The defendant's counsel requested the court to submit to the jury the question under the evidence in the case, whether the plaintiff did or did not claim, in his patent of January 31st, 1845, the reversed angle of the teeth of the blade, independent of any combination.

The court refused to submit that question to the jury, and the defendant's counsel excepted to the refusal.

The defendant's counsel also asked the court to instruct the jury, that, from the facts that Bell's machine operated successfully in 1829, and that it operated well also in 1853, they were at liberty to infer that it had operated successfully in the intermediate period, or some part of it.

But the court held and charged, that there being no evidence respecting it, except at the trial of it in 1829, and the trial of it in 1853, the jury could not infer anything on the subject, and refused to charge as requested. The defendant's counsel excepted to the refusal, and also excepted to the charge in this respect.

Upon these exceptions, the case came up to this court, and was argued by *Mr. Harding* and *Mr. Stanton* for the plaintiffs in error, and by *Mr. Dickerson* and *Mr. Johnson* for the defendant. There was also a brief filed by *Mr. Selden* for the plaintiffs in error.

It is almost impossible to convey to the reader a clear idea of the argument, because models and drawings were produced in court by the counsel on both sides. The points made, however, were the following, viz:

For the plaintiff in error.

VI. The construction given in the court below, to the second claim of the patent of 1845, was erroneous.

1. The words "in manner described," used in the second claim, refer exclusively to the description of the construction of the sickle, given in folio 155, without reference to the peculiar shape of the fingers, or to any combination whatever. They refer to the straight blade alone, with the specified positions of its teeth.

To test this construction, suppose a prosecution under this claim, of one who used such *blade* as is here described, with fingers having parallel sides, forming right angles with the

line of the blade—could it be said that this claim was not infringed? If it could not, there must be error in the charge on this point.

The construction given to this claim by the court would permit the free use by the public of the reversed angle of the sickle, *when not combined with the spear-headed finger.* Can that be reconciled with the language of the patentee, either in the description of his invention, or of the claim based upon it?

If it can, a similar construction must be given to the third claim, which is thus rendered *identical with the second,* as each will then cover *exactly the same combination,* and the spear-head finger will be given to the public, except when combined with the straight blade and reversed angle of the teeth.

We suppose the correct rule for the interpretation of patents is laid down by Mr. Curtis, in his Treatise on Patents, sec. 126. "The nature and extent of the invention claimed by the patentee, is the thing to be ascertained; and this is to be arrived at through the fair sense of the words which he has employed to describe his invention." But that rule, even as limited or aided by the principle referred to in section 132, viz: "that a specification should be so construed as, consistently with the fair import of language, will make the claim co-extensive with the actual discovery," does not relieve the plaintiff here from the distinct claim of the reversed teeth of the blade *as an independent invention.*

This principle was well applied in the case of Haworth *v.* Hardcastle, (Webster's Pat. Cases, 484, 485,) from which it was taken by Mr. Curtis. In that case it is shown, by the opinion of Chief Justice Tindal, that a forced construction of the language of the patent was required to make the claim embrace what it was alleged to embrace; but in the present case a forced construction not only of the language of the claim, but of the description of the invention, must be adopted to exclude the claim of the reversed teeth of the blade as an independent invention. Such latitude of interpretation cannot be safely allowed of a patent, or any other instrument. Neither is it necessary for the protection of the rights of the patentee. If he made "a mistake, the patent law affords means of correcting it; but until corrected, the claim must be taken as it stands, whatever error may have led to it." (Byam *v.* Farr, 1 Curtis, 263; Act of 1836, sec. 13.)

A patent for an invention is a grant from the Government, and should be construed, as we suppose, *like all other grants, fairly and liberally for the accomplishment of the objects designed by it,* and not otherwise. (Curtis, sec. 386.) Rights, the result of intellectual labor, are no doubt sacred; but we believe them no

more sacred than those which are the result of more humble toil, and that *the same liberality of interpretation* should be extended to the title-deeds of both. That those rules of construction which are applied to patents for lands should be applied to patents for inventions. That the latter should no more be stretched beyond the fair import of their terms when the interest of the patentees would be promoted by their extension, or contracted in like degree when their interest would be promoted by their restriction, than should any other deeds or contracts. (Godson on Patents, 204, 205; Leroy *v.* Tatham, 14 How., p. 176.)

Any more loose construction would render nugatory the statute requiring "a written description of the invention," &c., in "full, clear, and exact terms," and in case of any machine, that the patentee "shall *particularly specify, and point out the part, improvement, or combination, which he claims as his own invention or discovery.*" (Act of 1836, sec. 6.)

And it would render entirely useless the provision in section 13 of the same act, providing for the amendment of defective specifications.

The reason usually given for requiring a more liberal construction of patents, than of other instruments, is, that there is a great difficulty in giving exact descriptions of inventions. Conceding the fact to be so, it may be a sufficient answer to say, that the statute *requires an exact description* as a condition of the grant. But, aside from the statute, it should be borne in mind, that every mechanic in the land is bound, *at his peril, to decide correctly, from the specification, what every patent, touching his business, covers;* and the question is, if the subject be difficult, where should the responsibility of its solution rest—upon him who makes the description of *his own work*, for his *own interest*, and with all the aids to be derived from the Patent Office, and, if he chooses, from patent agents, and men of science skilled in such matters, or from the mechanic pretending to no particular knowledge on the subject, having no interest, and often deprived of all extraordinary aids? We think that both reason and the statute demand of him, who claims the exclusive right, to define clearly the limits of his invention. It can in no case be difficult for an inventor to say, distinctly, whether he claims two or more elements singly, or merely in combination. (Evans *v.* Hettick, 3 Wash., p. 408; S. C., 1 Robb, 166.)

2. The point was material.

Hiram Moore used such a sickle as early as 1836, if not in 1834, and this was proved on the first trial of this case, as long ago as June, 1851. Notice of this invention by Moore was

given to the plaintiff as early as September, 1850. The sickle, as used by Moore in 1836, was also described by witnesses examined in October, 1851, and cross-examined by plaintiff's counsel in this cause.

The plaintiff in his history of his invention, sworn to January 1, 1848, presented to the Commissioner of Patents, for the purpose of obtaining an extension of his first patent, shows, as we think, that he did not use the blade with reversed teeth until the harvest of 1841.

Under these circumstances, we insist that the plaintiff was called upon, during the three years that intervened between the trial in June, 1851, and that in October, 1854, to disclaim the invention of the reversed angle of the teeth of the blade.

It was therefore a question for the jury, under section 9 of the act of March 3d, 1837, (Curtis pp. 489, 490,) whether the plaintiff had not unreasonably neglected or delayed to enter at the Patent Office his disclaimer.

To allow a patentee, under such circumstances, to designedly delay a disclaimer, would defeat the manifest object of the last proviso to section 9 above referred to, which was to compel a patentee who had inadvertently covered by his patent something to which he was not entitled, and thus wrongfully obstructed its free use, to remove the obstruction as soon as possible after the discovery of his mistake.

XI. The request of instructions to the jury, "that from the facts that Bell's machine operated successfully in 1829, and that it operated well also in 1853, they were at liberty to infer that it had operated successfully in the intermediate period, or some part of it," should have been given; and the actual charge, "that there being no evidence respecting it, except the trial of it in 1829, and the trial of it in 1853, *the jury could not infer anything on the subject*," was erroneous.

What the evidence was, of the use of Bell's machine, will be found in Loudon's Encyclopædia of Agriculture, pp. 442 to 427, and from the testimony of Obed Hussey.

We think that on this evidence, (that the machine used in England was that described by Loudon,) it was proper to submit to the jury the question as to its operation, and not to place it under the ban as an entire failure, which seems to be the effect of the charge, as it was given.

If it operated well in 1829 and in 1853, which is clearly proved, and is assumed by the judge, it must certainly have been *capable* of operating well at any intermediate time. Whether actually used or not, is wholly immaterial.

And if the machine as a whole operated well, then the divider, reel, and reel-bearer, each, operated well, and the reel

was supported by a practically successful contrivance, which formed no impediment in the way of the divider, or of the division and separation of the grain, and on which no straws could clog, as the entire space beneath the reel-shaft is, in this machine, left unobstructed by the reel-bearer, which is horizontal some feet above the platform, and completely out of the reach of the grain. There is no difference between the reel-bearer in the machine of the plaintiffs in error and that in Bell's machine. Waters, (McCormick's witness,) on being shown the drawing of Bell's machine, in Loudon's Encyclopædia of Agriculture, says: "As a mere manner of supporting the reel, I see no difference between the method of supporting the reel in this and the defendant's machine."

This prior invention of Bell's, if the court had not substantially excluded it from the consideration of the jury, would have furnished a complete answer to the charge of infringement of the fifth claim of McCormick's patent of 1845. (Evans *v.* Hettick, 3 Wash., p. 408; S. C., 1 Robb, p. 166.)

XII. It was erroneous to grant *costs* to the plaintiff, inasmuch as it appeared that he was not the first inventor of the reversed angle of the sickle, and had not filed a disclaimer prior to the commencement of the suit. (Act of 1837, sec. 9.)

The testimony showed conclusively that Moore was the first inventor of the reversed angle of the teeth.

Points for the defendant in error:

Thirteenth Exception.—The description annexed to the letters patent of plaintiff describes a sickle with reversed-cut teeth, and then describes the manner in which this reversed-cut sickle operates in connection with the spear-headed fingers, "forming an acute angle between the edge of the blade and the shoulder of the spear, by which the grain is prevented from yielding to the touch of the blade." The specification then claims "the reversed angle of the teeth of the blade in manner described."

1. It also appeared, that ever since the date of the first reaping patent in 1834, the plaintiff had experimented with this reversed sickle edge without producing any successful result, until he combined it in the manner described in the patent of 1845.

2. The sickle, separate and apart from the machine, is no invention, in whatever way the teeth are cut, but when combined in the machine in the manner described, the reversed cut becomes a very valuable invention, enabling the sickle to cut itself clear each stroke; whereas, if the sickle were cut only one way, and the fingers were straight, it would only operate on the grain half the time.

3. This part of the invention was not infringed.

Fourteenth Exception.—Unreasonable neglect to file a disclaimer under the ninth section of the act of 1837, is a question of fact for the jury.

Fifteenth Exception.—There was no evidence that Moore had ever constructed a reversed-cut sickle in the manner deseribed in the patent of plaintiff, nor that he had ever made one in any manner which was successful—the only claim being, that in 1836–'37 he had made a reversed-cut sickle, and had never seen one before, while the plaintiff had done the same thing in 1834. There was therefore no fact for the jury to find, and it would have been erroneous if the court had submitted an hypothesis unsupported by evidence for their decision.

The construction of the claim also settled this point, because there was a pretence that such a manner of applying the reversed-cut sickle was old.

Twentieth Exception.—The facts stated in this exception, that Bell's machine operated successfully in 1829 and in 1853, are not evidence from which the jury could legally infer that it had operated successfully in the intermediate period, or any part, for there is no rule which raises a presumption of successful operation out of the facts assumed in the prayer, but rather the contrary, since, if it ever did succeed at all, it most probably never would have been abandoned, and then its continued use to a more recent date would have been quite as easily proved as its use at any prior date.

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 northern district of New York.

The suit was brought by McCormick against Seymour and Morgan, for the infringement of a patent for improvements in a reaping machine granted to the plaintiff on the 31st June, 1845. The improvements claimed to be infringed were—1st, a contrivance or combination of certain parts of the machinery described, for dividing the cut from the uncut grain; and 2d, the arrangement of the reel-post in the manner described, so as to support the reel without interfering with the cutting instrument.

In the course of the trial, a question arose upon the true construction of the second claim in the patent, which is as follows: "I claim the reversed angle of the teeth of the blade in manner described." This claim was not one of the issues in controversy, as no allegation of infringement was set forth in the declaration. But it was insisted, on the part of the defendants, that the claim or improvement was not new, but had

before been discovered and in public use; and that, under the ninth section of the act of Congress passed March 3, 1837, the plaintiff was not entitled to recover cost, for want of a disclaimer of the claim before suit brought; and that, if he had unreasonably neglected or delayed making the disclaimer, he was not entitled to recover at all in the case.

The ground upon which the defendants insisted this claim was not new, was, that it claimed simply the reversed angle of the teeth of the blade or cutters. The court below were of opinion, that, reading the claim with reference to the specification in which the instrument was described, it was intended to claim the reversed angle of the teeth in connection with the spear-shaped fingers arranged for the purpose of securing the grain in the operation of the cutting—the novelty of which was not denied.

The majority of the court are of opinion, that this construction of the claim cannot be maintained, and that it is simply for the reversed angle of the cutters; and that there is error, therefore, in the judgment, in allowing the plaintiff costs.

In respect to the question of unreasonable delay in making the disclaimer, as going to the whole cause of action, the court are of opinion that the granting of the patent for this improvement, together with the opinion of the court below maintaining its validity, repel any inference of unreasonable delay in correcting the claim; and that, under the circumstances, the question is one of law. This was decided in the case of the Telegraph, (15 How., 121.) The chief justice, in delivering the opinion of the court, observed that "the delay in entering it (the disclaimer) is not unreasonable, for the objectionable claim was sanctioned by the head of the office; it has been held to be valid by a circuit court, and differences of opinion in relation to it are found to exist among the justices of this court. Under such circumstances, the patentee had a right to insist upon it, and not disclaim it until the highest court to which it could be carried had pronounced its judgment."

Several other questions were raised in the case, which have been attentively considered by the court, and have been overruled, but which it cannot be important to notice at large, with one exception, which bears upon the fifteenth section of the patent act of 1836.

Bell's reaping machine was given in evidence, in pursuance of a notice under this section, with a view to disprove the novelty of one of the plaintiff's improvements; a description of it was read from "Loudon's Encyclopædia of Agriculture," published in London, England, in 1831. In addition to the description of the machine, it appeared in the work that the

reaper had been partially successful in September, 1828, and 1829.

It also appeared, from the evidence of Mr. Hussey, that he saw it in successful operation in the harvest of 1853.

The court was requested, on the trial, to instruct the jury, that from the facts that Bell's machine operated successfully in 1829 and in 1853, they were at liberty to infer that it had operated successfully in the intermediate period, which was refused. Without stating other grounds to justify the ruling, it is sufficient to say, that the only authority for admitting the book in evidence, is the fifteenth section of the act above mentioned. That section provides, that the defendant may plead the general issue, and give notice in writing, among other things, to defeat the patent, "that it (the improvement) had been described in some public work anterior to the supposed discovery thereof by the patentee." The work is no evidence of the facts relied on for the purpose of laying a foundation for the inference of the jury, sought be obtained.

The judgment of the court below is affirmed, with the qualification, that on the case being remitted to the court below, the taxation of costs be stricken from the record.

Mr. Justice GRIER dissented.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the northern district of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause, excepting that part embracing the taxation of costs in the Circuit Court, be and the same is hereby affirmed with costs. And it is further ordered and adjudged by this court, that this cause be and the same is hereby remanded to the said Circuit Court, with directions to strike from the record the taxation of costs in this cause.

E. G. ROGERS AND L. F. ROGERS, MERCHANTS AND COPARTNERS, DOING BUSINESS UNDER THE NAME AND STYLE OF E. G. ROGERS & CO., PART OWNERS OF THE CARGO OF THE SCHOONER ELLA; POOLEY, NICOLL, & CO., OWNERS OF THE SAID SCHOONER ELLA; J. R. BROOKS AND F. G. RANDOLPH, MERCHANTS AND COPARTNERS, DOING BUSINESS UNDER THE NAME AND STYLE OF BROOKS & RANDOLPH, AND THOMAS SULLIVAN, TRADING UNDER THE NAME OF JOHN HURLEY & CO., PART OWNERS OF THE CARGO OF THE SCHOONER ELLA, APPELLANTS, *v.* THE STEAMER ST. CHARLES, JAMES L. DAY, ADAM WOLF, JOHN GEDDES, JOHN GRANT, ROGER A. HEIRNE, AND ROBERT GEDDES, CLAIMANTS.

Where a steamer ran down and sunk a schooner which was at anchor in a dark and rainy night, the schooner was to blame for having no light, which, at the time of collision, had been temporarily removed for the purpose of being cleansed.

But, inasmuch as the schooner was in a place much frequented as a harbor in stormy weather, and of which the steamer was chargeable with knowledge, it was the duty of the steamer to slacken her speed on such a night, if not to have avoided the place altogether, which could easily have been done.

The fact that the steamer carried the U. S. mail, is no excuse for her proceeding at such a rapid rate.

The case must therefore be remanded to the Circuit Court, to apportion the loss.

Where the decree was for a less sum than two thousand dollars, the appeal must be dismissed for want of jurisdiction.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana, sitting in admiralty.

It was a case of collision under the circumstances stated in the opinion of the court.

It was argued by *Mr. Benjamin* for the appellants, and *Mr. Nelson* for the appellees.

Mr. Benjamin made the following points:

I. The undisputed facts are as follows: The Ella was at anchor; the night was dark and rainy; the hour of the collision was about half-past eleven, P. M.; the St. Charles was running at a speed of eight or nine miles an hour, *at least;* the collision occurred by the steamer's running at that rate of speed against a vessel at anchor in a dark night.

II. We allege that the Ella was anchored in a proper place, and out of the track usually pursued by steamers from New Orleans to Mobile or Pensacola.

III. The Ella had her light out in the customary manner. This is proven by a number of witnesses, and their testimony

is not to be overthrown by the oath of witnesses on the steamer, *that they did not see it.*

IV. It was extreme imprudence in the St. Charles to run at her rate of speed in a dark night, in waters crowded with small vessels in a place where they usually anchor. The speed is stated by the witnesses at ten or eleven knots an hour, eight or nine knots, and ten knots. Yet this speed was not checked, although several vessels were confessedly anchored together where the Ella was, all with lights displayed.

The points taken in *Mr. Nelson's* brief were the following, viz:

By referring to the report of the commissioner and the decree of the District Court, it will be perceived that the claim of Brooks & Randolph is for the sum of eight hundred and thirty-five dollars and five cents, and that of John Hurley & Co. thirteen hundred and sixty-eight dollars and ninety-eight cents, sums insufficient to sustain the jurisdiction of this court, and that this appeal, as far as concerns them, must be dismissed. 6 Peters, 143; Oliver *v.* Alexander, &c.

With regard to the remaining libellants, the appellees will maintain that, upon the evidence, it is clear that the collision complained of was in no wise attributable to the fault or negligence of those navigating the steamer, but was the result of a want of care on the part of the schooner, and that the decree of the Circuit Court ought to be affirmed.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the eastern district of the State of Louisiana, sitting in admiralty.

The libel was filed in the District Court to recover the value of a quantity of merchandise on board the schooner Ella, which was sunk in a collision with the steamer on Lake Borgne, some six or eight miles east of the light-ship in Pass Mary Ann, while at anchor on the night of the 5th February, 1853. The District Court rendered a decree charging the steamer with the loss.

On an appeal, the Circuit Court reversed the decree, and dismissed the libel, on the ground that the schooner was in fault in not having a light in the fore-rigging, or in any other conspicuous place on the vessel, to give notice of her position to the approaching steamer.

The night was dark and rainy, and the wind blowing fresh from north-northwest. A proper light had been hung in the fore-rigging early in the evening, and kept there till near the

time of the collision, which happened about half-past eleven o'clock. One of the hands had taken the lamp down to wipe off the water that had collected upon the glass globe, so that it might shine brighter. While he was standing midships, wiping the lamp, he heard the approach of the steamer, and immediately placed it on the top of the cook-house. The collision soon after occurred. The fault lies in removing the lamp for a moment from the fore-rigging to midships. If it was not practicable to wipe it in the rigging, another light should have been placed there on its removal. The time of the removal may be, as happened in this case, the instant when the presence of the light was most needed to give warning to the vessel approaching. All the hands examined who were on board the steamer deny that they saw any light at the time on the schooner.

We agree, therefore, with the court below, that the schooner was in fault.

But it is insisted, on the part of the appellants, that the steamer was also in fault on account of her rate of speed at the time, regard being had to the darkness of the night and the character of the channel she was navigating. The schooner, on coming out of the Pass Mary Ann, towards evening met a strong head wind and swell of the lake, and after pursuing her course some four or five miles, anchored under Cat Island. There were several other vessels at anchor at the time in that vicinity.

Some of the witnesses state that the place is used as a harbor for schooners and other vessels navigating the lake in rough weather, as it is somewhat sheltered from the winds; and the number of vessels at anchor in the neighborhood, at the time of the collision, would seem to confirm this statement, and there is no evidence in the case to the contrary.

There is conflicting evidence on a point made by the appellant, that the steamer was out of the direct and usual course of steamers from Pass Mary Ann to Mobile. The weight of it is, that this course was a mile and a half or two miles north of the place where the schooner lay. But we do not attach much influence to this fact, as in the open lake there was no very fixed track of these vessels within the limit mentioned.

There is also some little discrepancy of the witnesses as to the darkness of the night. But the clear weight of it is, that at the time of the collision it was very dark and rainy, and the wind blowing fresh.

The witnesses on the part of the steamer are very explicit on this part of the case. The pilot says, the night was very dark, and drizzling rain. The captain, that the night was

dark and cloudy, and the wind blowing briskly. The engineer, that the night was so dark, a vessel of the size of the schooner could not be seen at all till upon her, without a light; and yet he says there was nothing in the weather to prevent her running at her usual speed.

The steamer was going, at the time of the collision, at the rate of from nine to ten miles an hour. The pilot says, at her usual rate of speed, or at the rate of eight or nine knots. The engineer, not exceeding the usual rate of speed, which, it appears, averages about ten miles. The mate states, that the speed at the time was between ten and eleven miles.

Now, considering the darkness of the night and state of the weather, and that the steamer was navigating a channel where she was accustomed to meet sailing vessels engaged in the coasting trade between Mobile and New Orleans and the intermediate ports, we cannot resist the conclusion that the rate of speed above stated was too great for prudent and safe navigation; and this, whether we regard the security of the passengers on board of her, or the reasonable protection of other vessels navigating the same channel; and especially under the circumstances of this case, in which she was bound to know that the place where this schooner lay was a place to which vessels in rough and unpropitious weather, navigating this channel, were accustomed to resort for safety. The case presented is much stronger against the steamer than that of casually meeting the schooner in the open waters of the lake. She was at anchor with other vessels in an accustomed place of security and protection against adverse winds and weather, familiar to all persons engaged in navigating these waters. The place and weather, therefore, should have admonished the steamer to extreme care and caution, and it is, perhaps, not too much to say, should have led to the adoption of a course that would have avoided the locality altogether. The weight of the evidence is, even if she had pursued the most direct course from Pass Mary Ann to Mobile, it would have had this effect: she would have passed north of this cluster of vessels anchored under the shelter of the island.

Neither is it at all improbable, if the speed of the steamer had been slackened, and she had been moving at a reduced rate, with the care and caution required by the state of the weather, that she would have seen the light on the schooner in time to have avoided her. The proof is full that there was a light on board from the time she cast anchor till the happening of the disaster. But, at the critical moment, it was in the hand of the seaman at midships, instead of at a conspicuous place in the rigging. The light must have been in some de-

gree visible, as all the sails of the vessel were furled, and was placed on the top of the cook-house as soon as the wet and moisture were wiped from the glass.

The admiralty in England have repeatedly condemned vessels holding a rate of speed in a dark night, under circumstances like the present, and so did this court in the case of the steamer New Jersey, (10 How., 568.) The Rose, 2 Wm. Rob., 1; The Virgil, Ib., 201.

It has been urged, on behalf of the steamer, that she carried the mail, and that a given rate of speed was necessary in order to fulfil her contract with the Government.

This defence has been urged in similar and analogous cases in England, but has been disregarded, and indeed must be, unless we regard the interest and convenience of the arrival of an early mail more important than the reasonable protection of the lives and property of our citizens.

Having arrived at the conclusion that the steamer was in fault, the case is one for the apportionment of the loss.

The decree must therefore be reversed, and the case remitted to the court below, for the purpose of carrying this apportionment into effect.

POOLEY, NICOLL, & Co.,
v.
THE STEAMER ST. CHARLES.

The decree of the court below is reversed, for the reasons given in the case of E. G. Rogers & Co. *v.* the same steamer, and remitted to the court for an apportionment of the loss.

BROOKS & RANDOLPH
v.
THE STEAMER ST. CHARLES.

The appeal in this case is dismissed for want of jurisdiction; the decree in the court below being for a sum less than $2,000.

JOHN HURLEY & Co.
v.
THE STEAMER ST. CHARLES.

The appeal is dismissed for want of jurisdiction; the decree of the court below being for a sum less than $2,000.

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 the opinion of this court that the appeals of Brooks & Randolph, and Hurley & Co., should be

dismissed for the want of jurisdiction, on the ground that the amount in controversy in each of the said cases is less than $2,000; and it is also the opinion of this court that the steamer St. Charles was in fault, and that the decree of the said Circuit Court in the cases of E. G. Rogers & Co., and Pooley, Nicoll, & Co., should be reversed, and the cause remanded for an apportionment of the loss on these two appeals. Whereupon, it is now here ordered, adjudged, and decreed, by this court, that the appeals of Brooks & Randolph, and of Hurley & Co., be and the same are hereby dismissed for the want of jurisdiction; and that the decreee of the said Circuit Court in the cases of E. G. Rogers & Co., and Pooley, Nicoll, & Co., be and the same are 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, and as to law and justice shall appertain.

PIERRE FELIX COIRON AND MARIE J. T. COIRON, A MINOR, BY HER NEXT FRIEND, PIERRE FELIX COIRON, APPELLANTS, *v.* LAURENT MILLAUDON, EDWARD SHIFF, SYNDICS, &C., OF ALEXANDER LESSEPS, ET AL.

Where a sale of mortgaged property in Louisiana was made under proceedings in insolvency, and the heirs of the insolvent filed a bill to set aside the sale on the ground of irregularity, it was necessary to make the mortgagees parties. They had been paid their share of the purchase money, and had an interest in upholding the sale.

The fact that such persons are beyond the jurisdiction of the court is not a sufficient reason for omitting to make them parties.

Neither the act of Congress nor the 47th rule of this court enables the Circuit Court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree, and the objection may be taken at any time upon the hearing or in the appellate court.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana, sitting as a court of equity.

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

It was submitted on a printed argument by *Mr. Hunt* and *Mr. Ogden* for the appellants, and argued by *Mr. Benjamin* for the appellees.

The point upon which the case was decided was thus stated by *Mr. Benjamin:*

I. There is an absence of the parties indispensable in the suit. The complainants seek to set aside a sale made by the

creditors of Coiron, through the agency of their syndic, to Millaudon and Lesseps.

In order to do this, both vendor and vendees must be parties. Shields *v.* Barrow, 17 Howard, 131.

It is obvious, that if the sale complained of be set aside, the effect would be to entitle the defendants to recover back their money from the syndic or the creditors, and to entitle the creditors to take back the property, and have it regularly sold in satisfaction of their claims.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the district judge, sitting in the Circuit Court of the United States for the eastern district of Louisiana.

The bill was filed in the court below, by two of the heirs of J. J. Coiron, against Alexander Lesseps, Laurent Millaudon, and others, to set aside a sale of a plantation and slaves to the two defendants named, in 1834, in pursuance of proceedings in a case of insolvency before a parish court in the city of New Orleans.

The father of the complainants, having become insolvent in 1833, applied to the court for liberty to surrender his property for the benefit of his creditors, and that in the mean time all proceedings against his person or property might be stayed, which application was granted, and the surrender of his property accepted.

Theodore Nicolet was appointed syndic of the creditors, and such proceedings were had, that a sale of the plantation and slaves was directed in March, 1834, when the two defendants became the purchasers. The inventory of the debts of the insolvent, which accompanied his application to the parish court, exceeded $177,000, and of his assets, $137,000. The assets sold for some $77,000; and after satisfying the charges and expenses of the proceedings, the balance was distributed among the creditors under the direction of the court. This amount, some $60,000, fell short of satisfying the claims of the two principal creditors, Van Brugh Livingston, and Harriet, his wife, of New York, and the firm of Nicolet & Co., of New Orleans, which were secured upon the estate by mortgages.

The object of this suit is to set aside the sale on the ground of irregularities in the insolvent proceedings, which are set forth in detail in the bill.

The court below, after hearing the case upon the pleadings and proofs, decreed against the complainants and dismissed the bill.

The record is quite voluminous, but we have stated enough

of the facts to present the questions upon which we shall dispose of the case.

According to the law of Louisiana, on a surrender by the insolvent of his property for the benefit of creditors, the estate vests in the latter sub modo, and is disposed of by them through the agency of the syndic, under the supervision and control of the court before whom the proceedings take place. 2 Rob. R., 193, 194.

They appoint the syndic and fix the terms and conditions of the sale, and have the charge of the estate in the mean time between the surrender and final disposition.

The creditors, therefore, are the parties chiefly concerned in these proceedings; and as it respects those to whom the proceeds of the estate have been distributed, they are directly interested in upholding the sale; for, if it is set aside, and the proceedings declared a nullity, they would be liable to refund the share of the purchase money each one had received in the distribution.

A court of equity, in setting aside a deed of a purchaser upon grounds other than positive fraud on his part, sets it aside upon terms, and requires a return of the purchase money, or that the conveyance stand as a security for its payment. 1 J. Ch. R., 478; 4 J. R., 536, 598, 599.

This constitutes the essential difference between relief in equity and that afforded in a court of law. A court of law can hold no middle course. The entire claim of each party must rest, and be determined at law, on the single point of the validity of the deed; but it is the ordinary case in the former court, that a deed not absolutely void, yet, under the circumstances, inequitable as between the parties, may be set aside upon terms.

Nicolet & Co., and Van Brugh Livingston and wife, the mortgage creditors, or their legal representatives, were therefore necessary parties to the bill, as any decree made in the case disturbing the sale may seriously affect their interests.

This objection has been anticipated in the bill, and an averment made that these parties were out of the jurisdiction of the court. But it is well settled, that neither the act of Congress of 1839, (5 U. S. Stat. at Large, 321, sec. 1,) nor the 47th rule of this court, enables the Circuit Court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree, and that the objection may be taken at any time upon the hearing, or in the appellate court. 17 How., 130; 1 Peters, 299.

We think the decision of the court below was right in dismissing the bill, and therefore affirm the decree.

REUBEN L. LONG, JOHN S. PENRISE, AND AMELIA PENRISE, HIS WIFE, AND ALICE PENRISE, BY HER GUARDIAN, JOHN S. PENRISE, COMPLAINANTS AND APPELLANTS, *v.* JOHN O'FALLON.

Where an administrator sells property which had been conveyed to him for the purpose of securing a debt due to his intestate's estate, his failure to account for the proceeds amounts to a devastavit, and renders himself and his sureties upon his administration bond liable; but it does not entitle the heirs to claim the property from a purchaser in good faith for a valuable consideration.

Nor can the heirs, in such a case, claim land which has been taken up by the administrator as vacant land, and for which he obtained a patent from the United States, although such land was included in the conveyance to him.

Moreover, the facts necessary to sustain the plea of the statute of limitations are proved on the part of the defendant in this case, and no charge in the bill discloses a case of exception from its operation.

THIS was an appeal from the Circuit Court of the United States for the district of Missouri, sitting as a court of equity.

It was a bill filed by a part of the heirs of Gabriel Long, (Clara V. Long, one of the heirs, having been left out as a complainant, on account of her residence in Missouri, but made a defendant to an amended bill, after a demurrer had been sustained upon this ground,) under the following circumstances:

In 1799, the Spanish Government surveyed for Antoine Morin a tract of land, fronting on the Mississippi river, supposed to be sixteen arpens in front, having a depth of forty arpens, which, in February, 1809, was confirmed to his widow and heirs, he being then dead. The survey showing, however, that the tract contained more than 640 arpens, that quantity only was confirmed; and the commissioners directed another survey to be made, so as to throw off the surplus on the western side of the tract.

In October, 1809, the Morins conveyed the property to Elijah Smith, who, in September, 1812, conveyed it to Alexander McNair.

In 1817, the survey ordered by the board was made, but the surplus quantity was thrown off from the south side of the tract instead of the west, by which means fractional sections 26, 27, 33, 34, and 35, of townships 46, range 7 east, were reunited to the body of public lands.

In 1820, McNair, being indebted to Gabriel Long, mortgaged to him a tract of one hundred and twenty arpens of land, situated on the river Gingrass, and fronting on the river Mississippi, and bounded southwardly by land formerly owned by Clement B. Penrose, northwardly by the land of Joseph Morin, and westwardly by the land now or formerly owned by Joseph Brazeau, being the same land which he had purchased from

Elijah Smith. The land was three arpens in front, by forty in depth, and was nearly or quite identical with the land thrown out, as above mentioned.

In October, 1822, Gabriel Long died.

In December, 1822, Alexander McAllister took out letters of administration upon the estate of Long, and on the 19th of February, 1823, commenced suit to foreclose the mortgage against McNair, and obtained a decree of foreclosure in October, 1823, and an order to sell the mortgaged premises.

Although somewhat in advance of the chronological order of events, it is proper here to introduce the following admission of counsel, which was filed in the cause:

"It is admitted in this case that Catharine Dodge was the aunt of Mrs. McNair, wife of Alexander McNair. It is admitted that in the inventory of Alexander McAllister, filed by him as administrator of Gabriel Long, deceased, in the county court of St. Louis county, said McAllister charged himself with the following debts, as due to said Long's estate from Alexander McNair, viz: note on McNair, $1,889, drawing 10 per cent.; note on McNair, $100; debt on McNair, $340; in all, $2,329. That in the settlement of said McAllister, as such administrator, in said court, at the February term, 1828, he was credited by the same amounts charged against him in inventory, the same being desperate as he stated in said settlement."

It is admitted that Mrs. Long, wife of Gabriel Long, after his death, married Alexander McAllister; and after his death, she married Abel Rathbone Corbin, and she is still living.

To resume the thread of the narrative.

In March, 1824, Catharine Dodge took out a patent from the United States for fractional sections 34 and 26, making together a little upwards of 128 acres, and being a part of the land thrown out, as above mentioned, and included in the mortgage from McNair to Long.

In August, 1824, the sale of the mortgaged premises took place under a decree of the court, as above mentioned, when McAllister became the purchaser for the sum of one hundred and twenty dollars.

In September, 1824, Catharine Dodge united with McNair in executing a deed, by way of mortgage to McAllister, in order to secure the payment of two thousand six hundred and fifty dollars, admitted to be due from McNair to McAllister, as the administrator of Long. This deed gave to McAllister the power to sell the premises, viz: fractional sections 34 and 26.

In January, 1828, McAllister entered in his own right fractional sections 27, 33, and 35, containing in the whole about

nine acres, and being the residue of the lands thrown out by the survey.

On the 10th of August, 1828, Mrs. Dodge, in consideration of the debt due by McNair to McAllister, secured by the mortgage, above referred to, released to McAllister all her right, title, and interest, in the above premises.

In February, 1833, McAllister and wife conveyed to John O'Fallon, for the consideration of twelve hundred dollars, all that tract of land lying on or near the river Gingrass, in the county of St. Louis, being three arpens in front, by forty arpens, more or less, in depth, forming a superficies of one hundred and forty arpens, without recourse, however, to the grantors for any defect of title.

This was the same land which had been mortgaged by McNair, purchased by McAllister at public sale, and conveyed to him (in part) by Mrs. Dodge. O'Fallon had previously gone into possession of the premises, about the year 1830, under an agreement with McAllister.

In December, 1852, the heirs of Gabriel Long, residing in California and Mississippi, filed their bill against O'Fallon, on the equity side of the Circuit Court of the United States for Missouri. The bill alleged that McAllister, being administrator of Gabriel Long, and purchasing the mortgaged property, had thereby become a trustee for the use of the heirs; that the deed of conveyance, executed by Catharine Dodge, to secure debts due to McAllister and the estate of Long, enured to the benefit of the heirs of Long, as did also the patent for the three fractional sections taken out in his own name by McAllister; that he had never accounted with the heirs for the $120, which was the purchase money of the mortgaged property; that O'Fallon was a purchaser with notice, in fact and in law, and that the sale made to him by McAllister and wife was fraudulent in fact and in law; and that thereby O'Fallon became a trustee for the heirs of Long to the same extent that McAllister was bound to them.

The defendant, O'Fallon, filed his answer, in which, amongst other matters, he denied that he was a purchaser with notice, asserting, on the contrary, that when he purchased said real estate described in the two deeds made by said McAllister to this defendant—one in August, 1828, and the other in February, 1833—and paid the consideration expressed in said two deeds to said McAllister, this defendant had never heard the title of said McAllister, or his right to sell said real estate, questioned; said McAllister always claimed and treated it as his own, and in his own right. If this defendant has had any notice or intimation from any one that said McAllister's title

or right to sell said real estate was questioned or questionable, or that he held or claimed it only in trust for other parties, and not in his own individual right, this defendant would not have purchased said real estate, or had anything to do with it, and certainly this defendant would not have paid the consideration for said real estate that he did, if the title thereto, or right to sell, had been questioned or questionable; for the said price or consideration paid for said real estate to said McAllister, by this defendant, was equal to the cash value thereof at that time.

The defendant further alleged that he had been in continuous possession, in good faith, under his claim of title, for twenty years and upwards, next before the bill was filed, and set that up as a bar to the claim of the complainants.

After various proceedings in the case, it came up for argument in April, 1855, when the court dismissed the bill with costs.

The complainants appealed to this court.

It was argued by *Mr. Glover* for the appellants, and *Mr. Geyer* for the appellee.

The following notice of the points, on behalf of the appellants is taken from the brief of *Mr. Glover:*

1. The case of the appellants rests upon the doctrine of resulting trusts, aided by that of fiduciary relation. An administrator who purchases land under a judgment in favor of the intestate, holds it as a trustee. It must be intended that an administrator so purchasing, does so at the request and for the benefit of the heirs. He is a trustee for the heirs, and cannot divest himself of the trust.

And the *cestui que trust* may take the land at his election. Fellows *v.* Fellows, 4 Cowen, 698, 704, 706.

One Hedden purchased at an executor's sale part of the property sold, for the separate use of the executor's wife. The purchase was at public auction, and for a fair price.

Held that no fraud or unfairness need be shown, but that the sale was void at the pleasure of the persons interested, and if they said so the sale must be set aside. Davon *v.* Fanning, 2 J. Ch. R., 252.

We have been unable to find any one well-considered case to sustain the right of an executor to become the purchaser of property which he represents, or any portion of it, even at a fair price at public sale, without fraud. Michond *v.* Girod, 4 Howard, 557. This case states all the reasons of the rule.

Where lands in the hands of a party stand affected with a trust, and the person in whose hands they so stood has sold

them to a third person, the *cestui que trust* has the right to follow the lands into the hands of any one but an innocent purchaser. And the trustee cannot deprive him of this right. Oliver *v.* Piatt, 3 Howard, 401.

Meyer conveyed his property in trust to pay debts. Part of it was sold under an execution in the control of the trustee, and bought by him.

Held, the purchaser took in trust for the beneficiary. Harrison, administrator, et al., *v.* Mock et al., 10 Ala. R., 185.

If an agent discovers a defect in the title to the land of his principal, he cannot misuse it to acquire a title to it himself. Ringo *v.* Burnes, 10 Peters, 281.

Where the trustee aliens the land *pendente lite*, the *cestui que trust* may elect to take the land, or the money it sold for. Murray *v.* Lylburn, 2 J. Ch. R., 422.

The *cestui que trust* may affirm the sale, and take the property, or have a resale. Thorp et al. *v.* McCullum et al., 1 Gilman Ill. R., 614.

It seems the beneficiary has three courses he may pursue in his election. 1. He may set aside the purchase, and have a resale. 2. He may affirm it, and take the property as his own. 3. He may take the money.

That the *cestui que trust* has this election only shows that he owns the property.

2. That O'Fallon knew how McAllister came by the propty, and that he held it in trust for the persons interested in the estate of Gabriel Long; they having paid the purchase-money is manifest from the title-papers themselves.

3. The article of agreement between O'Fallon and McAllister, dated August 12, 1828, recites that on the 9th August, 1828, McAllister relinquished to O'Fallon the title procured from Mrs. Dodge in August, 1828. This date of the "9th" is a manifest mistake, because the deed of Mrs. Dodge, in August, 1828, was made 10th of August, and could not therefore have been recited by a conveyance on the 9th. Besides, this part of the instrument was no evidence against the plaintiffs. The agreement was valid to show a sale to O'Fallon on the 12th, but not evidence of the recited matter against the appellants.

4. On the sale to McAllister, in 1824, the property in dispute was held by him in trust. On the 10th August, 1828, after the release of Mrs. Dodge, the property in dispute was held by him in trust. And if he did, as recited in the instrument of August 12, 1828, sell the interest gotten of Mrs. Dodge, on the 10th, to O'Fallon, he had no power to divest the title of Long's heirs thereby.

5. The entries by McAllister, in January, 1828, were in fraud of the rights of the heirs of Long, and enured to their benefit.

It is impossible to conceive the ground on which the Circuit Court dismissed the bill, as to these entries. McAllister, who held the property as administrator, and who in this way learned of the defects in the title, went into the market and purchased up, *on his own mere motion*, an outstanding title to the trust estate. See Hoffman's Ch. R., 195; De Bevoix *v.* Sandford, 5 Vesey, 678; 3 Mer., 200; 13 Vesey, 601.

6. The property when vested in McAllister being in equity, the property of Long's heirs could only be sold by proceedings in the Probate Court, in conformity with the statute law. See Revised Code of Missouri, 1825, vol. 1, pp. 106, 40, 41.

7. The statute of limitations is not applicable to the case, or if it is, it did not begin to run till the deed to O'Fallon in 1833, which was the first repudiation of the trust by McAllister.

Mr. Geyer, for the defendant in error, made the following points:

I. The sale in August, 1824, under the decree of the St. Louis Circuit Court, was not a sale of any property belonging to the estate of Gabriel Long, nor was it a sale made by the administrator, nor under his direction or control; and therefore the purchase by the administrator was not a breach of any trust, nor did he become, in fact or law, a trustee for the heirs of Gabriel Long.

According to the laws of Missouri, Gabriel Long had no estate in the land embraced by the mortgage deed. The land was held as a security for the debt, and could be subject to sale only as the property of the mortgagor, and in the mode adopted by the administrator—by decree of a court—the sale to be made by the sheriff.

An administrator may buy goods of his intestate at sheriff's sale, (Haddix *v.* Haddix, 5 Lett., 204;) and so at an open and public sale, without fraud, an executor may purchase the property of his testator. Drayton *v.* Drayton, 1 Dessess., 567; Anderson *v.* Fox, 2 Hen. and M., 245; McKey *v.* Young, 4 Hen. and M., 430; Hudson *v.* Hudson, 5 Hen. and M., 180.

A person who had married a widow and administratrix, and was acting guardian of the minor heirs, was held to have a right to purchase the estate at full price at public sale directed by the court for the purpose of partition. McGuire *v.* McGowen, 4 Desaces, 486.

The case of Fillows *v.* Fillows (4 Cowen, 698, 704, 706) has

been cited as authority to sustain the position of the appellant, that an administrator, who purchases land under a judgment in favor of the intestate, holds it as a trustee for the heirs, and cannot divest himself of the trust; and there is a marginal note to that effect, but it is not warranted by the opinion. In that case, the complainants sued as administrators, and set up the interest in the property as such, against persons not heirs, who demurred to the bill on the ground that the complainants came in two capacities, a part of the property having been purchased by them at sheriff's sale, under a judgment in favor of their intestate. The court regarded the complainants as having averred substantially that they purchased as administrators, and it was not for the defendants to question their authority; and Judge Southerland said, "It is to be presumed, at this stage of the cause, that they purchased at the request and for the benefit of the heirs, and a court of equity would compel them to account to the estate."

The right of an executor or administrator to purchase on his own account the property of his testator or intestate, at a judicial sale under the order or process of a court, has been questioned; but there is no adjudged case, it is believed, in which it has been held that an executor or administrator may not purchase property of others at a public judicial sale, under a decree, judgment, or process, in favor of the testator or intestate, or of his personal representatives.

II. No estate or interest in the land in controversy was vested in the heirs of Gabriel Long by virtue of the tripartite deed of the 1st September, 1824, nor by the deed of Catherine Dodge to Alexander McAllister, of 10th of August, 1828.

The first of these deeds is a mortgage in trust for sale; under it, McAllister, as mortgagee, held the land to secure the debts due to the estate of Long, with power, in case of default in the payments stipulated for, to make sale absolutely, at public or private sale, of the land embraced; the proceeds to be applied first to the payment of the principal and interest of the debt, and the residue, if any, to be paid over to Mrs. Dodge—McAllister held the estate as trustee for Mrs. Dodge, subject to the debt due from McNair to Long's estate. The personal representatives of Long, not his heirs, held the security for the debt, and were entitled to enforce it.

Before the execution of the second deed, McAllister made a settlement of his accounts, as administrator of Gabriel Long's estate, and was credited with the amount of McNair's debts, as desperate, so that he was no longer charged therewith as administrator; but undoubtedly, if he afterwards received anything on account of that debt, by the sale of mortgaged prop-

erty or otherwise, he was bound to account for it as administrator, if received while he continued to act as such, or with his successor, if he had ceased to be administrator.

The land continued to be held as a security for the debt of McNair, when Mrs. Dodge conveyed to McAllister her right to redeem the land which she had purchased from the United States, and mortgaged by the deed of 1st of September, 1824. McNair's right to redeem, however, still remained until the sale made to O'Fallon.

There is no allegation or evidence that McAllister applied any of the assets of the estate of his intestate to the purchase of any part of the land in question, either at the sheriff's sale in 1824, or in consideration of the deeds of Mrs. Dodge in 1824 and 1828; the accounts of the administrator, McAllister, exhibit no charge against the estate for anything paid on account of the land.

At the time O'Fallon became the purchaser, McAllister held in his own right all the estate and interest of McNair and Mrs. Dodge in the land, subject only to the encumbrance created by the tripartite deed of 1st September, 1824, under which he had a complete power of disposition, but was bound to apply so much of the proceeds of any sale as was necessary to the payment of the debt of McNair to Long's estate. That is, at most, the land was subject to a mortgage to secure the debt to Long, which enured to the personal representative of Long, and not an estate held by McAllister in trust for the heirs.

If, therefore, the defendant, O'Fallon, could be regarded as holding the land precisely as it was held by McAllister, he could be required only to satisfy the debt due from McNair to Long's estate, or sell the land and apply the proceeds to the payment; but he does not hold the estate in the land in trust for the heirs of Long; the cause of action, if any, against him, is in the personal representative of Gabriel Long. And, even if the heirs might prosecute an action in a court of equity for a money demand, the interest of Alton Long was not assigned by his deed to Penrise; and the bill was properly dismissed, because the heirs are not the proper parties complainant, and because a part of them only are made parties.

The sale to O'Fallon having been fairly made, and a full consideration paid, the title vested in him discharged of the encumbrance in favor of the personal representative of Gabriel Long created by the deed of 1st September, 1824.

The sale was made after the last settlement by McAllister of his accounts as administrator with the County Court of St. Louis, and it does not appear whether he afterwards accounted for the proceeds of the sale or not. The bill contains no alle-

gation that he failed to account, and it was not put in issue in the cause. But it is clear that McAllister was authorized to make the sale to secure the money and make the conveyance, and there was no obligation on the part of the purchaser to see that he accounted for the proceeds as administrator of the estate of Long. Grant *v.* Hooke, 13 Sergt. and Rawle, 262; 2 Des., 378; Field *v.* Sheiffelin, 7 John. Ch. R., 160.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellants, a part of the heirs of Gabriel Long, deceased, instituted this suit in the Circuit Court against the defendant, to obtain a decree for a title to, and for an account for the rents and profits of, a parcel of land in St. Louis, Missouri.

The case made in the record is, that in 1820, Alexander McNair and wife executed a mortgage deed for the land in controversy to Gabriel Long, to secure a debt not then due. Before its payment, Long died, and Alexander McAllister was appointed to administer his estate. In 1823, this administrator obtained a decree in the Circuit Court of St. Louis county, for a foreclosure of the mortgage, and an order of sale, to be executed after a limited period. This order was executed in August, 1824, by a public sale of the property to McAllister, for a small portion of the debt.

The title of McNair before this sale had entirely failed. The Spanish concession and survey, under which he claimed the land, had been surveyed and located by the officers of the land office so as to exclude this parcel, and, in consequence, it was subdivided into five fractional sections, and was subject to sale as public land. At the date of the sale by the sheriff, two of these fractions, embracing the whole tract except nine acres, were claimed by Catherine Dodge, under a patent from the United States, and the remaining sections were patented to McAllister, as a purchaser, by entry at the land office in 1828.

In September, 1822, Catherine Dodge and McNair agreed to secure the debt due to the estate of Long, by a mortgage in favor of McAllister.

The debt was divided into three unequal instalments, which were to be paid within three years by McNair; and Mrs. Dodge conveyed her two fractional sections, in mortgage, with a power of sale in the event of a default, to secure the performance of the obligation.

McNair failed to make the payments, and in 1828 Mrs. Dodge released to McAllister her equity of redemption and her claim upon him for any surplus from the mortgage, for the consideration of one dollar.

In 1828, the defendant purchased the five fractional sections

from McAllister, for a fair price, and has been in the undisputed possession of the land since 1830. The defendant pleads the statute of limitations in bar of the recovery.

The opinion of the court is, that the conveyances of Mrs. Dodge to McAllister did not invest the heirs of Gabriel Long with an equitable estate, or a particular lien on the property described in them. Their primary object was to create a security, or a fund, for the payment of the debt of McNair, and to enable McAllister to dispose of the land in case of its nonpayment, at his discretion, for its discharge. The release executed in 1828 was not made to extinguish any portion of the debt, nor did it remove the obligation of McAllister to convert the security into pecuniary assets. His sale of the land was a legitimate exercise of the powers of an administrator and trustee, and his vendee was not obliged to look to the application of the purchase-money. (Tyrrell *v.* Morris, Dev. and Batt. Ch. R., 559.) His failure to account was a devastavit, for which he and his sureties are liable on their official bond at law; and probably, if the land had been retained by him, or any person claiming as a volunteer under him, a court of equity might have permitted the heirs to accept the property, instead of the debt due to the estate. But, in the present instance, the defendant is a purchaser in good faith, and is entitled to hold the property, exempt from the claims of the plaintiffs. (Rayner *v.* Pearsall, 3 John. Ch. R., 578.)

Nor can the title of the defendant to the three small fractional sections entered by McAllister at the land office, and which were purchased from him by the defendant after his patent from the United States had been issued, be successfully questioned by the plaintiffs. The estate conveyed to Long by McNair, in mortgage, was known to be without value in 1824. McAllister did not acquire by the sheriff's deed any interest in the land, or profit from his purchase. The land was then a part of the public domain, and subject to entry at the land office, under the laws of the United States. Without considering whether there was any relation between this administrator and these heirs, which precluded the former to purchase the land for his own account, under the principles of equity, we are satisfied that the heirs are not entitled to pursue their claim against a purchaser for value, who has not been guilty of fraud or collusion.

The facts necessary to sustain the plea of the statute of limitations are proved on the part of the defendant, and no charge in the bill discloses a case of exception from its operation. (Piatt *v.* Vattier and others, 9 Pet., 405.)

Decree of the Circuit Court affirmed.

ROMELIUS L. BAKER AND JACOB HENRICI, TRUSTEES OF THE HARMONY SOCIETY OF BEAVER COUNTY, PENNSYLVANIA, AND OTHERS, APPELLANTS, *v.* JOSHUA NACHTRIEB.

The Harmony Society was established upon the basis of a community of property, and one of the articles of association provided, that if any member withdrew from it, he should not claim a share in the property, but should only receive, as a donation, such sum as the society chose to give.

One of the members withdrew, and received the sum of two hundred dollars, as a donation, for which he gave a receipt, and acknowledged that he had withdrawn from the society, and ceased to be a member thereof.

A bill was then filed by him, claiming a share of the property, upon the ground that he had been unjustly excluded from the society by combination and covin, and evidence offered to show that he had been compelled to leave the society by violence and harsh treatment.

The evidence upon this subject related to a time antecedent to the date of the receipt. There was no charge in the bill impeaching the receipt, or the settlement made at its date.

Held, that under the contract, the settlement was conclusive, unless impeached by the bill.

THIS was an appeal from the Circuit Court of the United States for the western district of Pennsylvania, sitting as a court of equity.

It was a bill filed by Nachtrieb, under the circumstances mentioned in the opinion of the court.

The Circuit Court, after having referred the case to a master to state an account, decreed that the trustees should pay to Nachtrieb the sum of $3,890; from which decree the trustees appealed to this court.

It was argued by *Mr. Stanberry* and *Mr. Loomis* for the appellants, and by *Mr. Stanton* for the appellee.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee, who describes himself as a member in the common and joint-stock association for mutual benefit and advantage, and for the mutual acquisition and enjoyment of property, called the "Harmony Society," filed a bill in the Circuit Court against the appellants, as the trustees and managers of its business and estate. The object of the bill is to obtain for the plaintiff a decree for an account of the share to which he is entitled in the property of the society, or compensation for his labor and service during the time he was a member.

In 1819 he became associated with George Rapp and others, in the Harmony Society in Indiana, and remained with them there, or at Economy, in Beaver county, Pennsylvania, till 1846. He devoted his time, skill, attention, and care, during that period, to the increase of the wealth and the promotion of the interest of the society.

These facts are admitted in the pleadings of either party.

The bill avers, that in 1846, the plaintiff being then forty-eight years old, and worn out with years and labor for said association, was wrongfully and unjustly excluded from it, and deprived of any share in its property, benefits, or advantages, by the combination and covin of George Rapp and his associates; that at the time of his exclusion he was entitled to a large sum of money, which those persons unjustly and illegally appropriated to their own use; that George Rapp was the leader and trustee of the association, invested with the title to its property; and that, since his death, the defendants have acquired the control and management of its business and affairs, and the possession of its effects. The plaintiff calls for the production of the articles of association, which from time to time have regulated this society, and prays for an account and distribution of its property, or a compensation for his labor.

The defendants produce a series of articles, by which the association has been governed since its organization in 1805.

They admit, that from small beginnings the society have become independent in their circumstances, being the owners of lands ample for the supply of their subsistence, warm and comfortable houses for the members, and engines and machinery to diminish and cheapen their labors. They affirm that the plaintiff participated in all the individual, social, and religious benefits which were enjoyed by his fellows, under their contract, until he became possessed by a spirit of discontent and disaffection, a short time before his membership terminated. They deny that the plaintiff was wrongfully excluded from the association, or deprived of a share or participation in the property and effects, by the combination or covin of George Rapp and his associates; but assert, that voluntarily, and of his own accord, he separated himself from the society. They deny that he had a title to any compensation for labor and service while he was a member, other than that which was expended for his support, maintenance, and instruction, and that which he derived during the time from the spiritual and social advantages he enjoyed. To support this averment, they epitomize the history of the Harmony Society, and the agreements which, from time to time, have been the basis of its organization.

The society was composed at first of Germans, who emigrated to the United States in 1805, under the leadership of George Rapp. The members were associated and combined by the common belief that the government of the patriarchal age, united to the community of property, adopted in the days of the Apostles, would conduce to promote their temporal and

eternal happiness. The founders of the society surrendered all their property to the association, for the common benefit. The society was settled originally in Pennsylvania, was removed in 1814 and 1815 to Indiana, and again in 1825 to Economy, in Pennsylvania.

The organic law of the society, in regard to their property, is contained in two sections of the articles of association, adopted in 1827 by the associates, of whom the plaintiff was one. They are as follows: "All the property of the society, real, personal, and mixed, in law or equity, and howsoever contributed and acquired, shall be deemed, now and forever, joint and indivisible stock; each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in land, goods, money, or labor, and the same rule shall apply to all future contributions, whatever they may be.

"Should any individual withdraw from the society, or depart this life, neither he, in the one case, nor his representatives, in the latter, shall be entitled to demand an account of said contributions, whether in land, goods, money, or labor; or to claim anything from the society as matter of right. But it shall be left altogether to the discretion of the superintendent to decide whether any, and, if any, what allowance shall be made to such member, or his representatives, as a donation."

The defendants, admitting, as we have seen, that the plaintiff, until 1846, was a contented member of the association, answer and say, that during that year he became disaffected; used violent threats against the associates; made repeated declarations of his intentions to leave the society, and in that year fulfilled his design by a voluntary withdrawal and separation from the society, receiving at the same time from George Rapp two hundred dollars as a donation. They exhibit, as a part of the answer, a writing, signed by the plaintiff, to the following effect:

"To-day I have withdrawn myself from the Harmony Society, and ceased to be a member thereof; I have also received of George Rapp two hundred dollars as a donation, agreeably to contract. JOSHUA NACHTRIEB.

"ECONOMY, *June* 18, 1846."

This statement of the pleadings shows that no issue was made in them upon the merit of the doctrines, social or religious, which form the basis of this association; nor any question in reference to the religious instruction and ministration, or the domestic economy or physical discipline which their leader and the other managers have adopted and enforced.

Nor do they suggest any inquiry into the condition of the members, and whether they have experienced hardship, oppression, or undue mortification, from the ambition, avarice, or fanaticism, of their guides and administrators.

The bill depends on the averments, that the plaintiff approved the constitution of the society; submitted to its government; obeyed its regulations, and prized the advantage of being a member. The burden of his complaint is, that he was wrongfully, and without any fault or consent on his part, deprived of his station through the combination of the leader and his assistants. And the defendants concede the character the plaintiff claims for himself; they concede that the plaintiff was an approved and blameless member of the association, and was entitled to whatever its constitution and order provided for the temporal good or the eternal felicity of the members, and assert that he enjoyed them until he became disaffected and repining, and finally surrendered to a spirit of discontent, which moved him to abandon his condition and privileges. As an evidence of this, they produce a writing, signed by him, in which he acknowledges a voluntary secession from the society, and claims that the case has arisen to authorize him to make an appeal to the bounty of the superintendent, and that the superintendent has answered that appeal by a donation. The value of this writing is now to be considered. The power of the superintendent to substract from the otherwise "joint and indivisible stock" of the society a portion for the individual use of a seceding member, depends upon the concession that the member has withdrawn voluntarily. He cannot supply one who is the victim of covin or combination. The evidence shows that the mind of the plaintiff, in June, 1846, was disquieted in consequence of his connection with the association, and that he contemplated a change in his condition; that he made inquiries upon the expediency of a removal from Economy, and made some preparations for his departure; that the leader of the society, suspecting his discontent, and discovering some deviation by him from the rules of the society, rebuked him with harshness, and menaced him with a sentence of expulsion. Some of the witnesses testify to such a sentence, while the testimony of others reduces the expressions to an admonition and menace. But two days after the occurrence of the last of these scenes, and before any removal had taken place, the writing in the record was executed by him, embodying his decision to leave the society, and to accept the bounty the constitution permitted the superintendent to bestow. This writing would have much probative force, if we were simply to treat it as an admission of the statements it contains, when

considered in connection with other evidence in the record. But, we think, this writing is something more than an admission, and stands in a different light from an ordinary receipt. The writing must be treated as the contract of dissolution, between the plaintiff and the society, of their mutual obligations and engagements to each other. No evidence of prior declarations or antecedent conduct is admissible to contradict or to vary it.

It was prepared to preserve the remembrance of what the parties had prescribed to themselves to do, and expresses their intention in their own language; and that such was its object, is corroborated by the fact that for three years there is no evidence of a contrary sentiment. Treating this writing as an instrument of evidence of this class, it is clear that the bill has not made a case in which its validity can be impeached. To enable the plaintiff to show that the rule of the leader, (Rapp,) instead of being patriarchal, was austere, oppressive, or tyrannical; his discipline vexatious and cruel; his instructions fanatical, and, upon occasions, impious; his system repugnant to public order, and the domestic happiness of its members; his management of their revenues and estate rapacious, selfish, or dishonest; and that the condition of his subjects was servile, ignorant, and degraded, so that none of them were responsible for their contracts or engagements to him, from a defect of capacity and freedom, as has been attempted by him in the testimony collected in this cause, it was a necessary prerequisite that his bill should have been so framed as to exhibit such aspects of the internal arrangements and social and religious economy of the association. This was not done; and for this cause the evidence cannot be considered. The authorities cited from the decisions of this court are decisive. Very *v.* Very, 13 How., 361, 345; Patton *v.* Taylor, 7 How., 157; Crockett *v.* Lee, 7 Wheat., 525.

Decree reversed. Bill dismissed.

JAMES MEEGAN, PLAINTIFF IN ERROR, *v.* JEREMIAH T. BOYLE.

In Missouri, where a deed was offered in evidence, purporting to convey the titles of married women to land, and their names were in the handwriting of other persons, and there was no proof that the women had either signed or acknowledged the deed, it was properly refused by the court to be allowed to go to the jury.

The property was paraphernal, and could not be conveyed away by their husbands.

The facts in the case were not sufficient to warrant the jury to presume the consent of the married women.

The original deed not being evidence, a certified copy was not admissible.
An old will, which had never been proved according to law, was properly excluded as evidence. Moreover, no claim was set up under it, but, on the contrary, the estate was treated as if the maker of it had died intestate.
Neither the deed nor the will come within the rule by which ancient instruments are admitted. It only includes such documents as are valid upon their face.
The statute of limitations did not begin to run until after the disability of coverture was removed.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

Boyle, who was a citizen of Kentucky, brought an action of ejectment against Meegan, to recover a lot within the present limits of the city of St. Louis, in Missouri, which was particularly described in the declaration. There was no dispute about location, and both parties claimed under the title of Francis Moreau. The lot was recommended for confirmation by Recorder Bates, in 1815, and confirmed to Moreau's representatives (he being then dead) by the act of Congress passed on the 29th of April, 1816.

Boyle alleged that a portion of the title remained in Moreau's descendants until 1853, when it was levied upon under a judgment, and sold to him at a sheriff's sale. On the other hand, it was the effort of Meegan to show that these descendants had parted with their title by deed, or that Moreau had willed away the property a long time before the sheriff's sale. The portion of the title which Boyle claimed was the entire share of Angelique, one of Moreau's daughters, who married Antoine Mallette, about 1804 or 1805; the shares of two of Moreau's grand-daughters, being the children of his daughter Helen, who had married Pierre Cerré, said grand-daughters having married, one of them Pierre Willemin, and the other Felix Pingal. Boyle also claimed the derivative share which these persons were entitled to as the heirs of two of Moreau's children, whose title was alleged to have remained vested in them at their deaths, without issue. One of these deceased children was Marie, who had married Collin.

The judgment under which Boyle claimed was recovered, in 1852, against Angelique Mallette, then a widow, (the daughter of Moreau,) Pierre Willemin and Melanie Cerré, his wife, (a grand-daughter of Moreau,) and Felix Pingal and Josephine Cerré, his wife, (another grand-daughter of Moreau.)

Upon the trial, Boyle offered in evidence the certificate of the recorder of land titles in Missouri, the survey, the confirmation, and the pedigree of Moreau's family, with the dates of the deaths which had taken place. He then gave in evidence the sheriff's deed to himself, and proved that Meegan had been in possession of the premises since 1839.

The line of defence was to show that the title had passed out of Moreau's heirs to a person named Chouteau, and from him to Mullanphy, who had been in possession since 1820. For this purpose, a paper was offered in evidence, purporting to be a deed from Moreau's heirs to Chouteau, dated September 3d, 1818. It had attached to it the names of three of the daughters of Moreau, (amongst other signatures,) viz: Marie Collin, Angelique Moreau, and Ellen Moreau. It had also the signatures of the husbands of the two last, viz: Antoine Mallette, the husband of Angelique, and Pierre Cerré, the husband of Ellen or Helen. Marie Collin's name was written; the others made their marks. It was proved that her name was in the handwriting of her husband, Louis Collin; the names of Antoine Mallette and Pierre Cerré were in the handwriting of Guyol, and that of Ellen Moreau, the wife of Pierre Cerré, was in the handwriting of Hawley. John O'Fallon testified that he became the executor of Mullanphy in 1833, and that this deed was received by him amongst the other title-papers of Mullanphy. The defendant then offered to read the deed in evidence.

To the admission of which the plaintiff objected, because the deed was not signed or acknowledged by Marie Collin, Angelique Mallette, and Helen Cerré, under whom he claims, and because there was no proof that it had been executed by them under whom he claimed, and because the deed did not convey or pass the title of Mrs. Collin, Mallette, and Cerré, under whom he claims; which objections were sustained by the court, and the same was not admitted in evidence; to which ruling of the court the defendant excepted.

The defendant was allowed to read in evidence a deed from Chouteau and wife to Mullanphy, dated 30th October, 1819, to which the plaintiff did not object, because, if Chouteau had no title, he could convey none to Mullanphy.

The defendant then offered a certified copy of the deed from Moreau's heirs to Chouteau, to the admission of which the plaintiff objected, for the same reasons urged against the original deed. The objection was sustained, the copy excluded, and the defendant excepted.

The defendant then offered a paper purporting to be the will of Francis Moreau, executed on 2d of August, 1798, before sundry official persons, by which he made his son, Joseph Moreau, his universal legatee.

To the admission of which the plaintiff objected, because the will had not been probated or proved in any lawful manner; because the conditions were not proved to have been complied with; because the Spanish law authorized no such disposition

of property as therein made; and because there was evidence before the court to show that the devisee had not accepted the estate under the will, but had renounced it, which objections to the will were sustained by the court, and the will was not admitted in evidence, to which ruling of the court the plaintiffs then and there excepted. At the same time the will was offered, sundry deeds and documents were read in evidence, the purport of which was to show that the estate of Francis Moreau was treated, after his death, as if he had died intestate.

The defendant then prayed the court to give the following instructions to the jury:

1. If the jury find that Francis Moreau, in his lifetime, was the owner of the lot in controversy, that he died prior to 1804, and that his two daughters, Mrs. Mallette and Mrs. Cerré, took their husbands prior to 1804, then the several interests of said daughters in said lot became, upon their marriage, and was their paraphernal property.

2. If the jury find as mentioned in instruction No. 1, and further find that, in the year 1818, Mallette and Pierre Cerré, husbands of said daughters, made the deed read in evidence by the defendants, then, under the evidence in this cause, the jury may presume that said daughters gave the administration of said paraphernal property to their husbands, and that the same was alienated with their consent.

3. If the jury find as mentioned in instruction No. 1, and further find that the defendants and those under whom they claim have had open and continued possession of the lot in question for thirty years and more before the bringing of this suit, claiming to own the same, then the plaintiff cannot recover any interest in said lot, derived by Mrs. Mallette or Mrs. Cerré from their said father.

If Mrs. Pingal was dead, leaving a child, at the time of the sheriff's sale, under which plaintiffs claim, and during all the time of the coverture of said Mrs. Pingal, the lot in controversy was in the possession of the defendants, and those under whom they claim holding the same adversely to Mrs. Pingal and her husband, and there never was any entry on the part of the wife or husband, then the plaintiff derived no title to the lot in controversy, under Mrs. Pingal or her husband.

The court gave the instruction No. 1, and refused the others, whereupon the defendant excepted.

The jury found the following verdict:

"We find the defendant guilty of the trespass and ejectment complained of, as to two-fifths undivided of all the block of land, part of the premises demanded, lying in the city of St.

Louis, bounded north by the north line of the Moreau arpent, being survey No. 1,480; south by the south line of said survey, 1,480; east by Seventh street; west by Eighth street, excepting only the two lots No. 7 in said block, as shown by the proceedings in partition between the heirs of John Mullanphy, deceased; and we assess the plaintiff's damages, sustained by the plaintiff by the said trespass and ejectment, at the sum of ten dollars, and find the monthly value thereof to be one dollar; and the defendant is not guilty as to the residue of the premises demanded."

The case was argued in this court by *Mr. Geyer* for the plaintiff in error, and *Mr. Williams* and *Mr. Crittenden* for the defendant.

Mr. Geyer made the following points:

The plaintiff in error submits that the Circuit Court erred in rejecting the documentary evidence offered by him at the trial.

1. The instrument, purporting to be the deed of the heirs of Moreau to Chouteau, dated 3d September, 1818, and that offered as the act of Pierre Reaume and wife, dated 6th November, 1819, ought to have been admitted in evidence.

The execution of the last-mentioned deed was fully proved by proof of the death of the subscribing witnesses and their handwriting. (See Sarpy's evidence, p. 17.)

Both instruments were more than thirty years old at the time of the trial, and proved themselves. The bare production of them was sufficient to entitle them to be read as the deeds of the parties whose acts they purport to be. (1 Greenl. Ev., sec. 21, p. 142.)

The presumption of the due execution of these instruments is moreover corroborated by the facts and circumstances in evidence at the trial: 1. It is proved that several of the parties collected at St. Louis from other places, for the purpose of making a conveyance of their interest in the land, at about the time of the date of the first instrument, and afterwards declared that they had sold to Pierre Chouteau. 2. The existence of the deed soon after is established by the official certificates appended. 3. The title of Chouteau, as derived from the heirs of Moreau, is recited in his deed to Mullanphy, executed, acknowledged, and recorded, in 1819. 4. Both the instruments rejected by the court were recorded in the proper office, and were in the possession of Mullanphy, under whom the defendant below claimed more than thirty years before the trial. 5. Mullanphy, the grantee of Chouteau and those claim-

ing under him, have been in undisturbed possession of the land, claiming under those deeds, more than thirty years. 6. All the parties grantors, except Alexis and Joseph Moreau, resided in the county of St. Louis, and no one of them ever set up a claim to the land. (See 1 Greenl. Ev., sec. 21, pp. 143, 144, 570, and cases there cited; Gray *v.* Gardner, 3 Mass. R., p. 399; Coleman *v.* And., 10 Mass. R., p. 105; Spoler *v.* Brown, 6 Binney, p. 435; Lee *v.* Tapscott, 2 Wash. R., 276; Doe ex dem. Clinton *v.* Phelps, 9 Johns., p. 169; Same *v.* Campbell, 10 do., p. 475; Newman *v.* Studley, 5 Mo. R., p. 291.)

If the antiquity of the instrument, together with the facts and circumstances disclosed at the trial, were not absolutely conclusive of their due execution, they at least afford a fair and reasonable presumption of that fact, and ought to have been referred to the consideration of the jury, to whom alone it belonged to determine upon the precise force and effect of the circumstances proved, and whether they were sufficiently satisfactory and convincing to warrant them in finding the fact. (1 Phillips Ev., p. 437.)

The fact, if it had been found by a jury, or admitted, that the deed of 3d September, 1818, was "not signed or acknowledged by Marie Collin, Angelique Mallette, and Helen Cerré, and had not been executed by any person under whom the plaintiff claims," would not authorize the rejection of the deed: it being admitted, and very fully proved, that it was duly executed by other parties having title as tenants in common in the land.

The plaintiff exhibited no conveyance or other evidence of title from Marie Collin; and, if her interest was not conveyed by the deed of 1818, it passed on her death (she having died without issue) to her brothers and sisters, and their descendants. Nor does he derive title under Angelique Mallette, or Helen Cerré, by any act of theirs, or of their representatives. His claim is founded on a sheriff's sale on execution (without any judgment produced) against Angelique Mallette, Pierre Willemin, and Malanie Cerré, his wife, Felix Pingal, and *Josephine Cerré, his wife*, by her guardian, which Malanie and Josephine are two of three surviving children of Helen Cerré. The latter, *Josephine*, was probably dead at the time of the sale, and, if living, an infant. At most, the plaintiff could claim only one share and two-thirds of another. And it was competent for the defendant to give in evidence conveyances from the other parties in interest.

The deed of 3d September, 1818, was duly acknowledged by Joseph Ortiz, and Eleanor, his wife, Joseph Minard, Auroria,

his wife, and the execution of it was proved at the trial by proof of the handwriting of Thomas R. Musick, in whose presence it was signed and acknowledged. The execution of the deed of Reaume and wife is proved beyond controversy. Joseph Minard, Eleanor Ortiz, and Marceline Reaume, are the children and heirs of Marie Louise Minard, deceased, who was a daughter of Francis Moreau, and wife of Joseph Minard, deceased.

The execution of the same deed by Alexis Moreau, and by Joseph Moreau, is established by the evidence of Osille Andre, the widow of Alexis Moreau, and by the declarations of both Alexis and Joseph, in the presence of other witnesses.

But it is sufficient, if the deed was executed by any one of those having title under Francis Moreau, to entitle the defendant to read it in evidence. If admitted, the plaintiff could not have recovered, there being no proof of an actual ouster, or any act equivalent. (Rev. Code of Mo., 1845, Tit. Ejectment, s. 11.)

2. The will of Francis Moreau, being one of the archives of the Spanish Government deposited in the office of the recorder of St. Louis county, and therein recorded and duly certified, was competent evidence by the statute law of Missouri. (Rev. Code, 1845, Tit. Evidence, s. 12.)

This document is what is called an open testament, being dictated *viva voce.* It was made before the commandant in lieu of a notary, in the presence of a sufficient number of witnesses, and afterwards deposited and preserved among the archives of the Government, and needed no probate to give it effect. (Partidas, L. 3, T. 1, b. 6; Novis'a Recop., L. 1, T. 18, b. 10; Schmidt's Civil Law, Tit. 7, chapter 5.)

In Upper Louisiana, the commandants of the posts, or some one designated by the Lieutenant Governor, were substituted for the notaries, and their acts have always been regarded as notarial acts, and of the same effect. (See McNare *v.* Hunt, 5 Mo. R., 300.)

The will contains no condition precedent to the operation of the clause by which Joseph Moreau is instituted universal heir, and if it did, proof of performance would not be a necessary preliminary to the admission of the document in evidence. The will is not void on account of the institution of a universal heir—the effect is only to give to him that portion of the estate disposable by testamentary donation, which in this case is one-third; the residue will pass to the heirs *ab intestato.* The acceptance of the donation by the instituted heir is not more necessary than the acceptance of the succession by the legal heirs—in either case, it may be express or implied—and when

material, is a question of fact for the jury. (Schmidt's Civil Law, Tit. 7, ch. —, art. 1059; chap. 8, art. 1177, Tit. 8. c. 5; Novis. Recop., L. 1, T. 18, b. 10; 18th Law of Toro.; Partidas, L. 11, 13, 15, Tit. 6, b. 6.)

The following points are taken from the brief of *Mr. Williams*, counsel for defendant in error:

It was conceded at the trial, that the property vested in the daughters in this way was *paraphernal*, according to the code of laws lately prevailing here. "A succession accruing to the wife during marriage is her paraphernal property, which she may administer without the authorization, consent, or interference, of her husband." (Flower *v.* O'Conner, 8 Martin, n. s., 556; Savenat et al *v.* Le Breton, 1 Lousi. R., p. 520.) This species of property could not be sold by the husband without the consent of the wife. (O'Conner *v.* Barre, 3 Martin, Lousi. R., 455.) The property a woman inherits during marriage is paraphernal. (Allen *v.* Allen, 6 Rob. R., 104.) The woman is accustomed to bring, besides her portion, (dot,) other property, which is called *paraphernalia*, and which is, or *are*, the property and things, whether (muebles) personal or (rèeles) real, which wives retain for their separate use. From this definition, it follows: 1. That if the wife gives to the husband this property, with the intention that he may have the dominion (senorio) of it, he shall possess it during marriage; and if she should not do this expressly in writing, the dominion of such property shall always be in the wife. (1 White's New Recopilacion, p. 56.) On same page, Note 33, it is said that Palacios questions the necessity of a writing, but says it *must appear that the wife made a gift to her husband*, with the intention of giving him dominion over it.

2. The supposed deed of Angelique Mallette, Marie Collin, and Helen Cerré, was properly excluded from the jury as a conveyance of their property.

1. The supposed deed was not valid under the Spanish law, as to Marie Collin, because her husband did not execute it.

2. It was not valid as to either of the women, because it does not appear that either of them ever signed it or assented to it, nor that either of them ever knew of its existence in the life of her husband; nor does it appear that either of them ever gave her husband the property or power to sell it.

3. That the supposed deed was not valid under the common law, which was introduced into the Territory January 19, 1816, is too obvious for comment. (1 Ter. Laws Missouri, p. 436.)

4. The facts in evidence did not authorize any presumption of the execution of the instrument by the married women. It

was insisted at the trial, that the supposed deed should be admitted, that it might be submitted to the jury, whether, under all the evidence in the cause, they would not presume a conveyance by them to the parties in possession. The position on the other side was this: That if the husband conveys the wife's lands, and possession is taken under the conveyance, and is continued for thirty years, and is open and notorious, and then the husband dies, any subsequent claim by the wife is overturned by the presumption of fact arising on these circumstances, that she has conveyed the property. To our minds this is a monstrous proposition. The discussion of it is undertaken with the apology, that it was pressed with a great deal of zeal at the trial, and is, perhaps, to constitute the principal point in the cause in this court. Nothing is more intelligible than the principle on which a conveyance is *presumed.* It is well stated, as follows: "The rational ground for presumption is, when the conduct of the party out of possession cannot be accounted for without supposing that the estate has been conveyed to the party in possession." (Kingston *v.* Lesly, 10 S. and R., 391.) "It is founded on the consideration, that the facts and circumstances are such as could not, according to the ordinary course of human affairs, occur without presuming a transfer of title, or an admission of an existing adverse title in the party in possession." (Jackson *v.* Porter, Paine R., 489.) "The presumption may always be rebutted by showing that the possession held or privilege exercised was perfectly consistent with the right or interest of the party who afterwards sets up the adverse claim." (Daniel *v.* North, 11 East R., 372.) "And this presumption in favor of a grant, and against written evidence of title, can never arise from mere neglect of the owner to assert his rights, where there has been no adverse title or enjoyment by those in whose favor the conveyance is to be presumed." (Schauber *v.* Jackson, 2 Wend., 37; Doe *v.* Butler, 3 Wend., 153; Lynde *v.* Dennison, 3 Conn., 396; Ricord *v.* Williams, 7 Wheaton, 109; Roberts on Frauds, p. 67, note.) "As soon as it appears that during the time in which it is presumed the party would have asserted his right, if he had one, that party was under a legal disability, which prevented or excused it, there is an end of the presumption." It may be necessary, *in this case*, to quote an authority, that when one *has had no power* to do an act, no presumption can arise that he did it. (Martin *v.* State of Tenn., 10 Humph., 157.)

Now, what was the condition of the persons here against whom presumptions are supposed to arise? Marie Collin was married in 1805, and so remained till March 22, 1840. Angelique Mallette was a married woman from 1804 till April 19,

1844. Helen Cerré was married at the date of the supposed deed, and so remained till 1838. The common law was introduced into the Territory of Missouri, January 19, 1816, (1 Ter. Laws Mo., 436,) and placed these women under all the disabilities belonging to that code. When their property was sold by their husbands, there was no possible mode in which they could interpose a legal objection. No remedy known to the law was within their reach, to redress the wrong done; their silence, then, is perfectly consistent with their rights. They seemed to acquiesce in the possession, because they could not help it. They could not sue; and reason would seem to indicate that in such case they should be excused for not suing. But just the reverse is the argument of the plaintiff in this court. He contends that the same law which put it out of their power to sue, at the same moment declared that if they did not sue, it must be presumed that they had surrendered their titles. "Why," said the adversary at the trial, "suppose they had sued, and their suits been dismissed, still they would have asserted their claim!" Such is the doctrine supposed to belong to the common law, which some are pleased to consider the perfection of reason. It requires what it forbids. It punishes, by nothing less than forfeiture, the *not doing* what it provides *shall not be done.* But this singular view is supposed to be supported by books. The plaintiff in error claims that it has been *so decided* in Melvin *v.* Proprietors of Locks and Canals on the Merrimack River, 16 Pick., p. 140. The case is this: Joana Fletcher, by her father's will, became in 1771 tenant in common of an undivided half of the premises in suit, and was in peaceful possession till her marriage to Benjamin Melvin, in February, 1777, when her husband in her right went into possession. In 1782, Melvin, the husband, conveyed the premises to Chambers, by a deed which, though signed by Joana, did not pass her title. The possession was taken, under the conveyance, and held peaceably by Chambers and those claiming under him, making valuable improvements, till after the year 1832, when one of Joana's sons brought suit, she having resided with her husband near the land, making no claim up to her death in 1826, and the husband making no claim up to his death in 1830. The court held there was no acquiescence on the part of Melvin and wife, or of their children, in Chambers's possession, for they had no right to interfere. They could not object to his erecting buildings. He was authorized to occupy the land according to his pleasure, therefore there was but slight ground to presume a subsequent grant from Melvin and wife, and that the *instruction to the jury was correct.* Now the instruction was, (see it, p. 137–'8,) that Chambers's

holding under Melvin, sen., in right of his wife, was valid and legal during the husband's life, and no presumption arose thereon against the plaintiff. Is it not then something singular that the court should discover still a *slight* ground of presumption? But so far there is nothing of moment in the case. The court proceeds, however, and in brief, p. 140, ascertains that the facts contain evidence of a conveyance from Joana to her husband prior to her marriage! It must be observed that Joana was in possession of the property as her own from the commencement of her title till her marriage. It was then passed out of her possession by the act of marriage, and though no presumptions could arise against her while married, *for she could make no objections*, yet, in the opinion of the court, it must be submitted to a jury, to say if they would not presume a conveyance by her, previous to her marriage to her husband! The course of the opinion was such as to indicate a predetermined purpose of the court to rob the plaintiff of his lands. And that purpose was carried out in 17 Pick., 259, when the case was again before the court. Facts which transpired after the marriage were allowed to go to the jury as evidence of a grant prior to the marriage!

It is well, perhaps, that there is one case on record in which an intelligent court has been found to set down, in a deliberate opinion, the absurdities of the doctrine contended for by the plaintiff.

In the case of Weatherhead's Lessee *v.* Boskerville, 11 Howard, 329, the subject was thoroughly discussed, and settled by an opinion of this court, in which a rule is laid down with reason and justice. The court say: "The rule in such case is, that when a person is under a legal incapacity to litigate a right in a court of justice, and there has been no relinquishment of it by contract, a release of it cannot be presumed from circumstances over which the person has had no control, happening before the incapacity to sue has been removed." A married woman "cannot sue without the assent and association of her husband, for any property which she owns, or to which she may become entitled in any of the ways in which that may occur." "For this cause it is, the statute of limitations does not run against her during coverture." She is presumed to "act under the coercion of her husband."

When there is a statute of limitation applicable to the case, presumptions are never permitted. "For to presume a grant in a case where the title would otherwise be protected by the statute, would be a plain evasion of the statute." (Cowen and Hill's Notes, p. 356–'7, note 311.)

3. It has been supposed that, in Missouri, the law in force at

the dissolution of the marriage by death, fixes the marital rights dependent on that event, and not the law which was in force at the time of the marriage. (Riddick *v.* Walsh, 15 Mo. R., 537–'8.)

This case, it is said, is broad enough to give to the husband a tenancy, by curtesy, in lands vested in the wife prior to the statute of Missouri, July, 1807, (1 Ter. Laws, 131, sec. 16,) which introduced that tenure amongst us. If this be the force of the case of Riddick *v.* Walsh, then the husbands of Madame Cerré and Madame Mallette, by virtue of the act July, 1807, the prior marriage and issue born, became tenants by curtesy, which was a particular estate for life in the husbands. (Reaume *v.* Chambers, 21 Mo., see Appendix; Alexander *v.* Warrance, 17 Mo. R., 229.)

The introduction of the common law in 1816, (1 Ter. Laws, 436,) though it did not give tenancy by curtesy to Madame Collin's husband, she never having had issue, did nevertheless, upon the above view of Riddick *v.* Walsh, give him an estate of freehold in the lands of his wife, determinable with her life. (2 Kent. Com., 130.)

If this view is correct, then the deed of Antoine Mallette and Pierre Cerré passed to Chouteau their life estates as tenants by the curtesy. And there was also outstanding in Louis Collin, during the whole of his life, a freehold estate, which was interposed between his wife and any claim by her to the land in controversy.

When the plaintiff, therefore, establishes that the husbands of Madame Cerré and Madame Mallette became tenants by curtesy, by force of the act of July, 1807, and that Louis Collin took a freehold by force of the common law introduced in 1816, he shows that the women in question had no title to the property in dispute while the husbands were living, and consequently that their causes of action did not accrue to them till they were respectively discovert.

Then, there is no possible ground upon which any presumption can rest. They had really no interest in the property—nothing to convey—nothing which the presumption of a conveyance can reach.

"Neither a descent, cast, nor the statute of limitations, will affect a right, if a particular estate existed at the time of the disseisin, or when the adverse possession began, because a right of entry in the remainder-man cannot exist during the existence of the particular estate, and the laches of tenant for life will not affect the party entitled after him." (Jackson *v.* Schonemaker, 4 J. R., 402; Jackson *v.* Johnson, 5 Cowen, 75, 103.) "At common law, the alienation of husband seized

in right of the wife, discontinued the wife's estate." But by statute, 32 Henry 8, adopted in Missouri, (1 Ter. Laws, 436,) the contrary was provided. Since that statute, the husband's deed passes his own right, and the wife's stands intact as a reversion or remainder, so that her interest ceases during the coverture, and springs up again on its determination. (Jackson *v.* Sears, J. R., 435; Jackson *v.* Stearnes, 16 J. R., 110; Jackson *v.* Carnes, 20 J. R., 303; Miller *v.* Shackleford, 3 Dana, 289; S. C., 4 Dana, 278; Memmon *v.* Coldwell, 8 B. Mon., 33; Gill et al. *v.* Fauntleroy, Ib., 177; Gregory *v.* Ford, 5 B. Mon., 471; Martin *v.* Woods, 9 Mass., 360; Heath and Wife *v.* White, 5 Conn., 228; Jackson *v.* Swartout, 5 Cowen, 96; 1 Hilliard R. Est., 555.

4. The statute of limitations is no defence to this action. As early as December 17, 1818, the Territorial Legislature passed an act for limiting real actions, and it has been in force ever since. This act abolished all the rules of prescription known to the Spanish law, and substituted in lieu thereof its own period of twenty years after action accrued, and in case of disability by coverture, twenty years after disability removed. (1 Ter. Laws, 598; Landes *v.* Perkins, 12 Mo. R., 257; Youse *v.* Norcum, 12 Mo. R., 549; Biddle *v.* Mellon, 13 Mo. R., 335; Blair *v.* Smith, 16 Mo. R., 277; Jackson *v.* Cairnes, 20 J. R., 301; Jackson *v.* Selleck, 8 J. R., 262; Rev'd Stat. Mo., 1835, p. 392, art. 1, sec. 1, also sec. 4; Ib., 393, art 3, sec. 11; Reaume *v.* Chambers, Appendix.)

It would seem to be very plain, that whether the cause of action accrued to the women in 1820, when Mullanphy took possession of the premises, or at the moment when the life estates respectively of the husbands terminated, not one of their titles is cut off by the statute of limitations. In either case, the period of limitation would not be less than twenty years. If the cause of action accrued in 1820, the eleventh section of the third article of the "*Act prescribing the time for commencing actions,*" approved March 16, 1835, (Rev'd Code, 1835, p. 396,) exempts their case from the operation of that act; and then, by the statute of 1818, (1 Ter. Laws, 598, and Rev'd Code of 1825, sec. 3, p. 511,) twenty years is allowed wherein to sue after discoverture.

And if the cause of action accrued at the termination of the life estate of the husbands, then, by all the statutes ever in force in Missouri, twenty years at least would be given wherein to sue.

It has always been held by our courts, that the enactment of the statute of limitations of 1818, and the introduction of the common law in 1816, not only abolished the rules of prescription under the Spanish law, but annulled the power

of married women and infants to bring any action while under disability. (Landes *v.* Perkins, 12 Mo. R., 257; Youse *v.* Norcum, 12 Mo. R., 549.)

4. Felix Pingal was entitled as tenant by the courtesy to his wife's lands, although neither the husband nor the wife was actually seized during the coverture. (4 Kent's Com., 29, 30; 1 Hilliard R. Est., 111; Reaume *v.* Chambers, Appendix.)

5. When a large amount of property is in controversy, desperate means are sometimes resorted to, for the purpose of holding possession. Such is the attempt to set up, in bar of this suit, the *pretended will of Francis Moreau.*

The Spanish law required a will to be produced before the judge, and proved by the attesting witnesses, within one month after the testator's death. The witnesses having been examined, the will was ordered to be protocoled (recorded.) (1 White's Recopilacion, 111; 2 Moreau and Carleton's Partidas, 975, 976, 977.) Francis Moreau had no right to give all his property to one child. He could not disinherit a child without cause, nor without naming expressly the child, and the reason of the disinherison. (2 Moreau and Carleton's Partidas, 1031, 1032, 1033; 1 White's Recopilacion, 107.) To entitle an heir to the benefit of a devise, it was necessary he should have performed the conditions annexed to it. (2 Moreau and Carleton Partidas, 997, and following; 1 White's Recopilacion, 103.) And it was also necessary he should appear before the judge, and plainly accept or reject the devise. (1 White's Recopilacion, 111, 127.) But this will, if it was ever seen by Francis Moreau, was *never produced to any judge after his decease—never shown to the pretended witnesses—never proved—never recorded—never accepted by the heir,* in the manner required by law.

And Joseph Moreau, who is made by it *universal heir,* never *performed any of the conditions* which it imposed upon him.

Joseph did, after his father's death, make claim to the succession, and for this he was imprisoned by the Lieutenant Governor.

It is most probable, therefore, that the pretended will was a forgery.

It is certain that Joseph Moreau, after his release from prison, acted towards the property of the estate, and towards his brothers and sisters, as if his father had died intestate, and the estate was settled and distributed as an intestate's estate. If the pretended will had been legally established, Joseph was estopped by his own acts against setting it up.

Mr. Justice McLEAN delivered the opinion of the court.

This writ of error brings before us the judgment of the Circuit Court for the district of Missouri.

Boyle brought an action of trespass and ejectment in the Circuit Court for a common-field lot, in what was formerly known as the Big Prairie, of St. Louis, containing one arpent in front, on Broadway, in the city aforesaid, by the depth of forty arpens, running westwardly, being the same lot of land granted by the Spanish Government to Moreau, and confirmed to his representatives by the United States, and known as survey 1,480.

The defendant pleaded not guilty. A verdict of guilty was found against him for an undivided two-fifths of the land described.

A grant of the land claimed under the Spanish Government was proved to have been made to Francis Moreau, who occupied the land some time before his death, which took place in 1802. He left seven children surviving him—three sons and four daughters. His sons were named Joseph, Alexis, and Louis; his daughters, Manette, widow of one Cadeau, and afterwards wife of Louis Collin; Marie Louise, wife of Joseph Menard; Helen, who afterwards intermarried with Pierre Cerré; and Angelique, who intermarried with Notaine Mallette.

The plaintiff gave in evidence a sheriff's deed, dated the 24th of February, 1853, which recites a judgment in favor of David Clary and William Waddingham, against Angelique Mallette, Pierre Willemin, and Melanie Cerré, his wife, Felix Pingal and Josephine Cerré, his wife, by her guardian, for $455.31, on which an execution was issued, and levied on the defendant's land, designated as survey 1,480, and the same was sold the 19th of February, 1853, to the plaintiff Boyle, to whom the above deed was given, which purports to convey all the right and interest of the defendants.

The plaintiff proved that defendant had been in possession of the premises since 1839.

On the part of the defendant it was proved that, in the summer of 1820, John Mullanphy built a small brick house, which stands partly on the premises sued for, and partly on one of the common-field lots confirmed to Vien. Soon after the house was built, Mullanphy fenced three or four acres of ground, including the house. In 1822 or 1823, he enclosed fifteen or twenty acres, and in 1835 or 1836, John O'Fallon, the executor of Mullanphy, induced Waddingham to enclose all the land claimed by the estate of Mullanphy in that neighborhood, which included the land sued for. The house and enclosures were rented to different persons from time to time, and were occupied with occasional intervals, sometimes of several months. In 1846 or 1847, Waddingham's fence fell down, and the tract

lay vacant and unenclosed for a year or two, when portions of it were enclosed by the heirs of Mullanphy.

At the trial, a paper was offered in evidence, purporting to be the deed of Joseph Moreau and others, heirs of Francis Moreau, deceased, dated the 3d of September, 1818, conveying to Pierre Chouteau all their estate and interest in the tract of land in the declaration described. A certificate of Thomas R. Musick, a justice of the peace, certifying that Joseph Menard and wife, Joseph Ortiz and his wife, signed the instrument, and acknowledged it to be their deed. There was also offered an instrument purporting to be a deed of Pierre Reaume and Marceline, his wife, and of Joseph Menard and Marie Louise Moreau, dated 6th November, 1819, conveying to Pierre Chouteau their interest in the land conveyed by their co-heirs, by the foregoing deed. Also, there was offered a certificate of Raphael Widen, notary public, of the acknowledgment of this instrument, the 6th November, 1819; and also a certificate that both the instruments were recorded 6th June, 1822.

It was proved that the above papers, after the death of John Mullanphy, came into the possession of John O'Fallon, having been found among the papers of the deceased.

The signatures to the first instrument were affixed by marks, the names being in the handwriting of F. M. Guyol and others.

Certain persons swore that they heard several of the heirs say they had sold their land to Pierre Chouteau. That Joseph Moreau lived in Louisiana in a destitute condition, where he died; and that he was never heard to claim any land in St. Louis, and, in fact, that he said he had sold his land in Missouri.

Pierre Chouteau and wife, on the 30th October, 1819, conveyed the tract in controversy to John Mullanphy by deed, which was duly acknowledged and recorded.

On the above evidence, the two deeds in 1818 and 1819 were offered in evidence, to which the plaintiff objected, "because the first deed was not signed or acknowledged by Marie Collin, Angelique Mallette, and Helen Cerré, under whom he claims, and that it did not convey any title of the femes covert."

The defendant then offered in evidence a copy of the will of François Moreau, certified by S. D. Barlow, recorder, to have been taken from among the archives of the French and Spanish Governments, deposited in his office, and filed for record on the 17th August, 1846, being archive 2,257. If the recorder had power to certify as to the deposit of the will, it does not appear by whom it was made, nor at what time.

This instrument states that in the year 1798, on the 2d August, we, Louis Collin, in default of a notary, went to the home of St. Francis Dunegant, captain commandant of St. Ferdinand, of Florisant, assisted by Antoine Rivierre and five others named; where St. François Moreau went with Joseph Moreau at my residence; the said Francis Dunegant and the said François Moreau declared and requested to make his last will, which he pronounced to us in a loud and intelligible voice, as follows, &c.: "Among other provisions, the testator names his son Joseph universal legatee, and afterwards declares it is with the reserve, that he shall reimburse to each of his brothers and sisters $27 silver out of the estate of their deceased mother, and it is declared that Joseph Moreau obliges himself to furnish certain articles annually to his father during his life." The testimoneum is as follows: Done and passed at St. Ferdinand, in Florisant, the day and year aforesaid, and signed (after being read) before Don Francis Dunegant, captain commanding, and the aforesaid witnesses; the said Francis Moreau made his ordinary mark, &c.

At the time of offering the will, the following deeds and documents were read in evidence, as bearing upon said will, and its admissibility in evidence: a deed dated 2d April, 1818, from Joseph Moreau and others, for a lot on Third street, town of St. Louis. In the deed it is stated that Joseph Menard, Aurora, the wife of Joseph Hortiz, are children of —— Moreau, alias Menard, deceased. Also, the inventory and account of sales of the estate of Francis Moreau, the inventory of the community property of Francis Moreau and wife, under the direction of Francis Dunegant, commandant, &c.

On the foregoing testimony the defendant moved the court to instruct the jury as follows:

1. If the jury find that Francis Moreau, in his lifetime, was the owner of the lot in controversy; that he died prior to 1804, and that his two daughters, Mrs. Mallette and Mrs. Cerré, took their husbands prior to 1804, then the several interests of said daughters in said lot became upon their marriage, and was their paraphernal property.

2. If the jury find, as mentioned in instruction No. 1, and further find, that in the year 1818, Mallette and Pierre Cerré, husbands of said daughters, made the deed read in evidence by the defendants, then, under the evidence in this cause, the jury may presume that said daughters gave the administration of said paraphernal property to their husbands, and that the same was alienated with their consent.

3. If the jury find, as mentioned in instruction No. 1, and further find, that defendants, and those under whom they

claim, have had open and continued possession of the lot in question for thirty years and more, before the beginning of this suit, claiming to own the same, then the plaintiff cannot recover any interest in said lot, derived by Mrs. Mallette or Mrs. Cerré from their said father.

4. If Mrs. Pingal was dead, leaving a child, at the time of the sheriff's sale, under which plaintiff claims, and during all the time of the coverture of said Mrs. Pingal the lot in controversy was in possession of defendants, and those under whom they claim, holding the same adversely to Mrs. Pingal and her husband, and there never was any entry upon the part of the wife or husband, then the plaintiff derived no title to the lot in controversy under Mrs. Pingal or her husband.

The court gave the first instruction, and refused the others, to which refusal exception was taken.

It is argued that the deed of the heirs of Moreau to Chouteau, dated September 3, 1818, and that offered as the act of Pierre Reaume and wife, dated 6th November, 1819, ought to have been admitted in evidence; that the execution of the last-mentioned deed was fully proved by proof of the death of the subscribing witnesses and their handwriting.

Some of the grantors in this deed acknowledged the execution of it before Thomas R. Musick, a justice of the peace, but there was no proof that Angelique or Helen Cerré, or Marie Collin, had signed or acknowledged the deed, and these were the heirs under which the plaintiff claims. It was proved by Colonel O'Fallon, that he was the executor of John Mullanphy, and that in 1833 he received from the son of the deceased the title-papers of the estate, among which was the above original deed, with certain endorsements. And it was proved that the deed was in the handwriting of Guyol, a justice of the peace, with whose handwriting he was well acquainted. It was also proved that the signatures, Antoine Mallette, Pierre Cerré, and Joseph Moreau, were in the handwriting of Guyol, and that of Marie Collin in the handwriting of her husband, Louis Collin; the signature, Ellen Moreau, the wife of Pierre Cerré, is in the handwriting of Hawley. Guyol, the witness states, was a man of good character. There was some proof that Pierre Cerré and Antoine Mallette, after the date of said paper, stated often that they had sold their land to Pierre Chouteau, sen.; but there appears to be no proof that Angelique Mallette, or Helen Cerré, or Marie Collin, had ever stated or admitted that they had parted with their interest in the land.

One of the defendant's witnesses stated that Joseph Moreau said, that, after the decease of his father, he set up a claim to

the succession, and that he was imprisoned for doing so, and that Pierre Chouteau had him released. Some evidence was given as to the deed having been deposited in the recorder's office for record, and an endorsement that it was to be handed to Mullanphy.

The common law was adopted in the Missouri Territory in 1816, and consequently it governs all subsequent legal transactions.

The children of Moreau, being seven at the time of his decease, were reduced, by the death of Louis, intestate, and Marie, who also died intestate, to five. And it seems that the plaintiff derived his title from two of the surviving daughters, Angelique and Helen, and their heirs; he therefore claims under Louis, Marie, Helen, and Angelique. It seems not to be contested that the property vested in the daughters, under the civil law, was paraphernal. A succession accruing to the wife during marriage is her paraphernal property, which she may administer without the consent or control of her husband. (O'Conner *v.* Barre, 3 Martin Lou. Rep., 455.) The wife may give the control of this property, in writing, to her husband. (1 White's New Recopilacion, 56, note 33.)

The Circuit Court committed no error in excluding from the jury the above deed. The execution of it, by the parties under whom the plaintiff claims, is not proved, nor do the facts relied on, from which a presumption is attempted to be drawn in favor of its validity, authorize such presumption. The femes covert were under disabilities. They could only divest themselves of their rights in the mode specially authorized. Their husbands had no power, without their concurrence and action, to convey their real estate.

The defendant offered to read a certified copy of the deed, to show its condition at the time it was recorded, but the court refused to permit such copy to be read. If the original deed was not evidence, it is difficult to perceive for what legal purpose a recorded copy of it could be read. There was no error in this ruling by the court.

There was no evidence that the will had been proved, or that the conditions stated in it had been complied with.

A deed dated 2d April, 1813, from Joseph Moreau and his brothers and sisters, conveying to Hempstead and Farrar a lot which would have passed by the supposed will to Joseph Moreau, had it been operative. Also, there was shown a sale bill of the personal property of the estate on the 19th of April, 1803, Joseph Moreau being present, and that he purchased a part of the property devised to him by the will.

Also, it was shown that an administrator was duly appointed

on the estate of Francis Moreau, and his estate was administered in the same manner as if he had died intestate.

By the Spanish law, a will was required to be proved by the attesting witnesses within one month after the decease of the testator; and, when proved, it is required to be recorded. (1 White's Recopilacion, 111; 2 Moreau and Carleton's Partidas, 975–'6–'7.) The testator cannot disinherit a child without naming the child, and the reasons for doing so. (1 White's Re., 107.) No heir can claim a devise, without performing the condition annexed to it. (1 White's Re., 103.) It is required that he shall appear before the judge, and either accept or reject the devise. (1 White's Re., 111, 127.) None of these requisites were performed by Joseph Moreau, who was made, by the will, universal heir.

If the will was a genuine instrument, and Joseph was the universal heir, it could not have remained dormant, it would seem, for fifty years, or in the archives, without being brought to the light, and having on it some judicial action. But whether it be a genuine instrument or not, it has not been treated as valid, as no claim has been set up under it, and all the heirs have acted, in regard to the estate of their father, as though he had died intestate.

Neither the deed to Chouteau, nor the will, can be admitted in evidence, without proof, as an ancient instrument. The rule embraces no instrument which is not valid upon its face, and which does not contain every essential requirement of the law under which it was made. Neither the deed nor the will comes within the rule, and we think the court very properly excluded them both from the jury.

In regard to the second, third, and fourth instructions, which the court refused to give to the jury, there was no error.

As early as December 17, 1818, the Territorial Legislature passed an act limiting real actions, which remains in force. The act abolished all the rules of prescription under the Spanish law, and substituted a limitation of twenty years after action accrued, and, in case of disability by coverture, twenty years after it ceased. In 1820, it appears Mullanphy took possession of a part of the premises in controversy, and from that time retained possession. Some of the husbands had a life estate in the lands; but whether this was so or not is immaterial, as there is no bar to the claim of the plaintiff by the statute of limitations.

By an act "prescribing the time for commencing actions," approved March 10, 1835, (Revised Code, 396,) it is declared, in the 11th section, that "the provisions of this act shall not apply to any action commenced, nor to any cause where the

right of action or entry shall have accrued, before the time when this act takes effect, but the same shall remain subject to the laws now in force."

It will be observed, that the limitation act of 1818, being still in force, cannot operate on any of the femes covert of whom the plaintiff claims. It did not begin to run against them until they became discovert, from which time it required twenty years to bar their right. Under such circumstances, no presumption can arise against them, as they had no power to prosecute any one who entered upon their land. No laches can be charged against them until discoverture; and there is no ground to say that either the statute or lapse of time, since that period, can affect the rights of the plaintiff, or of those under whom he claims. The court, therefore, did not err in refusing to give to the jury the instructions requested.

Upon the whole, the judgment of the Circuit Court is affirmed, with costs.

WILLIAM E. POST AND OTHERS, CLAIMANTS OF A PORTION OF THE CARGO OF THE SHIP RICHMOND, APPELLANTS, *v.* JOHN H. JONES AND OTHERS, LIBELLANTS.

It cannot be doubted that a master has power to sell both vessel and cargo, in certain cases of absolute necessity.

But this rule had no application to a wreck where the property is deserted, or about to become so, and the person who has it in his power to save the crew, and salve the cargo, prefers to drive a bargain with the master, and where the necessity is imperative, because it is the price of safety.

No valid reason can be assigned for fixing the reward for salving derelict property at "not more than a half or less than a third of the property saved." The true principle in all cases is, adequate reward according to the circumstances of the case.

Where the property salved was transported by the salvors from Behring's Straits to the Sandwich Islands, and thence to New York, the salvage service was complete when the property was brought to a port of safety. The court allowed the salvors the one-half for this service, and also freight on the other moiety from the Sandwich Islands to New York.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York, sitting in admiralty.

It was a libel filed by the owners of the ship Richmond and cargo, under circumstances which are particularly stated in the opinion of the court.

The District Court dismissed the libel, thereby affirming the sales.

The Circuit Court reversed this decree, and declared the

sales invalid, but that the respondents were entitled to a moiety of the net proceeds, in the New York market, of the articles brought in their respective ships, and sold by the said respondents, respectively; and that they pay to the owners of the Richmond the other moiety of the said proceeds, with interest, to be computed at the rate of seven per cent. per annum, from the dates of the sales of the said articles.

The claimants appealed to this court.

It was argued by *Mr. O'Connor* for the appellants, and *Mr. Lord* for the appellees.

As this case involved some very important points of law, with respect to the rights of captains of vessels upon the ocean, and also the rights and duties of salvors, the reporter thinks it proper to take an extended view of the arguments of counsel, although they sometimes refer to depositions and facts which are not especially mentioned in the narrative, which is given in the opinion of the court.

Mr. O'Connor, for the appellants, made the following points:

First Point.—The decree of the Circuit Court cannot be sustained, unless, by an unbending rule which admits of no exception or qualification, the power of the master to sell is absolutely limited to a sale by auction, with the advantage of free competition between rival purchasers. If, in any case, or under any circumstances, he may sell by private contract and to a single purchaser, the decree is erroneous.

I. The authority of the master to sell in cases of extreme necessity like the present, is, as a general proposition, definitively settled. Even where there is only "a probability of loss, and it is made more hazardous by every day's delay," to act promptly, and thereby "to save *something* for the benefit of all concerned, though but little may be saved," is his imperative duty. (Abbott on shipping, 5 Am. ed., pp. 14, 19; Ib., note to page 19; Brig Sarah Ann, 2 Sumner, 215; New England Ins. Co. *v.* Sarah Ann, 13 Peters, 387.)

II. The master of the Richmond had no other resort, for the purpose of saving anything, than the sale which he made.

1. Even if transportation to the shore was practicable, every witness who was examined testifies that preservation there, through the long winter then approaching, was not possible. The faint intimations to the contrary by *Reeve*, and those still fainter put forth by *Cherry*, scarcely form an exception to the universality of this opinion.

2. That freighting or salvage services were unknown in those

regions, and would not have been undertaken by any one, is still more distinctly established by the proofs. It rests not merely on the uniform opinion of experts, the absence of practice, the extreme remoteness of the scene from the theatre of any human action, except catching whales; for it is proven by the form of the insurance policies used by American whalers, the only civilized visiters of the territory. (1 Seward's Works, p. 242; The Boston, 1 Sumner, 335, 336; Elizabeth and Jane, Ware, 38.)

a. The freight, even as far as the Sandwich Islands, according to the best guess the libellants could elicit from any witness, if obtained by a miracle, would have exceeded the alleged maximum allowance in salvage cases.

b. A salvage service would involve a transportation over 25,000 miles for adjudication. A judgment *in rem* in a foreign intermediate admiralty would not be regular or binding; nor, if so, would it be beneficial to these libellants. (The Hamilton, 3 Hagg, 168.)

III. There was no want of ordinary judgment or prudence in the manner of the sale.

1. He gave notice to every vessel within reach; and, considering the season, the little experience yet had in those seas in respect to the time of its closing, and the great danger there was that the Richmond might go to pieces in case of any delay, prudence dictated the earliest possible action.

a. The experts differ much as to the time of the season closing.

b. Even Reeve deemed it unsafe to stay longer.

c. P. Winters's anxiety to get cargo on board of the Frith for safety even before the sale is manifest.

2. The event is not the proper test, but if applied here it would favor the master's decision. He could not have induced these three ships to lie *idle*, and to lie still in an unlucky spot until the 18th of August, waiting for customers. And if he had the means of working this singular achievement, there is no satisfactory evidence that he could have drummed up a sufficient company to make an auction such as the decree below requires.

3. The weight of evidence is, that as much was obtained as could have been gotten if there were numerous bidders.

4. The want of precision and exactitude as to weight and measure, in a place where neither weights nor measures existed or were in use, is an unimportant circumstance.

5. Dispensing with settlement or payment till the meeting at Sandwich Islands was natural, and indeed necessary; for money was not to be had.

6. The difference in value between oil and bone, which might have led to a more profitable arrangement, did not at the time occur to any one concerned in these transactions. It is not necessary to the validity of the sale, that in every detail the most subtle contrivances ingenuity can suggest for attaining a profitable result should have been resorted to.

IV. There is not the remotest ground for imputing fraud or ill motive to any one concerned.

1. That Philander Winters was in failing health, apprehensive of approaching death, and susceptible of fraternal tenderness, are not circumstances to excite suspicion of *his* motives.

2. The difference in age and experience between the brothers was trivial. There was evidently a total absence of concert between the three purchasing masters; and the weight of evidence is, that the Junior got the greatest amount of bone.

3. The relation between Jonas and Philander Winters, coupled with the omission of Jonas to secure for himself any advantage over the others, and his letting the wreck go to a stranger for $5, conclusively repel every suggestion of this kind. They also present a vivid picture of the extraordinary condition of things produced by a shipwreck in the Arctic regions.

4. The small price given for the wreck is like what frequently happens at regular auction sales with full competition. (7 Law Reporter, 378; 6 Cowen's Rep., 271.)

5. The resort to the forms of an auction may indeed have been idle, as there were not purchasers enough to take the whole, and so, necessarily, no competition; but, pursuing imitatively the practice *in the world*, is not alone adequate proof that these Polar wanderers were seeking to color the transaction.

V. None of the preceding propositions are affected by the testimony of Reeve and Cherry.

1. They are interested in the result, and actual prosecutors of the claim. Their testimony should be wholly rejected as incompetent, because of their interest. (The Boston, 1 Sumner, 328.)

2. They are evidently uncandid, self-impeached in a considerable degree, and are contradicted in many particulars. (The Jane, 2 Hagg, 338; The Boston, 1 Sumner, 345.)

Second Point.—The decree of the Circuit Court appears to borrow some of its principles from analogy to the position, assumed as law, that a contract between salvors and the salved, made at sea, is necessarily and *per se* void. Such is not the case; and the most that can be said on that head is, that the nature of the subject gives apparently more occasion to the

"*chancery of the sea*" than the chancery of the land, to vacate oppressive and unreasonable contracts.

1. There are two *obiter dicta* to that effect in 1 Bee, (pp. 136, 139;) but the English authorities, and those in the American admiralty, including this court, are merely that such agreements must appear to be fair and reasonable. (The True Blue, 2 W. Rob., 176; The Graces, 2 W. Rob., 294; The Westminster, 1 W. Rob., 235; The Industry, 3 Hogg, 205; The Mulgrave, 2 Hogg, 77; The Emulous, 1 Sumner, 210, 211; Houseman *v.* Sch. North Carolina, 15 Peters, 45.)

Third Point.—The libellants err in supposing that the law of nature, which enforces the saving of *life* as a duty, has any force in relation to the saving of property. (The Boston, 1 Summer, 335, 336; The Zephyr, 2 Hogg, 43; The Ganges, 1 Notes of Cases, 87; The Margaret, 2 Hagg, 48, note.)

Fourth Point.—It is not, as claimed by the libellants, a fixed and invariable rule, that salvage, in cases of derelict, shall not exceed one-half the value; and, if such appeared to be the rule in all former decisions, the present is a new case in all its features, and would require a higher compensation.

I. This moiety practice has a very barbarous origin, and is entitled to no respect. The authorities all show that it has no binding force, the allowance being merely discretionary. (The Aquila, 1 C. Rob., 41, 47, and note; 1 Sumner, 214, 215; 1 Story, 323; 1 Ware, 39; The Huntress, 1 Wallace, jr., 70.)

II. The instances of salvage service to be found in the books are confined to the highways of commerce, and within comparatively narrow spaces.

There is no recorded judgment upon the salvage to be allowed for rescuing property from shipwreck, under circumstances at all comparable with the present case. (The Martha, 3 Hagg, 434; Elliotta, 2 Dodson, 75; The Effort, 3 Hagg, 166; L'Esperance, 1 Dodson, 49; Sprague *v.* 140 Bbls. Flour, 1 Story, 197; Peisch *v.* Ware, 4 Cranch, 346; The Reliance, 2 Hagg, 90, note; The Jubilee, 3 Hagg, 43, note; The Jonge, 5 Ch. Rob., 322; Howland *v.* 210 Bbls. Oil, 7 Law Rep., 377; The Swan, 1 W. Rob., 70.)

Fifth Point.—The power of the master to sell in a case of extreme necessity, allows him to sell as he may. In the Polar regions, where, by an invincible and irreversible law of nature, it is impossible to perform the duty of agent for all concerned, in the methods usually employed within the territory of trade and civilization, he may still save what can be saved, by using such means as present themselves.

Mr. Lord, for the appellees, made the following points:

First Point.—1. The whole transaction was in its nature a salvage from a ship in hopeless distress on the high seas, and near an uninhabited coast; with a master and crew dependent on the other ships; which master was willing and had offered to give all the cargo, in order to be taken directly home, after a three years voyage. It therefore belongs to courts of admiralty to judge it by its own rules of humanity, policy, and justice.

2. In all cases within the admiralty jurisdiction, the court, as the chancery of the sea, supervises all attempted contracts, where distress of a ship or her crew enter into the transaction.

3. To allow contracts between parties dependent for salvage service and salvors to be valid, would defeat the jurisdiction of admiralty entirely. (Cowel *v.* The Brothers; Schultz *v.* The Mary, Bee's Rep., 136, 137; The Emulous, 1 Sumn. C. C. R., 210; The Henry Ewbank, 1 Sumn., 416; Bearse *v.* 340 Pigs Copper, 1 Story R., 323; Laws of Oleron, Ch. IV, (Godolphin, art. 4; 1 Peters Adm., App., art. 4 and art. 9;) The Packet, 3 Mason R., 253, 260; La Isabel, 1 Dodson, 273; The Augusta, 1 Dodson, 283; 8 Jurist, 716; The Westminster, 1 W. Rob., 230.)

Second Point.—The form of sale attempted to be made the means of divesting the property of the wrecked ship and cargo, was invalid in law; and, in substance and in circumstance, fraudulent as to the owners of the property.

1. There was no market nor any market value at the time and place of sale, whereby the form of a sale could afford any test of actual value. There was no competition, or expectation of it, by those who were to attend the sale; and the whole question of adequacy of price or reasonableness of conduct is as open as it would have been without the formality; it remains purely a question of salvage. (The Tilton, 5 Mason R., 477; The Sarah Ann, 2 Sumner, 217, S. C., 13 Peters R., 402.)

2. The form of a sale was contrived, arranged, and conducted, not by the master of the wrecked ship, but by his brother, the master of the saving ship, and his associates, masters of the other ships, to whom the master of the wrecked ship had offered to abandon all, for the sake of a speedy passage home. The master of the wrecked ship exercised no power of sale or other power whatever; he was throughout passive, and without the spirit or means of resistance to any demand whatever.

3. The absence of all arrangement to protect the interest of the sellers, as to quantity, security for price, means of examination of detail and mode of selling, would have avoided this form of a sale, if made under any circumstances. In all particulars of quantity saved, value of property, probability of recovery, or of loss, the transaction remains wholly open to be adjudged as in a case of salvage.

Third Point.—The salvage awarded was liberal, and fully and generously sufficient.

1. There was no danger worth remunerating; none beyond any shore salvage.

2. There was no generosity of motive in the salvors; but, on the contrary, there was an attempt to avoid the adjudication of the appropriate salvage tribunal, and actually to secrete the whalebone, the part of the saved property most valuable for the purpose of transportation home.

3. The attempt to show that it was as well to fill up the ships by catching whales and trying out the oil, as by taking oil and whalebone already prepared and at hand, entirely failed, and is intrinsically incredible.

4. The relations between the parties to the wrecked ship and cargo and the two saving ships, should have prevented, and should prevent, the latter from stripping the former, whether by a pretended sale or on a real claim of salvage.

5. The appellate court will not disturb an adjudication of salvage, unless largely erroneous. (The Sybil, 4 Wheaton, 98; Hobart *v.* Drogan, 10 Peters R., 108.)

Mr. Justice GRIER delivered the opinion of the court.

The libellants, owners of the ship Richmond and cargo, filed the libel in this case for an adjustment of salvage.

They allege, that the ship Richmond left the port of Cold Spring, Long Island, on a whaling voyage to the North and South Pacific Ocean, in July, 1846; that on the 2d of August, 1849, in successful prosecution of her voyage, and having nearly a full cargo, she was run upon some rocks on the coast of Behring's Straits, about a half mile from shore; that while so disabled, the whaling ships Elizabeth Frith and the Panama, being in the same neighborhood, and about to return home, but not having full cargoes, each took on board some seven or eight hundred barrels of oil and a large quantity of whalebone from the Richmond; that these vessels have arrived in the port of Sag Harbor, and their owners are proceeding to sell said oil, &c., without adjusting or demanding salvage, unjustly setting up a pretended sale of the Richmond and her cargo to them by her master.

The libellants pray to have possession delivered to them of the oil, &c., or its proceeds, if sold, subject to "*salvage and freight.*"

The claimants, who are owners of the ships Frith and Panama, allege, in their answer, that the Richmond was wholly and irrevocably wrecked; that her officers and crew had abandoned her, and gone on a barren and uninhabited shore near by; that

there were no inhabitants or persons on that part of the globe, from whom any relief could be obtained, or who would accept her cargo, or take charge thereof, for a salvage compensation; that the cargo of the Richmond, though valuable in a good market, was of little or no value where she lay; that the season during which it was practicable to remain was nigh its close; that the entire destruction of both vessel and cargo was inevitable, and the loss of the lives of the crew almost certain; that, under these circumstances, the master of the Richmond concluded to sell the vessel at auction, and so much of her cargo as was desired by the persons present, which was done on the following day, with the assent of the whole ship's company.

Respondents aver that this sale was a fair, honest, and valid sale of the property, made from necessity, in good faith, and for the best interests of all concerned, and that they are the rightful and bona fide owners of the portions of the cargo respectively purchased by them.

The District Court decreed in favor of claimants; on appeal to the Circuit Court, this decree was reversed; the sale was pronounced void, and the respondents treated as salvors only, and permitted to retain a moiety of the proceeds of the property as salvage.

The claimants have appealed to this court, and the questions proposed for our consideration are, 1st, whether, under the peculiar circumstances of this case, the sale should be treated as conferring a valid title; and, if not, 2d, whether the salvage allowed was sufficient.

1. In the examination of the first question, we shall not inquire whether there is any truth in the allegation that the master of the Richmond was in such a state of bodily and mental infirmity as to render him incapable of acting; or whether he was governed wholly by the undue influence and suggestions of his brother, the master of the Frith. For the decision of this point, it will not be found necessary to impute to him either weakness of intellect or want of good faith.

It cannot be doubted that a master has power to sell both vessel and cargo in certain cases of absolute necessity. This, though now the received doctrine of the modern English and American cases, has not been universally received as a principle of maritime law. The Consulado del Mare (art. 253) allows the master a power to sell, when a vessel becomes unseaworthy from age; while the laws of Oleron and Wisby, and the ancient French ordinances, deny such power to the master in any case. The reason given by Valin is, that such a permission, under any circumstances, would tend to encourage fraud. But, while the power is not denied, its exercise should be closely scruti-

nized by the court, lest it be abused. Without pretending to enumerate or classify the multitude of cases on this subject, or to state all the possible conditions under which this necessity may exist, we may say that it is applied to cases where the vessel is disabled, stranded, or sunk; where the master has no means and can raise no funds to repair her so as to prosecute his voyage; yet, where the *spes recuperandi* may have a value in the market, or the boats, the anchor, or the rigging, are or may be saved, and have a value in market; where the cargo, though damaged, has a value, because it has a market, and it may be for the interest of all concerned that it be sold. All the cases assume the fact of a sale, in a civilized country, where men have money, where there is a market and competition. They have no application to wreck in a distant ocean, where the property is derelict, or about to beeome so, and the person who has it in his power to save the crew and salve the cargo prefers to drive a bargain with the master. The necessity in such a case may be imperative, because it is the price of safety, but it is not of that character which permits the master to exercise this power.

As many of the circumstances attending this case are peculiar and novel, it may not be improper to give a brief statement of them. The Richmond, after a ramble of three years on the Pacific, in pursuit of whales, had passed through the sea of Anadin, and was near Behring's Straits, in the Arctic ocean, on the 2d of August, 1849. She had nearly completed her cargo, and was about to return; but, during a thick fog, she was run upon rocks, within half a mile of the shore, and in a situation from which it was impossible to extricate her. The master and crew escaped in their boats to the shore, holding communication with the vessel, without much difficulty or danger. They could probably have transported the cargo to the beach, but this would have been unprofitable labor, as its condition would not have been improved. Though saved from the ocean, it would not have been safe. The coast was barren; the few inhabitants, savages and thieves. This ocean is navigable for only about two months in the year; during the remainder of the year it is sealed up with ice. The winter was expected to commence within fifteen or twenty days, at farthest. The nearest port of safety and general commercial intercourse was at the Sandwich Islands, five thousand miles distant. Their only hope of escape from this inhospitable region was by means of other whaling vessels, which were known to be cruising at no great distance, and who had been in company with the Richmond, and had pursued the same course.

On the 5th of August the fog cleared off, and the ship Eliza-

beth Frith was seen at a short distance. The officers of the Richmond immediately went on board, and the master informed the master of the Frith of the disaster which had befallen the Richmond. He requested him to take his crew on board, and said, "You need not whale any more; there is plenty of oil there, which you may take, and get away as soon as possible." On the following day they took on board the Frith about 300 barrels oil from the Richmond. On the 6th, the Panama and the Junior came near; they had not quite completed their cargoes; as there was more oil in the Richmond than they could all take, it was proposed that they also should complete their cargoes in the same way. Captain Tinkham, of the Junior, proposed to take part of the crew of the Richmond, and said he would take part of the oil, "provided it was put up and sold at auction." In pursuance of this suggestion, advertisements were posted on each of the three vessels, signed *by* or *for* the master of the Richmond. On the following day the forms of an auction sale were enacted; the master of the Frith bidding one dollar per barrel for as much as he needed, and the others seventy-five cents. The ship and tackle were sold for five dollars; no money was paid, and no account kept or bill of sale made out. Each vessel took enough to complete her cargo of oil and bone. The transfer was effected in a couple of days, with some trouble and labor, but little or no risk or danger, and the vessels immediately proceeded on their voyage, stopping as usual at the Sandwich Islands.

Now, it is evident, from this statement of the facts, that, although the Richmond was stranded near the shore upon which her crew and even her cargo might have been saved from the dangers of the sea, they were really in no better situation as to ultimate safety than if foundered or disabled in the midst of the Pacific ocean. The crew were glad to escape with their lives. The ship and cargo, though not actually derelict, must necessarily have been abandoned. The contrivance of an auction sale, under such circumstances, where the master of the Richmond was hopeless, helpless, and passive—where there was no market, no money, no competition—where one party had absolute power, and the other no choice but submission—where the vendor must take what is offered or get nothing—is a transaction which has no characteristic of a valid contract. It has been contended by the claimants that it would be a great hardship to treat this sale as a nullity, and thus compel them to assume the character of salvors, because they were not bound to save this property, especially at so great a distance from any port of safety, and in a place where they could have completed their cargo in a short time from their own

catchings, and where salvage would be no compensation for the loss of this opportunity. The force of these arguments is fully appreciated, but we think they are not fully sustained by the facts of the case. Whales may have been plenty around their vessels on the 6th and 7th of August, but, judging of the future from the past, the anticipation of filling up their cargo in the few days of the season in which it would be safe to remain, was very uncertain, and barely probable. The whales were retreating towards the north pole, where they could not be pursued, and, though seen in numbers on one day, they would disappear on the next; and, even when seen in greatest numbers, their capture was uncertain. By this transaction, the vessels were enabled to proceed at once on their home voyage; and the certainty of a liberal salvage allowance for the property rescued will be ample compensation for the possible chance of greater profits, by refusing their assistance in saving their neighbor's property.

It has been contended, also, that the sale was justifiable and valid, because it was better for the interests of all concerned to accept what was offered, than suffer a total loss. But this argument proves too much, as it would justify every sale to a salvor. Courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit. (See 1 Sumner, 210.) The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services. We are of opinion, therefore, that the claimants have not obtained a valid title to the property in dispute, but must be treated as salvors.

2. As to the amount of salvage.

While we assent to the general rule stated by this court, in Hobart *v.* Dorgan, (10 Peters, 119,) that "it is against policy and public convenience to encourage appeals of this sort in matters of discretion," yet it is equally true, that where the law gives a party an appeal, he has a right to demand the conscientious judgment of the appellate court on every question arising in the cause. Hence many cases are to be found where the appellate court have either increased or diminished the allowance of salvage originally made, even where it did not "violate any of the just principles which should regulate the subject." (See The Thetis, 2 Knapp, 410.)

Where it is not fixed by statute, the amount of salvage must necessarily rest on an enlarged discretion, according to the circumstances of each case.

The case before us is properly one of derelict. In such cases, it has frequently been asserted, as a general rule, that the compensation should not be more than half nor less than a third of the property saved. But we agree with Dr. Lushington, (The Florence, 20 E. L. and C. R., 622,) "that the reward in derelict cases should be governed by the same principles as other salvage cases—namely, danger to property, value, risk of life, skill, labor, and the duration of the service;" and that "no valid reason can be assigned for fixing a reward for salving derelict property at a moiety or any given proportion; and that the true principle is, adequate reward, according to the circumstances of the case." (See, also, The Thetis, cited above.)

The peculiar circumstances of this case, which distinguish it from all others, and which would justify the most liberal allowance for salvage, is the distance from the home port, twenty-seven thousand miles; and from the Sandwich Islands, the nearest port of safety, five thousand miles. The transfer of the property from the wreck required no extraordinary exertions or hazards, nor any great delay. The greatest loss incurred was the possible chance, that before the season closed in, the salving vessels might have taken a full cargo of their own oil. But we think this uncertain and doubtful speculation will be fairly compensated by the certainty of a moiety of the salved property at the first port of safety. The libellants claim only the balance, "after deducting salvage and *freight*," conceding that, under the circumstances, the salvors were entitled to both. When the property was brought to a port of safety, the salvage service was complete, and the salvors should be allowed freight for carrying the owners' moiety over twenty thousand miles to a better market, at the home port. As this case has presented very unusual circumstances, and as we think the claimants have acted in good faith in making their defence, all the taxed costs should be paid out of the fund in court.

The case is therefore remitted to the Circuit Court, to have the amount due to each party adjusted, according to the principles stated.

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 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 have the amount due to each party adjusted, according to the principles stated in the opinion of this court, and that all the costs of said cause in this court, and in the Circuit and District Courts, be paid out of the fund in the said Circuit Court.

E. J. DUPONT DE NEMOURS & Co., LIBELLANTS AND APPELLANTS, *v.* JOHN VANCE ET AL., CLAIMANTS OF THE BRIG ANN ELIZABETH.

To be seaworthy as respects cargo, the hull of a vessel must be so tight, stanch, and strong, as to resist the ordinary action of the sea during the voyage, without damage or loss of cargo.

A jettison, rendered necessary by a peril of the sea, is a loss by such peril within the meaning of the exception contained in bills of lading—aliter, if unseaworthiness of the vessel caused or contributed to the necessity for the jettison.

The owner of cargo jettisoned has a maritime lien on the vessel for the contributory share due from the vessel on an adjustment of the general average, which lien may be enforced by a proceeding in rem in the admiralty.

Where the libel alleged a shipment of cargo under a bill of lading, and its non-delivery, and prayed process against the vessel, and the answer set up a jettison rendered necessary by a peril of the sea, and this defensive allegation was sustained by the court, it was held that the libellant was entitled to a decree for the contributory share of general average due from the vessel.

There are no technical rules of variance or departure in pleading in the admiralty.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana, sitting in admiralty.

As many points were decided by this court which were not raised in the court below, it is proper to explain to the reader how this happened; and this will best be done by tracing the history of the case from its commencement.

In December, 1852, Dupont de Nemours & Co. shipped at their wharf, on the river Delaware, an invoice of gunpowder in kegs, &c., the value at the place of shipment being, by the invoice, $6,325. The articles were shipped on board the Ann Elizabeth, bound to New Orleans, and owned by the claimants in this cause. Two bills of lading were signed by the mate, and delivered to the shippers. The brig sailed on December 21, 1852.

After the arrival of the vessel at New Orleans, the shippers

filed a libel in the District Court of the United States for the eastern district of Louisiana, alleging that the following packages were missing, viz:

972 kegs powder, at	$4.50 - - - - - -	$4,374.00
563 half do.	2.37½ - - - - - -	1,337.13
99 quarter kegs,	1.33¾ - - - - - -	132.41
12 cases canister,	7.75 - - - - - -	93.00
1,646 packages.		$5,936.54

The libellants therefore held the vessel to her general responsibility for the non-delivery of the articles, and filed the bills of lading as exhibits.

After the usual proceedings in admiralty, John Vance, master and part owner of the brig, intervening for his own interest, and for the interest of the other owners of the brig, filed his answer in June, 1853. In this answer, he gave a narrative of the voyage, and alleged that the articles in question were thrown overboard for the safety of the vessel, and "that unless the same had been thrown over, your respondents believe, and so allege, that the vessel would have filled and gone down."

This answer was sworn to by the proctor and agent of respondent, as being true to the best of his belief or knowledge.

Evidence was taken on both sides. For the libellants, it consisted of the testimony of two persons in Delaware to prove the shipment, and the testimony of two persons in New Orleans to prove the unseaworthiness of the vessel, from examinations made after her arrival.

For the claimants, the evidence consisted of the notarial protest of the captain, mate, and three of the crew; and also the testimony of a stevedore, who unloaded the vessel, to show her sound condition.

Upon this evidence, the cause came on for trial, when the district judge decreed against the stipulators for $5,936.54, less $270.95 freight, equal to $5,665.59, with interest from 15th January, 1853, and costs.

Upon motion of the proctor for the claimants, a rehearing was granted, and fresh evidence was taken. On the part of the libellants, it consisted of the depositions of two persons living in New Orleans, to prove the value of the powder; and on the part of the claimants, the depositions of three persons living in New Orleans, who were not on board of the ship during the voyage. Two testified to the condition of the vessel, and the third to some proceedings respecting an average bond.

With this additional evidence, the case came up again, when

the district judge decided that the notarial protest must be rejected as evidence, and that, upon its being thrown out, there was nothing at all to prove the fact of the jettison. He therefore adhered to his former decree. The claimants appealed to the Circuit Court.

In the Circuit Court, additional evidence was taken on the part of the claimants, viz: the depositions of five persons, two of whom were not on board, but testified as experts; and of the three who were on board, two were passengers, and the third was one of the crew. These three testified to the fact of the jettison, and the circumstances under which it was made, and gave a narrative of the voyage.

When the case came up for trial before the circuit judge, he decreed that the claimants had sustained their answer, and dismissed the libel, each party paying his own costs.

The libellants appealed to the court.

It was argued by *Mr. Gerhard* for the appellants, and *Mr. Bayard* for the claimants.

Mr. Gerhard contended—

1. That the vessel was not seaworthy at the commencement of the voyage, and that therefore the owners were responsible for the total loss of the articles thrown overboard.

2. That there was such a neglect of proper precaution during the voyage as to make the vessel responsible.

3. That if the vessel should be held to have been seaworthy, and the jettison should be deemed to have been justified by the violence of the seas, still it was the duty of the master, on his arrival at the port of destination, to have the general average adjusted for a general contribution. (3 Kent's Com., 244; 11 Johnson, 323; Abbott on Shipping, part IV, chap. X, sec. 14, 5th American Ed., p. 611, note 1; 3 Sumner, 308.)

The argument on this point was concluded thus:

Now, it is admitted by the respondents that the libellants should be paid for their goods which were jettisoned. They are entitled to be recompensed, either in whole by the captain and owners of the brig, or in part by the contribution of the ship, freight, and cargo, in general average. But how can the libellants proceed to collect their *pro rata* contribution in general average, when, by the acts of the captain, his gross fault and inexcusable negligence, they are entirely precluded from pursuing this course? Where is the bond to secure them? How many of the consignees are mere agents for merchants living along the whole Mississippi valley? How many are insolvent? What are their names? Why did not the claim-

ants deposit in court the amount they acknowledge they owe by the statement of their own adjuster?

This neglect of the captain has made the owners liable. (See La Code 2, 972; 4 Boulay Paty, 592–'3.)

Mr. Bayard's points were the following:

First. The brig was seaworthy at the time she commenced her voyage, being sufficient in all respects for the voyage, well manned, and furnished with sails and all necessary furniture, and, being so, reasonably sufficient for the voyage, the necessity for the jettison of part of the cargo, to save the vessel and the residue of the cargo, cannot be met by the allegation, that, with a stouter vessel, or one better manned, the necessity for the jettison might not have occurred. (Conkling's Adm., pp. 164, 165; 1 Curtis, pp. 155, 156.)

Second. The testimony shows that the necessity for the jettison did not arise from the worm-holes which were discovered after the arrival of the vessel in port, as the pumps were abundantly able to overcome any danger which could possibly arise from such a source.

Third. The failure of the master to use proper exertions to have the average account adjusted, does not render the brig or owners liable for the loss by jettison, nor is any claim made in the libel for an alleged negligence of the master in this respect.

Fourth. The claim of the libellants for contribution against the other shippers and the owners, is not affected by the laches of the master, but the contribution may be recovered either by a suit in equity against all, or by several suits at law against each party who ought to contribute; nor is the right of the sufferer affected by the delivery of the cargo to the respective consignees without taking an average bond. (Abb. on Ship., pp. 207, 208.)

Fifth. The measure of damages, where the contract of affreightment is not performed, is properly the value of the goods at the port of shipment, with interest for the time when they ought to have been delivered. (Conk. Adm., p. 185, et seq.)

Mr. Justice CURTIS delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the eastern district of Louisiana.

The libel alleges that the appellants shipped on board the brig Ann Elizabeth, at Wilmington, in the State of Delaware, a large quantity of gunpowder, to be carried to New Orleans, in the State of Louisiana; and that, on the shipment thereof,

bills of lading, in the usual form, were signed by the master of the brig; that, according to the invoices of the merchandise specified in the bills of lading, its value was $7,233.75; that, on the arrival of the brig at New Orleans, the libellants required the delivery of the merchandise thus shipped, but they received only a part thereof; and that the part not delivered consisted of 1,646 packages, which, according to the same invoice valuation, amounted to the sum of $5,936.54.

The libel further alleges that no part of that sum has been paid to the libellants; and it prays process against the brig, and a decree for the damages thus demanded, and for such other relief as shall to law and justice appertain.

The master of the brig, intervening for his own interest and that of his part-owners, admits that the shipment of goods was made, as alleged in the libel; but propounds that, in the course of the voyage, it became necessary, for the safety of all concerned, through the perils and dangers of the seas, to make a jettison of that part of the libellant's goods which were shipped and not delivered.

The first question is, whether the claimant has shown, in support of his defensive allegation, that the jettison was occasioned by a peril of the sea. If it was, then the carrier is exonerated from the delivery of the merchandise, and has only to respond for that part of its value which is his just contributory share towards indemnity for the common loss by the jettison. A jettison, the necessity for which was occasioned solely by a peril of the sea, is a loss by a peril of the sea, and within the exception contained in the bill of lading.

But, if the unseaworthiness of the vessel, at the time of sailing on the voyage, caused, or contributed to produce, the necessity for the jettison, the loss is not within the exception of perils of the seas.

That there was such a necessity for this jettison as justified the master in making it, we think, is proved. In the case of Lawrence *v.* Minturn, (17 How., 109,) this court had occasion to consider the extent of the authority of the master to make a jettison. We then held, that "if he was a competent master; if an emergency actually existed, calling for a decision whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision, with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. It will be deemed to have been necessary for the common safety, because the person to whom the law has intrusted authority to decide upon and make it, has duly exercised that authority."

We find the case at bar is within this rule. We do not detail the evidence, because the authority of the master to make the jettison has not been seriously controverted.

This part of the case turns upon the other inquiry, whether the vessel was unseaworthy for the voyage when it was begun.

It is the hull of the vessel which is alleged to have been unseaworthy. To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, stanch, and strong, as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo under deck.

If a vessel, during the voyage, has leaked so much as to injure the cargo, or render a jettison of it necessary, one mode of testing seaworthiness is, to ascertain what defects, occasioning leakage, were found in the vessel at the end of the voyage; and then to inquire which of those defects are attributable to perils of the seas, encountered during the voyage, and which, if any, existed when it was begun; and, if any of the latter be found, the remaining inquiry is, whether they were such as to render the vessel incompetent to resist the ordinary attacks of the sea, in the course of the particular voyage, without damage or loss of cargo.

This vessel, on her arrival at New Orleans, was taken into dock, and examined. She was found to be a new vessel, and that she had been strained. A but, about midships, at or near the third or fourth streak, was started. The hood-ends forward were also strained, and, on trial, it was found they would take about a thread of oakum.

Two worm-holes were also found in her bow, about three-eighths of an inch in diameter—one about three streaks from the keel, the other a little higher up. As the vessel was new, there seems to be no doubt these holes were in the plank when put on the vessel, but from some cause remained undiscovered.

The vessel sailed from Wilmington on the afternoon of the 21st of December, 1852. The wind being northeast and strong, the vessel came to anchor at Reedy Island, and on the 22d proceeded to sea. The master, being a part-owner and claimant, has not been examined. The first officer appears to have died before the proofs were taken in the Circuit Court. No account is given of the second officer or the crew, except one seaman, who, together with two passengers, have been examined on the part of the claimants, to prove the occurrences of the voyage. It would have been more satisfactory to have had the evidence of one or more officers of the vessel, and especially of the mate, with his log-book. Still, these three witnesses do satisfactorily show, that on the night of the 23d of December,

the brig encountered a strong gale and heavy seas, causing her to labor and strain badly. This weather continued, and the sea became more heavy, up to the night of the 27th. Until about 8 o'clock that night, it was not known the vessel was leaking; but, on sounding the pumps at that time, it was found that the vessel had two feet of water in the hold. The pumps were manned and kept going, but the leak increased two feet in about two hours. The jettison was then made, and the vessel so far relieved that the pumps could control the leak, and the vessel, with the residue of the cargo, arrived at New Orleans.

It is manifest that the vessel encountered extraordinary action of the sea; and, as the vessel appears to have been new, and generally stanch and well fastened, the defects found at New Orleans, except the worm-holes, are fairly attributable to this cause. The starting of a but, and the opening of the hood-ends of a new vessel of ordinary strength, indicate a very uncommon degree of strain; and such defects would alone account for the amount of leakage of a vessel heavily laden, and exposed to such a sea as is described.

We do not think the existence of the worm-holes amount to unseaworthiness. Any leak which might have been occasioned by them in any ordinary sea, does not appear to have been such as the pumps could not control, without damage to the cargo. All vessels have leaks; and, independent of the strains received from the violent action of the sea, we are not satisfied this vessel would have leaked so much that the pumps could not have controlled the water in her hold, and prevented its doing damage to the cargo.

We find, therefore, that the vessel is exonerated from the claim for the full value of the merchandise; and the remaining question is, whether the vessel is chargeable with any part of the value of the merchandise in this cause.

When a lawful jettison of cargo is made, and the vessel and its remaining cargo are thereby relieved from the impending peril, and ultimately arrive in the port of destination, though the shipper has not a lien on the vessel for the value of his merchandise jettisoned, he has a lien for that part of its value which the vessel and its freight are bound to contribute towards his indemnity for the sacrifice which has been made for the common benefit. And this lien on the vessel is a maritime lien, operating by the maritime law as a hypothecation of the vessel, and capable of being enforced by proceedings *in rem*.

The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment, has very long existed in the general maritime law. It is found asserted

in a variety of forms in the Consulado, the most ancient and important of all the old codes of sea laws, (see chaps. 63, 106, 227, 254, 259;) and the maxim that the ship is bound to the merchandise, and the merchandise to the ship, for the performance of the obligations created by the contract of affreightment, is a settled rule of our maritime law. (The Schooner Freeman, 18 How., 182; The Ship Packet, 3 Mason, 261; The Volunteer, 1 Sum., 550; The Reeside, 2 Sum., 467; The Rebecca, Ware's R., 188; The Phœbe, Ib., 263; The Waldo, Davies's R., 161; The Gold Hunter, 1 Blatch. and How., 305.)

Pothier declares (Treatise of Charter-parties, preliminary chapter on Average) that the right to contribution in general average is dependent on the contract of affreightment, which embraces in effect an undertaking, that if the goods of the shipper are damaged for the common benefit, he shall receive a due indemnity by contribution from the owners of the ship, and of other merchandise benefited by the sacrifice.

The power and duty of the master to retain and cause a judicial sale of the merchandise saved, has also been long established. (Consulado del Mare, ch. 51, 52, 53, and note 1 in vol. 3, p. 103 of Pardessus's Collection; Laws of Oleron, art. 9; Ord. de la Marine, Liv. 3, tit. 8, sec. 21, 25; Nesbit on Ins., 135; Strong *v.* New York Firemen's Insurance Company, 11 John. R., 323; Simonds *v.* White, 2 B. and C., 805; Loring *v.* The Neptune Insurance Company, 20 Pick., 411; 3 Kent. Com., 243, 244.) And this right to enforce a judicial sale, through what we term a lien *in rem*, is not confined to the merchandise, but extends to the vessel.

Emerigon, (ch. 12, sec. 43,) speaking generally of an action of contribution, says it is in its nature a real action. Cassaregis, (dis. 45, N. 34,) "*est in rem scripta.*"

It would be extraordinary if the right to a lien were not reciprocal; if it existed in favor of the vessel, when sacrifice was made of part or the whole of its value, for preservation of the cargo, and not against the vessel, when sacrifice was made of the cargo for preservation of the vessel.

By the ancient admiralty law, the master could bind both the ship and cargo by an express hypothecation, to obtain a ransom on capture. So he could, and still may, when the whole enterprise has fallen into distress, which could not otherwise be relieved, hypothecate both the vessel and cargo to obtain means of relief. These are cases of express hypothecation made by the master, under the authority conferred on him by the maritime law; but he can also sell a part of the cargo to enable him to prosecute his voyage, or deliver a part of it in payment of ransom of his vessel, and the residue of the

cargo, on capture; and when he does so, the law of the sea creates a lien on the vessel, as security for the reimbursement of the loss of the shipper whose goods have been sacrificed. (The Packet, 3 Mason, 255; Pope *v.* Nickerson, 3 Story's R., 492; The Gold Hunter, 1 Blatch. and How., 300; The Boston, Ib., 309; Consol. del Mare, ch. 105; Laws of Oleron, art. 25; Ord. of Antwerp, art. 19; Emerigon Con. a la Grosse, ch. 4, secs. 9, 11.)

The authority to make a jettison of cargo is derived from the same source; an instant necessity, incapable of being provided for save by a sacrifice of part of what is committed to the master's care, and the presumed consent of the owners of all the subjects at risk, that the loss shall become a charge upon what is benefited by the sacrifice. (The Gratitudine, 3 Rob., 210.) If the sacrifice be made to enable the vessel to perform the voyage, by paying what the owners are bound to pay to complete it, the charge is on the vessel and its owners. If it be made to relieve the adventure from a peril which has fallen on all the subjects engaged in it, the risk of which peril was not assumed by the carrier, the charge is to be borne proportionably by all the interests, and there is a lien on each to the extent of its just contributory obligation. This authority of the master to make the sacrifice, and this consent of the owners of the subjects at risk to have it made, and their implied undertaking to contribute towards the loss, are viewed by the admiralty law as sufficient to create an hypothecation of the subjects benefited, for the security of the payment of the several sums for which those subjects are respectively liable. In other words, as the master is authorized to relieve the adventurer from distress, by means of an express hypothecation, in case of capture or distress in port, or by means of a sale of part of the cargo, thereby creating a maritime lien on the property ultimately benefited, in favor of the owner of what is sold or hypothecated; so he may also, in a case of necessity at sea, make a jettison of cargo, and thereby create a lien on the property thus saved from peril. Pothier (Con. Mar., n., 34, 72) and Emerigon (Con. a la Grosse, ch. 4, sec. 9) say that the sale of part of the cargo in port, to supply the necessities of the ship, is a kind of forced loan. Though the sacrifice of part of the cargo at sea cannot be considered a loan, it is a forced appropriation of it to the general benefit of those engaged in a common adventure, under a contract of affreightment; and such use of the property of one, for the benefit of others, creates a charge on what was thus saved, for what may fairly be termed the price of that safety. (Abbott on Shipping, part 4, ch. 10, s. 6.)

In United States *v.* Wilder, (3 Sumner, 311,) which was a case of general average, Mr. Justice Story likens it to a case of salvage, where safety is obtained by sacrifices of labor and danger, made for the common benefit; and he says the general maritime law gives a lien *in rem* for the contribution, not as the only remedy, but as in many cases the best remedy, and in some cases the only remedy. In the District and Circuit Courts of the United States, this jurisdiction has been exercised, and some cases of this kind are found in the books, though most of their decisions are not in print. (The Mary, 5 Law Reporter, 75; 6 Ib., 73; The Cargo of the George, 8 Law Reporter, 361; Sparks *v.* Kittredge, 9 Law Reporter, 349; Dunlap's Ad. Pr., 57; 2 Browne's Civ. and Ad. Law, 122; The Packet; The Gold Hunter; The Boston, above cited.) The restricted admiralty jurisdiction in England seems insufficient to enforce this lien. (The Constantia, 2 W. Rob., 487.)

Nor is there anything in the case of Rae *v.* Cutler, decided by this court in 1849, and reported in 7 How., 729, which conflicts with the view we have now taken.

That was a libel by the owner of a vessel against the consignee of cargo, to recover the contributory share of the average due from the goods which the master had voluntarily delivered to the respondent before the libel was filed. The court decided, that though the master, as the agent of the owner of the vessel in that case, had by the maritime law a lien upon the goods, as security for the payment of their just contribution, this lien was lost by their voluntary delivery to the consignee; and that the implied promise to contribute could not be enforced by an action *in personam* against the consignee, in the admiralty. This admits the existence of a lien, arising out of the admiralty law, but puts it on the same footing as a maritime lien on cargo for the price of its transportation; which, as is well known, is waived by an authorized delivery without insisting on payment.

On full consideration, we are of opinion that when cargo is lawfully jettisoned, its owner has, by the maritime law, a lien on the vessel for its contributary share of the general average compensation; and that the owner of the cargo may enforce payment thereof by a proper proceeding *in rem* against the vessel, and against the residue of the cargo, if it has not been delivered.

The remaining question is, whether the pleadings in this case are in such form as to present this claim for the consideration of this court, and entitle the libellant to assert a lien on the vessel for its contribution.

The rules of pleading in the admiralty are exceedingly sim-

ple and free from technical requirements. It is incumbent on the libellant to propound with distinctness the substantive facts on which he relies; to pray, either specially or generally, for the relief appropriate to them; and to ask for such process of the court as is suited to the action, whether *in rem* or *in personam*.

It is incumbent on the respondent to answer distinctly each substantive fact alleged in the libel, either admitting or denying, or declaring his ignorance thereof, and to allege such other facts as he relies upon as a defence, either in part or in whole, to the case made by the libel.

The proofs of each party must correspond substantially with his allegations, so as to prevent surprise. But there are no technical rules of variance, or departure in pleading, like those in the common law, nor is the court precluded from granting the relief appropriate to the case appearing on the record, and prayed for by the libel, because that entire case is not distinctly stated in the libel. Thus, in cases of collision, it frequently occurs that the libel alleges fault of the claimant's vessel; the answer denies it, and alleges fault of the libellant's vessel. The court finds, on the proofs, that both were in fault, and apportions the damages.

Looking to this libel, we find it states that a contract of affreightment was made to transport these goods from Wilmington to New Orleans, on board this brig; that the goods were laden on board, and the brig had arrived, but only a part of the goods have been delivered. It states the value of the part not delivered, avers that the libellants have not been paid any part of that sum, prays for process against the brig, and a decree for the value of the merchandise not delivered, and also for such other relief as to law and justice may appertain.

The answer admits all the facts stated in the libel, but sets up, by way of defensive allegation, a necessary jettison of that part of the cargo not delivered. It is manifest, that though this answers, in part, the claim for damages made by the libel, it does not wholly answer it. It shows sufficient cause why the libellant should not assert a lien on the brig for the whole value of his merchandise, but at the same time shows that the libellant has a valid lien on the brig for that part of the value of the merchandise which the vessel is bound to contribute. While it asserts that the performance of the contract of affreightment by transportation of the merchandise to New Orleans was excused by a peril of the sea, it admits that an obligation arose out of the relations of the parties created by that contract of affreightment, and out of the facts relied on as an excuse for not transporting the merchandise; that this

obligation was to pay to the shipper a part of the value of his goods; that it was the duty of the master, at the port of New Orleans, to ascertain what part of that value the vessel was bound to contribute, and that there is a lien on the vessel to secure its payment.

If the technical rules of common-law pleading existed in the admiralty, there might be difficulty in admitting a claim for general average, in an action founded on a contract of affreightment; because, though the claim for such average grows out of the contract of affreightment, the implied promise to pay it is technically different from the promise on the face of a bill of lading. In the case of Pope *v.* Nickerson, (3 Story, 465,) Mr. Justice Story went into a very extensive examination of such claims, under an agreed statement of facts, in an action of assumpsit on bills of lading; and it does not seem to have occurred, either to him or the counsel, that it was inconsistent with any substantial rule of the common law so to do.

But in the admiralty, as we have said, there are no technical rules of variance or departure. The court decrees upon the whole matter before it, taking care to prevent surprise, by not allowing either party to offer proof touching any substantive fact not alleged or denied by him.

But where, as in this case, the defensive allegation of the respondent makes a complete case for the libellant, so that no evidence in support of it is required, and where that case is within the form of action and the prayer of relief, and the process used by the libellant, we think it not a sufficient reason for refusing relief, that the precise case on which the court think fit to grant it is not set out in the libel.

We understand, that in the court below the libellants relied on the duty of the master to adjust and collect, and pay to them, the general average contributions, as precluding the defence of a necessary jettison. We think this defence was properly overruled. The libellants did not there insist on their lien on the vessel for its contribution. We do not consider their failure to do so precludes them from calling on this court to make that decree, to which the record shows they are entitled. In Finlay *v.* Lynn, (6 Cranch, 238,) this court was of opinion that the appellant, whose bill was dismissed by the Circuit Court, was entitled to an account, on a ground not assumed in the Circuit Court. This court said: "The plaintiff probably did not apply for this account in the court below, and it does not appear to have been a principal object of his bill. This court therefore doubted whether it would be most proper to affirm the decree dismissing the bill, with the addition that it should be without prejudice to any future claim

for profits, and for the debt due from one store to the other, or to open the decree and direct the account. The latter is deemed the more equitable course. The decree, therefore, is to be reversed, and the cause remanded, with directions to take an account of the profits of the jewelry store, if the same shall be demanded by the plaintiff." But, as the libellants failed to call the attention of the Circuit Court to this view of their rights, and placed their claim there solely on the grounds that the jettison was unlawful, or, if lawful, could not be a defence, because the master had failed to do the duty incumbent on him in a case of general average, we think the decree should be reversed, without costs. The cause must be remanded to the Circuit Court, with directions to ascertain the amount of the lien of the libellants on the Ann Elizabeth, for the share to be contributed by the vessel towards the loss sustained by the libellants, and to enter a decree accordingly.

Mr. Justice CATRON and Mr. Justice CAMPBELL dissented.

Mr. Justice CAMPBELL dissenting.

I dissent from that part of the opinion of this court which allows to the libellants a decree against the libellee for the amount of his contributory share in the account of average.

The libel is for the non-delivery of cargo according to the conditions of a bill of lading. The exemption claimed in the answer is, that the failure was occasioned by a peril of the seas, which made a jettison of the goods necessary; and this issue was tried in the District and Circuit Courts.

The objection raised here is, that the exemption is not complete, unless the contributory share of the libellee, to be ascertained, in the first place, by the adjustment of an average account, is also admitted and tendered.

In Bird *v.* Astcott, (Bulst., 280,) which was an action on the case against a carrier for the non-delivery of goods lost by a jettison, Coke, Lord Ch. J., cited a case which had been decided, and said, in respect to it, "We all did resolve, that this being the act of God, this sudden storm, which occasioned the throwing over of the goods, and which could not be avoided; and for this reason the plaintiff recovered nothing." (Mouse's case, 12 Co., 63.)

I have not been able to find a precedent, either in the United States or Great Britain, where a contributory share, in the nature of average, has been recovered, in a contentious litigation, in an action on a bill of lading for the non-delivery of cargo.

But the books of precedents show that average contributions

are recovered in actions, either of special or general assumpsit, the form of the action depending on the fact of the adjustment of the account. (2 Chitt. Plead., 50, 152, 161; Saund. Plead. and Ev., 278.)

"I entertain a decided opinion," said Chancellor, then Ch. J. Kent, "that the established principles of pleading, which compose what is called its science, are rational, concise, luminous, and ought, consequently, to be very carefully touched by the hand of innovation." (1 Joh., 471, Bayard *v.* Malcolm.) And the advantage of an orderly, not to say scientific system of administration, is as apparent in the courts of admiralty, and the mischiefs of uncertainty or inexactness are as positive there, as in any other tribunals. Such seems to have been the opinion of Justice Story. (The Boston, 1 Sum., 328.) This difference in opinion with the court would not have been the ground of a public dissent on my part, if I had not deemed the decree erroneous, and if I did not believe that the parent error is to be found in this departure from accurate pleading. The decree treats the liability of the master or owner for an average contribution as an integral part of their special written contract of affreightment; and their failure to pay their share of average is disposed of as a breach of the express obligation. My opinion is, that the obligations are distinct, though intimately associated, and are referable to different principles of law, and in the judicial administration of the United States may be subject to distinct jurisdictions.

The principle of the rule of general contribution, as applied to the case of a jettison, exists in all commercial nations; and the rule itself became a part of the statute law of England, in the reign of the Conqueror, and that of his youngest son. In a later period, the same principle was applied to a great number of analogous cases.

The inquiry is, upon what courts was the duty devolved of enforcing and administering this principle of general jurisprudence, and particularly in the cases of average? In Berkley *v.* Peregrave, (1 East., 220,) which was a special action of assumpsit for average on an unadjusted average account, Lord Kenyon says: "This action, the grounds and nature of which are fully set out in the special count, is founded in the common principles of justice. A loss is incurred, which the law directs shall be borne by certain persons in their several proportions. When a loss is to be repaired in damages, where else can they be recovered but in the courts of common law? And wherever the law gives a right, generally, to demand payment of another, it raises an implied promise in that person to pay." In Dobson *v.* Wilson, (3 Camp., 480,) Lord Ellenborough said: "A

court of equity may perhaps be a more convenient forum for adjusting the claims of the different parties concerned; but if a shipper of goods, which are sacrificed for the salvation of the rest of the cargo, is entitled to receive a contribution from another shipper whose goods are saved, I know not how I can say this may not be recovered by an action at law. This is a legal right, and must be accompanied with a legal remedy. The difficulty of showing, by strict evidence, the exact amount of the contribution, is great; but, as there are data upon which it may be calculated with great certainty, I think, is no objection to the action." (Price *v.* Noble, 4 Taun., 123.)

Holroyd, in the argument of the case in East., said: "At the common law, where a contribution was required, a writ of contribution issued, precedents of which are to be found. (Fitz. Nat. Brev.) This has fallen into disuse; because, in most instances, as many persons were concerned, a more easy remedy was administered in equity."

And so, from the earliest of the chancery reports, we learn that chancery will enforce an average or contribution to be made, when necessary, and that it will enforce an agreement among merchants to pay average. (Comyns's Dig., Chan. 2 J., 2 S.; Hick *v.* Pallington, Moor., 442; Ca. Parl., 19.) Spence, in his history of equitable jurisdiction, says, "That the court of chancery, from a period which cannot be traced, but which, as it was also apparently adopted from the Roman law, was probably coeval with the establishment of the court, exercised jurisdiction to compel contribution amongst general shippers of goods, when those belonging to one were thrown overboard for the safety of the ship, or in cases, as they are technically called, of general average." (1 Spenc. Eq. Ju., 663.) The popular treatises on the chancery system show that the title "Contribution" is one of great reach, comprehending a variety of cases which rest upon a familiar maxim of equity, and that average is only an instance of its application. How stands the historical evidence in regard to the jurisdiction of the admiralty courts, with reference to this subject? What say the "Black Book" and "Godolphin," or the controversionalists, Prynne, or Jenkins, in support of the ancient claims of these tribunals? What is to be found in the treaty of limits between the courts of common law and admiralty? In the case of the Constancia, (2 W. Rob., 488,) a question arose upon the distribution of the proceeds of a ship and cargo which were on deposit in the registry of the court, in a cause in which its jurisdiction was indisputable.

The claimant asserted a preference in the distribution, because a portion of the cargo belonging to him had been sold

for the repairs of the ship. The learned judge of that court said: "As far as my own experience extends, no claim of a similar description is to be found in the annals of the court; a circumstance which naturally induces me to consider with some carefulness whether the novelty of the claim be specious or real. In other words, whether, novel in appearance, it does not rest upon some recognised principles by which other claims have been decided. What, then, is the true character of the claim in question? It is a claim on behalf of the owners of certain property shipped on board of the vessel, and applied to relieve the ship's necessities, and to enable her to complete her voyage.

"In the case of the Gratitudinine, Lord Stowell has held that property so sacrificed is to be considered as the proper subject of general average; and Lord Tenterden, in his book on shipping, lays down the same doctrine. If this be so, and if, upon the authority of my Lord Stowell, thus confirmed by my Lord Tenterden, I am to consider this claim as a subject of general average, two considerations immediately suggest themselves. First, whether I have any jurisdiction at all over questions of general average; and, secondly, whether I could satisfactorily exercise such a jurisdiction under the circumstances of this case? The absence of any precedent, where the court has exercised the jurisdiction, is of itself a strong *prima facie* proof that I have no authority to entertain the question at all; and I am the more strongly inclined to this opinion, by the further consideration that, in all cases of average, it is essential that the tribunal which is to adjust it should have the power to compel all parties interested to come in, and to pay their quota. I possess no such power; and if I could not bring all parties interested before the court, I could not adjust a general average, which is a proportionate contribution by all." These citations from the opinions of the various tribunals which administer different departments of the judicial power of Great Britain, show that the doctrine upon which average contributions is made is not peculiar to the maritime code; and, also, that the maritime courts of the first commercial power that has existed have never administered it, and their judges suppose their modes of proceeding unsuitable to it. In the case of the Constancia, the *res* was in the custody of the court of admiralty, yet that court denied the existence of a maritime lien, or that any liability of the freighters against the ship could be enforced there. And this is equally apparent from the doctrines of the courts of chancery and law. In Hallett *v.* Bonsfield, (18 Vesey, jr., 187,) which was the case of a shipper whose property had been overthrown to lighten a ship in a storm, and who moved

to restrain the master and ship-owner from delivering any part of the cargo and receiving the freight, or parting with any share of the ship, Lord Eldon said, "that in such a case there is a lien upon the goods of each freighter, for contribution and average, in some sense; that is, the master is not bound to part with any part of the cargo until he has security from each person for his proportion of the loss; but there is no authority, that on the ground that he has a lien to the extent of entitling him to call on every person to give security for the amount of their average when it shall be adjusted, every owner of a part of the cargo can compel the captain to do so; and it strikes me, upon the short time I have had to consider it, that is a length the plaintiff cannot reach. The defendant it is true is a trustee for others, but the nature of the trust is regulated by the practice; and there is no instance of an action, or a suit in equity, to effectuate the lien, otherwise than through the right of the master to take security; that practice ascertaining the true nature and extent of the trust." This lucid statement of the English law explains the meaning of the older class of writers on commercial law, when they speak of the master's lien, and his duty to settle an average account.

Valin observes, that the article of the ordinance of 1681, which confers a right of detention upon the master, does not impose an imperative obligation upon him, and that he may deliver to each freighter his goods, without fear of consequences, unless specially required to withhold them. And other writers concur in the opinion, that the freighters, under that ordinance, had no action against one another. (Boucher Droit Mar., 450, 451.)

Lord Tenterden cites this case from Vesey, jr., without dissent, in his work on shipping, (Abb. on Ship., 508;) and in Simonds *v.* White, (2 B. and C., 805,) he describes the power of the master over the goods "as a power of detention," given in order that the expense, inconvenience, and delay of actions and suits, may be avoided. This court, in Cutler *v.* Rae, (7 Howard, 729,) declared that the party entitled to contribution "has no absolute and unconditional lien upon the goods liable to contribute. The captain has a right to retain them until the general average with which they are charged has been paid or secured; and, that this right of retainer is a "qualified lien," "dependent on the possession of the goods by the master or ship-owners," and "ceases when they are delivered to the owner or consignee;" "and does not follow them into their hands, nor adhere to the proceeds;" and a corresponding opinion of Lord Tenterden is to be found in Scaife *v.* Tobin, (3 Barn. and Ad., 523,) in which he says, "a consignee who is the absolute own-

er of the goods is liable to pay general average, because the law throws upon him that liability; but a mere consignee, who is not the owner, is not liable." And this demonstrates that the lien for average is not a maritime lien. A maritime lien does not include or require possession. The claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached. (Harmer *v.* Bell, 2 L. and Eq., 63.) These cases show, that neither in the adjudications of the courts of Great Britain or the United States, nor in the usages of their merchants, is there any sanction for the doctrines of this decree. No adjudication during sixty years of our history is to be found, where the power to adjust or to collect an average account is affirmed, or has been exerted by the district courts sitting in admiralty, upon direct application to them for the purpose.

The importance of the subject will justify me in an examination of the continental authorities, which are supposed to establish the existence of a maritime lien for contribution. The ancient codes do nothing more than recognise the existence of a rule of contribution in regard to losses arising from a jettison, or cases of a similar character, and the master's power of detention of the cargo saved, for the security or payment of the contributory shares, but they do not ascribe any greater operation to the rule, either in affecting property or in designating the jurisdictions to which the enforcement of the rule should be committed.

The leading authority cited for the doctrine, that average affords a maritime lien on the property saved, is found in a line of Emerigon, who says, "the action in contribution is real in its nature."

But that author discriminates the feature in a real action to which the action in contribution has any resemblance. The feature is, "that the action vanishes if the effects saved by means of the jettison perish before arriving at their destination."

The real action is for a thing, or to assert some right in it, and is terminated by its surrender, or destruction without the fault of the possessor. So long as the ship and cargo are exposed to peril in the same voyage in which the jettison is made, the action in contribution is inchoate, and dependent on the ultimate safety of the thing; and thus far it resembles a real action. But when the safety of the ship and cargo is confirmed, the liability of the contributories becomes personal, and the sums due are recoverable without further reference to

them; in France, by action in contribution; and in England, by a bill in equity for contribution, or action of assumpsit. It is a great mistake to suppose that the action in contribution was a hypothecary action, as I shall hereafter show.

In the time of Emerigon it was thrown upon the master, as the legal attorney of all persons interested in the ship and cargo. It was his duty to collect the contributory shares, and to pay them among the parties concerned; but he was not liable for the shares of insolvents, nor obliged to detain the goods, and that was an unusual, if not an unprecedented remedy.

The ordinance of 1681 simply permitted this remedy to be used. This ordinance was defective, in not defining the rights of the master in the goods liable to contribution. The ordinance did not take the precaution to establish the existence and legitimacy of privileged claims, is the testimony of those who framed the Code of Commerce of Napoleon. (3 Locré Com., 22.) The Code of Commerce was framed to repair what was considered a defect. In reference to average, it provides, "that in all the cases before mentioned, the master and mariners have a privilege on the goods or their proceeds for the amount of the contribution." This clause was not in the "projét" of the commission, nor in their revision; but after successive changes, the article appears in this form for the first time in the final draught of the code. The *jus in re* is conferred by this clause on the master, and he may proceed to enforce his rights by judicial seizure and sale, or opposition, or he may sue each contributory for his share in contribution, and is responsible in an action to each of them. But the evils of dormant liens are removed by limitations upon the extent and duration of the claim. The code bars actions against the freighter who receives his goods and pays his freight without a legal notice of the claim for average; and each claim must be notified in twenty-four hours to the opposite party, and be pursued by judicial demand in one month. (Thier Droit Con., 41, 124, 277; 4 Locré Com.; 3 Pard. Droit Com., sec. 750; 18 Dall., 544.)

Other articles define the liability of the owner, and the contributory share of the ship and cargo, the responsibility of the master, and create a privilege upon the ship and freight to answer the agreements of the charter-party, and whatever defaults of the master and mariners. (Thiernt Con. Droit, 28, sec. 2; 29, sec. 11; Code de Com., 190, secs. 11, 216, 222, 280.)

The commentaries of Pardessus, Locré, Boulay, Paty, and other authors, are made upon these enactments of French statute law. They affirm that these articles establish, as the

law of France, that the frieghter of a ship is obliged, by a contract or quasi contract to the master, to contribute his share of an average contribution; and that the master engages to indemnify the freighter whose property has suffered or been sacrificed for the common benefit; and that reciprocal rights of action are given to either party. I have no occasion to question the accuracy of their conclusions, nor to deny that the code itself embodies the usages, experience, and regulations, of the French nation in the management of their commerce, and is adapted to the wants and habits of their merchants. And no one can doubt that the authority of Louis XIV and Napoleon was adequate to the introduction of the ordinance and the code. But the question arises here—and it is one of grave import to those who desire to preserve the Constitution of the Union inviolate, and the limits it prescribes to the judicial power of the Federal Government, and the lines of division among the Federal courts undisturbed—the question arises, by what authority is it that the commercial system of France, the product of the legislative authority of her monarchs, has become the basis for judicial decision in the courts of the United States, and her legal administration of purely municipal regulations is taken as a guide to determine the jurisdictional limits of those courts of justice? That Congress may prescribe rules in reference to the settlement of average contributions, arising in the foreign or federal commerce of the country, may be admitted, and also may assimilate the American and French systems of commercial regulation. But I am not prepared to admit that this can be done by judicial authority.

The commercial systems of Great Britain and the United States recognise no such contract between the masters and freighters as the French code establishes; they invest the master with no such privilege upon the property of the shippers; they confer no such powers to maintain suits, and subject him to no such liabilities. The policy and spirit of the British and American commercial systems tend to restrain the agency and control of subordinates to precise limits in settlements or contests with respect to property and obligations; wherever it can be done, they bring the owners of the property, and the principals in the obligations, to confront one another. In my opinion, this decree introduces a new principle into the American commercial system, and that this interpolation adds to the jurisdiction of the judiciary department of this Government. This is done by judicial authority. In my opinion, the Constitution does not give such a power to this court. I therefore dissent from the decree.

Having carefully examined the foregoing opinion of Mr. Justice CAMPBELL, after it was in print, I am satisfied with its correctness, and concur therein. J. CATRON.

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 reversed, without costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to ascertain the amount of the lien of the libellants on the Ann Elizabeth, for the share to be contributed by the vessel towards the loss sustained by the libellants, and to enter a decree accordingly.

THE CLAIMANTS AND OWNERS OF THE STEAMER VIRGINIA, APPELLANTS, *v.* MICHAEL W. WEST, WILLIAM T. BELL, ALBERT R. HEATH, AND JAMES J. EDWARDS, PARTNERS, UNDER THE FIRM OF HEATH & EDWARDS; THOMAS C. BUNTING AND —— LECATO, PARTNERS, UNDER THE FIRM OF BUNTING & LECATO, AND JOHN M. HENDERSON.

Where an appeal is taken to this court, the transcript of the record must be filed and the case docketed at the term next succeeding the appeal.

Although the case must be dimissed if the transcript is not filed in time, yet the appellant can prosecute another appeal at any time within five years from the date of the decree, provided the transcript is filed here and the case docketed at the term next succeeding the date of such second appeal.

THIS was an appeal from the Circuit Court of the United States for the district of Maryland.

Mr. Johnson moved to dismiss the appeal, upon the ground that the record was not filed in time.

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

This is an appeal from the Circuit Court for the district of Maryland.

The decree from which the appeal has been taken was passed by the Circuit Court on the 17th day of November, 1855, and the appeal was prayed on the same day in open court. But it was not prosecuted to the next succeeding term of this court,

and no transcript of the record was filed here during that term. But a transcript has been filed at the present term of this court, and the case docketed. And a motion is made to dismiss it, upon the ground that the appeal is not legally before this court, according to the act of Congress regulating appeals.

The construction of this act of Congress, and the practice of this court under it, has been settled by the cases of Villalobos *v.* The United States, (6 Howard, 81,) and The United States *v.* Curry, (6 Howard, 106.) The transcript must be filed in this court and the case docketed at the term next succeeding the appeal, in order to give this court jurisdiction. This case must therefore be dismissed.

But the dismissal does not bar the appellant from taking and prosecuting another appeal at any time within five years from the date of the decree, provided the transcript is filed here and the case docketed at the term next succeeding the date of such second appeal.

JOHN BROWN, PLAINTIFF IN ERROR, *v.* ——— DUCHESNE.

The rights of property and exclusive use granted to a patentee do not extend to a foreign vessel lawfully entering one of our ports; and the use of such improvement in the construction, fitting out, or equipment, of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs.

THIS case came up, by writ of error, from the Circuit Court of the United States for the district of Massachusetts.

The facts in the case and state of the pleadings in the Circuit Court are set forth so particularly, in the opinion of the court, that they need not be repeated.

It was submitted on a printed argument by *Mr. Dana* for the plaintiff in error, and argued by *Mr. Austin* for the defendant.

As the points raised in the case are entirely new, it is thought expedient to present them to the reader as they were brought before the court by the respective counsel.

Mr. Dana, for the plaintiff in error, after stating the circumstances of the case, said that the question for the court to decide was:

Whether, under these circumstances, there is an exemption

from the operation of our patent laws, by reason of the nationality of the vessel.

Since this cause was argued in the Circuit Court, my attention has been called to the case of Caldwell *v.* Van Vlissengen, 9 Hare, 415, (9 Eng. L. and Eq. Rep., p. 51.)

In that case, the machine patented was a screw propeller. This was a substantial part of the vessel, and almost necessary to her use. The vessel was built and solely owned in Holland, where the invention was in free and common use. The affidavits set forth facts sufficient to establish an exemption, if national character can give one. The court fully considers the question, and decides against the exemption. (On pp. 58, 59, the court puts the right to an injunction upon the ground that actions at law are maintainable in these cases.) The court considers that the question of the exemption of foreign vessels, either entirely, or in cases of reciprocity, is one of national policy, and to be dealt with by the Legislature, rather than by the courts.

After reading this decision, I wrote to Sir William Page Wood, the counsel for the respondents, then Solicitor General, and now Vice Chancellor, and received from him the following reply:

31 Great George St., Westminster,
November 6, 1855.

My Dear Sir: Your letter reached me yesterday. The case you refer me (Caldwell *v.* Van Vlissengen) was *not* appealed. I thought the decision was right, though it was against me. At the same time, I saw that there were inconveniences in the application of the law; and in the session of 1852, when a bill was passing through the House of Commons, with reference to the amendment of the Patent Laws, I proposed the insertion of the following clause. [Here follows section 26, of the act of 15 and 16 Victoria, ch. 83.]

The opinion of Sir William Page Wood is entitled to great weight before every judicial tribunal, as is well known to your honors.

After this decision, the act 15 and 16 Victoria, ch. 83, was passed; section 26 of which is as follows: (4 Chitty's Statutes, 217.) "No letters patent for any invention (granted after the passing of this act) shall extend to prevent the use of such invention in any foreign ship or vessel, or for the navigation of any foreign ship or vessel, which may be in any port of her Majesty's dominions, or in any of the waters within the jurisdiction of any of her Majesty's courts, where such invention is not used for the manufacture of any goods or commodities to be vended within or exported from her Majesty's

dominions. Provided, always, that this enactment shall not extend to the ships or vessels of any foreign State, of which the laws authorize subjects of such foreign State, having patents or like privileges for the exclusive use or exercise of inventions within its territories, to prevent or interfere with the use of such inventions in British ships or vessels, while in the ports of such foreign State, or in the waters within the jurisdiction of its courts, where such inventions are not so used for the manufacture of goods or commodities, to be vended within or exported from the territories of such foreign State."

Such is the state of the law in Great Britain, the greatest commercial nation of Europe. There is no reason to believe that the law of any other nation of Europe varies from that of England. Indeed, it is probable that other nations will do likewise, and keep in their own hands the power of granting or withholding such an exemption, on considerations of policy, by legislation or treaty.

It is therefore respectfully suggested that the court should leave this question to the law-making and treaty-making departments of our Government, in the mean time placing the law in this country upon the same basis upon which it rests in England.

Is there any controlling reason why the court should not do this?

It is conceded that the statute, in its terms, suggests no exemption. No *interpretation* of the statute would suggest an exemption. If one is established, it must be by some *imposed construction*, paramount over the plain language of the acts. This is found solely in certain supposed principles of international law. No decision in point, in this country, has been cited, and the English cases referred to are inapplicable, as shown in Caldwell *v.* Van Vlissengen, cited.

The defendant's vessel, being private property, and here voluntarily, for purposes of trade, has no exemption from general national jurisdiction. (Phillimore's Int. Law, 367, 373; The Exchange, 7 Cranch, 144; Story's Conflict of Laws, sec. 383.)

International law respects absolute rights, the violation of which is cause of war, and comity, or rights of imperfect obligation, the contravention of which is not presumed, but which each nation is competent to contravene if it chooses. (This distinction is well stated in Mr. Webster's letter to Lord Ashburton, in the appendix to Wheaton's Law of Nations.)

It will not be claimed that the prohibition of the use of such an article as this, in a private vessel, under these circumstances,

is a violation of any absolute right secured by the law of nations. The Government has the right to prohibit commerce altogether, or with particular nations, as by embargo or non-intercourse laws. (1 Kent's Com., sec. 33 n; Vattel, Book 2, Ch. 7, sec. 94; Ch. 8, sec. 100; Ch. 2, secs. 25, 33—Book 1, Ch. 8, sec. 90.)

As a nation may prohibit trade, so it may lay conditions and restrictions. Authorities cited supra. (Vattel, Book 2, Ch. 8, sec. 100.)

The question is really under the *comitas gentium.* Between countries trading freely, is there a presumption from the law of comity that no nation will prohibit or restrict the use of such an invention, under such circumstances, so well settled as to authorize a court to establish the exception against the language of the statute?

This can hardly be contended, since the case of Caldwell *v.* Van Vlissengen, and the act 15 and 16 Victoria.

This is not a question of property, or of the domicil or *situs* of property. The defendant may have his vessel full of these articles, if he chooses. We admit the property in the article to be in him, and that it is part of the national wealth of France, and has its *situs* in France, for purposes of taxation, and for all national purposes. (Hays *v.* Pacific Co., 17 How., 596.) The question is upon a restriction of its use within our dominions.

As the use of the machine is not alleged to be necessary, and the presence of the vessel here is voluntary, if the comity of nations does not allow the prohibition in this case, it would forbid it in all cases of patents; and vessels nominally owned in the British Provinces, and in the West India Islands, may use all our nautical patents.

To what burdens is the foreigner and his personal property subject?

Not to taxes *for the support of the Government.* (In re Bruce, 2 Cr. and J., 437; Vattel, Book 2, Ch. 8, sec. 106.)

Nor to duties that relate to the quality of a citizen, as militia or jury duties. But they are subject to all burdens, taxes, and duties, relating to the police and economical regulations of a State. (Vattel, B. 2, Ch. 8, sec. 106.)

They are subject to imposts and duties levied for the purpose of encouraging the manufactures or other industry of a country, and are liable to prohibitions and restrictions made for the same purpose. Such are most navigation laws, and a large part of the revenue laws of a country. (Vattel, B. 2, Ch. 8, sec. 106; 1 Kent's Com., 35.)

Their exemption seems to be based upon the principle that

they shall not be required to do anything inconsistent with their home allegiance, or anything which supposes an allegiance or fealty to the State in which they merely sojourn.

The patent and copyright laws of a country stand upon the same ground with navigation laws, and laws prohibiting altogether or restricting certain kinds of trade, for economical purposes, or to add to the military resources and strength, or to increase the effective power and industry of a country, or to develop its genius. As to these, each nation is the proper judge of its own policy. (Vattel, B. 2, Ch. 2, secs. 25, 33.)

Indeed, Vattel (B. 1, Ch. 20, sec. 255) seems to define the police regulations of a country so as to include patent laws.

The object of the patent laws is to develop the genius and industry of the country, as well for war as for peace. And whether the law in this case be looked upon as a prohibition of the use, or as a duty, burden, or tax, on the use, it is equally within the recognised jurisdiction of the sovereign, under the comity of nations.

Under the British copyright laws, a foreigner cannot introduce into England, even for his private use, a book printed in his own country, if it is subject to copyright in England; and the introduction entails a forfeiture, instead of a tax to be paid to the author. (Act 5 and 6 Victoria, Ch. 45.)

In this state of the international law, in the absence of all direct decisions in support of the defendant's position, and since the passage of 15 and 16 Victoria, and the decision in Caldwell *v.* Van Vlissengen, it is respectfully suggested that the question of exemption of foreigners (in cases not of necessity or charity) should be treated as a political rather than a legal question, and the British precedent be followed by the court, until Congress or the treaty-making power shall act upon it.

Mr. Austin, for defendant in error, made the following points:

I. Foreign vessels entering a port of the United States, by the express or implied permission of the Government, do so under an implied immunity and reservation of the right belonging to them by the laws of the country to which they belong, with an implied understanding that the persons on board shall not violate the peace or domestic laws of the country. (Vattel's Law of Nations, B. 2, Ch. 8, sec. 101.)

The Alcyon, coming from the island of Miquelon, may be deemed to have entered a port of the United States by express permission. (5 United States Statutes at Large, 748, Ch. 66, which specially mentions this island.)

The plaintiff says that the terms of the patent law are broad enough to render the use of the aforesaid contrivance or gaff-saddle on board of the Alcyon, while in the harbor of Boston, a violation of his right.

The question is, whether the patent law can be properly so construed as to include a use of said gaff-saddle, notwithstanding the circumstances under which the said gaff-saddle was incorporated into the structure of the Alcyon, and notwithstanding the express or implied permission of the United States, by force of which she entered a port of the United States.

II. What shall or does constitute a vessel must be determined exclusively by the law of the country to which the vessel belongs, i. e., by the law of the owner's domicil.

This follows necessarily from general maxims of international jurisprudence. (Story on Con. of Laws, secs. 18, 20.)

In order to ascertain what is or is not real property, we must resort to the *lex loci rei*, (Id., sec. 382, 447;) so as to what is or what is not a corporation. (Bank of Augusta *v.* Earle, 13 Pet., 519.)

The Alcyon, although in a port of the United States, was still within the jurisdiction of France.

Children born on board of her while in Boston harbor would have been French subjects. (Vattel L. of N., B. 1, Ch. 19, sec. 216.)

The extent to which this principle is applied is shown in the case of In re Bruce, (2 Cr. and J., 437,) and Thompson *v.* The Advocate General, (12 Clark and F., 1.) See also United States *v.* Wiltberger, (5 Wh., 76.)

The gaff-saddle was as much an integral part of the Alcyon as her rudder, or her keel, or her gaff. Whether a more or less necessary part, does not alter the fact that it *was* rightfully a part of the vessel by French law. Therefore, if the United States patent law operated to prevent the defendant from using the gaff-saddle while in the harbor of Boston, notwithstanding it was a part of his vessel, without plaintiff's permission, it operated just so far to impose a restriction on the implied permission accorded by the United States to all French vessels to enter the ports of the United States, and upon the express permission accorded to all French vessels from Miquelon.

The statutes of the United States relating to patents were not intended to affect, and do not affect, foreign vessels coming into the ports of the United States.

1st. The statutes of a country relating to patents are not such laws as a foreigner, visiting this country temporarily, and not to become a resident, is bound to obey, so far as those laws relate merely to the use of articles purchased abroad, and

brought into the country solely for the personal use of the party in possession while a transient visiter. (Vattel L. of N., B. 2, Ch. 8, secs. 101, 106, 109; Boullenois Traité des Statuts, pp. 2, 3, 4; Universities of Oxford and Cambridge *v.* Richardson, 6 Vesey, Jr., 689, which entirely supports this position.)

2d. The United States, in granting letters patent, or any other exclusive privilege to a citizen, necessarily always reserve by implication their own rights of sovereignty, which are not to be affected by any individual or private privilege.

Examples of the application of this principle are as follows:

1. In regard to the right of eminent domain.

This exists inherently in every Government. (Vattel's L. of N., B. 1, Ch. 20, sec. 244; Bonaparte *v.* The Camden and Amboy Railroad, 1 Bald., 220.)

It is recognised in the Constitution of the United States. (Amdt. V.)

Therefore, if the Government by a land patent convey today a portion of its public lands to an individual, it could tomorrow, by virtue of the implied reservation of its right of eminent domain, resume the land from its own grantee, and against his consent, by paying to him an indemnity.

Independently of the principle that the right of eminent domain, being an attribute of sovereignty, *could* not be conveyed away, the conclusion above stated follows from the rule that in public grants nothing passes by implication. (United States *v.* Arredondo, 6 Pet., 738; Jackson *v.* Lamphire, 3 Pet., 289.)

2. The constitutional power of Congress over commerce.

This power extends to navigation, (2 Story's Com. on Con., sec. 1,060,) and to every species of commercial intercourse. (Id., 1,061.)

In the exercise of this power, Congress in 1845, after the date of the plaintiff's patent, passed the law relating to French vessels coming from Miquelon, (ubi supra,) which law makes no exception as to the kind of vessel, or the mode of its rig, or the peculiarities of its structure.

Either, therefore, the power of Congress to pass an act thus broad in its terms was limited by the grant to the plaintiff of an exclusive right to use the contrivance in question, or the exclusive right was limited in its extent by the implied reservation of power to pass such an act. As the grant to the plaintiff, and the act of 1845, are in direct opposition, the grant must be construed against grantee. (Mills *v.* St. Clair County, 8 How., 569.)

The defendant does not contend that he would have a right to bring into a port of the United States a cargo or any number of these contrivances for sale; nor even that he had a right

to detach and sell that on board of the Alcyon. In this argument the gaff-saddle is deemed a part of the schooner, in the same way as fixtures are parts of the reality.

3. The power of Congress to alienate a portion of its territory.

This power exists in every Government, (Vattel's L. of N., B. I., Ch. 21, sec. 263.) It was exercised in the Treaty of Washington, 1842, (8 U. S. Stat. at Large, 572.)

Every patent right then existing extended over the whole country as then bounded. The alienation of a portion of the territory diminished the value, by diminishing the extent of every existing patent right; but they were all granted, subject to the implied reservation of power on the part of the Government thus to diminish their value.

The right, therefore, of the plaintiff, to an exclusive use of his patented contrivance within the jurisdiction of the United States, was limited by the paramount right of the sovereignty of the United States to admit all vessels into the ports of the United States, which right they have exercised in regard to French vessels, by implication, by treaty, and by statute. The same reasoning which would separate the gaff-saddle from the schooner might be allowed to separate her into as many parts as there should happen to be articles on board of her incorporated into her structure, the like of which were patented in this country.

3. The private right of every patentee is subject to the public right of the Government, to admit into the ports of the United States any foreign vessel, free from any private or public charges, tolls, or burdens, other than those imposed by treaty or by the laws of nations. (The Attorney General *v.* Burridge, 10 Price, 350; Same *v.* Parmeter, Id., 378; The same *v.* The Attorney General, Id., 412.)

The cases cited are exactly analogous in principle to the case at bar.

In the citations, the *jus privatum* was a grant by Charles I of his property in land between high and low water mark; and the *jus publicum* with which it interfered was the right of the public freely to pass and repass upon the salt water between high and low water mark.

In the present case, the *jus privatum* is the exclusive right granted to the plaintiff to use within the jurisdiction of the United States a certain machine, and the *jus publicum* with which it interferes is the right the public has to the free admission into the ports of the United States of all foreign vessels, being such according to the law of the country where they belong.

The grant by Charles I of land between high and low water mark was held void, so far as it prevented this free passage. By parity of reasoning, the letters patent of the plaintiff must be held void, or rather as never having extended to foreign vessels visiting the ports of the United States, as the Alcyon visited Boston.

The principle here contended for, as it applies to ports and harbors, is clearly stated by Lord Hale, in his treatise *De Jure Maris*, cap. 6, p. 35, and in the treatise *De Portibus Maris*, chapter on the *jus publicum*, pp. 84, 89: "When a port is fixed and settled," "though the soil and franchise and dominion thereof *prima facie* be in the King, or by derivation from him in a subject, yet that *jus privatum* is clothed and superinduced with a *jus publicum.*" So in the case at bar, the *jus privatum* of the patentee is subject to the *jus publicum* by which foreign vessels, however constructed, may enter our ports. This Government, never having undertaken to decide, nor ever having granted to an individual the right to decide for the Government, that certain vessels, or vessels constructed partly or wholly in a certain way, shall not enter our ports without paying a toll, or charge, or duty, not imposed by treaty or special laws relating thereto.

4. The statutes relating to patents cannot properly be so construed as to include machines or contrivances forming a part of the original structure of foreign vessels entering the ports of the United States, as the Alcyon entered Boston harbor.

(1.) Because such construction, for the reasons above stated, would introduce public mischiefs and manifest incongruities. (Sawin *v.* Guild, 1 Gall., 485; Talbot *v.* Seaman, 1 Cr., 1; Murray *v.* The Charming Betsey, 2 Id., 64.)

(2.) These statutes were passed *alio intuitu.* (See the reasoning of Judge Curtis, in the opinion delivered by him in this case, printed from the original MS. in 4 Am. Law Register, 152. Also, Lessee of Brewer *v.* Blougher, 14 Pet., 178: "The laws will restrain the operation of a statute within narrower limits than its words import, if the literal meaning of its language would extend to cases which the Legislatnre never designed to embrace in it"—198.) It cannot be supposed that Congress intended the statutes on patents to confer a right on a patentee to interfere in any way with the exercise of a license conferred by Government on a foreign vessel. (Same doctrine in Mercer *v.* Mechanics' Bank of Alexandria, 1 Pet., 64.)

IV. Letters patent of the United States confer upon the grantee the exclusive right to the subject-matter of the patent, *to be exercised within their jurisdiction.* A foreign ship coming

within one of the ports of the United States, with their express or implied permission, is without the jurisdiction within which this exclusive right is to be exercised.

1. Foreigners within the territorial jurisdiction of a country may yet be within its municipal jurisdiction for no purpose whatever. Such is the status of public ministers—(Wheaton's Elements of the L. of N., Part III, c. 1, s. 14; Id., Part II, c. 2, s. 9)—and of foreign sovereigns entering the territory of another—(id. id. id.)—and of foreign armies marching, &c., through the territory—(id. id. id.)—and of a foreign ship of war—(id. id. id.)—and Schooner Exchange *v.* McFadden, 7 Cr. 135, 147.)

2. Foreigners within the territorial may be within the municipal jurisdiction of a country for all purposes. This is the status of foreigners who come into the country *animo manendi*, becoming inhabitants. (Vattel's L. of N., B. I, c. 19, s. 213.)

3. Foreigners within the territorial may be within the municipal jurisdiction for some purposes, and not for others. This is the case with transient persons (Vattel's L. of N., B. II, c. 8, ss. 105–'6–'8–'9) and consuls; (Wheaton's Elements, P. III, c. 1, s. 23.) The same principle applies to a part of the country in temporary possession of an enemy. (U. S. *v.* Hayward, 2 Gall., 485.) To goods imported, and not entered, although within the territorial jurisdiction of the State, they are not subject to its municipal jurisdiction. (Harris *v.* Dennie, 3 Pet., 292.)

This principle applies to a foreign commercial vessel visiting a port of the United States. It is within the jurisdiction of the United States, so far that persons on board are bound to do no act against the public peace, or *contra bonos mores*, or against the revenue laws, &c., &c. But "for all the personal relations and responsibilities existing in a ship at the time she entered a port, and established or permitted by the laws of her own country, her authorities are answerable only at home; and to interfere with them in discharge of the duties imposed upon them, or the exercise of the powers vested in them by those laws, on the ground of their being inconsistent with the municipal legislation of the country where the ship happens to be lying, is to assert for that legislation a superiority not acknowledged by the law, and inconsistent with the independence of nations." (Mr. Legare's Opinion, 4 Op. of Att. Gen., 98, 102; Same point, 6 Webster's Works, 303.)

V. The case of Caldwell *v.* Van Vlissengen, (9 Hare, 415, reprinted in 9 Eng. Law and Equity R., 51,) will be cited by plaintiff in error, as deciding the point before the court. On this case, the defendants say:

1. It will be regarded by this court only so far as the reasoning commends itself to the court as sound.

2. The case was not placed upon the grounds assumed in the case at bar. The principles here contended for were neither considered nor even presented to the court.

3. Statute 15 and 16 Victoria, c. 83, s. 26, passed July 1, 1852, provides that letters patent thereafter granted shall not prevent the use of inventions in foreign ships resorting to British ports when not used for the manufacture of goods to be vended in or exported from England, excepting from the act, ships of foreign States in the ports of which British ships are prevented from using foreign inventions when not employed for the manufacture of goods to be vended in or exported from such foreign States.

This statute was passed in evident recognition of the existence and propriety of the principles of international law contended for by the defendant in error.

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

This case comes before the court upon a writ of error to the Circuit Court of the United States for the district of Massachusetts.

The plaintiff in error, who was also plaintiff in the court below, brought this action against the defendant for the infringement of a patent which the plaintiff had obtained for a new and useful improvement in constructing the gaff of sailing vessels. The declaration is in the usual form, and alleges that the defendant used this improvement at Boston without his consent. The defendant pleaded that the improvement in question was used by him only in the gaffs of a French schooner, called the Alcyon, of which schooner he was master; that he (the defendant) was a subject of the Empire of France; that the vessel was built in France, and owned and manned by French subjects; and, at the time of the alleged infringement, was upon a lawful voyage, under the flag of France, from St. Peters, in the island of Miquelon, one of the colonies of France, to Boston, and thence back to St. Peters, which voyage was not ended at the date of the alleged infringement; and that the gaffs he used were placed on the schooner at or near the time she was launched by the builder in order to fit her for sea.

There is also a second plea containing the same allegations, with the additional averment that the improvement in question had been in common use in French merchant vessels for more than twenty years before the Alcyon was built, and was the

common and well-known property of every French subject long before the plaintiff obtained his patent.

The plaintiff demurred generally to each of these pleas, and the defendant joined in demurrer; and the judgment of the Circuit Court being in favor of the defendant, the plaintiff thereupon brought this writ of error.

The plaintiff, by his demurrer, admits that the Alcyon was a foreign vessel, lawfully in a port of the United States for the purposes of commerce, and that the improvement in question was placed on her in a foreign port to fit her for sea, and was authorized by the laws of the country to which she belonged. The question, therefore, presented by the first plea is simply this: whether any improvement in the construction or equipment of a foreign vessel, for which a patent has been obtained in the United States, can be used by such vessel within the jurisdiction of the United States, while she is temporarily there for the purposes of commerce, without the consent of the patentee?

This question depends on the construction of the patent laws. For undoubtedly every person who is found within the limits of a Government, whether for temporary purposes or as a resident, is bound by its laws. The doctrine upon this subject is correctly stated by Mr. Justice Story, in his "Commentaries on the Conflict of Laws," (chap. 14, sec. 541,) and the writers on public law to whom he refers. A difficulty may sometimes arise, in determining whether a particular law applies to the citizen of a foreign country, and intended to subject him to its provisions. But if the law applies to him, and embraces his case, it is unquestionably binding upon him when he is within the jurisdiction of the United States.

The general words used in the clause of the patent laws granting the exclusive right to the patentee to use the improvement, taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.

Neither will the court, in expounding a statute, give to it a construction which would in any degree disarm the Government of a power which has been confided to it to be used for the general good—or which would enable individuals to embarrass it, in the discharge of the high duties it owes to the community—unless plain and express words indicated that such was the intention of the Legislature.

The patent laws are authorized by that article in the Constitution which provides that Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. The power thus granted is domestic in its character, and necessarily confined within the limits of the United States. It confers no power on Congress to regulate commerce, or the vehicles of commerce, which belong to a foreign nation, and occasionally visit our ports in their commercial pursuits. That power and the treaty-making power of the General Government are separate and distinct powers from the one of which we are now speaking, and are granted by separate and different clauses, and are in no degree connected with it. And when Congress are legislating to protect authors and inventors, their attention is necessarily attracted to the authority under which they are acting, and it ought not lightly to be presumed that they intended to go beyond it, and exercise another and distinct power, conferred on them for a different purpose.

Nor is there anything in the patent laws that should lead to a different conclusion. They are all manifestly intended to carry into execution this particular power. They secure to the inventor a just remuneration from those who derive a profit or advantage, within the United States, from his genius and mental labors.

But the right of property which a patentee has in his invention, and his right to its exclusive use, is derived altogether from these statutory provisions; and this court have always held that an inventor has no right of property in his invention, upon which he can maintain a suit, unless he obtains a patent for it, according to the acts of Congress; and that his rights are to be regulated and measured by these laws, and cannot go beyond them.

But these acts of Congress do not, and were not intended to, operate beyond the limits of the United States; and as the patentee's right of property and exclusive use is derived from them, they cannot extend beyond the limits to which the law itself is confined. And the use of it outside of the jurisdiction of the United States is not an infringement of his rights, and

he has no claim to any compensation for the profit or advantage the party may derive from it.

The chief and almost only advantage which the defendant derived from the use of this improvement was on the high seas, and in other places out of the jurisdiction of the United States. The plea avers that it was placed on her to fit her for sea. If it had been manufactured on her deck while she was lying in the port of Boston, or if the captain had sold it there, he would undoubtedly have trespassed upon the rights of the plaintiff, and would have been justly answerable for the profit and advantage he thereby obtained. For, by coming in competition with the plaintiff, where the plaintiff was entitled to the exclusive use, he thereby diminished the value of his property. Justice, therefore, as well as the act of Congress, would require that he should compensate the patentee for the injury he sustained, and the benefit and advantage which he (the defendant) derived from the invention.

But, so far as the mere use is concerned, the vessel could hardly be said to use it while she was at anchor in the port, or lay at the wharf. It was certainly of no value to her while she was in the harbor; and the only use made of it, which can be supposed to interfere with the rights of the plaintiff, was in navigating the vessel into and out of the harbor, when she arrived or was about to depart, and while she was within the jurisdiction of the United States. Now, it is obvious that the plaintiff sustained no damage, and the defendant derived no material advantage, from the use of an improvement of this kind by a foreign vessel in a single voyage to the United States, or from occasional voyages in the ordinary pursuits of commerce; or if any damage is sustained on the one side, or any profit or advantage gained on the other, it is so minute that it is incapable of any appreciable value.

But it seems to be supposed, that this user of the improvement was, by legal intendment, a trespass upon the rights of the plaintiff; and that although no real damage was sustained by the plaintiff, and no profit or advantage gained by the defendant, the law presumes a damage, and that the action may be maintained on that ground. In other words, that there is a technical damage, in the eye of the law, although none has really been sustained.

This view of the subject, however, presupposes that the patent laws embrace improvements on foreign ships, lawfully made in their own country, which have been patented here. But that is the question in controversy. And the court is of opinion that cases of that kind were not in the contemplation of Congress in enacting the patent laws, and cannot, upon any

sound construction, be regarded as embraced in them. For such a construction would be inconsistent with the principles that lie at the foundation of these laws; and instead of conferring legal rights on the inventor, in order to do equal justice between him and those who profit by his invention, they would confer a power to exact damages where no real damage had been sustained, and would moreover seriously embarrass the commerce of the country with foreign nations. We think these laws ought to be construed in the spirit in which they were made—that is, as founded in justice—and should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated, without departing from the principle upon which they were legislating, and going far beyond the object they intended to accomplish.

The construction claimed by the plaintiff would confer on patentees not only rights of property, but also political power, and enable them to embarrass the treaty-making power in its negotiations with foreign nations, and also to interfere with the legislation of Congress when exercising its constitutional power to regulate commerce. And if a treaty should be negotiated with a foreign nation, by which the vessels of each party were to be freely admitted into the ports of the other, upon equal terms with its own, upon the payment of the ordinary port charges, and the foreign Government faithfully carried it into execution, yet the Government of the United States would find itself unable to fulfil its obligations if the foreign ship had about her, in her construction or equipment, anything for which a patent had been granted. And after paying the port and other charges to which she was subject by the treaty, the master would be met with a further demand, the amount of which was not even regulated by law, but depended upon the will of a private individual.

And it will be remembered that the demand, if well founded in the patent laws, could not be controlled or put aside by the treaty. For, by the laws of the United States, the rights of a party under a patent are his private property; and by the Constitution of the United States, private property cannot be taken for public use without just compensation. And in the case I have stated, the Government would be unable to carry into effect its treaty stipulations without the consent of the patentee, unless it resorted to its right of eminent domain, and went through the tedious and expensive process of condemning so much of the right of property of the patentee as related to foreign vessels, and paying him such a compensation therefor as should be awarded to him by the proper tribunal. The same difficulty would exist in executing a law of Congress

in relation to foreign ships and vessels trading to this country. And it is impossible to suppose that Congress in passing these laws could have intended to confer on the patentee a right of private property, which would in effect enable him to exercise political power, and which the Government would be obliged to regain by purchase, or by the power of its eminent domain, before it could fully and freely exercise the great power of regulating commerce, in which the whole nation has an interest. The patent laws were passed to accomplish a different purpose, and with an eye to a different object; and the right to interfere in foreign intercourse, or with foreign ships visiting our ports, was evidently not in the mind of the Legislature, nor intended to be granted to the patentee.

Congress may unquestionably, under its power to regulate commerce, prohibit any foreign ship from entering our ports, which, in its construction or equipment, uses any improvement patented in this country, or may prescribe the terms and regulations upon which such vessel shall be allowed to enter. Yet it may perhaps be doubted whether Congress could by law confer on an individual, or individuals, a right which would in any degree impair the constitutional powers of the legislative or executive departments of the Government, or which might put it in their power to embarrass our commerce and intercourse with foreign nations, or endanger our amicable relations. But however that may be, we are satisfied that no sound rule of interpretation would justify the court in giving to the general words used in the patent laws the extended construction claimed by the plaintiff, in a case like this, where public rights and the interests of the whole community are concerned.

The case of Caldwell *v.* Vlissengen, (9 Hare, 416, 9 Eng. L. and Eq. Rep., 51,) and the statute passed by the British Parliament in consequence of that decision, have been referred to and relied on in the argument. The reasoning of the Vice Chancellor is certainly entitled to much respect, and it is not for this court to question the correctness of the decision, or the construction given to the statute of Henry VIII.

But we must interpret our patent laws with reference to our own Constitution and laws and judicial decisions. And the court are of opinion that the rights of property and exclusive use granted to a patentee does not extend to a foreign vessel lawfully entering one of our ports; and that the use of such improvement, in the construction, fitting out, or equipment of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a for-

eign port, and authorized by the laws of the country to which she belongs.

In this view of the subject, it is unnecessary to say anything in relation to the second plea of the defendant, since the matters relied on in the first are sufficient to bar the plaintiff of his action, without the aid of the additional averments contained in the second.

The judgment of the Circuit Court must therefore be affirmed.

MOSES C. MORDECAI, ISAAC E. HERTZ, JOSEPH A. ENSLOW, AND ISAAC R. MORDECAI, CARRYING ON BUSINESS UNDER THE NAME, STYLE, AND FIRM, OF MORDECAI & CO., LIBELLANTS AND APPELLANTS, *v.* W. & N. LINDSAY, OWNERS OF THE SCHOONER MARY EDDY, HER TACKLE, &C.

Where the decree of the District Court, in a case of admiralty jurisdiction, was not a final decree, the Circuit Court, to which it was carried by appeal, had no power to act upon the case, nor could it consent to an amendment of the record by an insertion of a final decree by an agreement of the counsel in the case; nor can this court consent to such an amendment.

The District Court having ordered a report to be made, the case must be sent back from here to the Circuit Court, and from there to the District Court, in order that a report may be made according to the reference.

THIS was an appeal from the Circuit Court of the United States for the district of South Carolina.

It was a libel filed on the 6th of April, 1854, in the District Court of South Carolina, by Mordecai & Co., against the schooner Mary Eddy, and all persons intervening.

A very brief narrative will be sufficient to show the condition in which the case was, when it left the District Court, and this is all that is required under the present opinion of this court.

In March, 1854, the Mary Eddy was in New Orleans, about to sail for Charleston. One hundred and two hogsheads of sugar were shipped on board of her, which were to be delivered to Mordecai & Co. The libel was for the non-delivery of these articles.

The answer admitted the shipment and arrival of the vessel in Charleston, and then averred the delivery of three hogsheads of the sugar, (together with some barrels of syrup,) the freight of which Mordecai & Co. refused to pay. The answer then alleged that the libellants, having refused to pay freight until the sugars were received by them at their store, or until possession had passed to them, the master unloaded the residue

of the sugars, and, when landed on the wharf, gave notice to Mordecai & Co. that he would deliver the articles to them upon payment of the freight; that Mordecai & Co. having refused to do this, the master retained the custody of the sugars in order to preserve his lien for the freight. A correspondence took place between the parties, which it is not necessary to state for the purposes of this report.

The district judge decreed in favor of the libellants, with costs, and then added:

"Mr. Gray, the commissioner and clerk of this court, will ascertain the charges to be made against the respective parties to this suit, and state the account between them. For this purpose, he is authorized to use the testimony already reported, and such further evidence as may be brought before him in relation to this point."

Without any further proceedings being had in the case, the claimants appealed to the Circuit Court, and the record was accordingly transmitted.

When the cause came up for hearing before the circuit judge, he reversed the decree of the District Court, and dismissed the libel with costs, whereupon the libellants appealed to this court.

The case was argued upon its merits by *Mr. Phillips* for the appellants, and *Mr. Johnson* and *Mr. Reverdy Johnson, jr.*, for the claimants, whose arguments it is not necessary to state in this report, in consequence of the case being decided upon a preliminary point.

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 South Carolina.

Upon the hearing of this cause in this court, it was suggested that the court had not jurisdiction of the case, on the ground that the District Court, which had original jurisdiction of it, had not given a final decree in favor of the libellants, before the cause was taken by appeal to the Circuit Court; from the decision of which, reversing the decision of the district judge and dismissing the libel, the appellants appealed to the Supreme Court. No such decree of the District Court is set out in the record; but the court, supposing it might be a clerical omission, gave to the counsel concerned in the cause time to ascertain the fact, in order that it might be made, either by consent of parties or by certiorari, a part of the record, that there might be no delay in the final disposition of the case by this court. The counsel having made the necessary inquiries

from the clerk of the District and Circuit Courts, and having reported to this court that no final decree had been extended or passed in favor of the libellants by the district judge, and that the case had been taken by appeal to the Circuit Court upon such imperfect record, and decided in that court, without any notice of the omission having been brought to its view either from the record or in the argument of the case, the counsel have applied to this court to permit them to amend the record by consent, by inserting in it what might be agreed upon by them to be a final decree, urging, as the merits of the case between the parties had been fully discussed here, that the court could proceed upon such amendment to decide the case.

We have examined the proposal of counsel in connection with the laws of Congress regulating appeals from the District Court to the Circuit Court, and from the latter to this court, and also the decisions of this court upon those laws, and we do not find, upon any interpretation which has been or could in our view be given to them, that it is in our power to grant the application of counsel for the amendment of the record as they propose it should be done.

The right of appeal is "conferred, defined, and regulated," by the second section of the act of March 2, 1803, (ch. 20, 1 Stat. at Large, 244.) Its language is: "That from all final judgments or decrees in any of the District Courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the Circuit Court next to be holden in the district where such judgment or judgments, decree or decrees, may be rendered; and the Circuit Court or Courts are hereby authorized and required to receive, hear, and determine, such appeal. And that from all final judgments or decrees rendered in any Circuit Court, or in any District Court acting as a Circuit Court in cases of equity, of admiralty, and maritime jurisdiction, and of prize or no prize, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars, shall be allowed to the Supreme Court of the United States; and that upon such appeal a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court." It is, then, only upon final judgments and decrees that appeals can be taken from either of the courts to the other courts. Without such a decree, neither the Circuit nor the Supreme Courts can have jurisdiction to determine a cause upon its merits, as was done in this case by the Circuit Court, from which decision it has been brought by appeal to this court. The Circuit Court had nothing before it to make

its decision available for the appellants, if its view of the merits of the case had coincided with the opinion of the district judge, or upon which its process could have been issued to carry out the judgment given by it in favor of the respondents. Nor could it have permitted an amendment of the record of appeal by the insertion of what the parties might have agreed to be a final judgment as to amount, without its having first received the judicial sanction of the district judge. And this court is as powerless in this respect as the Circuit Court was, as its jurisdiction depends upon that court having a proper legislative jurisdiction of the case. It cannot overlook the fact upon which its jurisdiction depends, *by any action in the case in the Circuit Court* upon *an irregular appeal.* The case in that court was coram non judice, and is so here. The appellants have the right to the execution of the order given by the district judge to the commissioner and clerk of the court, to ascertain the charges to be made against the respective parties to the suit, and to state an account between them; for which purpose he was authorized to use the testimony already reported, and such further testimony as might be brought before him in relation to that point. *That* the Circuit Court cannot direct to be done, nor can this court do so. All that we can do in the case, as it stands here, is to reverse the decree of the Circuit Court dismissing the appellants' libel, to send the case back to the Circuit Court, that the appeal in it may be dismissed by it for want of its jurisdiction, leaving the case in its condition before the appeal to that court, that the parties may carry out the case in the District Court to a final decree, upon such a report as the commissioner and clerk may make, according to the order which was given by the judge. The judgment of the Circuit Court is reversed accordingly.

TERENCE COUSIN, PLAINTIFF IN ERROR, *v.* FANNY LABATUT, WIDOW AND TESTAMENTARY EXECUTRIX, JULES A. BLANC, CO-EXECUTOR, AND OTHERS, LEGAL REPRESENTATIVES OF EVARISTE BLANC.

In Louisiana, all the evidence taken in the court below goes up to the Supreme Court, which decides questions of fact as well as of law. In the absence of bills of exceptions, setting forth the points of law decided in the case, this court must look to the opinion of the State court, (made a part of the record by law,) in order to see whether or not any question has been decided there which would give this court appellate jurisdiction, under the twenty-fifth section of the judiciary act.

A claim to land in Louisiana was presented to the commissioner appointed under the act of 1812, (2 Stat. at L., 713,) reported favorably upon by him to Congress,

and confirmed by the act of 1819, (3 Stat. at L., 528.) But it did not appear that this claim had been surveyed, or that it had any definite boundaries.

In 1820, the register and receiver gave to the claimant a certificate that he was entitled to a patent, but without saying how it was to be located.

In 1822, Congress passed an act (3 Stat. at L., 707) giving to the registers and receivers power to direct the location and manner of surveying the claims to land confirmed by the act of 1819.

In 1826, the register and receiver ordered the claim to be surveyed, speaking of it, however, as being derived from an original claimant, different from the person who was mentioned as the original claimant in the certificate of 1820.

The act of 1822 was remedial, and this difference was immaterial.

When the survey was executed according to that order, it gave a prima facie title, and the United States were bound by it until it was set aside at the General Land Office. The Supreme Court of Louisiana were in error when they decided that it gave no title, and this court has jurisdiction, under the twenty-fifth section of the judiciary act, to review that judgment.

But until the survey was made and approved, the United States could sell the land, and a purchase of a part of it must stand good.

THIS case was brought up, from the Supreme Court of the State of Louisiana, by a writ of error issued under the twenty-fifth section of the judiciary act.

As this case will probably be much referred to hereafter, as settling some general principles of great importance, it may be well to state in this report the precise nature of the certificates of confirmation and order of survey.

Under the act of Congress of April 25, 1812, (2 Stat. at L., 713,) Cousin presented a donation claim to the commissioners appointed under that act. On the 2d of January, 1816, the commissioners reported as follows upon this claim, calling it No. 255, and placing it in class B. (See American State Papers, Public Lands, vol. 3, p. 56.)

By whom claimed.	Original Claimant.	Nature of claim, and from what authority derived.
F. Cousin.....	Stephen Réné.....	Order of survey.

Date of claim.	Quantity claimed.	Where situated.	By whom issued.	When surveyed.
Sept. 10, 1789..	1,000.....	St. Tammany...	E. Miro.....	

By whom surveyed.	Inhabited and cultivated from to	General remarks.

It will be observed that the name of the original claimant is here said to have been Stephen Réné. No survey or location of the land was made under this certificate.

In 1819, Congress passed an act (3 Stat. at L., 528) confirming this claim amongst many others, and on the 8th of June, 1820, the register and receiver gave to Cousin the following certificate:

[Certificate of Confirmation.]

Commissioner's Report, Letter B, Certificate No. 178.

LAND OFFICE, ST. HELENA.

In pursuance of the act of Congress passed the 3d of March, 1819, entitled "An act for adjusting the claims to land, and establishing land offices for the district east of the island of New Orleans," we certify that claim No. 255, in the report of the commissioner marked B, claimed by Francis Cousin, original claimant, Stephen Réné, is confirmed as a donation, and entitled to a patent for one thousand arpens, situated in St. Tammany, and claimed under an order of survey dated 10th September, 1798.

Given under our hands, this 8th day of June, 1820.

Attest: (Signed) CHARLES S. COSBY, *Register.*
F. HERAULT, *Clerk.*
FULWER SKIPWITH, *Receiver.*

It will be observed that the name of the original claimant is here mentioned as Stephen Réné, and there is no mode of survey pointed out, the original order of survey not being produced.

In 1822, Congress passed an act (3 Stat. at L., 707) giving to the registers and receivers power to direct the location and manner of surveying the claims to land confirmed by the act of 1819.

On the 21st of September, 1826, the register and receiver gave to Cousin the following order of survey:

[Order of Survey.]

LAND OFFICE, ST. HELENA.

Francis Cousin, Certificate No. 178, }
Dated June 8th, 1820. }

ST. TAMMANY, *Sept.* 21, 1826.

Francis Cousin claims a tract of one thousand arpens of land, situate in the parish of St. Tammany, as purchaser from his father, Francis Cousin, deceased, who bought it from Louis Blanc, who bought it from the original owner, Gabriel Bertrand, and in virtue of certificate No. 178, dated 8th June, 1820, and signed Charles S. Cosby, register, and Fulwer Skipwith,

receiver, in which certificate it is alleged by this claimant that it is erroneously set forth that Stephen Réné was the original claimant; it appearing that this tract of land is fronting on Bayou la Liberté, bounded below by the tract of land of Mr. Girod, and above by a tract of land belonging to claimant.

It is ordered that this claim be located and surveyed with a front extending on said bayou, from the land of said Girod to that of claimant above, and from these points on the bayou to run back for quantity.

Given under our hands, this 21st day of September, 1826.

(Signed) SAMUEL J. RANNELLS, *Register.*
WILL KINCHEN, *Receiver.*

The difference between this certificate and the other, as respects the derivation of title, will be manifest upon comparing the two.

Upon this subject, the Supreme Court of Louisiana made the following remarks:

"The counsel for plaintiff also objects to the certificate of 8th June, 1820, on account of the vagueness of description of the land donated. We consider this objection to be well founded. The description is, 'One thousand arpens, situated in St. Tammany.' It is plainly impossible to locate land by such a description as this. And when such is the case, the grant can produce no effect. (16 Peters, U. S. *v.* Miranda; 10 Howard, Villalobos *v.* U. S.; 15 Peters, U. S. *v.* Delestine; 11 Howard, Lecompte *v.* U. S.; 5 Annual, Ledoux *v.* Black.)

"It is proper here to mention that the order of survey of 10th September, 1798, mentioned in the certificate, is not produced, although formally called for by the opposite party. Had such an order of survey ever been given in evidence before the commissioner of land claims, it would have been recorded in the archives of the land office. (See acts of Congress of 1812 and 1819, above quoted.)

"But no such record appears.

"It was probably a consciousness of this defect in his title, which induced the defendant's ancestor to procure from Rannells and Kinchen, the successors of Cosby and Skipwith in the office of register and receiver of the land office at St. Helena, the order of location and survey of the 21st September, 1826, which the defendants offer in evidence.

"This paper sets out by declaring that the first certificate had erroneously stated the origin of defendant's title, gives another and totally different origin to the same as the correct one, and orders a survey to be made, and the defendant's donation to be located on the Bayou Liberté, between the lands

of certain proprietors named. The survey of Vanzandt was made in conformity to this order.

"We view the amended certificate of the 21st September, 1826, and the survey under it, as nullities. For the certificate of Cosby and Skipwith followed strictly the report of the commissioner of land claims, confirmed by the act of Congress of 3d March, 1819. Therefore, in correcting that certificate, Rannells and Kinchen took upon themselves to correct the report of the commissioner of land claims, and to make the act of Congress apply to a claim which was not mentioned in that report, and which was consequently never before Congress.

"The Supreme Court of this State, in the case of Newport *v.* Cooper, (10 La. Rep.,) decided that the register and receiver of the land office at St. Helena were without power, by law, to reverse and annul a certificate granted by their predecessors. By parity of reasoning, are they without power to make amendments in such a certificate, which falsify the act of Congress on which the first certificate was based? If the claimant could not locate the land claimed by him, under his claim as presented to the commissioner of land claims, and reported to Congress, that was a misfortune which the land officers at St. Helena had no power to remedy, by fabricating for him a new claim, seven years after the action of Congress upon the report."

Under the order of September 21, 1826, Vanzandt made a survey in 1845, which was one of the evidences of Cousin's title.

The history of the case in the State courts of Louisiana is given in the opinion of this court.

It was argued by *Mr. Janin* for the plaintiff in error, and *Mr. Benjamin* for the defendants.

Mr. Justice CATRON delivered the opinion of the court.

Evariste Blanc sued Terence Cousin, in the eighth District Court of Louisiana, invoking the aid of that court to settle a disputed boundary between the plaintiff and defendant.

Cousin, instead of responding to the action, for the purpose of settling boundary, filed an answer, denying Blanc's *title* to the property described in his petition, and setting up title in himself, and claiming damages against Blanc, who joined issue on the answer, and denied the validity of the title asserted by Cousin. This turned Cousin into a plaintiff, (as the State courts held,) and imposed on him the burden of proof to support his title. It was adjudged in the District Court, on the documents presented by Cousin, that he had no title whatever to any part of the land in dispute; and so the Supreme

Court of Louisiana held on an appeal to that court, where the cause was reheard.

Pending the appeal, Blanc died, and his widow and heirs were made parties. They prayed the benefit of the judgment of the court below, and also that it might be so amended by the Supreme Court as to give them the benefit of all that Blanc claimed in his petition—that is to say, 222.80 acres, according to certificate No. 1,280, showing a regular purchase from the United States; together with 1,240 arpens in superficies, according to a plan annexed to the original petition of Blanc; that they might be quieted in the possession thereof as owners, and that the 1,240 arpens may be bounded according to the plan. And to this effect the court gave judgment.

The laws of Congress, and the acts of the officers executing them in perfecting titles to public lands, have been drawn in question, and construed by the decision of the Supreme Court of Louisiana in this case; and the decision being against the title set up by Cousin, under the acts of Congress and the authority exercised under them, it follows that jurisdiction is vested in this court, by the 25th section of the judiciary act, to examine the judgment of the State court; and, in doing so, we refer to the opinion of that court, which is made part of the record by the laws of Louisiana, and is explanatory to the judgment, of which it is there deemed an essential part. We refer to the opinion, in order to show that questions did arise and were decided, as required, to give this court jurisdiction. (9 How., 9.) This is necessarily so in cases brought here by writ of error to the courts of Louisiana, because no bill of exceptions is necessary there, when appeals are prosecuted. The court of last resort acts on the law and facts as presented by the whole record.

By relying on this source of information, as to what questions were raised and were decided by the State court, we are relieved from all difficulty in this instance.

Cousin's claim is assumed to have originated in a Spanish order of survey laid before the proper commissioner appointed under the act of April 25, 1812, whose duty it was to receive notices and evidences of claims, which were ordered to be recorded by the commissioner. It was made the duty of the commissioner to report to the Secretary of the Treasury upon claims, and the evidences thereof, thus notified to him; which report the act directed should be laid before Congress by the Secretary.

In January, 1816, the report was transmitted by him to Congress. By the act of March 3d, 1819, Congress legislated in regard to the claims reported. By that act, two land

districts were established east of the island of New Orleans, and a register and receiver were provided for each.

The books of the former commissioners, in which the claims and evidences of claims were recorded, were directed to be lodged with the register; and the register and receiver were vested with power "to examine the claims recognised, confirmed, or provided to be granted," by the provisions of that act; they were instructed to make out, for each claimant entitled in their opinion thereto, a certificate according to the nature of the case, pursuant to the instructions of the Commissioner of the General Land Office; and, on the presentation at that office of such certificate, a patent was ordered to be issued. Francis Cousin's claim was within the above description.

As no provision was made by the act of 1819, vesting authority in the register and receiver to direct in what manner confirmed claims should be located and surveyed, it was (sec. 11) left to the deputies of the principal surveyor south of Tennessee, to find the lands, and survey them according to their own judgment. Then, again, the surveyors had no authority to adjust conflicting boundaries, and therefore further legislation was deemed necessary; and accordingly the act of June 8, 1822, was passed by Congress, giving the registers and receivers power to direct the manner in which claims should be located and surveyed, (sec. 4,) and power was also given to them to decide between parties whose claims conflicted.

In June, 1820, the register and receiver gave Cousin a certificate of confirmation under the act of 1819. They certify "that claim No. 255 in the report of the commissioner, marked B, claimed by Francis Cousin, original claimant Stephen Réné, is confirmed as a donation, and entitled to a patent for one thousand arpens, situated in St. Tammany, and claimed under an order of survey dated 10th September, 1798."

No Spanish survey was found, to aid the foregoing description.

In 1826, the register and receiver made an order of survey, as follows:

"*Land Office, St. Helena.*

"FRANCIS COUSIN, CERTIFICATE No. 178, DATED JUNE 8TH, 1820.

"Francis Cousin claims a tract of one thousand arpens of land, situate in the parish of St. Tammany, as purchaser from his father, Francis Cousin, deceased, who bought it from Louis Blanc, who bought it from the original owner, Gabriel Bertrand, and in virtue of certificate No. 178, dated 8th June, 1820, and signed Charles S. Cosby, register, and Fulwer Skipwith, receiver, in which certificate it is alleged by this claimant that it is erroneously set forth that Stephen Réné was the original claimant; it appearing that this tract of land is front-

ing on Bayou la Liberté, bounded below by the tract of land of Mr. Girod, and above by a tract of land belonging to claimant.

"It is ordered that this claim be located and surveyed with a front extending on said bayou, from the land of said Girod to that of claimant above, and from these points on the bayou to run back for quantity."

The Supreme Court of Louisiana held the certificate of 1820 so vague as not to be of any value, and pronounced it void. Furthermore, that the second one of 1826 departed from the confirmation, and was also invalid. The first purported to be for land derived from Stephen Réné, as original claimant; and the second, for land of which Gabriel Bertrand was the original owner.

The act of 1822 is a supplement to the act of 1819; when taken together, they gave the register and receiver authority to declare what land had been confirmed, and how it should be surveyed. Now, if it be true, as is held by the State court, that the certificate of 1820 is so vague as to be of no value and void, then it follows, that another could be made in 1826 which would be certain in its description of the land confirmed, accompanied by an order of survey. Whether Réné or Bertrand once claimed the land, is immaterial. The confirmation is an incipient United States title, conferred on Cousin, which our Government, in its political capacity, reserved to itself the power to locate by survey, and to grant by the acts of its executive officers; with which acts the courts of justice have no jurisdiction to interfere. (16 How., 403, 414.)

It rested with the register and receiver to ascertain the location of the land confirmed to Cousin, from the evidences of claim recorded and filed with the register; and having decided where and how the land should be located and surveyed, the courts of justice cannot reverse that decision; the power of revision is vested in the Commissioner of the General Land Office.

It is proper here to say, we do not hold that the certificate of 1820 was void, because it was too vague to authorize a survey of the land. It established the *fact* that Cousin's claim was one of those described in the act of 1819, which had been confirmed. The act of 1822 was remedial; its main object was to confer power on the register and receiver to amend vague descriptions; so vague that patents could not issue on them, as required by the act of 1819.

The amendment was effectually made in this instance by the order of survey of 1826; and, when the survey was executed according to that order, the United States Government

was bound by it until it was set aside at the General Land Office.

The act of March 3, 1831, authorized a surveyor general to be appointed for the State of Louisiana, whose duty it was to cause confirmed claims to be surveyed; and the registers and receivers were again empowered (sec. 6) to decide in cases of contested boundaries, and consequently to control the surveys. On the 22d of December, 1846, the official survey (accompanied by a plat) of the claim of Francis Cousin, was approved at the surveyor general's office. This is known as Vanzandt's survey, and is the one relied on by Cousin in his defence. A copy thereof, duly certified as a record of the surveyor general's office, is found in the record; and which copy the act of 1831 (sec. 5) declares shall be admitted as evidence in the courts of justice.

The act of 1831 (sec. 6) further declares (as respects interfering claims) "that the decisions of the register and receiver, and the surveys and patents that may be issued in conformity thereto, shall not in anywise be considered as precluding a legal investigation and decision by the proper judicial tribunals between the parties to any such interfering claims, but shall only operate as a relinquishment on the part of the United States of all title to the land in question." The foregoing reservation applies here; Cousin's survey extended in depth, from Bayou Liberté, so as to include 222.80 acres of land, which had been purchased of the United States by Francis Alpuente, and on the 4th of March, 1844, (before Cousin's survey was made,) duly conveyed to the plaintiff, Blanc, as part of the succession of Alpuente.

Title to this land is claimed by Cousin by force of his confirmation, rendered certain by his survey of 1846; and which claim was rejected by the Supreme Court of Louisiana, when they rejected Cousin's title as set up.

We are of opinion that Cousin's title had no standing in a court of justice until the land was surveyed, and the survey approved as a proper one at the surveyor general's office; and that therefore the United States could lawfully sell the land, and give title to Alpuente. (8 How., 306.) The mere loose *order* of survey, made in 1826, by the register and receiver, cannot be recognised in this case as conferring any vested interest, as against Alpuente, to the 222.80 acres purchased by him; and to this extent the decision of the Supreme Court of Louisiana is proper. But as respects all other parts of Cousin's survey, it furnishes *prima facie* evidence of title in him, subject to be contested by the opposing title of Blanc, if he has any by prescription or otherwise.

We order that the judgment be reversed, and the cause remanded to the Supreme Court of Louisiana, to be further proceeded in.

ISAAC HARTSHORN AND DANIEL HAYWARD, PLAINTIFFS IN ERROR *v.* HORACE H. DAY.

Where a patentee is about to apply for a renewal of his patent, and agrees with another person that, in case of success, he will assign to him the renewed patent, and the patent is renewed, such an agreement is valid, and conveys to the assignee an equitable title, which can be converted into a legal title by paying, or offering to pay, the stipulated consideration.

An agreement between Chaffee, the patentee, and Judson, after the renewal, reciting that the latter had stipulated to pay the expenses of the renewal, and make an allowance to the patentee of $1,200 a year, during the renewed term, and then declaring: "Now, I (Chaffee) do hereby, in consideration of the premises, and to place my patent so that in case of my death, or other accident or event, it may enure to the benefit of Charles Goodyear, and those who hold a right to the use of said patent, under and in connection with his licensees, &c., nominate, constitute, and appoint, said William Judson my trustee and attorney irrevocable, to hold said patent and have the control thereof, so as none shall have a license to use said patent or invention, &c., other than those who had a right when said patent was extended, without the written consent of said Judson, &c.," passed the entire ownership in the patent, legal and equitable, to Judson, for the benefit of Goodyear and those holding rights under him.

If this annuity was not regularly paid, the original patentee had no right to revoke the power of attorney, and assign the patent to another party. His right to the annuity rested in covenant, for a breach of which he had an adequate remedy at law.

Evidence tending to show that the agreement between the patentee and the attorney had been produced by the fraudulent representations of the latter, in respect to transactions out of which the agreement arose, ought not to have been received, it being a sealed instrument.

In a court of law, between parties or privies, evidence of fraud is admissible only where it goes to the question whether or not the instrument ever had any legal existence. But it was especially proper to exclude it in this case, where the agreement had been partly executed, and rights of long standing had grown up under it.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Rhode Island.

It was an action brought by Day against Hartshorn and Hayward, for the violation of a patent for the preparation and application of India-rubber to cloths, granted to E. M. Chaffee in 1836, and renewed for seven years in 1850. Day claimed under an assignment of this patent from Chaffee, on the 1st of July, 1853. The defences taken by Hartshorn and Hayward are stated in the opinion of the court, in which there is also a succinct narrative of the whole case.

The defendants below first pleaded four special pleas, which were overruled upon demurrer. They then gave notice of eleven defences, assailing the validity of the patent. The record was very voluminous, being upwards of a thousand printed pages. One hundred and thirty-five exceptions were taken during the progress of the trial, which lasted for six weeks. After the testimony was closed, the counsel for the defendants offered seventy-four propositions to the court, by way of instruction to the jury, and six supplemental ones with regard to the fraud alleged to have been practised upon Chaffee by Judson. The court then charged the jury as contained in fifteen printed pages of the record, and the case came up to this court upon the following exception:

The court refused to instruct the jury as requested by the defendant's counsel, except so far as the propositions presented by them were adopted or approved in the charge as made, and refused to charge otherwise than as the jury had been instructed. The defendant's counsel excepted to such refusals, respectively, and also to the refusal of said court as to each of said requests. They also excepted to each instruction given by the court contrary to such requests, or either of them.

All this vast mass of matter was open to argument in this court.

It was argued by *Mr. O'Connor*, upon a brief filed by himself and *Mr. Brady* for the plaintiffs in error, and by *Mr. Richardson* and *Mr. Jenckes* for the defendant, upon which side, also, a printed argument was filed by *Mr. Gillet.*

There is only room to notice the general points taken by the respective counsel, omitting all subdivisions and illustrations. These would occupy half a volume. The points made on behalf of the plaintiffs in error were the following:

First Point.—The agreement of May 23, 1850, was a valid executory agreement by Chaffee to sell and convey to Goodyear the renewed patent now in question, in case such a patent should issue; and, upon its issue, the equitable ownership thereof vested in Goodyear, subject only to the license reserved to Chaffee to use it in his own business. (Curtis on Patents, secs. 195, 196.)

Second Point.—Chaffee having, by the agreement of September 5, 1850, without notice to Goodyear, without his consent, and, as it would appear, against his will, made another deposition of the patent, and having thereby put it entirely out of his (Chaffee's) power to execute a formal assignment to Goodyear, and thus entitle himself to the payment of the $1,500 by

Goodyear, which formed the only condition precedent to a complete investiture of Goodyear with at least the whole equitable ownership of the patent, he, Chaffee, and Day, his assignee, are precluded from availing themselves of such nonpayment by Goodyear as an objection to the use of the patented invention by Goodyear and his licensees. (Hockster *v.* Delatour, 2 Ellis and Blackburn, 688, and cases cited.)

Third Point.—The agreement between Chaffee and Judson, dated September 5, 1850, construed by itself alone, or in connection with the supplement thereto, dated November 12, 1851, and whether read, as it rightfully may be, in the light of surrounding and attending circumstances, or without such aid, (6 Peters, 68,) was, on the part of Chaffee, an executed contract. No further act of any kind was to be performed on his part; and, as it contained no condition subsequent, nor any clause of cessor, nor any reservation of power to rescind for any cause, the interest vested by it in Judson and his *cestuis que trust* could not be divested by Judson's omission to make prompt and punctual payments of the annuity. (Brooks et al. *v.* Stolley, 3 McLean, 526; Woodworth *v.* Weed, 1 Blatch., 165.)

Fourth Point.—Although it is not deemed material whether the interest acquired by Judson under the agreements between him and Chaffee was of an equitable or legal character, it is submitted that the whole legal title to the patent was thereby vested in Judson, subject to the license reserved to Chaffee to use the invention in his own business.

Fifth Point.—If the grant or agreement set forth in the paper dated September 5, 1850, is to be regarded as having been authenticated by the seal of Chaffee, and the actual execution by him, when of sound mind, of full age, and with knowledge of its contents, was established, neither Chaffee, nor Day, the plaintiff, who was his assignee and privy in estate, could be permitted to allege or prove, in a court of common law, for the purpose of defeating such grant or agreement, or for the purpose of varying its effect, that Chaffee was induced to execute it by threats of a lawsuit, or of hostility, or by false, deceitful, or fraudulent representations.

Sixth Point.—The court below erred in admitting the evidence of Woodman and Chaffee, touching the alleged fraudulent representations, and also in submitting the allegation of fraud to the jury, notwithstanding Woodman's professed nonrecollection that the instrument bore a seal when executed, and his asserted, but groundless disbelief of that fact.

Seventh Point.—Independently of the positions assumed in the preceding fifth and sixth points, the court erred in submitting it to the jury, to find that the instrument of September 5,

1850, was obtained by fraud, because there was no legal evidence in the case to support that allegation.

(The other points related to the pleas and demurrers.)

The points made on behalf of the defendant in error are taken from the brief of *Mr. Jenckes*, omitting all except those which relate to the power of Chaffee to revoke the power of attorney to Judson, and to assign the patent to Day.

I. The paper of the 5th of September, 1850, supposing it to have been untainted with fraud, conveyed no interest in the extended patent to Judson, or to Goodyear and his licensees. There is no word of grant or conveyance in it. It does not purport to give a license directly to Goodyear or his licensees. It gives Judson no power to grant licenses to any one.

II. The paper of the 5th September, 1850, offered a license to no persons except those who had a right to use the Chaffee patent at the time of its extension.

Hartshorn had no license to use the inventions of either Goodyear or Chaffee during the original term of the Chaffee patent. His license to use Goodyear's inventions was given on the 1st of February, 1851.

III. The legal title of the patent remained in Chaffee, and any action at law for an infringement must have been brought in his name, before his assignment to the defendant in error.

IV. The instrument bearing date November 12th, 1851, being between the same parties, and having relation to the same subject-matter, and purporting to be made for the purpose of correcting errors and omissions in the instrument of September 5th, 1850, the two must be taken togother as one instrument, and be so construed.

V. This instrument makes clear what was of doubtful construction in the former paper, and defines and limits the power of Judson, and the rights and interests which Goodyear and his licensees were to receive, and sets forth the conditions on which they were to receive them.

Judson is, for the first time, empowered to grant licenses as Chaffee's attorney, and Goodyear and his licensees are to have licenses through Judson, solely upon the condition of their severally contributing their share of the amount due Judson for services and expenses.

Judson was not empowered to license any others but the Goodyear licensees.

With respect to all other persons, the power to license was annexed to the legal title which remained in Chaffee. Judson was authorized to sue infringers, but he was not required to do so. If the Goodyear licensees should not comply with the condition on which they were to receive a license to use the

Chaffee patent, they might be sued as infringers, and Judson could reimburse himself out of the damages, or by compromising the suit by giving them a license on the terms required. Chaffee had a right to impose this or any other condition, and he was interested in having this condition performed, as he would thereby be relieved from his debt to Judson.

VI. So far as regards the rights of Chaffee, Goodyear and his licensees, and Judson, this instrument is a substitute for the provisions respecting the same subject-matter in that of September 5th, 1850.

These parties are bound by the facts recited in it, or which are necessarily to be inferred from it.

VII. Neither of these instruments gives Judson any interest in the patent itself, or in the profits of the patent, nor do they give him a right to use it, or to license others to use it, except upon conditions precedent, clearly and distinctly specified. Chaffee intended to give him security for the debt due him, and pointed out the fund from which the debt was to be paid, if the parties named should keep their agreement; and Judson took for his security a mere power to collect his dues out of this fund by selling licenses, or by suing for damages. The only interest which Judson took was in the money which might be produced by licenses or by suit, and to the extent of his claim for money advanced for services and expenses.

VIII. This instrument of November 12, 1851, was also executory, and is governed by the rules of law applicable to contracts executory in their nature, and to powers.

So far as the licenses were concerned, Chaffee was the contracting party on the one part, and Goodyear and his licensees on the other. The contract was not executed until the licensees had complied with the conditions under which they were to have a license, and Chaffee parted with nothing until such performance by them. If they neglected or refused to comply, his right of rescission was perfect.

So far as Judson was concerned, he held merely a power, from the proceeds of the execution of which he was to be paid, and to that extent the power operated as a security, and such power was revocable at any time, upon payment of the amount of the debt.

Powers to sell on mortgages are declared to be irrevocable in terms, but the deed and power together are cancelled by payment of the mortgage debt.

A power taken for security is revocable by the death of the grantor of the power. (Hunt *v.* Rousmaniere's Executors, 8 Wheat., 174.)

It is also revocable by the party giving it. (Mansfield *v.* Mansfield, 6 Conn., 559.)

In this case, the principles of the former case are adopted and carried out to their legitimate conclusions.

A power is irrevocable only when there is an express stipulation that it shall be irrevocable, *and* when the agent has an interest in its execution. Both of these circumstances must concur. (Story on Agency, sec. 476.)

The interest ceased, when Judson was offered the money for all his disbursements and services. There is no stipulation in the power of the 12th of November, 1851, that it shall be irrevocable.

IX. If the paper of the 5th September, 1850, be construed to give a license directly to Goodyear and his licensees, upon their paying the expenses and annuity, then such license is revocable if the conditions be not performed.

The instrument contains no words of grant or conveyance known to the common law. There are no covenants which would create an estoppel. The Goodyear licensees obtained nothing more than a license, not connected with any grant, or made part of any grant. Such a license is revocable at common law. (Thomas *v.* Lovell, Vaughan, 351.)

"A dispensation or license properly passeth no interest nor alters nor transfers property in anything, but only makes an action lawful, which without it would have been unlawful." (Wood *v.* Leadbitter, 13 Mees. and W., 843.)

"A license is in its nature revocable."

X. Hartshorn & Co. were not within the class of persons described in the paper of the 5th of September, 1850, nor in the class to whom Judson was authorized to give licenses by the paper of the 12th of November, 1851.

XI. The question of the performance of the condition of the papers of September 5, 1850, and November 12, 1851, after the papers had been construed by the court, was a question of fact for the jury.

XII. If the jury had found that there was a failure on the part of Judson and of Goodyear and his licensees to perform their part of the agreement of September 5, 1850; that the annuity had not been paid; that the Shoe Associates knew of the non-payment; that Judson was the agent of Goodyear and his licensees in making the paper of 12th of November, 1851, and of the Shoe Associates in all matters relating to the Chaffee patent since its extension; and that there had been an offer in good faith to repay Judson all that had been expended by himself or advanced by the Shoe Associates, on account of this extended patent; then, upon these facts, the revocation of the

powers given to Judson and the rescission of those contracts was proper on the part of Chaffee.

The instrument of revocation, the tender of all sums due to Judson, and the notice to Hartshorn & Co., were sufficient.

XIII. The title did not pass from Chaffee by the contracts of May 23, 1850, September 5, 1850, and November 12, 1851, in connection with the instrument executed between Goodyear and his licensees, dated July 1, 1848, in consideration of Judson's agreement in the paper of September 5, 1850, according to the prayer for instruction to the jury, which is made the subject of Exception 1.

XIV. One test of the right of rescission or revocation is, to inquire whether the contract is one that a court of equity would specifically enforce, under the circumstances existing at the time the rescission or revocation is sought to be made.

"The rules of law relating to specific performance, and those applied to the rescission of contracts, although not identically the same, have a near affinity to each other." (Boyce's Executors *v.* Grundy, 3 Peters, 210, 216.)

The remaining points are omitted.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the judgment of the Circuit Court of the United States, holden by the district judge in and for the district of Rhode Island.

The action was brought by Day against the defendants below, for an alleged infringement of a patent for the preparation and application of India-rubber to cloths, granted to E. M. Chaffee, August 31, 1836, and renewed for seven years from the 31st August, 1850. The plaintiff claimed to be the assignee of the patent from Chaffee. The defendants sought to protect themselves under a license derived from Charles Goodyear, whom they insisted was the owner, and not Day, of the renewed patent. Goodyear became the owner of the unexpired term of the original patent on the 28th July, 1844, and on the same day granted to certain persons, called "The Shoe Associates," the exclusive use of all his improvements in the manufacture of India-rubber, patented, or to be patented, during the term of any patents or renewals which he might own, or in which he might be interested, "so far as the same are, or may be, applicable to the manufacture of boots and shoes."

The defendants claimed a license under the Shoe Associates.

Chaffee, the original patentee, made application to the Commissioner of Patents, the 22d May, 1850, for the renewal of his patent, in which he states that the then present owners were willing and desirous that it should be renewed, and in

that event that they ought to make him further compensation for the invention. And on the next day, 23d May, 1850, he entered into an agreement with Goodyear, in which he stipulated to convey to him the patent, on its renewal for the extended term, in consideration of three thousand dollars.

There seems to have been some agreement or understanding that the then owners of the patent, and their licensees, should be at the expense of the renewal.

William Judson had become interested in one-eighth of the patent in 1846, by an assignment from Goodyear; and in 1848 he, in conjunction with Seth P. Staples, was appointed by Goodyear his attorney and agent, in taking out, renewing, extending, and defending his patents; and a fund was provided by Goodyear for defraying the expenses of these proceedings, and placed in the hands of Judson. By the consent of Goodyear, Judson subsequently became his sole agent and trustee of the fund for the purposes mentioned.

The patent was renewed, in pursuance of the application, on the 30th August, 1850. Soon after this renewal, to wit, on the 5th September, 1850, an agreement was entered into between Chaffee and Judson, which recites the renewal, and that the expenses were large, and also that at the time of the renewal the patent was held by Goodyear for the benefit of himself and his licensees; and, further, that he had agreed with Chaffee, for himself and those using the patent under him, that they would be at the expense of the extension, and make an allowance to him, Chaffee, of $1,200 per annum, payable quarterly, during the period of the extension; and reciting also that Judson had had the management of the application for the renewal, and had paid, and became liable to pay, the expenses thereof, and had agreed to guaranty the payment of the annuity of $1,200; and the agreement then provided as follows: "Now, I (Chaffee) do hereby, in consideration of the premises, and to place my patent so that in case of my death, or other accident or event, it may enure to the benefit of said Charles Goodyear, and those who hold a right to the use of said patent, under and in connection with his licensees, according to the understanding of the parties interested, nominate, constitute, and appoint said William Judson my trustee and attorney, irrevocable, to hold said patent, and have the control thereof, so as no one shall have a license to use said patent or invention, or the improvements secured thereby, other than those who had a right to use the same when said patent was extended, without the written consent of said Judson first had and obtained."

At the close of the agreement, Judson stipulates with Chaf-

fee to pay all the expenses of the renewal, and also the annuity of $1,200; and also to be at all the expense of sustaining and defending the patent; and Chaffee reserves to himself the right to use the improvement in his own business.

This contract was entered into without the privity of Goodyear, and changed materially the terms and conditions of that made by him with Chaffee on the 23d May. He was at first dissatisfied with the change when it came to his notice, but afterwards acquiesced.

The contract continued in operation down to the 12th November, 1851, when a modification of the same took place.

This last contract recites that there was an omission in that of 6th September, in not stating that if the said licensees continued to use the improvements, they should pay their just proportion of the expenses and services in obtaining the renewal, which it was intended they should pay to Judson; and recites also that there was no stipulation on the part of Judson to pay Chaffee $1,500 per annum, as claimed by him; and it is then agreed that the licensees shall pay their share of the expenses to Judson, as a condition to the granting of a license by him to them; and that, on the payment of such share of the expenses, a license shall be granted to them. And it was further agreed, that Judson should pay Chaffee the $1,500 per annum; and also that Judson might use Chaffee's name in the prosecution of infringements of the patent, or for any other purpose in relation to the use of it, he holding Chaffee harmless from all costs, &c., and he, Judson, to have all the benefits to be derived from said suits.

It will be perceived that the only provision in this agreement differing from that of 6th September, in which Chaffee has any interest, is the one providing for an annuity of $1,500, instead of the $1,200. All the other provisions are for the benefit of Judson. This annuity was paid down to the 1st December, 1852, when some difficulty arose between Judson and Chaffee, and the payment ceased.

And on the 1st July thereafter, Chaffee undertook, in consequence of this default, to revoke and annul the power and control of Judson over the patent, and to forbid his acting in any way or manner under the agreements of the 6th September, and of the 12th November, above referred to. And on the same day, for the consideration of $11,000, assigned the renewed patent to Day, the plaintiff in this suit. Day, on the 2d July, 1853, gave notice to Judson of the assignment, offering to pay, at the same time, all sums there might be due him, if any there were, for moneys advanced in procuring the extension of the patent, or in any other way paid for Chaffee on

account of said patent. The above is the substance of the case, as appears from the written agreements of the parties in the record. The questions involved turn essentially upon the points:

1. As to the operation and effect to be given to the three agreements which have been referred to, and especially of that of the 6th September, 1850, between Chaffee and Judson; and

2. The force and effect of the attempted rescindment of these agreements by Chaffee, on the 1st July, 1853, on account of the neglect or refusal of Judson to pay the annuity of $1,500.

1. It is not important to examine particularly the agreement between Goodyear and Chaffee of 23d May, as that was, in effect, superseded by the one entered into with Judson, the 6th of September, to which Goodyear afterwards assented.

It is important only as leading to the latter agreement, and may therefore assist in explaining its provisions.

By this first agreement, Chaffee bound himself to assign to Goodyear the renewed patent, as soon as it was obtained, for the consideration of $3,000. Goodyear became thus equitably entitled to the entire interest in the patent during the extended term, and could have invested himself with the legal title on the payment, or offer to pay the three thousand dollars, had he not subsequently acquiesced in the modification of it with Judson. Judson was the owner, jointly with Goodyear, of one-eighth of the patent. He was also the agent and attorney of Goodyear, generally, in his applications for patents, in obtaining renewals, and in the litigation growing out of the business; and was the trustee of a fund provided by Goodyear to meet the expenses. It was, doubtless, on account of this interest of Judson in the improvement, and his general authority from Goodyear in the management of his patent concerns, that led him to enter into the new arrangement with Chaffee, of the 6th September, in the absence of his principal. Goodyear might have repudiated it, and insisted upon the fulfilment of the first agreement. He thought fit, however, after a full knowledge of the facts, to acquiesce; and his rights, therefore, and those claiming under him, must depend upon this second agreement.

In respect to this agreement, whether the title which passed from Chaffee, in the renewed patent to Judson, was legal or equitable, the court is of opinion that the entire interest and ownership in the same passed to him for the benefit of Goodyear, and those holding rights and licenses under him. The instrument is very inartificially drawn, but the intent and

object of it cannot be mistaken. Chaffee, in consideration of the premises, which included the annuity of $1,200, "and (in his own language) to place my (his) patent so that in case of death, or other accident or event, it (the patent) may enure to the benefit of said Charles Goodyear, and those who hold a right to the use of said patent, under and in connection with his licensees," &c., nominates and appoints "said William Judson, my trustee and attorney irrevocable, to hold said patent, and have the control thereof, so that no one shall have a license, &c., other than those who had a right to use the same when said patent was extended, without the written consent of said Judson;" and at the close of the agreement, he reserves the right to use the improvement in his own business. At this time, as we have seen, Judson was the owner of one-eighth of the patent, and was the general agent and attorney of Goodyear in all his patent business transactions. It is apparent that the only interest in the patent, left in Chaffee, was the right reserved for his own personal use. The annuity and indemnity against the expenses of the renewal were the compensation received by him for parting with the improvement. The contract of the 12th November has no material bearing upon this part of the case. Most of the provisions were for the benefit of Judson, in relation to the licensees under Goodyear. The only provision important to Chaffee is the stipulation for the increased annuity of $1,500.

2. Then, as to the attempted rescindment of the contracts. The agreement of 6th September had been in force from its date down to the 1st July, 1853, a period of two years and nearly ten months. During all this time, the licensees of Goodyear, at the date of the renewal of the patent, and those whom Judson may have granted a license to since the renewal, had a right to use the improvement, and especially the Shoe Associates, referred to in their agreement with Goodyear, 1st July, 1848. Besides this stipulation with Goodyear, their right was expressly recognised by Chaffee himself, in the agreement with Judson of 6th of September.

The effect of the rescindment as claimed, and which would be necessary to enable the plaintiff to succeed in his action against the defendants, would be to break up the business of these licensees, by divesting them of their rights under this agreement—rights acquired under it from all parties connected with or concerned in the patent, and especially from Chaffee, the patentee, who placed it in the hands of Judson, for the benefit of Goodyear and those holding under him. The effect would also be to deprive Goodyear or Judson, or whichever of them had paid the expenses of obtaining the renewal, of the

equivalent for those expenses, except as they might have a personal remedy against Chaffee. To the extent above stated, the agreement of the 6th September was already executed, and, in respect to parties concerned, the abrogation would work the most serious consequences.

As we have already said, the ground upon which the right to put an end to the agreement is the refusal to pay the annuity of $1,500 after December, 1852. Judson proposed to Chaffee to resume the payment in June, 1853, which was declined; but we attach no importance to this fact, especially as we are in a court of law. But, in looking into the agreements of the 6th of September, and also the one of the 12th of November, the court is of opinion that the payment of the annuity was not a condition to the vesting of the interest in the patent in Judson, and of course that the omission or refusal to pay did not give to Chaffee a right to rescind the contract, nor have the effect to remit him to his interest as patentee. The right to the annuity rested in covenant, under the agreement of the 12th of November. One of the objects of that agreement was, to obtain from Judson this covenant. From the terms and intent of the agreement, the remedy for the breach could rest only upon the personal obligation of Judson, as, by the previous one of the 6th of September, the interest in the patent had passed to Goodyear and his licensees, and no default or act of Judson could affect them. Chaffee chose to be satisfied with the covenant of Judson, without stipulation or condition as it respected the other parties, and he must be content with it.

The cases of Brooks *v.* Stolly, (3 McLean, 526,) and Woodworth *v.* Weed, (1 Blatchford, 165,) have no application to this case.

The attempt to rescind the contracts, being thus wholly inoperative and void, in the opinion of the court, of course no interest in the patent passed to Day, under the assignment of the 1st July, 1853.

Evidence was given on the trial in the court below, for the purpose of proving that the agreement of the 6th of September was procured from Chaffee by the fraudulent representations of Judson, which was objected to, but admitted.

The general rule is, that in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed; and, more especially, where there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence, in the States where the two systems of jurisprudence prevail, of

equity and the common law, a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed.

Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practised upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence. (2 J. R., 177; 13 Ib., 430; 5 Cow., 506; 4 Wend., 471; 6 Munf., 358; 2 Rand., 426; 10 S. and R., 25; 14 Ib., 208; 1 Alab., 100; 7 Misso., 424; 4 Dev. and Bat., 436; C. and H., Notes, part 2, p. 615, Note 306, ed. Gould & Banks, 1850.)

It is said that fraud vitiates all contracts, and even records, which is doubtless true in a general sense. But it must be reached in some regular and authoritative mode; and this may depend upon the forum in which it is presented, and also upon the parties to the litigation. A record of judgment may be avoided for fraud, but not between the parties or privies in a court of law.

The case in hand illustrates the impropriety and injustice of admitting evidence of fraud to defeat agreements of the character in question in a court of law. We have a record before us of 1,055 closely-printed pages of evidence submitted to the jury, and a trial of the duration of some six weeks. Goodyear and his licensees had acquired vested and valuable rights under the agreements in this patent, and who were in no way privy to, or connected with, the alleged fraud, nor parties to this suit; and yet it is assumed, and without the assumption the fraud would be immaterial, that the effect of avoiding the agreements would be to abrogate these rights. They had been in the enjoyment of them for nearly three years, and may have invested large amounts of capital in the confidence of their validity. They were derived from Chaffee himself, the patentee of the improvement. A court of equity, on an application by him to set aside the agreements on the ground of fraud, would have required that these third parties in interest should have been made parties to the suit, and would have protected their rights, or secured them against loss, if it interfered at all, upon the commonest principles of equity jurisprudence.

Some slight evidence was given in the court below, upon the question whether the agreement of the 6th of September was sealed at the time of the execution. But the instrument produced was sealed, and is recited in the subsequent agreement of the 12th November, as an agreement signed and sealed by the parties.

A question was also made, as to the authority of the Shoe Associates to grant a license to the defendants. But they held under Goodyear the right to the exclusive use of the improvement for the manufacture of boots and shoes. They were competent, therefore, to confer the right upon the defendants. Besides, the point is not material in the view the court have taken of the case, as upon that view no interest in the patent vested in the plaintiff under the assignment from Chaffee.

It will be seen, by a reference to the bill of exceptions, that upon our conclusions in respect to several points raised in the case, the rulings in the court below were erroneous, and consequently the judgment must be reversed, and a venire de novo awarded.

HORATIO N. SLATER, PLAINTIFF IN ERROR, *v.* CHARLES EMERSON.

Where a railroad company became embarrassed, and were unable to pay the contractor, and a person interested in the company agreed to give the contractor his individual promissory notes if he would finish the work by a certain day, the contractor cannot recover upon the notes, unless he finishes the work within the stipulated time.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Massachusetts.

The facts are stated in the opinion of the court.

It was argued by *Mr. Bates* and *Mr. Bartlett* for the plaintiff in error, and by *Mr. Hutchins* upon a brief filed by himself and *Mr. Choate* for the defendant.

The following points on behalf of the plaintiff in error are taken from the brief of *Mr. Bartlett*, as being more condensed than those stated in the brief of *Mr. Bates:*

I. The single question is, whether by the true and rational construction of the contract it was agreed and understood between the parties that the doing the work within the time pre-

scribed was a condition on which the obligation of plaintiff to give his notes was to depend.

a. It is not sufficient to say that the parties, if such was their intent, might have expressed it so in terms, or might have secured damages for non-performance by an independent covenant. The books abound in cases where parties having inartificially expressed their purpose, the court have construed their agreement to be dependent. This want of express terms, therefore, though it may possibly lead in doubtful cases to a presnmption, is of value solely in that contingency.

b. We are to find, then, either from the reason of the thing, looking at the position of the parties and the surrounding circumstances, or by the application of the settled rules of construction, or by both, what was the intent of the parties; and,

1. The position of the parties is new and unusual. It is believed that a similar case is not to be found in the books. Usually the controversy is between a party contracting to perform and a party who is to enjoy the benefit of the thing to be performed. Here the question is upon the construction of a contract collateral to another, between other parties, which may be called the principal contract; and the entire direct fruits of performance are to be enjoyed by one of those other parties.

2. The extrinsic evidence shows that at the time of making the contract in question another negotiation was, with the knowledge of all parties, pending between one of the parties to the principal contract and a third party, of great pecuniary importance, the consummation of which was entirely dependent on the ability of one of the parties to open its road at a fixed time. That *fixed time was the precise period prescribed for the completion of the work by the contract in question.* (Ammidown's Testimony.)

3. Such are the surrounding circumstances, and before examining the terms of the contract and the settled rules of construction, it may be fairly asked whether defendent in error, who was already performing and bound to perform the work under another contract for the same remuneration, would be likely to agree that the covenant of plaintiff in error should be dependent, and this, too, when the notes to be given him were not to pay for the labor to be performed under the contract, but to an existing indebtedness of railroad to defendant in error. (Willis's Testimony.) And also whether plaintiff in error would be likely to make any other than a dependent agreement to pay on condition an old debt of a third party.

II. With these preliminary views, we proceed to examine the terms of the contract, and the usual rules of construction.

a. The terms of agreement by defendant in error are, "that he will *complete* all the bridge work *to be done by him for the Boston and New York Central railroad,* ready for laying down the iron rails for one track, *on the first day of December next.*

b. The agreement on the part of the plaintiff in error is, "that, in *consideration of the premises,* he will pay, within two days from the date hereof, the sum of $4,400 in cash; and that he will give said Emerson, on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street, his five notes for $2,000 each, payable in six months; *said notes, when paid, to be applied toward the indebtedness of said Railroad Company to said Emerson.*"

1. The agreement on the part of plaintiff is "*in consideration of the premises,*" and technically these are apt words to create a condition. (Thorpe *v.* Thorpe, 1 Ld. Raymond, 665; Ackerly *v.* Vernon, Willes, 157.)

2. That the agreement to give the notes was at least dependent upon prior performance, would seem free from all doubt. This is tested by considering whether an *action on the contract could have been maintained before the work was done.*

It falls clearly in this respect within the technical rule. "When a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed," no action can lie. (Bean *v.* Atwater, 4 Connecticut, 9; Pordage *v.* Cole, 1 Saunders, 320; Day *v.* Dox, 9 Wendell, 129.)

The fact that the notes were not to be given upon performance, but at a period after performance, does not affect it. This only shows that it does not belong to another class of dependent agreements, viz: Where two acts are to be done at the same time, or cases of concurrent covenants, as they are called. (Glazebrook *v.* Woodrow, 8 T. R., 374; Williams *v.* Healy, 3 Denio, 363; Gainzly *v.* Price, 16 Johnson, 267.)

3. Nor does the fact that payment of part of the consideration (viz: the $4,400) was to be made before performance, affect the question whether the agreement for a final payment was dependent or independent. The old case of Terry *v.* Duntzie, (2 Henry Blackstone, 389,) from which the opposite doctrine was derived, was unfounded in reason, and has been declared not to be law here and in England. (Cunningham *v.* Morrell, 10 Johnson, 203; Hopkins *v.* Elliot, 5 Wendell, 496; Grant *v.* Johnson, 1 Selden, 247; Johnson *v.* Reed, 9 Mass., 78; Lord *v.* Belknap, 1 Cushing, 279; Watchman *v.* Crooke, 5 Gill and Johnson, 254; Bean *v.* Atwater, 4 Connecticut, 4; Kettle *v.* Harvey, 21 Vermont, 301; McClure *v.* Rush, 9 Dana, 64.)

4. But it may be said, that although performance was a con-

dition precedent to delivery by plaintiff of his notes, yet performance *within the time* was not so.

a. It is important on this point to distinguish between the question whether non-performance within the time will, because of the agreement being dependent, defeat a recovery *on the contract itself*, and the question whether, notwithstanding such non-performance, assumpsit will not lie to recover for the labor and materials.

b. It would seem to be the settled rule, both here and in England, that if plaintiff has not performed the work in exact accordance with the contract, and there has been no waiver, he cannot recover on the contract, but must recover, if at all, on the common counts for his labor and materials. (2 Greenleaf's Evidence, secs. 104, 136; Chapel *v.* Hicks, 2 Crompt and Mee, 214; Read *v.* Banner, 10 B. and C., 440; Alexander *v.* Gardner, 10 Bingham N. C., 671; Chater *v.* Leese, 4 M. and W., 295, 311; Jewell *v.* Schroepel, 4 Cowen, 564; Ladua *v.* Seymour, 24 Wendell, 62; Britton *v.* Turner, 6 N. H., 481.)

c. Unless, therefore, time of performance might, in a declaration on the contract, be wholly omitted, this case falls within the rule, and plaintiff would be remitted to his common counts; that it could not be so omitted, plaintiff in error refers to Phillips *v.* Rose, 8 Johnson, 393; Jewell *v.* Schroepel, 4 Cowen, 565; Smith *v.* Guyarty, 4 Barbour, 615; Ladua *v.* Seymour, 24 Wendell, 61; Gregory *v.* Hincks, 3 Hill, 380; Watchman *v.* Crooke, 5 Gill and Johnson, 254; Farnham *v.* Ross, 2 Hall, 167.

d. As to to the right of defendant in error to recover on common counts, no discussion is necessary. The ruling excepted to declares the agreements to be independent, and that recovery may be, and it was in fact, had upon the counts on the special contract.

III. But, besides and beyond the artificial rules above adverted to, and under which it is submitted plaintiff in error is safe, there are others, founded on the plainest principles of equity and justice, which have guided, if not controlled, the courts, in their construction of this class of contracts; and it is upon these and their application that the case must turn.

Of these, the principal ones are—

1. Where non-performance by plaintiff deprives the defendant, not of part, but of the entire consideration of the contract, the agreement of defendant shall be deemed dependent. (Pordage *v.* Cole, 1 Wms. Saunders, 320; Duke St. Albans *v.* Shore, 1 H. Black, 270; Dakin *v.* Williams, 11 Wendell, 67; Atkinson *v.* Smith, 14 M. and W., 695.)

2. Where defendant, in case of plaintiff's non-performance,

has no other remedy for the injury he sustains except by declaring his agreement dependent. (Pordage *v.* Cole, 1 Wms. Saunders, 319.)

3. Where the amount of the consideration which defendant will be absolved from paying plaintiff, if his agreement be deemed dependent, is not, or may not be, commensurate with the injury sustained by plaintiff, or, in the language of this court, there "is no natural connection" between the two; in such case, defendant's contract shall be construed to be independent.

In discussing the application of these principles, plaintiff in error submits at the outset, that almost all the rules of construction in this class of cases are founded upon a struggle of the courts to avoid the old and long-standing doctrines of forfeiture. Thus the rule, that in case of failure to perform, when such failure deprives defendant only of part of the consideration to be received by *him*, the agreement shall be deemed independent, is founded solely on the ground of forfeiture, and the want of equity in allowing defendant to keep and enjoy the labor and materials of the plaintiff without compensation. So, also, the doctrine, that there is no natural connection between the sum due plaintiff at the time of breach, and the injury sustained by defendant by such breach, proceeds wholly on the thought that the sum so due is forfeited by the breach.

But in the class of cases to which the present one belongs, the doctrine of forfeiture is exploded, and it is well settled that the value of the labor and materials to defendant may be recovered on *quantum meruit* notwithstanding the breach.

The reason of the rule having therefore ceased, the doctrine will bear revision.

a. As to the first of the above rules, plaintiff in error submits that the failure to perform by defendant, although it left the fruits of his labor in the hands of the railroad, with whom he contracted to do it, and who are fully bound to pay him for it, yet deprived plaintiff in error of the whole consideration for which he made the contract, viz: the time within which performance was to take place.

b. It is important to note that the doctrine regards merely *the question of consideration moving from plaintiff to defendant*, not the consideration arising from plaintiff's altered condition in consequence of the contract. It seeks to avoid circuity of action which would arise if plaintiff recovered the agreed sum, and defendant, by cross action, recovered it back. (Duke of St. Albans *v.* Shore, 1 H. Black., 270; Pordage *v.* Cole, 1 Wms. Saunders, 319; Dakin *v.* Williams, 11 Wendell, 67; Atkinson *v.* Smith, 14 M. and W., 65.)

1. The necessity for making time a condition of the contract, and the probability that both parties would assent to make it so, have been adverted to, and plaintiff in error now submits, that unless time was the whole consideration, moving from defendant in error to plaintiff in error, there was no consideration at all.

a. For there was already a contract between the defendant in error and the railroad (subsisting and referred to as obligatory in this very contract) to do this same work, the terms of which were not varied one word, except in relation to this very matter of time. The matter of time, then, was the only change effected, and the only benefit derived to plaintiff in error.

b. If both contracts had been made by plaintiff with the railroad, would there have been any other consideration to support the additional contract except time?

c. It cannot be said that the work was done for the plaintiff, or at his request, or for his benefit, so as to form a consideration moving from the defendant in error to him—for it was to be performed, so far only as time was concerned, at his request, and its direct benefit was solely to the railroad.

His relation to the railroad was merely that of an officer, a creditor, and a stockholder; and it is believed that upon no known principles of law could damages be ascertained and assessed in his favor, for a deprivation of such a remote benefit, if defendant in error had failed to perform.

2. This last suggestion, if well founded, emphatically supports the second of the above grounds, viz: that the only remedy plaintiff in error can have for the breach of his agreement by defendant, is to construe his covenant to give his notes to be dependent on complete performance by defendant.

3. The last ground which is often relied on to show the covenants to be independent is, that there is no natural connection between the sum which is claimed to be paid defendant in error and which plaintiff seeks to withhold, and the amount of damages which plaintiff may sustain by defendant's non-performance.

a. If plaintiff in error had in fact received and was now enjoying the results of defendant's labor and materials, and if non-performance would leave defendant in error without remedy, this would be a forcible reason for holding the covenant of plaintiff in error to be independent.

b. But even in such case, as it is settled that no forfeiture is incurred, but defendant might, as against party enjoying the benefit of his labor and materials, maintain an action for his *quantum meruit* in which the injury by non-performance might

be set off and adjusted, it is submitted that the harmony of the law and the symmetry of pleading, which requires in actions on special contracts an allegation of complete performance, would be best preserved by obliging the party to resort to the common counts.

c. But, however this may be in other cases, in this case plaintiff in error does not hold and enjoy the benefit of defendant's labor and materials, but a third party, who has contracted with defendant to pay for them. The defendant is not without remedy against that party, and there may be said to be a natural connection between the amount which defendant in error loses, which is nothing, and the damage which plaintiff in error could recover for breach, which by law cannot, by reason of remoteness, be shown to be anything. In other words, the rule and its reason has no application to a collateral contract, in its nature a guaranty, when, for want of strict performance of the terms of the guaranty, one party has lost his remedy, and the other received no appreciable benefit.

IV. The remaining exception is to the ruling of the court, compelling plaintiff in error to prove and adjust his damages for breach of the contract by way of offset, recoupment, or reduction of damages of defendant in error in this action, and thus depriving him of his election to bring a cross action.

Plaintiff in error has been able to find no case in which the doctrine is established, that it is compulsory on a defendant to come prepared with his proofs of such damage, or have the damages assessed at a nominal sum, and be barred of his cross action. The question may be important in this case, the principle is fit to be settled, and plaintiff in error submits that the ruling was wrong.

V. The statement of counsel to Emerson should have been admitted to show that, in opinion of Emerson, the work could have been done by December 1st.

Points of defendant in error:

I. The first exception is as follows: "The defendant offers to prove, that just prior to the signature of the contract, both parties being present, the counsel of the plaintiff told him that, unless he was sure that he could complete the bridges by December first, he ought not to sign the contract, and could not recover if he did not complete them by December first; but the court refused to admit the same." To which refusal the defendant excepted.

Such testimony was clearly inadmissible. The contract must speak for itself. The conversations of the parties, their understandings and expectations, and the suggestions of counsel,

cannot affect or control the construction of this contract. This would be to vary or modify its terms by parol. (1 Greenleaf on Evidence, sec. 275, p. 327; Weatherhead's Lessee *v.* Baskerville, 11 Howard; Van Buren *v.* Digges, 11 Howard, 461; Grant *v.* Naylor, 4 Cranch, 224.)

II. The second exception is as follows: "The defendant offers to prove that, at the time the contract was drawn up, the element of time was talked over by the plaintiff and the defendant, and that plaintiff assented that time was the essence of the contract; but the court refused to admit the same." To which refusal the defendant excepted.

The same answer may be made to this as to the first exception. When the contract is reduced to writing, all the conversations of the parties, leading up to it, are merged in it. (1 Greenleaf on Evidence, sec. 275, p. 327.)

III. The third exception is as follows: "The defendant moved the court to rule and instruct the jury, that by the true construction of said contract declared upon, the plaintiff would not be entitled to recover, without showing that the work was completed, ready for laying down the rails for one track, by the first day of December, 1854; but the court refused so to instruct the jury, but did instruct them, that the agreement on the part of the defendant, to give the notes in said agreement mentioned, was not dependent upon the completion of said work, ready for laying down said rails for one track, at the time limited by said contract." To which ruling the defendant excepted.

It is sometimes difficult to determine whether covenants and promises are dependent or independent. Some rules of construction are laid down in the books, but, after all, each case is to be governed by its own circumstances. (Philadelphia W. and B. R. R. Co. *v.* Howard, 13 Howard, 307.)

1. The courts incline to consider covenants and promises independent, rather than dependent, to save forfeitures. The burden is on him who alleges dependency. (Platt on Covenants, p. 35, [78, 79,] Law Library, vol. 3.)

If there are no terms which import a condition, or which expressly make one promise dependent on the other, they are construed to be independent; and in this contract there are no such. Platt on Covenants, Law Lib., vol. 3, p. 32, [72, 73.]

More than this the terms import the contrary. In that part containing the promise, the *condition of time is wholly omitted*—thus indicating an intention not to make it dependent *on time*, but on *work done.*

2. The failure to perform on the day does not go to the whole consideration, and there is no natural connection be-

tween the amount to be paid for the work done after the day, and the injury or loss inflicted by a failure to perform on the day. (Platt on Covenants, Law Lib., vol. 3, p. 40, [90, 94;] Philadelphia W. and B. R. R. Co. *v.* Howard, 13 Howard.)

3. The forfeiture of the amount to be paid for the whole work, in consequence of its not being completed by the day, would be unreasonable in this case. By construing the promises as independent, the plaintiff can recover his *exact* damages (if any) or have them recouped. Thus the rights of both parties are secured. Platt on Covenants, vol. 3, Law Lib., p. 40, [90.]

4. The defendant in error completed the bridges. The plaintiff in error has had the benefit of his labor. The objection is, that it was not done *at the day*, (for which, however, the plaintiff in error claimed no damages.) It would be manifestly inequitable for the plaintiff in error to receive the benefit of this labor without paying for it. The objection taken is *technical*, and ought not to be sustained, unless the language is clear, and the rule of law imperative. (Philadelphia *v.* W. and B. R. R. Co., 13 Howard, 307; Van Buren *v.* Digges, 11 Howard, 461.)

5. The promise of the plaintiff in error was not dependent upon the completion of the bridge work by December 1st, because the notes were not to be given upon the completion of the bridges. Something *more* was to be done, to wit, the laying of the rails by another party. How can the promise of the plaintiff in error be said to be dependent upon the completion of his work by December 1st, when the completion of the work at that time would not then entitle the defendant in error to his notes?

6. When the acts stipulated to be done, are to be done at *different times*, the stipulations are to be construed as independent of each other. (Goldsborough *v.* Orr, 8 Wheaton, 217.)

Taking this decision as a guide, these promises must be construed as independent; for the promise of the defendant in error was to complete the bridges by December 1st, whereas the promise of the plaintiff in error was not to give the notes at that time, *but when the rails were laid.*

7. The plaintiff in error promised to pay the defendant in error $4,400 in cash, within two days from the date of the contract, and to give his notes upon the completion of the bridges and laying the rails. So far as this *cash* payment is concerned, the promise is clearly *independent*, as it necessarily preceded the completion of the work. If the construction contended for by the plaintiff in error be adopted, the *same* promise will be construed both as *dependent* and *independent*—

dependent as to the giving the notes, independent as to the payment of cash. Platt on Covenents, Law Library, vol. 3, p. 43, [96.]

IV. The fourth exception is as follows: "The defendant further requested the court to rule and to instruct the jury, that if the plaintiff failed to complete said work, ready for laying down the iron rails for one track, by the said first day of December, there was thereby a failure of the consideration of said contract, and the plaintiff would not be entitled to recover the amount claimed by him, or any part thereof; but the court refused so to instruct the jury." To which refusal the defendant excepted.

Very clearly, these instructions ought not to have been given. The consideration of the plaintiff in error's promise to pay the money and to give the notes, was the promise of the defendant in error *to do the work*, and not merely his promise to *do it by December 1st.* He having completed the work to their acceptance, there was clearly not a *total failure* of consideration.

V. The last exception is as follows: "His honor the judge having first called upon the defendant to offer evidence, if he saw fit, of any actual damage by him sustained by the non-performance of said work within the time limited by said contract, and the defendant declining to offer any such evidence, and admitting that no such actual damage was claimed by him in this suit, the court thereupon instructed the jury to deduct from any sum they might find for the plaintiff the sum of one dollar, as nominal damages for the said non-performance of plaintiff." To which direction the defendant excepted.

It is difficult to discover what there is objectionable in this direction. Undoubtedly, the plaintiff in error was entitled to have deducted in this suit any damage which he could show that he had sustained from the non-performance of the work within the time limited by the contract; and if the court had refused to admit testimony of such damage, he might well have excepted; but he expressly waived all claim to damage in this suit. In the absence of any proof or claim by him, the court directed a deduction of nominal damages. What more or different could the plaintiff in error require? (Winder *v.* Caldwell, 14 Howard, 434.)

Mr. Justice McLEAN delivered the opinion of the court.

This case is before us on a writ of error to the Circuit Court of Massachusetts.

The action was brought by Emerson against Slater, on an agreement made the 14th day of November, 1854, in which Emerson, "in consideration of the agreement of said Slater,

hereinafter contained, and of one dollar to him paid, covenants and agrees, with said Slater, that he will complete all the bridge work to be done by him for the Boston and New York Central Railroad Company, ready for laying down the iron rails for one track, by the 1st day of December next."

"And the said Slater, in consideration of the premises, hereby agrees, with said Emerson, that he will pay him, within two days from the date hereof, the sum of forty-four hundred dollars, in cash. And the said Slater further agrees, that he will give to the said Emerson, on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street, in Boston, from Dedham, his (said Slater's) five notes, for two thousand dollars each, dated when said notes were given, as above provided, and payable in six months from their date, to the said Emerson or his order. Said notes, when paid, are to be applied towards the indebtedness of said Boston and New York Central Railroad Company to said Emerson; it being understood that this agreement is in no way to affect any contract of said Emerson with said company, or any action now pending."

The execution of this agreement was admitted, and that the work upon the bridges, in said agreement set forth, was completed, ready for laying down the iron rails for one track, about the middle of December, 1854, and that the rails were laid to the foot of Summer street, in Boston, from Dedham, about the last of the same month.

It was proved that the defendant was President of the Boston and New York Central Railroad Company, and a stockholder and bondholder in the same. The corporation failed on or about the 2d of July, 1854. The company was then indebted to the plaintiff, and did not pay him. In the second week of July, there was a crisis in the affairs of the company, and Emerson suspended his work, so far as regarded new outlays. In August a new arrangement was made, and he went on till the first or second week in November, and then he kept a force on the great bridges sufficient to retain possession of the work, and would not surrender it; the witness (Willis) then made an effort to get the bridges completed. The question was, how much Emerson would take. The company owed him some ten to fifteen thousand dollars, and was then insolvent as respected meeting its engagements.

The defendant then introduced an agreement between the Boston and New York Central Railroad Company, a corporation, and Charles Emerson, of Boston, in which Emerson agreed to build and complete, sufficient for the passage of an engine over the same, on or before the first day of May next,

all the bridging as now laid out and determined upon by the engineer of said railroad, from the wharf near the foot of Summer street, in Boston, and from South Boston across the South Bay, so called, to the Dorchester shore, in Dorchester, in the manner and with the materials hereinafter described, and to finally complete the same to the satisfaction of the State commissioner and the engineers of said railroad, as soon after the first day of May next as may be. Several other bridges were required to be built on the road, Emerson furnishing all the materials, excepting the iron rails, chains, and spikes, which were to be furnished by the Railroad Company. This contract was dated the 23d of December, 1853, and signed by the parties.

A receipt, dated November 15th, 1854, signed by Emerson, acknowledged the payment of forty-four hundred dollars, by Slater, on the contract first above stated.

E. B. Ammidown, a witness, stated he was a director on the railroad, and that in November, 1854, there were negotiations pending for a contract for a through route from Boston to New York, between the Boston and New York Central Railroad Company and the Norwich and Worcester Railroad Company, and the Steamboat Company plying between Norwich and New York. The contract then existing between said Steamboat Company and Norwich and Worcester Railroad Company with the Boston and Worcester Railroad Company would expire about December 1st, 1854. It was necessary that said Steamboat and Norwich and Worcester Railroad Companies should make a new contract. They preferred to contract with us instead of the Boston and Worcester Railroad Company, provided our road could be ready to run by December 1st, 1854. The only part of our road, as to which there was any doubt of its completion, was the bridges, which the plaintiff was making. The whole matter was talked over, in the presence of the plaintiff. We regarded it as of very great importance. I considered the loss of that contract equal to a quarter of a million of dollars, and the plaintiff said half a million. Committees from Norwich and Worcester Railroad and Steamboat Companies came on, to make the arrangement, and went over part of the road. Whether this was before or after the contract the witness cannot say, but he has little doubt that it was before.

J. C. Hurd, a witness, and who was also a director, and as a committee, about the 14th of August, 1854, made a parol contract with Emerson to pay him $17,000, and secure to him $6,000 of Farnum, with endorsements. A larger sum than $17,000, he thinks, was paid at the time of the contract.

Emerson agreed to go on and finish the work, but he declined to sign a written agreement.

On the above evidence, the defendant moved the court to rule and instruct the jury, that by the true construction of said contract declared on, the plaintiff would not be entitled to recover without showing that the work was completed, ready for laying down the iron rails for one track, by the first day of December, 1854; but the court refused so to instruct the jury, and did instruct them that the agreement on the part of the defendant to give the notes in said agreement mentioned was not dependent on the completion of said work, ready for laying down said rails for one track, at the time limited by said contract. To which ruling and refusal the defendant excepted.

And the defendant further requested the court to rule and instruct the jury, that if the plaintiff failed to complete said work, ready for laying down said iron rails for one track, by the said first day of December, there was thereby a failure of the consideration of said contract, and the plaintiff would not be entitled to recover the amount claimed by him, or any part thereof; but the court refused so to instruct the jury. To which refusal the defendant excepted.

The judge having first called upon the defendant to offer evidence, if he saw fit, of any actual damage by him sustained by the non-performance of said work within the time limited by said contract; and the defendant declining to offer any such evidence, and admitting that no such damages were claimed by him in the suit, the court thereupon instructed the jury to deduct, from any sum they might find for the plaintiff, the sum of one dollar—as nominal damage, for the said non-performance of plaintiff. To which the defendant excepted.

The jury found for the plaintiff ten thousand one hundred and ninety-nine dollars.

The declaration contains four counts. The first one alleges the work was completed by the 1st of December, 1854; the second, on the 20th of December; third, the same time; the fourth, the same as the second, with an allegation that the defendant waived the time fixed for the work to be completed to the 20th of December.

This contract cannot be satisfactorily understood or construed without reference to the circumstances under which it was made. From the evidence, it appears that the work to be completed by the 1st of December was provided for by a previous contract, dated 17th December, 1851, in which the details and prices of the work were specially stated to be so constructed as to admit of an engine to run over it on or before

the 1st of May ensuing, and the whole to be completed as soon after that period as practicable.

The company, it seems, had become embarrassed, and were unable to make payment for the work as it progressed; still the contractor, Emerson, was unwilling to give up the contract, and retained a few hands in his employ on different parts of the work, so as to retain the possession of it.

Another fact to be noticed as important was, that if the road could be completed by the 1st of December, the company had an assurance that a contract could be made with the Steamboat Company plying between Norwich and New York, making a continuous line between Boston and New York. This was considered an object of great importance—equal, as was supposed by a witness, to a quarter of a million of dollars, and, as the plaintiff supposed, to half a million.

The defendant was President of the Boston and New York Central Railroad—a stockholder and a bondholder in the same; but it does not appear that he had any authority to bind the company, as he entered into the contract in his individual capacity.

Under these circumstances, the contract on which the action is prosecuted was made. It will be at once perceived there was a strong motive to have the work completed by the 1st of December ensuing, by all who had an interest in the Central railroad. The sum to be paid by Slater was not in addition to the price stipulated in the former contract, but in discharge of so much of that contract.

All these facts being admitted or undisputed, we will consider the language of the contract. It states "that the said Emerson, in consideration of the agreement of said Slater, hereinafter contained, and of one dollar to him paid, the receipt whereof is acknowledged, covenants and agrees with said Slater, that he, the said Emerson, will complete all the bridge work to be done by him for the Boston and Central Railroad Company, ready for laying down the iron rails for one track, by the 1st day of December next."

There is no ambiguity in this language. No one can misconstrue it. The work specified was to be completed by the 1st day of December. And the said Slater, "in consideration of the premises," that is, the completion of the work, "hereby agrees with said Emerson, that he will pay him, within two days from the date hereof, the sum of forty-four hundred dollars in cash; and the said Slater further agrees that he will give to the said Emerson, on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street, in Boston, from Dedham, his (said Slater's) five

notes for two thousand dollars each, dated when said notes are given, as above provided, and payable in six months."

The notes were to be given on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street, in Boston; and from this it is argued that the covenants in the agreement are independent. Much is found in the opinions of courts and elementary writers in regard to dependent and independent covenants. And it is said, "where the acts stipulated to be done are to be done at different times, the stipulations are to be construed as independent of each other." This, as a general rule, is correct, but it is subject to the intention of the parties, as signified in the language of the contract. The great rule is to ascertain the intent of the parties from the language used.

The work was to be done by the 1st day of December; and Slater agreed to give his notes, payable in six months after the work was completed; the time of giving the notes, therefore, is referable to the time fixed for the completion of the work. In no just or legal sense can this language be held to enlarge the time limited in the contract.

It is said by some writers, that it is impossible to make time of the essence of the contract where damages may compensate for the delay. But this is not correct as a general proposition. And a more fit illustration of this can scarcely be found than the contract under consideration. The amount of compensation for the work is not increased or diminished by the new contract. The first contract stands in all its force, unaffected by the second, except that the payments made under the second shall be applied as a credit on the first. The obligation assumed by Emerson in the new contract was, to finish the work, as stated, by the 1st of December, in consideration that forty-four hundred dollars should be paid to him in two days, and notes given for ten thousand dollars on the completion of the work. Slater, having no other interest in the work than any other stockholder and bondholder of similar amounts, paid the forty-four hundred dollars, and agreed to give his individual notes for the ten thousand dollars. In this contract he stands in the relation of a surety, and can only be held responsible under his agreement.

That time was an essential part of this contract is clear from the circumstances under which it was made, and the intent of the parties, as expressed. The continuous line to New York was the strong motive to Slater, and that could be secured only by the completion of the work on or before the 1st of December.

The defendant prayed the court to instruct the jury that the

plaintiff could not recover without showing the work was completed, ready for laying down the iron rails for one track, by the 1st day of December, 1854, which the court refused to do. In this, we think, there was error. On a contract where time does not constitute its essence, there can be no recovery at law on the agreement, where the performance was not within the time limited. A subsequent performance and acceptance by the defendant will authorize a recovery on a *quantum meruit.*

It is difficut to perceive any satisfactory mode by which the defendant in the Circuit Court could recoup his damages for the failure of the plaintiff to perform in that action, or by bringing another suit. As a stock and bond holder, his damages would be remote and contingent. To ascertain the general damage of the company by the failure, and distribute that amount among the members of the company in proportion to their interests, would seem to be the proper mode; and this would be complicated, and not suited to the action of a jury.

The judgment of the Circuit Court is reversed, with costs.

FREDERICK SCHUCHARDT AND FREDERICK C. GEBBARD, LIBELLANTS AND APPELLANTS, *v.* WINTHROP S. BABBIDGE AND OTHERS, CLAIMANTS OF HALF OF THE PROCEEDS OF THE SHIP ANGELIQUE.

Where a mortgage existed upon the moiety of a vessel which was afterwards libelled, condemned, and sold by process in admiralty, and the proceeds brought into the registry of the court, the mortgagee could not file a libel against a moiety of those proceeds.

His proper course would have been, either to have appeared as a claimant when the first libel was filed, or to have applied to the court, by petition, for a distributive share of the proceeds.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York, sitting in admiralty.

The facts are stated in the opinion of the court.

It was argued by *Mr. Cutting* upon a brief filed by himself and *Mr. Hamilton* for the appellants, and *Mr. Benedict* for the appellees.

The arguments of counsel, with respect to the relative rights of the claimants and libellants to the fund in court, are omitted.

With respect to the jurisdiction of the court, *Mr. Cutting's* point was this, viz:

Although courts of admiralty in the United States have no

power to foreclose a mortgage of a vessel by a sale, or to transfer the possession to the mortgagee, (17 Howard, 399, Bogart *v.* The Steamboat John Jay,) they may entertain an application by the mortgagee, after a sale, to be paid out of the proceeds of the sale in the registry of the court. (Propeller Monticello, 17 Howard, 152; Admiralty rule, 43.)

Mr. Benedict's point was this:

This is really a suit to foreclose *a mortgage*, even if it were an original suit against the *ship*. As a suit against the proceeds, it is in substance a suit in equity, for relief against a regular degree in admiralty. In either case, the District Court had no jurisdiction. (Case of the John Jay, 17 Howard, 399.)

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the southern district of New York, sitting in admiralty.

Between sixty and seventy libels had been filed in the District Court by material men—men who had furnished supplies; also, by shippers of goods and passengers—against the ship Angelique, of which S. W. Jones was master. These several proceedings were commenced in July and August, 1853, and interlocutory decrees, condemning the vessel, were entered in all of them, and final decrees in some six or seven. One of the parties obtaining a final decree issued execution, and the vessel was sold, and the proceeds brought into court. The vessel sold for $6,900.

In this stage of these proceedings, the present appellants filed their libel against the proceeds of the ship in court, setting forth, that, being the owners of the vessel, they sold and delivered her to one A. Pellitier, for the sum of $15,000, on the 7th May, 1853; that of this sum a promissory note of the vendee was given for $5,000, payable in six months, which was secured by a mortgage upon a moiety of the vessel to the vendors, which was duly recorded, in pursuance of the act of Congress, on the 9th May, 1853, in the office of the collector of customs of the port of New York, where the vessel was then registered, and a copy of the mortgage was also filed in the office of the register of deeds of the city and county of New York.

The libel prayed process against a moiety of the proceeds of the vessel in court, claiming the same under, and by virtue of, the mortgage.

Several of the libellants, who had obtained either final or interlocutory decrees, above referred to, appeared, and put in

answers to this libel of the mortgagees, setting up their proceedings, and the decrees condemning the vessel to pay their respective claims to the proceeds, in defence.

The case went to a hearing, when the District Court decreed to dismiss the libel. On an appeal, the Circuit Court affirmed the decree.

The libel filed in this case is a libel simply to foreclose a mortgage, or to enforce the payment of a mortgage, and the proceeding cannot therefore be upheld within the case of the John Jay, heretofore decided by this court. (17 How., 399.)

The proper course for the mortgagees was to have appeared as claimants to the libels filed against the vessel, in which the questions presented in the case might have been raised and considered; or, on the sale of the vessel, and the proceeds brought into the registry, they might have applied by petition, claiming an interest in the fund; and if no better right to it were shown than that under the mortgage, it would have been competent for the court to have appropriated it to the satisfaction of the claim. As the fund is in the custody of the admiralty, the application must necessarily be made to that court by any person setting up an interest in it. This application by petition is frequently entertained for proceeds in the registry, in cases where a suit in the admiralty would be wholly inadmissible. The decree of the court below is therefore right, and should be affirmed.

THE NEW YORK AND VIRGINIA STEAMSHIP COMPANY, OWNERS OF THE STEAMER ROANOKE, APPELLANTS, *v.* EZRA CALDERWOOD, THOMAS C. BARTLETT, DEXTER CARLETON, JOSHUA NORWOOD, PHILANDER CARLETON, ENOS COOPER, AND SETH COOPER, LIBELLANTS.

Neither rain, nor the darkness of the night, nor the absence of a light from a barge or sailing vessel, nor the fact that the steamer was well manned and furnished, and conducted with caution, will excuse a steamer for coming in collision with a barge or sailing vessel, where the barge or sailing vessel is at anchor or sailing in a thoroughfare, but out of the usual track of the steam vessel.

Therefore, where a collision took place between a steamer and a sailing vessel, the latter being out of the ship channel, and near an edge of shoals, the steamer must be responsible.

The sailing vessel had no pilot, and did not exhibit an efficient light. Although these circumstances did not exonerate the steamer, yet they make it necessary for this court to say that an obligation rests upon all vessels found in the avenues of commerce, to employ active diligence to avoid collisions, and that no inference can be drawn from the fact, that a vessel is not condemned for an omission of certain precautionary measures in one case, that another vessel will be excused, under other circumstances, for omissions of the same description.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York.

It was a libel filed by Calderwood, and the other owners of a schooner called the "Sprightling Sea," against the steamship Roanoke, her tackle, &c., in a case of collision at the place and under the circumstances stated in the opinion of the court.

In July, 1853, the district judge decreed that the libellants should recover against the steamship the damages occasioned by the collision, and referred the case to a commissioner to ascertain the amount.

In September, 1854, the commissioner reported that there was due to the libellants, for the value of the vessel at the time of the collision, after deducting the amount for which the vessel sold - - - - - - - - - - - - - - - - - - - $4,442.00
Amount added to the value above by court - - - 200.00
The value of the freight - - - - - - - - - - - 162.00
Interest on the above amounts, from Oct. 17, 1852 - 672.56

$5,476.56

The sum of five thousand four hundred and seventy-six dollars and fifty-six cents.

This report was confirmed by the District Court, and, upon appeal, the decree was affirmed by the Circuit Court, an appeal from which brought the case here.

It was argued by *Mr. Van Winkle* for the appellants, and *Mr. Benedict* for the appellees.

In a case of this kind, where the points of law are connected with the evidence, they can only be stated in general terms, although they may not be understood by the reader without a recital of the evidence. They were these on the part of the appellants. *Mr. Van Winkle*, after stating his version of the case, contended that the schooner was clearly to blame.

1. She was negligent; she was proceeding up a narrow river in the night time, without a pilot on board, without a light in her binnacle, and without a light displayed in any part of her hull or rigging. The steamer was moving as slowly as she could by steam; had three lights displayed, which were visible for miles; had a competent lookout, and at the approach of the danger, in the emergency, ported her helm. If the light first seen on her larboard bow was that of the schooner, she still did all she could do by hugging the easterly side of the channel, so as to pass the schooner on the larboard hand. (Trinity House Rule of 30th Oct., 1840.)

2. It is the duty of a sailing vessel in a river or roadstead to carry a light at night, conspicuously displayed in her rigging; if not imperative on her to do so, it is a precautionary measure, dictated by prudence, and if neglected, precludes a recovery, except for wilful damage. (The Rose Gilmor, 2 Wm. Rob., 4; The Columbine, Norwood, Ibid., 33.)

3. If the schooner was not to blame, or not so much so as to render her liable, then it was a case of inevitable accident, and the loss must remain where it fell. (Stainback *v.* Rae, 14 How., 532.)

4. The true state of the case seems to be, that the two vessels, when they respectively discovered each other, were approaching on opposite courses on a line, or on parallel lines so close as to amount to the same thing; that the steamer ported her helm, bore off to the starboard, close to the edge of the channel, which is here very narrow; but the schooner, through mistake or mismanagement, changed her course, fell with the wind, and ran across the steamer's bows.

If this be so, the steamer was not the cause of the accident, but the schooner was.

5. But, admitting that the schooner kept her course, the steamer, as in duty bound, tried to pass to the leeward of her. The schooner's navigators had no right to persist in their course, when they knew, or ought to have known, by so doing they incurred the imminent danger of forcing the steamer ashore, in her endeavors to pass to the leeward. It comes within the exceptions laid down in St. John *v.* Paine et al., (10 Howard, 582.)

Mr. Benedict's points were the following:

I. The plan of the position of the vessels at the time of the collision, asserted by the defendants, and proved by them to be a fair plan of the place of collision, exhitits the schooner close in shore, in a deep bay, heading along shore, and the steamer far out of the channel—also close in shore, heading at the schooner—a position so surprising as to put the steamer on her defence, with the strongest presumption against her—the wind being about south, and the schooner close-hauled on the privileged tack. They do not produce a lookout. The captain and pilot say they had a lookout. If so, the not producing him is ground of strong suspicion.

II. Their helmsman, Henson, is called to explain, and he says, "It was a kind of cloudy night; once in a while you would see the stars; it was not very thick or cloudy." This is corroborated by all our witnesses, and is true, although the captain and pilot swear it was pitch dark; could hardly see

the width of this room. He says, also, "The steamer was running N. W. half W., pretty much down the channel, rather more on the east, if anything." "There was ample room to have gone clear of her." Under these circumstances, they would never come together.

They, however, came together, the steamer having changed her course, before the collision, towards the east shore. "The pilot told me to keep her a little more to the east. He told me to port the helm, to give her more room. The next words he said were, 'hard a-port.'"

"Before we (steamer) changed our course, she was heading about down the channel. After we changed, she was heading towards the east shore.

The steamer struck the schooner, and cut her half in two.

I take this as the best account of the state of things in the steamer, for, although their other witnesses vary from it, it is quite clear that the man at the wheel is altogether the most reliable, and the pilot and the captain evidently are so much biased as not to be quite reliable. The weight of testimony is overwhelming in favor of this account of the matter.

III. The schooner was close-hauled, jam on the wind, her starboard tacks aboard, and continued so; all our witnesses swear to this. They know, and they alone know, how our sails were trimmed; and as soon as we saw the steamer's approach, we held up forward a good signal-light, and we were as close in shore as possible.

The testimony of some of their witnesses, that it was so dark that they could not see half the width of the room, although not true, is evidence that they did not see us, and are not, therefore, reliable witnesses as to our position, &c.

IV. By the settled law of navigation, the steamer is always held to have a free wind. She has so, in fact, being moved by a force within herself, and under her control. She makes the wind blow as she pleases, and she is therefore bound to avoid a sailing vessel. At this time she had also the outside atmospheric wind free, and the schooner was close-hauled on the wind on her starboard tack. On all grounds she had the right to hold her course, and the steamer was bound to avoid her.

V. The alleged declarations of the captain are of no value. They are highly improbable, in the sense in which they are offered. He says he never said so. What he did say may have been misunderstood or misremembered, so as to convert the mere language of civility into that of deliberate judgment, or he may have been adroitly led to say what he never intended to say. The question is not what the master said weeks

afterwards, but what are the facts. He could not thus destroy the rights of the owners.

VI. There was a vessel at anchor on the western shore, a little further down, with a light up, and we showed a warning light just before the collision.

The probability is, that on board the steamer they came to the conclusion that the schooner had changed her course, by transferring their first observation of the vessel at anchor, with a light up, to the schooner with its signal light temporarily exposed; and from these negligent observations, supposing both vessels to be one, they mistook the position of the schooner, and endeavored to cut in between her and the shore, when she was within a few feet of the shore, and this caused that collision. If the steamer had kept the channel, or had taken a sheer to westward a minute before collision, she would have passed clear of us.

Mr. Justice CAMPBELL delivered the opinion of the court.

This is a case of collision, in which the steamship Roanoke is charged with having carelessly and negligently run into and afoul of the schooner Sprightling Sea, in the Elizabeth river, Virginia, in October, 1852.

The facts disclosed by the pleadings and proofs are, that the schooner was ascending the river between 10 and 11 o'clock, P. M., and sailing at a rate of six miles per hour, with the aid of the tide. She was close-hauled, on her starboard tack, at a time when she descried the steamship descending the river, on her voyage to Richmond. The collision occurred on the eastern side of the river, "out of the ship channel," "near an edge of shoals," and "within a length or two of them." The object of those who managed the schooner was to avoid all danger, by leaving as large a space as possible for the steamer, whose lights had been seen. For this purpose, they approached as nearly as possible the eastern shore—the usual shore, for vessels navigated as she was, to ascend the river. The schooner did not carry a light in her fore rigging; but one was exhibited from her breast-hook some time before and till the time of the collision; and the steamer was hailed, and told to keep off.

The night was "dark and rainy;" the steamer was not running at any time at an improper rate of speed. The officers of the steamship discovered the light on the schooner, and supposed it to belong "to a vessel at anchor;" but they say the "light disappeared, and the next time they saw it, it was near by, under the bow of the steamer." The probability is, that the officers of the steamship were mistaken in their con-

clusions in reference to the course of the schooner, and under that mistaken impression went to the eastern side, and thus encountered her. No orders were given by the pilot in respect to the management of the steamer till the instant of the collision.

This court has decided that neither rain, nor the darkness of the night, nor the absence of a light from a barge or sailing vessel, nor the fact that the steamer was well manned, and furnished, and conducted with caution, will excuse the steamer for coming in collision with the barge or sailing vessel, where the barge or sailing vessel is at anchor, or sailing in a thoroughfare, out of the usual track of the steam vessel. In the present instance, the steamer had notice that a vessel was before her, and was near her track, and, under the circumstances, she was bound to take efficient measures to avoid the schooner.

The only facts we notice in the management of the schooner, which have occasioned a hesitation to affirm the decree, are the absence of a licensed pilot, and that the schooner did not exhibit an efficient light. The proofs in the case do not allow us to charge these omissions as indications of negligence; but, that the case may not be misunderstood, we assert that the ruling principle of the court is, that an obligation rests upon all vessels found in the avenues of commerce to employ active diligence to avoid collisions, and that no inference can be drawn from the fact, that a vessel is not condemned for an omission of certain precautionary measures in one case, that another vessel will be excused, under other circumstances, for omissions of the same description.

The decree of the Circuit Court is affirmed.

WESLEY WILLIAMS, GARNISHEE OF EDWARD F. MAHONE, PLAINTIFF IN ERROR, *v.* HILL, MCLANE, & CO.

The laws of Alabama provide, that where there is a judgment against a debtor who is unable to pay, a process of garnishment (which is called in some of the States an attachment upon final process) may be issued and laid in the hands of a garnishee, who may owe money to the judgment debtor, or have any effects within the control of the garnishee.

The garnishee, having real property under his control by virtue of a deed of trust, cannot retain it for the purpose of reimbursing himself for advances made to the judgment debtor after the execution of the deed in execution of a parol contract between them.

Where the garnishee sets up a claim to the funds in his hands, he must prove the bona fides of his claim, if it is derived from the judgment debtor after the origin of the creditor's demand.

Therefore, where the garnishee produced notes signed by the judgment debtor, bearing date prior to the judgment, but did not prove their existence before the judgment in consideration, it was properly left to the jury to say whether there was fraud or collusion between the garnishee and the judgment debtor.

THIS case was brought up, by writ of error, from the District Court of the United States for the middle district of Alabama.

The case is stated in the opinion of the court.

It was argued by *Mr. Phillips* for the plaintiff in error, and *Mr. Hilliard* for the defendant.

Mr. Phillips made the following points:

The answer of garnishee is required by the statute to be under oath, and when not disproved, must be taken as true. (Code, sec. 2,540; Davis *v.* Knapp & Shew, 8 Mo., 657; Kergen *v.* Dawson, 1 Gilman, 89; Muson *v.* Campbel, 2 Pike, 511.)

The plaintiff by the statute is allowed to "controvert" the answer; that is, he may show it to be untrue. The present code of Alabama does not point out the particular mode of proceeding; but when the issue is made up, it is evident the trial must proceed as in other cases. The statute, as it existed before the adoption of the "code" in express terms requires that "an issue shall be formed and *tried as in other cases.* (Clay's D., p. 60, sec. 25; Code, sec. 2,546; Thomas *v.* Hopper, 5 Al. Rep., 442.)

Not only the answer denies any indebtedness, but the promissory notes produced and proved, import a consideration. This by the law merchant and by the statute of Alabama. (Code, p. 424, sec. 2,278.)

By the well-established judicial construction of the attachment law, "no demand can be recovered by writ of garnishment, on which the defendant in the judgment, who is also the creditor of the garnishee, could not maintain debt or indebitatus assumpsit." (Self *v.* Kirkland, 24 A. R., 277.)

It follows that the proof required by the present plaintiff is the same as would have been required of the defendant in the judgment, if he had brought the suit. Could he have recovered on the evidence in this record?

There being no evidence disproving or tending to disprove the answer which denied any indebtedness, and nothing impeaching the consideration of the notes, there was no predicate for the charge as to "fraud and collusion." The bill of exceptions sets out all the evidence in the cause. Where the facts are not disputed, fraud is a question of law. (Swift *v.* Fitzhugh, 9 Port, 66, 67; Gillespie *v.* Battle, 15 A. R., 285.)

The points made by Mr. Hilliard were the following:

The answer of garnishee is not taken as true, when controverted by the plaintiff, his agent, or attorney. (Code, sec. 2,546.)

The code provides, that the answer of a garnishee being controverted by the oath of the plaintiff, his agent, or attorney, an issue must be made up *under the direction of the court;* and if required by either party, a jury must be empanelled to try the facts. (Code, sec. 2,546.)

The answer of garnishee is not evidence for himself upon the trial of this issue; the onus of disproving the facts of the answer of garnishee does not rest on the plaintiff. (Travis *v.* Taritt, 8 Ala., 574; Myatt *v.* Lockhart, 9 Ala., 94, 95.)

The only proof offered by garnishee to the court and jury, going to show that he was not indebted to defendant in execution, was that certain promissory notes had been made by said defendant, but the date of said notes, or rather the *actual time of their* execution, did not appear from any testimony. They were merely offered by garnishee as a set-off against the plaintiff's suit for the excess of money remaining in garnishee's hands after satisfying the debts provided for in the mortgages; and the consideration of said notes was not in proof.

The charge of the court, if erroneous, is in favor of the garnishee, and he cannot revise it in this court.

The counsel for plaintiffs requested the court to charge the jury, that their judgment against the defendant was a lien on his house and lot; and that they were entitled to the proceeds arising from the sale of said property, after the notes named in the mortgages were satisfied. This charge the court refused.

If the court erred in this, then garnishee cannot complain of it, nor can he of the remaining part of the charge; for if the judgment of plaintiffs be a *lien*, then they can recover, irrespective of the question of fraud.

The charge should have been given by the court. (19 Ala., 195, 196; 19 Ala., 753; 21 Ala., 504; Hazard *v.* Franklin, 2 Ala., 349.)

The charge of the court on the second point, as to fraud, was clearly correct.

It was a question for the jury; the facts were disputed; the very existence of the notes denied; the silence of garnishee respecting them, in his interview with plaintiff's counsel on the day of sale; his offer to relinquish his claim to the house and lot, upon being paid the remainder of the sum due on the notes named in the mortgages; the good faith of the entire transactions between garnishee and defendant in execution being contested—all this, and other facts appearing in evidence, presented a case which a jury alone could decide. The very pro-

ceeding, being an issue made up under the code, was a question of fraud or no fraud, and either party was entitled to a jury. (Code, sec. 2,546.)

The general principle, that no demand can be recovered by writ of garnishment, on which the defendant in the judgment could not recover, is conceded; but this principle does not affect this case.

The court, if it erred, was in error in instructing the jury, that if fraud existed between defendant and garnishee, then defendant (Mahone) could not recover, in action against garnishee, (Williams,) the excess in the hands of garnishee arising out of the sale of the house and lot.

Why could he not recover? Because of certain fictitious notes, fraudulently executed by said defendant to said garnishee, for the very purpose of defrauding creditors.

This is obviously incorrect; it ignores the very principle that it seems to sustain, viz: that a party to a fraudulent contract cannot invoke the aid of a court to sustain it.

Williams holds in his hands a fund arising out of a *bona fide* transaction; and yet Mahone, to whom the fund belongs, cannot recover it, because Williams sets up these fictitious notes, executed by Mahone, with a fraudulent intent. A set-off is in the nature of a cross-action, and, by the ruling of the court, Williams could recover upon fictitious and fraudulent notes.

But if the charge of the court be correct upon that point, and if it be true that Mahone could not recover from Williams, because of fraud, yet plaintiffs may subject the fund in the hands of garnishee to their debt. A garnishee is called into court to answer, not only as to his *indebtedness* to defendant, but as to his having in his possession the property, money, or effects, of defendant. (See Record, p. 2.)

The jury, by their verdict, found, after reviewing all the testimony, that garnishee was indebted to defendant in execution, and the judgment was correctly entered in favor of plaintiffs against garnishee, for the amount remaining in his hands, after satisfying the debts secured by mortgage.

Mr. Justice CAMPBELL delivered the opinion of the court.

The defendants recovered a judgment in the District Court, in a plea of debt against one Mahone. The latter having no property in possession liable to an execution, the defendants, in consequence, served a garnishment on the plaintiff, (Williams,) to attach any debt he might owe their debtor, or secure any effects of theirs he might have.

The garnishee answered to the process, that on the day the writ of garnishment issued, he had sold some personal property

of the debtor, under the authority of two deeds of trust, for the satisfaction of the debts described in them; and there remaining a balance due, he sold a house and lot, described in one of the deeds, for a sum sufficient to extinguish those debts and to leave a surplus. He further answered that Mahone, prior to the judgment, was indebted to him upon another account, and had so continued a debtor till the sale; that before the judgment, and afterwards, before the sale, Mahone had instructed him to apply any surplus that might arise from the sale to the payment of that account; and he had done so, in accordance with the instructions.

There was an issue formed upon the answer of the garnishee, and the subject of the controversy was the claim of the respective parties to the surplus above described.

The garnishee produced on the trial a number of promissory notes, dated prior to the judgment, and proved the signature of Mahone to them; he also proved that Mahone had admitted the authority of the garnishee to apply the surplus to the payment of his demands, not described in the deeds, shortly after the sale, and at that time disclaimed any power to control it. No evidence was given of the existence of the notes of a day prior to the answer, nor of their consideration. The defendants proved a conversation between their attorney and the garnishee, on the day of the sale, relative to the amount of the debt from Mahone to him, and that the notes were not mentioned by him in that conversation. The court instructed the jury that the inquiry for them was, whether there was fraud or collusion between the garnishee and the debtor. That if they found that the notes were made in fraud or collusion, they would render a verdict in favor of the attaching creditors, for the amount of the surplus in the hands of the garnishee. This charge includes the substance of all the questions presented to the court or jury.

We think the case was submitted as favorably for the garnishee as the facts warranted, and that he has no reason to complain in consequence of the instructions given or refused.

The plaintiff is not entitled to hold the surplus in his hands arising from the sale of the trust property, for the payment of the notes, under any stipulation in the deeds. *Those* provide for a return of the surplus to the grantor, after the payment of the debts described. Nor can the real property conveyed in the deed be retained as a security for advances, or debts subsequently made on the strength of a parol engagement. Such a contract would be avoided by the statute of frauds. Nor is the deed of trust such a conveyance or title-paper as to afford a security, as a deposit, for subsequent engagements.

In *Ex parte* Hooper, (1 Meri. Ch. R., 7,) Lord Eldon said: "The doctrine of equitable mortgage by deposit of title-deed has been too long established to be now disputed; but it may be said that it ought never to have been established. I am still more dissatisfied with the principle upon which I have acted, of extending the original doctrine so as to make the deposit a security for subsequent advances. At all events, the doctrine is not to be enlarged. In the present case, the legal estate has been assigned, by way of mortgage. The mortgagee is not entitled to say this conveyance is a deposit, because the contract under which he holds it is a contract for conveyance only, and not for deposit."

The only other title that the garnishee has interposed against the claim of the attaching creditor is, that the debtor made a valid appropriation of the surplus arising from the sale, to the satisfaction of a *bona fide* demand of the garnishee against him, prior to the service of the garnishment. The principle adopted by the courts of Alabama for such cases is, that the adverse claimant for property or effects seized at the suit of a creditor by attachment or execution, must prove the *bona fides* of his claim, if it is derived from the debtor after the origin of the creditor's demand; and the declarations or acknowledgments of the debtor will not be received to support the title. The recitals in a deed or mortgage executed by him, or admissions made at the time of its execution, will not be received. (Goodgame *v.* Cole, 12 Ala., 77; Nolen & Thompson *v.* Gwinn, 16 Ala., 725.) Nor is the consideration of a note in favor of the claimant shown by the production of the note itself. (De Vendell *v.* Malone, 25 Ala., 272.) The objection to such evidence is said to be, that it can be manufactured by one indebted, and by that means a creditor might be defeated; for, in most cases, it would not be practicable for him to prove a negative, or disprove the statement made by his debtor. In the present case, the consideration of the notes was not proved; nor was their existence before the service of the garnishment shown otherwise than by their date—that is, by an assertion of the debtor. Nor was the order to appropriate the surplus to their payment proved, except by an acknowledgment to a stranger, after the writ of garnishment had been issued.

The *bona fides* of the title of the garnishee to the surplus in his hands was not supported by competent proof, and therefore the lien of the garnishment was properly maintained.

The plaintiff contends that the proceeding by garnishment is a statutory proceeding, by which a creditor is enabled to reach a demand in favor of his debtor against a third person;

and that the remedy can only be resorted to when the debtor himself could maintain debt or indebitatus assumpsit; and that the only issue which can be made upon an answer of the garnishee is, indebitatus vel non. The Supreme Court of Alabama have decided, in the cases cited, that merely equitable demands or rights of action, not involving a debt or assumpsit, are not the subject of the garnishee process. But the same court has determined that money or effects in the hands of the garnishee, which are fraudulently withdrawn from the creditors of a defendant, may be reached, in an attachment or judgment, by that process. Hazard *v.* Franklin, 2 Ala., 349; Lovely *v.* Caldwell, 4 Ala., 684, and the civil code of Alabama, sec. 2,523, provides explicitly for the attachment of a demand similar to that existing in this case.

Judgment affirmed.

JOHN BELL, PLAINTIFF IN ERROR, *v.* COLUMBUS C. HEARNE, SAMUEL R. HEARNE, AND SAMUEL H. DOCKERY.

The act of Congress of 1820 and regulations of the General Land Office of 1831 direct the manner in which purchases of public land shall be authenticated by the registers and receivers of the land offices.

Where the receiver gave a receipt in the name of John Bell, and the register made two certificates of purchase, one in the name of John Bell and the other in the name of James Bell, the circumstances of the case show that the latter was an error which was properly corrected by the Commissioner of the General Land Office in the exercise of his supervisory authority; and he had a right to do this, although a patent had been issued to James Bell, which had been reclaimed from the register's office, and returned to the General Land Office to be cancelled.

The Supreme Court of Louisiana having decided against the validity of the patent issued to John Bell, this court has jurisdiction under the twenty-fifth section of the judiciary act to review that judgment; and the ground of the decision of the State court sufficiently appears upon the record.

THIS case was brought up from the Supreme Court of the State of Louisiana, by a writ of error issued under the twenty-fifth section of the judiciary act.

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

It was argued by *Mr. Baxter* and *Mr. Johnson* for the plaintiff in error, and by *Mr. Lawrence* and *Mr. Taylor* for the defendants.

The following notice of the points for the plaintiff in error is taken from the brief of *Mr. Baxter:*

I. John Bell was the purchaser of the land from the United States, and James Bell had no right or interest in it.

The receiver's receipt and his certificate prove the purchase was made by John Bell, and vested in him all the inchoate title which could be vested by the purchase.

It was the duty of the register to issue a certificate conforming to the receiver's receipt.

On this receipt, no certificate of purchase could lawfully be given to any other person than John Bell or his assignee; and an assignment, to be acted on by the officers of the land office, must be executed before the register, or a judge, or justice of the peace; must be preserved in the register's office until certificate granted, and must then be sent to the Department. And in the certificate to the assignee the name of the original purchaser must be inserted throughout, except in the last entry, preceding the words "shall be entitled." (See Circular to Registers of July 5, 1805, Land Laws, 2d vol., 257–'8; do. May 5, 1821, 307; do. May 29, 1820, 302; May 5, 1831, sec. 19, p. 446; sec. 32, pp. 451 and 466.)

No assignment by John Bell, the purchaser, to James Bell, exists, nor is it pretended any ever was made. The insertion of the name of James Bell in the register's certificate was a mere misnomer.

The cancellation of this certificate affords stringent evidence that this was a mere error, and it is confirmed by the fact that when the patent was demanded, John Bell held the certificates, on the production of which the patent was to issue.

II. James Bell having no right or interest in this land, the attempted sale under the execution of St. John Fabre & Co. against James Bell was a nullity, and created no estate, right, or interest, in the supposed purchaser, Smith, or those claiming under him, and gave to him or them no right to demand a patent, either to James Bell, or to them as assignees of James Bell.

Code of Louisiana, article 2,427: "The sale of a thing belonging to another person is null. It may give rise to damages, when the buyer knew not the thing belonged to another."

Under an execution, the interest of the debtor, only, in the property can be sold. The right of a stranger to the record and proceeding will not pass thereby.

III. James Bell having no title or interest in this land, and the pretended purchasers under the execution not having acquired any right or interest therein, John Bell was the only person who could be recognised by the United States as entitled to a patent, and the act of making a patent in the name of James Bell was an accident, which, if uncorrected, would defeat the contract of sale; but which, by the practice of the land office and the law of the land, might be corrected as long

as the patent was in the power of the land office. And if such erroneous patent had been delivered, it might be returned and cancelled; and if the holder refuses to deliver it up to be cancelled, the United States may institute proceedings to cancel it, or may authorize the party injured to institute such proceedings in the name of the United States. (See Putnam's Case, and Opinion of Mr. Wirt, 2 Land Laws, 27–'8; Opinion of Mr. Wirt, p. 24; Master's Case, pp. 32, 34; Opinion of Mr. Butler, 86–'7; Regulations, May 4 and 6, 1836, pp. 92–'3; Opinion of Mr. Butler, pp. 123–'4.)

For the common-law doctrines, reference is made to the 17th vol. Viner, p. 78, title Prerogative, letter (G *b* 2.)

The King's grant is void in five cases: 1st. When he is misinformed. 2d. Misrecital shall avoid it. 3d. If the King be deceived in matter of fact or matter of law. 4th. Want of form. 5th. When the thing granted is in the King, or comes to him in another manner than he supposes.

In Barwick's case, (5 Coke, 94,) it is said: "And it is a maxim, that if the consideration which is for the benefit of the Queen, be it executed or be it executory, or be it on record or not on record, be not true or be not duly performed, or if prejudice may accrue to the Queen, by reason of the non-performance of it, the letters-patent are void."

In the case of the Alton Woods, (1 Coke Rep., 51 *a*,) it held, if the King's grant cannot take effect, according to his intent, it is void.

2 Williams Saunders's Rep., p. 72 *q*, note 4 to Underhill *v.* Devereux, where a patent is granted to the prejudice of another's right, he may have a *scire facias* to repeal it at the King's suit, and the King is of right to permit the person prejudiced to use his name. (Dyer, 276 *b*; 3 Lev., 220; Sir Oliver Butler's Case, 2 Vent., 344.)

Bill in equity will lie to decree a patent to be delivered up and cancelled in a case of fraud, surprise, or gross irregularity in issuing it. (Attorney General *v.* Vernon, 1 Vernon's Rep., 277, 280, 281; Sawyer, Attorney General, *v.* Vernon, 1 Vernon's Rep., 370, 386 to 392.)

In this country, the proper proceeding is probably by bill in equity; but whether by *scire facias* or bill in equity, is only a question of form. In either case, the same results may be attained.

But the law forces no man to make a defence against conscience. A party who has wrongfully obtained a patent may surrender it to be cancelled. (Comyn's Digest, vol. 5, title Pat., letter [G,] p. 388.) "So, if a man surrenders his patent, and it be cancelled, and a note of it endorsed, and afterwards

the surrender enrolled, it shall be vacated by it." (Dy., 167 *a*; R. Dy., 179 *b*.)

In Grant *v.* Raymond, (6 Peters, 218,) this court held, that a patent for a useful invention might be surrendered, and a new patent issue. (See C. J. Marshall's Opinion, from page 240 to 244.)

In Shaw *v.* Cooper, (7 Peters, 292,) the same doctrine was held. Both cases were before the act of 1836.

In the case at bar, John Bell had, by his contract of purchase, the only rights which the United States could lawfully recognise and carry into patent. He applied for his patent. A patent in the name of James Bell was tendered to him. He returned it to the Land Office. According to the regulations of the Land Office and the common law, the Commissioner held the patent in the name of James Bell void, cancelled it, and issued a corrected patent in conformity with the contract of sale to John Bell.

The Supreme Court of Louisiana has adjudged this cancelled patent valid, and superior to the corrected patent; and the inquiry is, shall this judgment be reversed?

IV. The judgment of the Supreme Court of Louisiana in the case at bar adopts the decision of that court in Lott *v.* Prudhomme, (3 Rob., 294–'5–'6,) and applies it to this case, and carries it to the extent of declaring that the Commissioner of the Land Office has no right to cancel a patent which has passed the seal of the office; intimating the naked act of cancellation is a fraud, and holding that the jurisdiction of the Government of the United States over the subject is ended when the patent is sealed, and setting up the cancelled patent as superior to the corrected patent issued to pass the title of the United States.

1. We insist the Supreme Court of Louisiana erred in the proposition "that the question whether a patent which has issued from the Land Office of the United States may be annulled for mistake or fraud, is, so far as it concerns a citizen of Louisiana, to be solved by the laws of Louisiana."

a. The State of Louisiana has no laws which regulate the grant of the lands of the United States, and no officers who can grant these lands. Lands of the United States are granted by the officers of the United States, acting under the laws of the United States. All questions of the authority of those officers, and of the conformity of their proceedings to law, must be solved by the laws of the United States.

b. The United States has an interest in the sale of these lands as vendor, and may incur, by the misconduct of her officers, the responsibility of a defaulting vendor. There must

therefore be, in her jurisdiction as a Government, a power to correct the errors of her officers to her prejudice, and to the prejudice of persons contracting with her. And she is not denuded of this jurisdiction when the question whether a patent issued to her prejudice is to be solved.

c. In Wilcox *v.* Jackson, the court says, the question, whether the property has passed, is to be resolved by the laws of the United States.

But fraud, *laches*, accident, and mistake, may so defeat the intended contract of sale, that the patent may be void, and the title not pass by it. (Alton Wood's Case, 1 Coke, 44 *a*, *b*; Magdalen College Case, 11 Coke, 72.)

2. We insist, the proposition of the Supreme Court of Louisiana, that "the moment a patent has passed the great seal, it is beyond the power of the officers of the General Government," is erroneous.

a. This proposition seems to assume that the seal of the Land Office is analogous to the great seal of England.

In England, the King is the fountain of justice, of honor, of office, and of privilege; and the great seal is the emblem of his royal authority and dignity. The powers of the court of chancery flow from the great seal. (1 Strange, 157, 158.) And all grants of land, held by the King in right of his crown, are to be under the great seal. (Lane's Case, 2 Coke's Rep., 16.)

In the Land Office of the United States there is no seal analogous to the great seal. The public lands are not held *jure coronæ*, to be disposed of as matter of royal bounty, but are held in trust for the States; (Pollard *v.* Hagan, 3 Howard, 212;) and are to be disposed of to purchasers, by contracts of sale, under the laws of the United States.

In England there are many seals. (17 Viner, pp. 67 to 77.) If an analogy to some of the seals in England must be found, it will be best found in the case of Attorney General *v.* Vernon, (1 Vernon, 391.)

b. The effect of a patent sealed by the recorder, and the power of the Commissioner over it, must be ascertained from our Constitution and laws.

The Constitution makes it the duty of the President to take care that the laws are faithfully executed.

The act re-organizing the Land Office (1 L. Laws, 553) confers on the Commissioner, under the direction of the President, the executive powers and duties prescribed by law, and appertaining to the sale and survey of the public lands, and the issuing of all patents for grants. Section 1, sect. 4, makes it the duty of the recorder, in pursuance of instructions from the

Commissioner, to affix and certify the seal of the Land Office, to attend to the correct engrossing and transmission of patents.

The act of the recorder is a ministerial act. The system of disposing of our public lands is a system of bargain and sale. The contract is made by the purchase from the receiver; and all the steps subsequently taken in the Land Office are merely to insure to the purchaser a title to the land for which he has paid.

These proceedings are all to be taken under the executive discretion of the Commissioner, acting under the direction of the President; and there must be such enlarged discretion as will protect the purchaser from accident or errors occurring in the office.

The purchaser, standing in the relation of vendee, has the right to see that the title made out for him conveys the thing purchased. He cannot be compelled to accept a patent which does not give him the land which he has bought and paid for.

From these relations of contracting parties it follows that the title is consummated by the delivery and acceptance of the patent. (Bagnell *v.* Broderick, 13 Peters, 450.)

There cannot be, by any fancied analogies of the English law, a magic in the errors or even misconduct of any clerk or ministerial officer through whose hands the title may pass, which will defeat the rights of the purchaser, or prevent the President from exercising his duty of seeing that the laws are faithfully executed.

We contend, then, that the practice of receiving back and cancelling patents which fail, from accident or mistake, to effect the designed sale, is legal; and the act of cancellation by the Commissioner in this case was a lawful act.

The judgment of the Supreme Court of Louisiana, setting up the cancelled patent, is erroneous, and should be reversed.

Mr. Lawrence for defendants in error.

It appears from the record, that on the 3d of July, 1839, a certificate of purchase was issued by the register of the land office at Natchitoches, in the name of James Bell, the brother of the plaintiff in error, which certificate was transmitted by the register to the General Land Office at Washington, and upon this certificate a patent was issued to James Bell on the 10th of July, 1844, and was transmitted to the register at Natchitoches for delivery, where it remained until 1849, when it was delivered to the agent of Mr. John Bell, and by the latter was filed in the General Land Office in 1850, to be cancelled; and a patent issued in *his* name, upon a duplicate certificate and receiver's receipt, in his possession and in his name.

In the mean time, the land had been sold under execution, as the land of James Bell, and had come by *mesne* conveyances to the defendants in error.

I maintain that the Commissioner had no right to cancel a patent which had passed the seal, and been transmitted for delivery. It is not pretended that there is any statutory authority giving him this power. On the contrary, like all other officers of the General Government, having only so much power as is expressly conferred, and this power of cancelling being neither expressed nor necessarily implied, he could not be invested with this authority, unless, upon general principles of law, it would be incident to his office.

But we find that, upon the principles of the common law, both in this country and in England, it has been constantly held that a patent which has passed the great seal can only be vacated by a *scire facias*, or bill in equity. In England, where letters patent are of record in the chancery, a *scire facias* would be proper, but here we should resort to a bill in equity. In the case of Jackson *v.* Lawton, (10 Johns., 24,) Chief Justice Kent, after a most elaborate examination of the authorities, both in England and this country, held, that a patent issued by mistake could not be avoided, except by *scire facias*, or bill in equity, or some equivalent proceeding. And this case has ever since been the leading authority on the subject. In Maryland, it was held that so long as a grant remained *unrepealed by chancery*, it must prevail at law against a younger grant. (2 H. and M., 141.)

Now, the practice of the Department has been in accordance with these principles, and this case of Jackson *v.* Lawton has been acted on again and again. The Department has even refused to issue a second patent when another patent, issued by mistake, has been unrepealed. (See the opinions of Attorneys General Berrien and Legaré.) I conclude, then, that there is no statutory provision giving the power to the Commissioner; that the decisions at common law and the practice of the Department are against it.

But even if the Commissioner had the naked power to cancel a patent issued by mistake, he could not do it to the injury of those who had purchased for valuable consideration, without notice. And the very possibility that there might be purchasers *bona fide*, without any notice of the mistake, illustrates the propriety of a bill in equity for the vacating of the patent. And no court of equity would vacate a patent, as against innocent purchasers, although it should be made manifest that it had issued by mistake. Yet this monstrous power is claimed for the Commissioner of the Land Office, that by the mere sweep

of his pen, upon *ex parte* testimony, without any notice to others in interest, and without any record of his reasons, he may cut off, without a hearing and without a remedy, persons who have bought and paid for lands standing upon the records of his own office in the name of him whose title they have purchased. This very case illustrates the enormity of this pretension. Here were parties in possession of land which had been conveyed through several persons to them, and which was originally sold as the property of James Bell, (who had, by the way, pointed it out as his,) and in whose name it stood upon the records of the Land Office. Now, if the Commissioner, in the retired apartment of his office, could, without any notice to these parties, cancel this patent, *as to them*, so that they could not prove its former existence as a legal title under which they had innocently purchased and gone into possession, but should be met with the suggestion that such patent had been cancelled, and was *therefore* of no legal effect, why, then, without any fault of their own, they could, without a hearing, be deprived of what they had *bona fide* bought, and were in the actual possession of, by the mere *sic jubet* of the Commissioner.

Mr. Justice CAMPBELL delivered the opinion of the court.

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

The plaintiff commenced a petitory action in the District Court of Caddo parish, Louisiana, for a parcel of land in the possession of the defendants. He claims the land by a purchase from the United States, and exhibits their patent for it, bearing date in June, 1850, with his petition. The defendant (Hearne) appeared to the action, and answered that the United States had sold the land to James Bell, and as the property of James Bell it had been legally sold by the sheriff of Caddo, under a valid judgment and execution against him, and that a person under whom he (Hearne) derives his title was the purchaser at the sheriff's sale. A number of parties were cited in warranty, and answered to the same effect. A judgment was given for the defendants in the District and Supreme Courts; and upon the judgment in the last, the plaintiff prosecutes this writ of error.

The title of the plaintiff consists of the duplicate receipts of the receiver of the land office at Natchitoches, Louisiana, (No. 1,270,) dated in July, 1839, by which he acknowledges the receipt, from the plaintiff, of full payment for the lands described in the receipt and petition; a patent certificate, of the same date and number, from the register of that office, certifying

the purchase of the plaintiff, and his right to a patent; and a patent, issued in due form, for the said lands, in pursuance of the act of Congress and the patent certificate.

The case of the defendants originates in these facts: The register of the land office at Natchitoches, in making up his duplicate certificate of purchase, to be returned to the General Land Office, inserted the name of James Bell for that of John Bell. That certificate was sent to the General Land Office, with the monthly returns of the register, and in July, 1844, a patent was issued in the name of James Bell, and sent to the register at Natchitoches, who retained it in his office till 1849. In 1849, John Bell sent to the office of the register his duplicate receipts, and the patent in the name of James Bell was delivered to him. Upon a representation of the facts to the Commissioner of the General Land Office, this patent was cancelled, and a new one issued to the plaintiff.

It appears, from the proof in the case, that the plaintiff had a brother, named James Bell, who was his agent for making the entry, and that the land was sold in March, 1844, as his property, by the sheriff of Caddo, as is stated in the answers of the defendants.

The act of Congress of the 24th April, 1820, providing for the sales of the public lands of the United States, enacts, "That the purchaser at private sale shall produce to the register of the land office a receipt of the Treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase money on any tract, before he shall enter the same at the land office." At various times, since the passage of the act, the *modes* of conducting sales at the different land offices of the United States have been prescribed by the Commissioner, and the evidence to be afforded to the purchaser designated. The circular issued in 1831 contains the instructions under which the local officers were acting at the date of this entry. The instructions pertinent to this case are, that "when an individual applies to purchase a tract of land, he is required to file an application in writing therefor; on such application the register endorses his certificate, showing that the land is vacant and subject to entry, which certificate the applicant carries to the receiver, and is evidence on which the receiver permits payment to be made, and issues his receipt therefor; the duplicate of this is handed to the purchaser, as evidence of payment; and which should be surrendered when a patent, forwarded from the General Land Office, is delivered to him. The other receipt is handed to the register, who must immediately indicate the sale on his township plat, and enter the same on his tract book, and is trans-

mitted to the General Land Office with the monthly abstract of sales and certificates of purchase."

The certificates of purchase are made according to forms furnished by the General Land Office. One is issued to the purchaser, and another is retained, to be sent to the Commissioner. They should be duplicates; and the instructions to the register in regard to them are, "that the designation of the tract, in the certificates of purchases, is always to be in writing, not in figures. The certificates are to be filled up in a plain, legible hand, and great care is to be taken in spelling the names of the purchasers. The monthly return must always be accompanied by the receiver's receipts and register's certificates of purchase." From this statement of the act of Congress and the regulations of the Land Office, it will be seen that the embarrassment in which this title is involved proceeds from an error committed by the register at Natchitoches in making up the duplicates of his certificate of purchase—the duplicate intended for the General Land Office—and from which the monthly abstract was prepared.

The plaintiff was nowise responsible for this. He had paid his money into the receiver's office, and obtained the receipt prescribed by the act of Congress of 1820, before cited.

He had obtained his certificate of purchase, evincing his title to a patent certificate. At this stage of the proceeding, the register of the land office, in completing his office papers, and in making up his returns for Washington city, committed a mistake, which was not detected by the officers at Natchitoches in comparing their returns, (as they are ordered to do,) and eluded the vigilance of the officers at Washington. It was discovered at Natchitoches, when an agent of the plaintiff applied for the patent, and surrendered his duplicate receipt and certificate.

It was then discovered that the christian name of the plaintiff had been inaccurately set out in the returns at Washington and the patent. The Supreme Court of Louisiana say: "It appears, from the evidence, that the plaintiff and his brother James Bell purchased the land in dispute from the United States on the same day—3d July, 1839—and that the patent certificates were issued in their respective names by the register of the land office at Natchitoches, Louisiana, bearing the same number."

We interpret the papers from the land office differently from the Supreme Court. There is no evidence, in our opinion, of more than one sale—that evinced by the receiver's receipt—and, in that receipt, John Bell, the plaintiff, is named as the purchaser. We think there was but one certificate of pur-

chase issued to a purchaser—that in favor of John Bell. The certificate of purchase which contains the name of James Bell is found in the General Land Office. If that was intended for a James Bell, there should have been another for John Bell. But there is only a single certificate there, and the conclusion is irresistible, that the name *James* was entered by mistake for *John*. We find no evidence in the record to show that James Bell held any evidence of a purchase.

Whatever appearance of a title he had, is owing to the mistake in the duplicate certificate returned to the General Land Office, and the patent issued in his name. But this patent was never delivered to him. The question then arises, had the Commissioner of the General Land Office authority to receive from John Bell the patent erroneously issued in the name of James Bell, and to issue one in the proper name of the purchaser? And the question, in our opinion, is exceedingly clear. The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud, in the important and extensive operations of that officer for the disposal of the public domain. The power exercised in this case is a power to correct a clerical mistake, the existence of which is shown plainly by the record, and is a necessary power in the administration of every department. Our conclusion is, that the Supreme Court of Louisiana erred in denying the validity of this title, and in conceding any effect or operation to the certificate of purchase or patent issued in the name of James Bell, as vesting a title in a person bearing that name.

It is objected that this court has no jurisdiction over this judgment of the Supreme Court of Louisiana.

The plaintiff claimed the land described in his petition, under a purchase made from the United States, and produced muniments of title issued by their authority, and this title is pronounced to be inoperative by the District and Supreme Courts of Louisiana.

Does this appear by the record before us? The record in the Supreme Court of Louisiana purports to be a true and faithful transcript of the documents filed, orders made, proceedings had, and evidence adduced, on the trial in the District Court. The Supreme Court possesses the right, and is under the obligation of examining questions of fact as well as of law, and to state the reasons of their judgment. The statement of the evidence adduced is taken as an equivalent for a state-

ment of the facts by the district judge in the practice of that court. It clearly appears that the ground upon which the judgment in the Supreme Court was given was the invalidity of the title of the plaintiff, because an older patent had been issued in favor of James Bell. We think this court has jurisdiction. (Armstrong *v.* Treasurer, &c., 16 Pet., 261; Grand Gulf R. R. and B. Co. *v.* Marshall, 12 How., 165; Almonester *v.* Kenton, 9 H., 1.)

Judgment reversed. Cause remanded.

THOMAS RICHARDSON, PLAINTIFF IN ERROR, *v.* THE CITY OF BOSTON.

In Massachusetts, a former verdict and judgment in an action on the case for a nuisance is not conclusive evidence of the plaintiff's right to recover in a subsequent action for the continuance of the same nuisance.

The plea of the general issue in actions of trespass or case does not necessarily put the title in issue.

But the former verdict, though not conclusive, is permitted to go to the jury as prima facie or persuasive evidence.

Where there is some evidence tending to establish a fact in issue, the jury must judge of its sufficiency.

It is the duty of the court to construe written documents, but the application of their provisions to external objects is the peculiar province of the jury.

[MR. JUSTICE CURTIS, HAVING BEEN OF COUNSEL, DID NOT SIT IN THIS CAUSE.]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Rhode Island, to which it had been removed from the district of Massachusetts.

It was an action of trespass on the case brought by Richardson against the city of Boston, for the continuance of a nuisance which is described in the case of the city of Boston *v.* Lecraw, (17 Howard, 426.) He was the owner of two wharves between which the drain in question was erected, whereby the access to his wharves by boats or vessels was very materially interrupted. The case was tried at June term, 1855, and resulted in a judgment for the defendants. The bill of exceptions taken by the counsel of Richardson will be mentioned hereafter.

As one of the important questions in the case was, whether or not the record of a former case between the same parties could be given in evidence, it is proper to see what that record was.

At June term, 1853, a case was tried between the same parties, having also been removed from the district of Massachusetts to Rhode Island. The opinion of the district judge

(who tried the case) was, that the right of property could not be taken from Richardson without compensation, and that, under the circumstances of the case, he was entitled to recover against the city of Boston whatever damages he might prove under the sixth count of his declaration. That sixth count stated the occupancy of Price's wharf by Bullard as tenant, the reversionary interest being in Richardson, and the occupancy of the Bull wharf by Lecraw & Perkins, the reversionary interest being in Richardson, and averred that the dock in front of these wharves was, and had been for a long time, a public way, slip, or dock, so as to allow a free communication between the wharves and the channel of the sea. Under this instruction of the court, the jury found a verdict for the plaintiff, and assessed his damages at $1,209.69. It was this record of the case, tried in 1853, which the counsel of the plaintiff offered in evidence in the present suit, but the judge ruled that the judgment was not admissible in evidence for any purpose, and refused to admit the same to be put in evidence; to which refusal and ruling the plaintiff excepted.

The plaintiff then offered in evidence an agreed statement of facts contained in the record of the former suit, which the judge refused to admit, and to this ruling also the plaintiff excepted.

The plaintiff then gave in evidence all the documents enumerated in said agreed statement of facts, together with much parol testimony relative to the premises, which it is impossible to specify particularly.

The plaintiff then rested, whereupon the defendants offered the following:

ORDER OF MAYOR AND ALDERMEN, JUNE 18, 1849.

CITY OF BOSTON.

An Ordinance constituting the Board of Health for the City.

Be it ordained by the Mayor, Aldermen, and Common Council, of the City of Boston, in City Council assembled, as follows:

The Mayor and Aldermen shall constitute the Board of Health of the City, and shall exercise all the powers and perform all the duties now vested in the City Council as a Board of Health, with the right of carrying into execution such powers and duties through the agency of any persons whom they may select, or in any manner which they may prescribe.

In Common Council, June 14, 1849. Passed. Sent up for concurrence. BENJAMIN SEAVER, *President.*

In Board of Mayor and Aldermen, June 18, 1849. Passed.

JOHN P. BIGELOW, *Mayor.*

A true copy. Attest: S. F. MCCLEARY, *City Clerk.*

And without offering any further evidence on their part, did request the court to rule and instruct the jury that there was not sufficient evidence in the cause to authorize the jury to find the rights claimed by the plaintiff, and the violation of those rights by the defendants, such as to sustain the plaintiff's action. The plaintiff on his part did request the court to rule and instruct the jury as follows:

1. That there is evidence in the case competent to go to the jury, and to be judged and weighed by them, that, at the time of the grants by the town to Gridley & Baxter of their estates or possessions, there existed a town or public way between those possessions, for access to and from the sea in boats and vessels, upon which those possessions were bounded, and that the right to use and enjoy said way passed to said grantees by the grant of those possessions, and is an appurtenance thereto, and to their heirs and assigns.

2. That if said way, so bounded on said possessions, existed at the time of the grant of those possessions, and the title to the land thereunder to high water was in the town, but not the title to the flats between said way at high-water mark, and the sea or low-water mark; and if said title rested in the town subsequently by the ordinance of 1641, then, by and after the said ordinance, said way became shaped and restricted over the flats to the interval between the flats annexed by said ordinance to the possessions of said Gridley & Baxter, and was and continued to be an appurtenance to the possessions so granted to Gridley & Baxter, their heirs and assigns.

3. That there is evidence competent to go to the jury, and be judged and weighed by them, that at the time of the grants of liberty to wharf to Gridley, Gill, & Bull, there existed a public or town way between the possessions of Gridley & Baxter, and bounding thereon for access of boats and vessels to the sea or low water, and that such liberties to wharf were bounded by said way, and thereby the right to use said way for access of boats and vessels to and from such wharves, one or both of them, became, by virtue of said respective grants, annexed or appurtenant to said grants, and to said possessions of Gridley & Baxter, their heirs or assigns.

4. That if the jury shall find that at the time of the staking out of said highway, October 31st, 1683, the same extended below high-water mark, and that the possessions of said Baxter bounded on said way, then by virtue of the liberty to wharf, granted at the same time to the proprietors of lands on Sea street, the right to use said way for access by boats and vessels to and from such wharf, became by virtue thereof an-

nexed or appurtenant to the possession of said Baxter, his heirs and assigns.

5. That there is evidence competent and proper to be submitted to the jury, to be judged and weighed by them, that a town way or highway was laid out by the selectmen, October 31st, 1683, to the sea or low-water mark; that the estates or wharves claimed by the plaintiff were bounded thereon; that said way was a way for boats and vessels, and that, at the time of the acts complained of, plaintiff was the owner and possessed of said wharves, as stated in the declaration; and if the jury shall so find, and that defendants while said way remained, and without a previous due and legal discontinuance thereof, erected the structure alleged in the declaration, and continued the same for the time and in the manner set forth therein, and that by reason thereof the plaintiff has been deprived of the use of said way for access to and from his wharves, with boats and vessels, then the plaintiff is entitled to recover.

6. That if the jury shall find that by reason of the acts of defendants complained of in the declaration, that part of plaintiff's wharf below low-water mark, held by him under a grant of the Legislature, has been injured in the manner set forth in the declaration, then the plaintiff is entitled to recover.

Thereupon his honor the judge did decline and refuse to make and give either of the said rulings and directions so prayed by the plaintiff, but did rule and instruct the jury as prayed by the defendants as aforesaid.

Whereupon the plaintiff excepted, and the jury found a verdict for the defendants.

The case came up to this court upon these several exceptions, and was argued by *Mr. Bartlett* for the plaintiff in error, and by *Mr. Chandler* and *Mr. Loring* for the defendants.

The reporter regrets that the limited space which must be allotted to the report of this case will not allow him to state the arguments of the respective counsel upon the various points which arose in the case.

Mr. Justice GRIER delivered the opinion of the court.

This is an action of trespass on the case brought by the plaintiff in error against the city of Boston, for the erection and maintenance of a drain at the foot of Summer street, which, it is alleged, is a nuisance, and injurious to the property of plaintiff. He is owner of two wharves, called the Price and the Bull wharf, which are extended from high to low-water mark, from the lots which adjoin Summer street on each side.

The nuisance, which is the subject of complaint in this case, is the same as that in the case of Boston *v.* Lecraw, decided in this court, and reported in 17 Howard, 426.

The declaration contains seven counts, in four of which the plaintiff, as owner of the several wharves, and having the seizin and possession, claims a right of way, as appurtenant to the same, over the "dock" or "way and dock," which constitutes the interval between the wharves; also, that his wharves are bounded on the "town dock," "town way or dock," which he alleges to have been long used as a "public dock, slip, or way."

The fifth and sixth counts are for injuries to the reversion, with like averments. A seventh count avers the wharves to be bounded, respectively, "by a highway, town way, or public way, to the sea, extending from the corner of Summer and Sea streets to the channel, or low-water mark, which was duly laid out and established pursuant to law."

The defendant pleaded the general issue, and on the trial the plaintiff offered in evidence the record of a former verdict and judgment rendered in his favor in an action against defendant for the erection of the same nuisance, the continuance of which is the subject of the present suit. The rejection of this evidence by the court is the subject of the first bill of exceptions.

It is contended that this record was not only evidence, but conclusive of the right of the plaintiff, and prima facie evidence of the continuance of such right; and that plaintiff, having no opportunity to plead it as an estoppel, may exhibit it as matter of evidence.

It may be admitted that numerous decisions may be found in many of the State courts affirming this proposition; nevertheless, it has not been universally adopted. The leading case of Outram *v.* Morewood (2 East., 174) establishes the following proposition, in which all concur: "That if a verdict be found on any fact or title distinctly put in issue in any action of trespass, such verdict may be pleaded, by way of estoppel, in another action between the same parties or their privies, in respect to the same fact or title." But estoppels, which preclude the party from showing the truth, are not favored. To give the verdict the effect of an estoppel, the facts must be distinctly put in issue.

The plea of the general issue, in actions of trespass, or case, does not necessarily put the title in issue; and, although the judgment is conclusive as a bar to future litigation for the thing thereby decided, it is not necessarily an estoppel in another action for a different trespass. The judgment can

only give the plaintiff an ascertained right to his damages, and the means of obtaining them. These principles seem to have been adopted by the courts of Massachusetts, and applied to cases like the present. In the decision of this point, we must be guided by the decisions of the courts of that State.

In the case of Standish *v.* Parker, (2 Pick., 20,) which was an action for a nuisance, the court say: "We think it very clearly settled that nothing is conclusively determined by the verdict but the damages for the interruption covered by the declaration. In actions for torts, nothing is conclusively settled but the point or points put directly in issue. By the plea of the general issue, the title is not concluded, because it cannot be made to appear upon the general issue that the title ever came in question." (See also 15 Pick., 564.)

Nevertheless, though a verdict in such case is not conclusive, it is permitted to go to the jury as prima facie, or persuasive, evidence. (3 Pick., 288.) If the evidence of the facts involved in the first trial are still doubtful, if witnesses were then examined whose testimony cannot now be obtained, for these and many other reasons the former verdict may have the effect of highly-persuasive evidence on another trial of the same question. But if on the last trial new evidence has been discovered, or if the question of title submitted on the first trial was connected with instructions in law which have since been found to be erroneous; or if a different verdict on the same evidence would have resulted from the different instructions given on the last, it is plain that the first verdict could have but little or no persuasive effect. Title is often a question of mixed law and fact—and a party is not concluded by an erroneous opinion of the court, pronounced in a former case.

We are of opinion, therefore, that the court erred in not permitting the record of the former suit to be given in evidence to the jury.

2. At the conclusion of the trial, the court, at the request of defendant's counsel, instructed the jury "that there was not sufficient evidence in the cause to authorize the jury to find the rights claimed by the plaintiff."

As it is the duty of the jury to decide the facts, the sufficiency of evidence to prove those facts must necessarily be within their province. The jury cannot assume the truth of any material averment without some evidence; and it is error in the court to instruct the jury that they may find a material fact of which there is no evidence. An instruction like this is imperative on a jury; it has taken the place, in practice, of a demurrer to evidence, and must be governed by the same rules. If there be "*no evidence* whatever," as in the case of

Parks *v.* Ross, (11 How., 393,) to prove the averments of the declaration, it is the duty of the court to give such peremptory instruction. But if there be *some* evidence tending to support the averment, its value must be submitted to the jury with proper instructions from the court. If this were not so, the court might usurp the decision of facts altogether, and make the verdict but an echo of their opinions.

The court below seem to have considered the decision of this court, in the case of Boston *v.* Lecraw, as requiring them to give the instruction demanded by the defendant. The action in that case was for the same alleged nuisance by a tenant of the present plaintiff. But the plaintiff in that case claimed no other right of way over the lands of defendant, save the public right of navigation; and this court decided that the public right of navigation, between high and low-water mark, was defeasible at any time by the owner of the subjacent land. That, as the space between the plaintiff's wharves had been converted into a dock by the accident of its position, so long as it remained unreclaimed, every person had a right to pass and repass over it. The exercise of this public right, for any length of time whatever, would therefore form no grounds of presumption either of a public dedication or a private grant to the owners of the adjoining wharves. While it remains unreclaimed, it is a public highway or dock, by a paramount but defeasible title. The adjoining wharves may receive much more advantage than others from the use of it, but they cannot convert it to a private use, under color of a public right.

The public officers of a town have no right to lay out a town way between high water and the channel of a navigable river, or appropriate the shore or flats to the use of the inhabitants of a town in the form of a way or road. (1 Pick., 179; 5 Pick., 494.) But in the present case the city of Boston is owner of the land, and has the same right to reclaim their flats which other owners have. Before they are so reclaimed, the public and the adjoiners may exercise their paramount right of navigation. But if the city elects to reclaim its portion of the shore, and extend Summer street to low water, it has a right so to do. And if the street should be less beneficial to the adjoiners in this form, than when they could use it as a dock under the public right of navigation, they cannot complain. The absence of these advantages may be a loss to them but if incurred by the defendants' exercise of their own rights, it is no wrong to them.

But if the city has determined to reclaim this land, and has laid out a street thereon, or continued Summer street to low-water mark, the right to use it as a street or highway on land

becomes appurtenant to the property of the adjoiners. It may be the duty of the city to make drains along or under the streets, but they cannot construct them so as to hinder the public use of them as streets, or erect thereon a nuisance to the adjoiners. If Summer street be extended to low water, the plaintiff has a right to pass along and across the same, and anything which obstructs such passage is a nuisance, and injurious to his rights.

The seventh count of plaintiff's declaration claims a right of way as appurtenant to his land or wharves, on the ground that Summer street extends to low water. In support of this allegation, the following entry in the town records was given in evidence: "October 31, 1683. The selectmen all met this day, staked out a highway for the town's use, on the southerly side of the land belonging to the late John Gill, deceased, being thirty foot in breadth from the lower corner of said Gill's wharf next the sea."

It is the duty of the court to construe written instruments; but the application of their provisions to external objects described therein is the peculiar province of the jury. Whether this document describes Summer street as it was afterwards laid out from high-water mark; whether "the lower corner of Gill's wharf next the sea" was at *that time* (in 1683) at low-water mark; whether this street was staked out to low water, were questions which should have been submitted to the jury. The fact that the learned counsel differ so widely as to the situation of the points called for as the boundary of the street next the sea, shows conclusively that it is a question for the jury, and not for the court.

Moreover, the court were requested by plaintiff's counsel to instruct the jury, "that if the jury shall find that, by reason of the acts of defendants complained of in the declaration, that part of plaintiff's wharf below low-water mark, held by him under a grant of the Legislature, has been injured in the manner set forth in the declaration, then the plaintiff is entitled to recover."

There was some evidence that the drain constructed by defendant was not carried out sufficiently to discharge its contents so as to be swept off by the tides; but that it caused an accumulation of matter at the outer end of the plaintiff's wharves, insomuch that vessels could not approach them with the same depth of water as formerly. If this be so, it was an injury to the plaintiff, for which he was entitled to recover damages.

This question should have been submitted to the jury, and this instruction given, as requested by plaintiff's counsel. The

others are disposed of by the opinion of this court in Boston *v.* Lecraw.

For these reasons, the judgment is reversed, and *venire de novo* awarded.

FELICITÉ FLETCHER HIPP, AND MARIA ANTONIO FLETCHER HIPP, ALIENS, AND RESIDING, THE FORMER IN VERA CRUZ, MEXICO, THE LATTER IN THE CITY OF MADRID, SPAIN, FOR THEMSELVES AND ON BEHALF AND FOR THE USE OF AUGUSTIN CUESTA, JAVIERA CUESTA, AND FELICITAS CUESTA, ALIENS, THE FORCED HEIRS OF ADELAIDE FLETCHER HIPP, DECEASED, *v.* CELINE BABIN, WIDOW OF URSIN JOLY, AND OTHERS.

A court of equity will not entertain a bill, where the complainants seek to enforce a merely legal title to land; and in the present case, in the absence of allegations that the plaintiffs are seeking a partition, or a discovery, or an account, or to avoid a multiplicity of suits, the bill cannot be maintained.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana, sitting in equity.

The facts of the case are stated in the opinion.

It was argued by *Mr. Smiley* and *Mr. Perin* in a printed argument for the appellants, and orally by *Mr. Taylor* for the appellees.

The manner in which the counsel for the appellants sought to sustain the equity jurisdiction of the court in the case was as follows:

In the opinion of the judge of the Circuit Court, the cause was not one over which the equity side of the court had any jurisdiction. The title being merely legal, and the documents upon which the title rested being accessible to all parties, there was "a case where plain, adequate, and complete remedy may be had at law." Several cases were cited and relied upon to sustain this opinion. But without referring to them, we may observe that this case is distinguished from all those cited, in this: that no objection is raised in this case by the defendants to the jurisdiction, neither in the pleadings nor upon the argument. It was not raised in the Circuit Court, and we are assured by the opposite counsel that it will not be in this. The objection was raised in some form, either by demurrer or in argument upon final hearing in all the others.

In the case of United States *v.* Sturges et al., (1 Paine C. C. R., 525,) it was objected, at the hearing for the first time, (not

by the court, but by the party,) "that there was a want of equity apparent on the face of the bill in two particulars," &c.

The court observes:

"There are several answers to be given to these objections. If, admitting the charges or facts stated in the bill to be true, there is no foundation in equity for the relief prayed, it was a proper cause for a demurrer, and the objection comes now with less weight than it would at an earlier stage of the proceedings." (See p. 531.)

The case of Pierepont *v.* Towle (2 W. and M., 24) we conceive to be quite as far from establishing the doctrine upon which this bill was dismissed. After a thorough examination of a great many authorities on the point, the judge says, (p. 35:)

"But the correct rule probably is, that a respondent may and usually should demur, if it appears, on the face of the bill, that nothing is sought which might not be had at law."

Without pursuing the authorities further, and even admitting, for the sake of the argument, that the judge was correct in his views of the authorities relied upon as a matter of law and practice, still we contend, and will endeavor to show to your honors, that he has fallen into an error on the facts exhibited in the record. He observes:

"The bill in the present case furnishes no reason for an application to the court of chancery, arising out of any particular condition of the parties; nor that a court of chancery is possessed of means to render a relief better suited to the claims of the case."

Now, with all deference, we conceive there are many distinct and separate grounds of chancery jurisdiction in the record. Although no ground for the interference of a court of chancery is shown by the bill, yet, if it appear in a supplemental bill, replication, answer, or any subsequent proceeding, the jurisdiction will be maintained. (Craft *v.* Bullard, 1 Smedes and M. Ch. R., 373; Lafayette Ins. Co. *v.* French et al., 18 How., 404.)

In the former case, the chancellor stated that he would have dismissed the bill, had not the answer disclosed the only ground upon which equity could take jurisdiction.

Among the undoubted grounds of jurisdiction presented by the record, are:

First. To avoid a multiplicity of suits. It appears in the original bill that five persons, and others, were sued in the State court in 1824. On filing the record from that court, it is shown that five separate suits at law were brought for the land included in the bill. The fact is admitted in the plea, and also in the answers of the defendants, by setting out the

subdivisions of the lands, and the parcels held by them, respectively.

This is one of the exceptions, in the case of Welby *v.* Duke of Rutland, to the general rule that chancery will not entertain suits upon legal titles merely. In that case, none but the appellant and respondent were concerned in the question, and there was no pretence for avoiding vexation or a multiplicity of suits at law. But why mention this circumstance at all, if it was not intended to recognise the right of going into chancery where five suits at law, or even a less number, could be united in one bill in equity? It appears clear, that if your honors acknowledge the principle above stated, that the jurisdiction may be shown by any part of the record, you will entertain this cause upon this ground, if upon no other. Whatever may be said of the facility afforded by the civil-law practice of the courts of Louisiana, to give relief in cases where, in the common-law States, the equity jurisdiction is undoubted, the expense and "other vexations" of a multiplicity of suits cannot be avoided there, any more than in Massachusetts or Mississippi.

The remedy, then, as it appears by this view of the case, not being as full and complete at law, the court would entertain jurisdiction on the rule established in Boice's Ex. *v.* Grundy, (3 Pet., 215; 9 Wheat., 842; 4 Wash., 202, 205.)

Second. Another class of cases, in which chancery will lend its aid for relief, is in matters of trust.

Thus, "if a man intrudes upon the estate of an infant, and takes the profits thereof, he will be treated as a guardian, and held responsible therefor to the infant in a suit in equity. (2 Story Eq., sec. 1,356; Ibid., sec. 511; 1 Mad. Ch., 91; Carmichael *v.* Hunter, 4 How., Miss., 315; Nelson *v.* Allan, 1 Yerger, 360; 8 Beaven, 159.)

In the last case, the equity jurisdiction was maintained upon a suit, by a person of full age, for mesne profits, accruing while he was a minor; "such disseizor being viewed in chancery as guardian, bailiff, or trustee." In Carmichael *v.* Hunter, it was admitted that this circumstance was the only ground of jurisdiction; as the title set up by complainant was legal, and an action for rents and profits a legal remedy.

Third. For discovery.

The discovery by defendants of their titles, the particular portions of the plantation claimed by them, and the time their possession and liability for rents and profits commenced, was material to complainants in making out their case.

Fourth. For partition.

"The necessity for a discovery of the titles, the inadequacy

of the remedy at law, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar remedial process of courts of equity, and their ability to clear away all intermediate obstructions against complete justice," are grounds upon which "these courts have assumed a general concurrent jurisdiction with courts of law, in all cases of partition. So that it is not now deemed necessary to state in the bill any ground of equitable interference." (1 Story Eq., sec. 658.)

Fifth. The remedy at law is not plain, adequate, and complete.

The record shows that there are five sets of defendants, each claiming separate and distinct subdivisions of the plantations in controversy. At law, complainants would have to commence by five distinct petitory actions, against the five sets of defendants. And partition could only be made at law by giving them three-fourths of each subdivision, which would divide the two plantations, of only thirteen arpens front, into ten tracts, five of which would belong to complainants, and each of which would be separated from the other by the five small tracts allotted to the defendants. This would so cut up the plantations as greatly to injure the interest of all parties. In such cases, courts of equity may decree a sale, or pecuniary compensation for owelty or equality of partition, which a court of law is not at liberty to do. (1 Story Eq., sec. 654, 656, 657.)

The long and difficult accounts to be taken on one side for rents and profits, and for the value of improvements on the other, make the case more suitable for a master in chancery than for a jury.

Catharine Hipp was the owner of one undivided fourth of the lands in controversy; that portion she could and did sell to Daniel Clark. Not having complied with the formalities required by law, she could not and did not sell the other three-fourths belonging to complainants. (C. C., 2,427; 12 Rob., 552; Fletcher *v.* Cavallier, 4 La., 267.)

Clark never was in actual possession of any part of the land, and could only be in the constructive possession of the one-fourth conveyed by Mrs. Hipp. And he could only convey the one-fourth that belonged to him. (C.C., art. 2,427.) There is, therefore, no question of legal title properly in controversy in this suit. The defendants having illegally taken possession of the whole estate, while complainants were infants, and received the rents and profits for a series of years, the whole scope of the bill is substantially a bill for partition and account between tenants in common.

"This court has been called upon to consider the sixteenth

section of the judiciary act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." (Boyce's Ex'r *v.* Grundy, 3 Pet., 215.)

In this case, although the bill may not, yet the whole record does show particular circumstances for the necessity of the court's interposition to prevent multiplicity of suits, other vexation, and for preventing an injustice irremediable by a court of law.

In Louisiana, the distinction between courts of law and equity is unknown. All remedies are, in fact, both in form and substance, equitable. We look to the English chancery practice, at the date of the adoption of the Constitution, for the equity remedies of the United States courts. Otherwise, the equity jurisdiction of the United States courts would be abolished in half the States of the Union. (Gordon *v.* Hobart, 2 Sum., 401; Mayer *v.* Foulkrod, 4 Wash., 354; Fletcher *v.* Morey, 2 Story, 567; Hawshaw *v.* Parkins, 2 Swans., 546.)

Courts of equity refuse to decide upon legal titles, and all cases when there is an adequate remedy at law; because such cases are properly triable by a jury. The reason of the rule does not exist in Louisiana, for the trial by jury is not respected there, and is not allowed, except on the application of one of the parties. And it is the universal practice of the Supreme Court of the State to render final judgments, on appeal upon the law and the facts, without a *venire facias de novo*. (1 Hen. Dig., [La.,] p. 95, No. 5.)

It is therefore unreasonable to refuse equity jurisdiction in cases from Louisiana, on the ground that such cases are properly triable by jury, or because adequate remedy may be had at law in the State courts, under the State practice. Courts of equity will and ought to dismiss bills, when their decrees would be absolutely void for want of jurisdiction; but we have found no case, in the reports of England or America, where a bill has been dismissed for want of jurisdiction, on the motion of the court, on the sole ground that there was an adequate remedy at law. Many courts of the highest respectability have held, that questions of jurisdiction, founded solely on the fact that there was an adequate remedy at law, must be presented by the pleadings. (Wiswall *v.* Hall, 3 Paige, 313; Bank of Utica *v.* City of Utica, 4 Ib., 399; 2 John. Ch. R., 339; 4

Paige Ch. R., 77; 1 Baily Ch. R., 62, 113; 1 S. and Marsh. Ch. R., 5, 13.)

The jurisdiction of the court in this case has been admitted during a litigation of more than ten years. No objection to it is raised by the pleadings, or on argument in the Circuit Court or in this court. There can be no doubt that a final decree would be binding and conclusive on all the parties. If this case is dismissed on the ground of want of equity jurisdiction, prescription, as we have shown, will commence only from the date of the decree of this court, and the costs and vexation attending five suits at law will be multiplied in proportion. It is therefore to the interest, and, we understand, the desire of all parties, that this court should decide the case upon its merits, and put an end to all further litigation, in a case which seems, and in reality will be, if this bill is dismissed, interminable.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellants filed their bill to recover land within the district, in the possession of the defendants, and for an account of the rents, profits, and receipts, during the period of their occupancy. They allege that James Fletcher, their ancestor, died in 1804, leaving a valid will, by which he devised to his widow and three children the principal portion of his succession, and appointed the former the executrix. The property described in the bill had been sold in 1801, but the purchaser had not paid the price stipulated at this time. The testator directed, that if the purchaser should complete the purchase, the sum received should be put to interest, on good security, for the mother and children, until the children should attain the age of sixteen years, when the succession should be divided. In May, 1806, the executrix agreed with the purchaser to rescind the contract of sale, received a conveyance of his title to the heirs of Fletcher, and refunded to him the money he had paid, being near $4,000.

In June, 1806, the executrix filed her petition in the Superior Court of the Orleans Territory, being the court of general law, equity, and probate jurisdiction, for the Territory, in which she declares the cancellation of the contract of sale aforesaid; and to enable her to refund the money, she had borrowed that sum from Daniel Clark; that the land was unproductive, and that she was unable to pay her debt. She prayed an order for the sale of the property, to provide for the education and maintenance of her minor children, and the discharge of her debt, and to carry the will of her husband into effect respecting the disposition of the remainder of the purchase-money. The

court made the necessary order, to empower the executrix to sell and convey the lands for such price as she could obtain, and to receive the money therefor; also, to appropriate the sum necessary for the payment of her debt, and to put out the remainder at interest, as required by the will.

Daniel Clark became the purchaser at private sale from the executrix, for the sum of $9,000, and received her conveyance.

The appellants impeach this sale as unauthorized and illegal, and insist upon their title under the conveyance to them.

The defendants claim by their answers as bona fide purchasers from persons deriving their title by valid conveyances in good faith from Daniel Clark, and affirm that the family of Fletcher left the United States in 1807, and enjoyed the benefit of the money paid to the executrix; that the lands have become valuable by their improvements, and that they, and the persons under whom they claim, have held the possession since 1806. The bill was dismissed by the Circuit Court, on the ground that the remedy at law is plain, adequate, and complete, and from this decree this appeal is prosecuted.

The Supreme Court of Louisiana, in a contest between the appellants and other parties, for other lands, have decided that the executrix was not authorized to convey the shares of her minor children by private act. (Fletcher *v.* Cavelier, 4 La. R., 268; 10 La. R., 116, S. C.)

But we are relieved from the duty of applying these decisions, or inquiring into the validity of the pleas of the appellees, by the opinion we have formed concerning the jurisdiction of the court of chancery over the cause. The sixteenth section of the judiciary act of 1789 declares, "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 bill in this cause is, in substance and legal effect, an ejectment bill. The title appears by the bill to be merely legal; the evidence to support it appears from documents accessible to either party; and no particular circumstances are stated, showing the necessity of the courts interfering, either for preventing suits or other vexation, or for preventing an injustice, irremediable at law. In Welby *v.* Duke of Rutland, (6 Bro. P. C., cas. 575,) it is stated, that the general practice of courts of equity, in not entertaining suits for establishing legal titles, is founded upon clear reasons; and the departing from that practice, where there is no necessity for so doing, would be subversive of the legal and constitutional distinctions between the different jurisdictions of law and equity; and though

the admission of a party in a suit is conclusive as to matters of fact, or may deprive him of the benefit of a privilege which, if insisted on, would exempt him from the jurisdiction of the court, yet no admission of parties can change the law, or give jurisdiction to a court in a cause of which it hath no jurisdiction.

Agreeably hereto, the established and universal practice of courts of equity is to dismiss the plaintiff's bill, if it appears to be grounded on a title merely legal, and not cognizable by them, notwithstanding the defendant has answered the bill, and insisted on matter of title. In Foley *v.* Hill, (1 Phil., 399,) Lyndhurst, Lord Chancellor, dismissed a bill upon an appeal from the Vice Chancellor upon the same grounds. He said "it was a point of great importance to the practice of the court." The objection was not made in the pleadings nor presented in the decree of the Vice Chancellor.

This decree was affirmed by the House of Lords. (2 H. L., cas. 28.) The practice of the courts of the United States corresponds with that of the chancery of Great Britain, except where it has been changed by rule, or is modified by local circumstances or local convenience. This court has denied relief in cases in equity where the remedy at law has been plain, adequate, and complete, though the question was not raised by the defendants in their pleadings, nor suggested by the counsel in their arguments. (2 Cr., 419; 7 Cr., 70, 89; 5 Pet., 496; 2 How., 383.) In Parsons *v.* Bedford, (3 Pet., 433,) the court insists on the necessity imposed on the Circuit Court in Louisiana, to maintain the distinction between the jurisdiction in which legal rights are to be ascertained, and that where equitable rights alone are recognised and equitable remedies administered.

And the result of the argument is, that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.

The appellants contend, that upon the pleadings and evidence a proper case for the jurisdiction of chancery appears, and that the Circuit Court *mero motu* was not warranted in dismissing the bill: 1st. Because it is shown that in 1806 the children of Fletcher were minors, and they are authorized to call upon the defendants for an account as guardians. 2d. That the defendants being entitled to the estate of the executrix and widow, under her conveyance, the plaintiffs can maintain the bill for a partition. 3d. That the court of chancery is bet-

ter fitted to take an account for rents, profits, and improvements, and may decide the question of title as incident to the account. 4th. That a multiplicity of suits will be avoided.

There are precedents in which the right of an infant to treat a person who enters upon his estate with notice of his title, as a guardian or bailiff, and to exact an account in equity for the profits, for the whole period of his occupancy, is recognised. (Blomfield *v.* Eyre, 8 Beav., 250; Van Epps *v.* Van Deusen, 4 Paige, 64.) But in those cases the title must, if disputed, be established at law, or other grounds of jurisdiction must be shown. In the present case, the defendants have all entered upon the lands since the plaintiffs arrived at their majority. They are purchasers of adverse titles under which possession has been maintained for a long period. The bill does not recognise their title to any part of the land, and there has been no unity of possession; so that the bill cannot be maintained, either as a bill for an account on behalf of minors or for a partition. (Adams's Eq., sec. 229; 4 Rand. Va. R., 74, 493.)

Nor can the court retain the bill, under an impression that a court of chancery is better adapted for the adjustment of the account for rents, profits, and improvements. The rule of the court is, that when a suit for the recovery of the possession can be properly brought in a court of equity, and a decree is given, that court will direct an account as an incident in the cause.

But when a party has a right to a possession, which he can enforce at law, his right to the rents and profits is also a legal right, and must be enforced in the same jurisdiction. The instances where bills for an account of rents and profits have been maintained are those in which special grounds have been stated, to show that courts of law could not give a plain, adequate, and complete remedy. No instances exist where a person who had been successful at law has been allowed to file a bill for an account of rents and profits during the tortious possession held against him, or in which the complexity of the account has afforded a motive for the interposition of a court of chancery to decide the title and to adjust the account. (Dormer *v.* Fortescue, 3 Atk., 124; Barnewell *v.* Barnewell, 3 Rid. P. C., 24.) Nor does the case show that a multiplicity of suits would be avoided, or that justice could be administered with less expense and vexation in this court than a court of law.

Decree affirmed.

JOHN D. WOLFE, EXECUTOR, AND MARIA D. L. RONALDS, EXECUTRIX, OF THOMAS A. RONALDS, DECEASED, APPELLANTS, *v.* JOHN H. LEWIS.

Where a fund is brought into court upon proceedings under a bill to foreclose a mortgage, it is altogether irregular for the court to order an investigation into the general accounts between the attorney and his client during past years, and to order that the attorney shall be paid, out of the fund in court, the balance which the master may report to be due. The persons interested in this decree were not properly before the court as parties.

THIS was an appeal from the District Court of the United States for the northern district of Alabama, sitting in equity.

The present appeal was from a collateral decree of the District Court, under the following circumstances:

Lewis had been for many years the attorney of Thomas A. Ronalds, the deceased testator of the present appellants. In the course of his practice, he had filed a bill in chancery to foreclose a mortgage, and thus obtain payment of a debt which was due to his client. The money was voluntarily paid, without a sale, and brought into court. Lewis then claimed a lien upon that fund, not only for his professional services in that particular case, but also for a general balance which he alleged to be due to him from his client, upon a general settlement of accounts between them. At November term, 1848, the court passed the following order:

Order referring matters of account between Lewis and his clients to the Standing Master, to report, &c., at November, 1848—*and Order to continue.*

"Come the parties by their solicitors, and, by their consent, it is ordered by the court that all matters of account between John H. Lewis, Esq., and his late client, the said Thomas A. Ronalds, deceased, and between the said John H. Lewis and the said John D. Wolfe, executor, and Maria D. L. Ronalds, executrix, of the last will and testament of the said Thomas A. Ronalds, deceased, be referred to the standing master in chancery; and it is further ordered, that said master report a statement thereof, and of all his proceedings relative thereto, to the next term of this court. And it is further ordered, that this cause be continued."

Under this order, the master went into a detailed examination of all the transactions between Lewis and his client for many preceding years, and made the report which is men-

tioned in the opinion of the court. From this report, when confirmed by the court, the present appellants appealed.

The case was argued by *Mr. Thomas* for the appellants, and by *Mr. Reverdy Johnson, jr.*, and *Mr. Reverdy Johnson*, for the appellee.

The arguments being chiefly directed to the merits of the case, into which this court did not enter, it is not deemed advisable to insert them.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the District Court for the northern district of Alabama.

The bill was filed to foreclose a mortgage, given to secure the payment of $12,000. Payments on this debt were made, amounting to the sum of $8,527, the last payment being made the 9th of October, 1839. An account was prayed, and that the mortgaged premises might be sold.

A supplemental bill was filed the 30th of November, 1843, stating that the last instalment of the mortgage debt had become due, and praying that the premises might be sold to satisfy that payment also.

The answer admitted the allegations of the bill, but claimed an additional credit of $600 on the mortgage. On the 23d of May, 1844, a final decree was entered, directing a sale of the mortgaged premises to pay the amount due, stated to be $10,077.68, with interest to the time of sale. Afterwards, at November term, 1848, the commissioner, who had been appointed to make the sale, returned that Cox, the defendant, had, without sale of the property, paid him the balance due under the decree, after deducting certain payments made before his appointment, which amounted to the sum of $8,318.47, which was brought into court.

At that term an entry in the cause was made, by consent of the solicitors of the parties, that all matters of account between John H. Lewis and his late client, Thomas A. Ronalds, deceased, and between the said Lewis and John D. Wolfe, executor, and Maria D. L. Ronalds, executrix, of the last will and testament of Thomas A. Ronalds, be referred to the standing master in chancery, "who was directed to report a statement thereof, and of all his proceedings relative thereto, to the next term of the court."

At November term, 1850, the master filed his report, which was exceedingly voluminous—covering more than two hundred and sixty pages of the record.

The master states an account, in which he charges Lewis with all sums, and interest, from the time he became chargeable up to the date of the report, 25th of November, 1850, amounting to the sum of $63,461.71. He shows the amount of credits claimed by Lewis, to same date, amounting to the sum of $55,966.82. Exceptions were filed to this report by both parties; and at May term, 1854, the court made a final decree on the master's report; in which is set out the manner in which the controversy arose, and referring to the order of November term, 1848, founded upon the motion in the Cox case, to remove Lewis from his capacity as attorney, so as to procure the payment to the complainants directly of the proceeds under the decree brought into court. And the court states that it considers the proceedings, as presented, not within its cognizance, inasmuch as no writ had been issued as between these parties, no bill filed, and no suit in any form commenced; there was no allegation or charge on the one side, or response or denial on the other; nor was the matter collateral to, or growing out of, any case pending.

On consideration, the court, though disposed to strike the matter from the docket, yet decreed that, as a large sum of money had been paid in under its order, it must be, in the language of the court, in some way paid out; and the exceptions to the master's reports were overruled, and the same was confirmed; and the marshal, as receiver, was ordered to pay over to Lewis the sum of $4,336.42 of the proceeds in his hands, and the residue, $3,982.05, he was directed to pay to the complainants. From this decree the complainants appealed.

This was an irregular proceeding, and without the authority of law. The bill was filed originally against Bartley Cox, the defendant, against whom the decree for the sum of $10,077.68 was entered. This being done, Lewis procured an order for his dismissal from the case, that he might bring up an account against Thomas A. Ronalds in his lifetime, and his executors since his decease, for professional services. And this was done without the form of suit, or the matter having any relation to the case before the court. And when it is considered that Ronalds was a citizen of New York, and that his representatives are citizens of New York, and do not seem to have had any notice of this illegal procedure, it can receive no sanction from this court.

It is contended that Lewis, as counsel, had a right to receive and receipt for moneys in the case; and whether he was entitled to reserve any portion thereof or not, can be properly tested only by a bill filed by the appellants against him to account.

But the whole proceeding in behalf of Lewis, as against the complainants, was irregular and void, the court having no jurisdiction of the matter. The order was of no importance that the decree should be without prejudice to either party, and not pleadable in bar to any subsequent litigation between them upon the same subject-matter, as the proceedings were invalid. But, as regards the complainants, it was error in the court to order any part of its original decree in their favor to be paid to one who was not properly before it as a party. For this purpose, neither complainants, nor the defendant, Lewis, were before the court, or amenable to its jurisdiction. The decree is therefore reversed, with costs. And the court direct that an order be transmitted to the Circuit Court, to require the defendant, Lewis, to pay over any money received by him under the decree to the proper officer of the court, that it may be paid to the complainants.

ROSWELL BEEBE ET AL., APELLANTS, *v.* WILLIAM RUSSELL.

The appellate jurisdiction of this court only includes cases where the judgment or decree of the Circuit Court is final.

In chancery, a decree is interlocutory whenever an inquiry as to matter of law or fact is directed, preparatory to a final decision.

But when a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree.

Therefore, where a case was referred to a master, to take an account of rents and profits, &c., upon evidence, and from an examination of the parties, and to make or not to make allowances affecting the rights of the parties, and to report his results to the court, this was not a final decree.

The preceding cases upon this subject, examined.

THIS was an appeal from the Circuit Court of the United States for the district of Arkansas, sitting in chancery.

The bill was filed by William Russell against Roswell Beebe, Mary W. W. Ashley, Henry C. Ashley, William E. Ashley, George C. Watkins, and Mary A. Freeman, praying that they might be ordered to convey to the complainant certain pieces of property, which, it was alleged, they fraudulently withheld from him, and account for the rents and profits.

The Circuit Court decreed that the defendants should execute certain conveyances, surrender possession, and then proceeded to refer the matter to a master, with the instructions which are stated in the opinion of the court. The defendants appealed to this court.

It was submitted by *Mr. Lawrence* for the appellants, and *Mr. Pike* for the appellee.

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 Arkansas.

We find, from our examination of the record, that the decree from which this appeal has been taken is not final, within the meaning of the acts of Congress of 1789 and 1803. It will therefore be dismissed for a want of jurisdiction. The right of appeal is conferred, defined, and regulated, by the second section of the act of March 2d, 1803, which, however, adopts and applies the regulations prescribed by the 22d, 23d, and 24th sections of the judiciary act of the 24th September, 1789, ch. 20, respecting writs of error. The language of both is, that final judgments and decrees, rendered in any circuit, &c., &c., may be reviewed in the Supreme Court, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars. It has been the object of this court at all times, though an accidental deviation may be found, to restrict the cases which have been brought to this court, either by appeal or by writ of error, to those in which the rights of the parties have been fully and finally determined by judgments or decrees in the court below, whether they were cases in admiralty, in equity, or common law. In the case of the Palmyra, (10 Wheat., 502,) where, in a libel for a tortious seizure, restitution with costs and damages had been decreed, but the damages had not been assessed, this court held that the decree was not final, and dismissed the appeal. It said, "the decree of the Circuit Court was not final in the sense of the act of Congress. *The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages.* The whole cause is not, therefore, finally determined in the Circuit Court, and we are of the opinion that the cause cannot be divided so as to bring up distinct parts of it." This court also ruled, in Brown *v.* Swann, (9 Peters, 1,) that a decree enjoining a judgment at law taxing a sum which remained to be ascertained with precision was not final, to permit an appeal from it. We might multiply citations from the reports of this court, to show its caution upon this subject. We feel very confident no case has been decided by it, when the question of the finality of a decree or judgment has been brought to its notice, in which the distinction between final and interlocutory decrees has not been regarded as it was meant to be by the legislation of Congress, and as it was understood by the courts in England and in this country, before Congress acted upon the

subject. A decree is understood to be interlocutory whenever an inquiry as to matter of law or fact is directed, preparatory to a final decision. (1 New., 322.) And we find it stated in the second volume of Perkins's Daniel's Chancery Practice, 1193, "that the most usual ground for not making a perfect decree in the first instance, is the necessity which frequently exists for a reference to a master of the court, to make inquiries, or take accounts, or sell estates, and adjust other matters which are necessary to be disposed of, before a complete decision can be come to upon the subject-matter of the suit." When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree. It is true, a decree may be final, although it directs a reference to a master, if all the consequential directions depending upon the result of the master's report are contained in the decree, so that no further decree of the court will be necessary, upon the confirmation of the report, *to give the parties the entire and full benefit of the previous decision of the court.* (Mills *v.* Hoag, 7 Paige, 18.)

Testing, then, this decree by the citations just given from Daniel's Chancery Practice, from the case of Mills *v.* Hoag, our inquiry is, whether further action of the court in the nature of a decree would not be necessary to give to the defendant in error the benefit of the "rents and profits received by the defendants in the court below, or which could or ought to have been received by them, or any of them, for any part of the premises," which it had directed the defendants to surrender to the complainant; and whether the court's direction to the master, how he should take the accounts of rents and profits, and that no allowances were to be made by the master for improvements which the defendants had made, and that no account of rent was to be taken upon permanent and valuable improvements erected by them, do not involve rights in the respective parties, and a pecuniary uncertainty in respect to the sum to be paid by the defendant, which are only made certain and operative by a decree of the court upon the master's report. The court's direction was, "that it be referred to the master, to take an account of the rents and profits received, or which could and ought to have been received, by the defendants, or any of them, for any part of the said premises; that he take such an account distributively as to the said Ashley and Beebe, in the lifetime of Ashley, and as to his heirs since his death, and as to said G. C. Walker since his purchases; that he make no allowances for improvements made

by them, or either of them, and take no account of rent upon permanent and valuable improvements erected by them; and that he report to the court here, at the next term thereof. And it is further ordered, &c., that the defendants do pay the costs of this suit." Thus leaving a sum to be ascertained with precision by the master from different elements, from which he is directed to make up the account, and those not merely consequential from the previous directions of the decree. Further, a decree from which an appeal may be taken must not only be final, but it must be one in which the matter in dipute, exclusive of costs, shall exceed the sum or value of two thousand dollars. The value of the subject-matter in controversy may be shown from the record, or by evidence aliunde, when it is disputed; and in this case the record discloses that to be such as would give the court jurisdiction; but the decree also shows that a sum is still unascertained between the parties, which may or may not exceed two thousand dollars, and, if it does, which may be the subject of another appeal. The object of the law, and the interpretation of it by this court, is to prevent a case from coming to it from the courts below, in which the whole controversy has not been determined finally, and that the same may be done in this court. We say, "in which the whole controversy has not been determined." Wherever it has been, and ministerial duties are only to be performed, though that be to ascertain an amount due, the decree is final.

But the reference of a case to a master, to take an account upon evidence, and from the examination of the parties, and to make or not to make allowances affecting the rights of the parties, and to report his results to the court, is not a final decree; because his report is subject to exceptions from either side, which must be brought to the notice of the court before it can be available. It can only be made so by the courts overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment. We have just said the decree is final when ministerial duties are only to be done to ascertain a sum due. The case of Ray *v.* Law, in 3 Cranch, 179, is an instance. It was then ruled by this court, that a decree for a sale under a mortgage is such a final decree as may be appealed from. Afterwards, when that case was cited in the case of the Palmyra, (10 Wheat., 502,) Marshall, Chief Justice, said for the court: "In that case, which was an appeal in an equity cause, there was a decree of foreclosure and sale of the mortgaged property. The sale could only be ordered after an account taken, or the sum due on the mortgage ascertained in some other way. And the usual decree is, that unless the defendant shall pay that sum in

a given time, the estate shall be sold. The decree of sale, therefore, is in such a case final upon the rights of parties in controversy, and leaves ministerial duties only to be performed." In such a case, the direction is but a consequence of the decree, and no further decree is necessary. So a decree upon the coming in of the master's report on a bill for specific performance, ascertaining the quantity of land to be conveyed, and the balance of money to be paid, and that the conveyance should be executed on such balance being tendered, is a final decree. (Navis *v.* Waters, 1 John. Ch., 85.) But in the last case cited, it would not have been final if the decree had not directed the conveyance of the land upon the sum found by the master being tendered.

It has been supposed that this court did not apply its present interpretation of the laws regulating appeal in the cases of Whiting *v.* Bank of the United States, (13 Peters, 6,) of Michaud *v.* Girod, (4 How., 503,) and in Forgay et al. *v.* Conrad, (in 6 Howard, 201.) It is, however, not so. Whiting's case, in that part of it relating to appeals, was only what this court had said in Ray *v.* Law, in the case of the Palmyra, before cited, that a decree of foreclosure and sale is final upon the merits of the controversy, and an appeal lies therefrom. In Michaud *v.* Girod, no such point was made in the argument of it, nor touched upon in the opinion of the court. In Forgay's case, it was made upon the decree given by the court below, and it was adjudged by this court to be final to give this court jurisdiction of it. But it was so, upon the ground that the whole merits of the controversy between the parties had been determined, *that execution had been awarded*, and that the case had been referred to the master merely for the purpose of adjusting the accounts. The fact is, the *order of the court in that case for referring it to a master was peculiar*, making it doubtful, if it could in any way control or qualify the antecedent decree of the court upon the whole merits of the controversy, or modify it in any way, *except upon a petition for a rehearing.* We refer to the case, however, with confidence, to show that the reasoning of the opinion is cautionary upon the subject of bringing appeals, and confirmatory of what we have said in this case. We dismiss the case, the court not having jurisdiction of the appeal.

TERENCE FARRELLY, EDWARD O. MORTON, ET AL., HEIRS AND REPRESENTATIVES OF FREDERIC NOTRIBE, APPELLANTS, *v.* WILLIAM W. WOODFOLK.

The rule with respect to final and interlocutory decrees, which is applied to the preceding case of Beebe et al. *v.* Russell, again affirmed and applied.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Arkansas, sitting in chancery.

The bill was filed by Woodfolk, a citizen of Tennessee, against the heirs and representatives of Frederic Notribe and others, for the purpose of obtaining a title to certain lands. The court decreed that the defendants should procure the legal extinguishment of the lien and encumbrance which existed upon the lands, and convey them to the complainant. The decree also contained a reference to a master, with the instructions which are stated in the opinion of the court. The defendants appealed to this court.

The case was submitted by *Mr. Pike* for the appellants, and *Mr. Meigs* for the appellee.

Mr. Justice WAYNE delivered the opinion of the court.

This case having been submitted to the court upon printed arguments, we find from an examination of the record that the appeal has been prematurely taken from an interlocutory and not a final decree.

After reciting such facts in the case as the court deemed to be necessary for understanding the subject-matter of controversy, and the court's directions in respect to the rights of the complainant, the court then orders that the cause shall be referred to the clerk of the court as a special master in chancery, to take and state an account of the sum for which the lands are bound under the mortgage exhibited in the pleadings in the cause; and also to take and state an account, showing what money and property Morton and his wife, and Mary T. Notribe, widow of Frederic Notribe, have severally received, and are entitled to receive, which were of the estate of Frederic Notribe at the time of his death; and a further account, showing what portion of said estate, if any, remains to be administered, setting forth all particulars thereof as far as practicable, and if necessary to the due execution of this order. And the master is directed to call for and examine on oath any of the parties to this suit, and also to take testimony of witnesses touching any of the matters aforesaid, and to make report to

this court. This is so obviously an interlocutory decree, that we do not think it necessary to examine it in detail, to show that a further and final decree is necessary, to give to the complainant any of the advantages to which the court in its previous directions has declared him to be entitled.

For the reasons given in the opinion in the case of Roswell Beebe et al., appellants, *v.* William Russell, we therefore direct this cause to be dismissed for want of jurisdiction.

ARCHIBALD BABCOCK, APPELLANT, *v.* EDWARD WYMAN.

Parol evidence is admissible to show that a conveyance of property, absolute upon the face of it, was really a mortgage or deed of trust.

In the present case, parol evidence, taken in conjunction with corroborating circumstances, shows that the deed was not intended to be absolute.

The statute of limitations is not applicable, because the possession was not adverse. So, also, the trustee is not protected by the statute, although he sold the land and received the proceeds six years before the bill was filed, because it was his duty to apply those proceeds to the reduction of the interest and principal of the debt due to him when the deed was made.

[MR. CHIEF JUSTICE TANEY AND MR. JUSTICE DANIEL DID NOT SIT IN THIS CAUSE.]

THIS was an appeal from the Circuit Court of the United States for the district of Massachusetts, sitting in equity.

The bill was filed by Edward Wyman, a citizen of Missouri, and an assignee of Nehemiah Wyman, by a deed of conveyance made in 1853. The facts of the case are particularly stated in the opinion of the court, and need not be repeated.

The decree of the Circuit Court was as follows, viz:

This case having been heard on the bill of complaint filed therein, and upon the answer of the defendants thereto, and upon the proof exhibited by the respective parties, and the parties having been heard by their counsel, this court doth declare the conveyance of Nehemiah Wyman to said defendant, bearing date the twentieth day of November, in the year one thousand eight hundred and twenty-eight, to have been a mortgage to secure the debts, the amount whereof is named in said deed, as the consideration of the same; and that, at the times of the sales of the lands in said conveyance set forth by the defendant, the assignor of the complainant had the right to redeem the same; and doth declare that the absolute sales and conveyances by defendant of said land to bona fide purchasers for valuable consideration, without notice, was a constructive fraud upon the rights of the assignor of complainant; and that therefore he became entitled, as against the

defendant personally, to an account of the value of the land and of the rents and profits thereof, and, after deducting the amount of principal and interest due said defendant, to the payment of the balance; and doth declare that the complainant, as assignee, has succeeded to those rights.

And said cause having been referred to a master, to take the necessary accounts, in pursuance of the foregoing declaration of this court, and said master having made his report in the premises, and the same being duly considered and the respective parties heard therein, this court doth order and decree that there be paid by said defendant to said complainant the sum of twelve thousand and sixty-seven dollars and nine cents, together with costs taxed at four hundred and sixty-nine dollars and seventy-four cents.

Babcock appealed to this court.

The case was argued by *Mr. Loring* and *Mr. Merwin* for the appellant, and by *Mr. Bartlett* for the appellee.

The reporter can notice only that part of the arguments of counsel which related to the admissibility of parol evidence in this case, to establish that the deed, absolute in its terms, was intended to operate only as a mortgage.

The counsel for the appellant treated this point in the following manner:

I. The first question is, whether, under the circumstances of this case, it is competent to show, by parol evidence, that a deed absolute in terms was intended to operate only as a mortgage. The respondent contends that it is not competent, but is in direct violation of the statute of frauds.

The well-settled rule in equity is, that it is not competent to show by parol evidence that an absolute deed was intended only as a mortgage, except upon the ground that the written defeasance was omitted by fraud, accident, or mistake. (1 Story Eq. Jur., secs. 153, 154, 155, 156; 4 Kent's Com., 142.)

It is clear, upon the facts, that a written defeasance was not omitted through any accident, mistake, ignorance, or fraud.

On the contrary, the parties executed all the papers they intended to, and the form of the conveyance was precisely what they intended it should be. (Hunt *v.* Rousmanier's Ex'rs, 1 Peters, 1.)

According to the testimony of both Nehemiah and William Wyman, the present conveyance was in exchange for the mortgages which the said Nehemiah had previously given to the respondent and Francis Wyman, the parties well knowing

the distinction between the two forms of conveyance, and their different legal effect.

It is also certain, upon their evidence, that no defeasance was contemplated, and that it was not omitted through any fraud of the respondent, or through any misapprehension, by Nehemiah Wyman, of the nature or effect of his deed.

The proposition, therefore, which the complainant must maintain in this case is, that it is competent, by parol evidence of the admissions of the grantee at the time the conveyance was made, to convert an absolute deed into a mortgage, although the grantor, well knowing their different legal effect, deliberately, and in defiance of the statute, gave an absolute conveyance.

Such a proposition is not warranted by the decisions, and is entirely subversive of the statute of frauds.

The fraud against which equity relieves, is not the refusal of one of the parties to acknowledge or perform a void parol contract, the parties having voluntarily assumed the risk of the statute—but it relieves where the parties did intend to put their contract into writing, conformably to the statute, and have failed to do so, through the fraud of one, or by mutual mistake.

"Where there is no fraud, and the party relies upon the honor, word, or promise, of the defendant, the statute making that promise void, equity will not interfere." (Lord Hardwicke, in Montacute *v.* Maxwell, 1 P. Wms., 618.)

To extend the doctrine beyond this, and to allow a party to offer parol evidence of an agreement, on the ground that the mere refusal to acknowledge or perform that agreement (which the statute itself declares is void) is such a fraud as will avoid the statute, and render the parol evidence competent, amounts to a judicial repeal of the statute.

Upon this ground, there can be no case to which the statute of frauds can possibly apply.

The fallacy of this theory is, that it admits the evidence prohibited by the statute, for the purpose of first proving a fraud by proving a refusal to perform a parol agreement, and then uses that fraud as the reason for admitting the parol evidence to prove the agreement.

To allow, then, the complainant, under the circumstances of the case, to control the legal effect of the conveyance of Nehemiah Wyman to the respondent, by parol evidence of his declarations or admissions made at the time the deed was executed, would violate the statute of frauds, and would also be contrary to the decided weight of authority.

In England, it has been uniformly held that parol evidence

was inadmissible, except to show that the defeasance was omitted through fraud, accident, or mistake. (Walker *v.* Walker, 2 Atk., 99; Young *v.* Peachy, 2 Atk., 257; Jones *v.* Statham, 3 Atk., 389.)

And the great preponderance of authority in this country is to the same same effect. (4 Kent's Com., 142; 2 Story Eq., sec. 1,018; Marks *v.* Pell, 1 John. Ch. R., 594; Stevens *v.* Cooper, 1 John. Ch. R., 429. Strong *v.* Mitchell 4 Johns. Ch. R., 167, and James *v.* Johnson, 6 Johns. Ch. R., 417, are not to the contrary. Rathbun *v.* Rathbun, 6 Barb., 98; Webb *v.* Rice, 6 Hill, 219; Lyod *v.* Ex'rs Inglis, 1 Des., 337; Fitzpatrick *v.* Smith, 1 Des., 340; Bond *v.* Susquehannah Co., 6 Har. and J., 128; Watkins *v.* Stocket's Adm'r, 6 Har. and J., 435; Merrills *v.* Washburn, 1 Day, 139; Brainerd *v.* Brainerd, 15 Conn., 586.)

In Massachusetts, the decisions are very pointed. (Walker *v.* Locke et al., 5 Cush., 90; Peabody *v.* Tarbell, 2 Cush., 226, 232.)

The decision of Judge Story, in Taylor *v.* Luther, 2 Sumn., 228, is inconsistent with the doctrine stated by him in 2 Story Eq., sec. 1,018.

And in 3 Story, 203, he said, "In Taylor *v.* Luther, I had occasion to carry the doctrine one step further."

No decision of this court authorizes the doctrine which the complainant must maintain in this case.

Conway's Ex'rs *v.* Alexander (7 Cranch, 238) simply decided that the court, in construing an instrument, may read it in the light of the extrinsic circumstances.

Morris *v.* Nixon et al. (1 How., 118, 133) was decided on the ground that the letter of Nixon to the complainant, either showed that the transaction was intended as a mortgage, or that Nixon had a design to mislead the complainant into that belief.

In Russell *v.* Southard et al., (12 How. U. S., 139,) a written memorandum was given by the grantee, and the question was, whether the transaction was a mortgage or conditional sale.

According either to the understanding of this respondent, the ground of that decision was, that the parties did intend a mortgage in due form, and that, through mistake or the fraud of Southard, the memorandum failed to be so expressed; or else, that if the transaction, as really understood by the complainant at the time, was a conditional sale, yet that the bargain was so unconscionable, and took such advantage of the complainant's necessities, that it amounted in equity to a fraud. Otherwise, if the memorandum did show a conditional sale, if the complainant so understood it, and the bargain was a fair

one, it would be difficult to conceive upon what ground it could be set aside, and held to be a mortgage only.

Mr. Bartlett, for the appellee, referred to the point as follows:

Upon the question, whether oral evidence is admissible to show that a deed, absolute on its face, was in fact given as security for a debt, and is a mortgage, appellee forbears to trouble the court with any authorities beside those referred to in the opinion of the Circuit Court, which seem conclusive, and are as follows: Taylor *v.* Luther, 2 Sumner, 229; Jenkins *v.* Eldridge, 3 Story, 293; Conway *v.* Alexander, 7 Cranch, 238; Sprigg *v.* Bank of Mt. Pleasant, 14 Peters, 201; Morris *v.* Nixon, 1 Howard, 126; Russell *v.* Southard, 12 Howard, 139.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court for Massachusetts.

The bill states the following facts: Nehemiah Wyman was seized in fee of about eleven and a half acres of land in Charleston, purchased by him of Tuft's administrator, one acre of which he sold to Foster, who gave a mortgage to secure the payment of the consideration of $600, which sum was not paid when due, and he entered to foreclose. The entire tract on the 1st of December, 1820, had been mortgaged by him to Francis Wyman, his brother, to secure three notes of that date, one for $676, payable in one month; another for $650, payable in six months; the third for $704.39, payable in one year; interest to be paid on each note semi-annually.

Shortly after this, Francis Wyman, by his will, dated 14th June, 1822, devised to defendant, Babcock, all his estate, including said notes and mortgage, in trust for testator's wife and children, and made Babcock his executor. The testator died in August, 1822. On the 1st of December, 1824, Nehemiah paid Babcock, as trustee and executor, the note for $704 and interest; and from time to time paid the interest on the other notes, up to December, 1826.

In 1825 or 1826, Nehemiah became embarrassed, and having entire confidence in his brother-in-law, Babcock, he, by deed, 26th April, 1826, mortgaged the eleven acres of land as security of a note to Babcock of that date, for $1,200, payable in one year, with interest. At this time, little, if anything, was due to Babcock, but it was understood, between them, that Babcock would become security for him, or advance money to him, the mortgage to stand as a security. Before the 20th of November, 1828, Babcock did become bound for and advanced

to him upwards of $400. In addition to this, there was due to Babcock as executor, for rent, $136.71. On a settlement, Nehemiah executed to Babcock three notes, one dated 7th November, 1828, for $486.79, of which $400.08 were due Babcock individually, and $86.71 to the heirs of Nehemiah Wyman, sen.; another note for $8.10, and third for $50, due to the heirs of the same, were given.

Nehemiah being thus indebted to Babcock, as trustee and executor, and not being able to pay the interest, Babcock and William Wyman, brother of Nehemiah, urged him to make a clear deed in fee for the land aforesaid, to Babcock, that he might manage and improve the same, and apply the rents and profits to pay interest on the encumbrances, and to the gradual liquidation of the principal. And finding that this conveyance to Babcock was made a condition of further advances, he eventually conveyed the estate to Babcock, it being expressly agreed by Babcock, that, notwithstanding the form of the conveyance, it should stand as security only for the sums due to him.

That on the 20th of November, 1828, a memorandum was made out of the sums thus due, and handed to Nehemiah, as evidence of the amount for which the land was held.

At the time this deed was executed, no one of the notes held by Babcock was surrendered, nor the mortgage to Francis Wyman, deceased. All the evidences of indebtedness remained in the hands of Babcock, Nehemiah holding only the memorandum of the sums. The total amount of the notes in said memorandum, with interest to the 20th November, 1828, amounted to the sum of $2,033.87.

Upon receiving the above deed, Babcock took possession under it, not only of the eleven acres, but of the adjoining acre. Babcock, it is alleged, received annually, from sales of clay, grass, and ledge stone, from the land, more than enough to pay interest and taxes. Nehemiah having removed to the West, regardless of his trust, Babcock sold the land at private sale, without notice to the said Nehemiah, and in fraud of his rights, for eight thousand dollars.

In the sale, Babcock represented himself to be the sole owner of the premises. On the 4th of February, 1853, Nehemiah conveyed his right to redeem to Edward Wyman, the complainant, &c. Within two years, Babcock has promised William Wyman, acting for his brother, that he would come to an account with Nehemiah for the price of the land, and pay him the proceeds of the sales, deducting the debts aforesaid, if he would take his notes on time; and would refer the question of amount of rents and profits to the arbitrament of neighbors.

Babcock has frequently, recently, admitted that it was originally intended that said deed should stand as security for the amount set forth in the memorandum; and that he always intended to do right in the matter, but that he had been advised by counsel, that the agreement, not being in writing, could not be enforced, and this was the reason he refused to perform it.

The bill prays for an account, and the defendant in his answer admits the conveyance stated in the bill, and that the land was subject to the mortgages. He avers the consideration named in the deed was the amount then due defendant in his own right, and as executor and trustee; and the further sum of $8.10, due the defendant, and $50 due as agent. He admits no additional consideration was paid; but he states the land was not worth more than $1,900; that he consented to receive the deed in payment of the sums due him personally, and upon an agreement that if he should be able to obtain therefrom, in addition, enough to pay the sums due to him as executor and trustee, he would pay these sums, and upon no other trust or confidence whatever.

That, upon the delivery of the deed, he cancelled the notes of Nehemiah held in his own right, and either surrendered them to him or destroyed them. That he did not cancel the notes held by him as executor or trustee, because he was not satisfied that he should receive enough from the land to pay the same; and in order to prevent the presumption that he had so agreed absolutely, he made a minute thereon to the effect that he did not guaranty the payment thereof, it being the understanding between him and Nehemiah, that Nehemiah should be personally liable therefor.

That he made no other agreement, and he denies that it was understood or agreed, that the land was conveyed to him on the trust set forth in the bill; but insists that the conveyance was absolute, in payment of the sums due him, and liabilities incurred; and the only understanding was, that if the defendant should realize therefrom more than enough to pay his own claims, he would pay the debts due him as executor and trustee.

Defendant took possession of the land, and for eight years occupied it, Nehemiah never claiming any interest in it. He denies the allegations of the bill, as to the trust; sets up the defence, that the agreement, not being in writing, cannot be enforced. He denies that he proposed a compromise, if his notes would be taken on time, as alleged, and he pleads the statute of twenty years limitation, &c., and avers the profits of the land did not exceed the taxes, &c.

Three points may be considered as embracing the merits of this case:

1. Was the deed executed by Nehemiah Wyman to Babcock, for the eleven and one-half acres of ground, given in trust?

2. Can this trust be established by parol evidence?

3. Does the statute of limitation or lapse of time affect the complainant's rights?

No one can read the history of this case, as stated in the bill, without being impressed with the confidential relations of the parties. The grantor and the grantee were brothers-in-law, and the advisers bore the same relation to the grantee. It was a family concern, designed, as it would seem from the bill, to aid an embarrassed member of it, without a probability of loss by the other members.

The bill charges, when the deed in question was executed, the sums which it was intended to secure were stated, and handed to Nehemiah. This is not denied in the answer, and William Wyman, the brother, being present, swears, as a witness, to the sums so stated, amounting in the whole to the sum of $2,033.87, the consideration named in the deed. This list was in the handwriting of the son of Babcock, and the paper was delivered to Nehemiah in the presence of the witness. The deed was drawn by the witness, and he knows that the sums named included all the debts which Nehemiah owed to Babcock individually, or as trustee. The witness remembers Babcock said, after the statement was made, add sixty-two cents for recording the deed, which made the sum inserted as the consideration in the deed. Nehemiah hesitated to sign the deed, when Babcock said, he can have the land again, at any time he shall pay the debts secured by it.

The answer avers, when the deed was executed, the defendant gave up the notes of Nehemiah held in his own right, and either surrendered them to him or destroyed them. But it is proved by the same witness that he did neither. These notes were given to the witness without explaining to whom they belonged. Witness supposed they belonged to the estate of Nehemiah Wyman, sen.

The witness says, the property, at the time it was sold, was worth thirteen or fourteen thousand dollars, and that it was sold greatly below its value.

The bill charges, that the defendant promised William Wyman, acting for his brother, that he would come to an account with Nehemiah for the price of the land, and pay him the proceeds of sales. This is denied in the answer. William Wyman swears, that on the 8th of November, 1851, he showed to Babcock the memorandum of the sums named, to secure the payment of which the deed was executed. He was much embarrassed, and admitted the handwriting was his son's, then

deceased. He then expressed a willingness to settle it up, and asked the witness, how shall this be done? Witness replied, that he should first charge Nehemiah with all his notes and interest, and then credit him with the proceeds of the land, and what he received from the land, with interest, and be allowed a fair compensation for his trouble. He then said, I can't tell how much I have received from the land, but we will leave it to two good men; and that he would give his note for what should be due.

A short time after this, Babcock told witness that he had consulted counsel, who advised him to pay the amount due the estate of Nehemiah, sen., and no more; and this he offered to do, if the witness would execute a bond of indemnity against any farther claim. He said that he had been advised, as the deed was absolute on its face, and no writing showed that the land was conveyed in security of a debt, the obligation could not be enforced.

The witness signified to Babcock, some time before the sale of the land, that he would redeem it for his brother.

Nehemiah Wyman, having transferred all his interest to the complainant, was examined as a witness, who stated, at the time he executed the deed to Babcock, he owed him, as an individual, as executor and agent, the sum of $2,033.87, which included sixty-two cents for recording the deed; and that sum was stated as the consideration in the deed. Of this sum, only $408.18, and interest, were due to Babcock in his individual capacity.

In his answer, the defendant states that the conveyance was made in payment of the sums due him personally; that he did not cancel the notes held by him as executor or trustee, because he was not satisfied that he should receive enough from the land to pay those debts. But the proof shows, that the debt due him as executor and agent, and also his individual debt, were all included in the consideration named in the deed.

The defendant made no advance to the witness, on the note and mortgage for twelve hundred dollars; but, at the date of the subsequent conveyance, the defendant had advanced to him $400.08, and $8.10, which, as above stated, constituted the debt due to the defendant on his personal account.

The conveyance was made to the defendant, the witness swears, with the express understanding, that Babcock was to have the entire management of the land, so as to apply the proceeds in payment of the interest, and witness was to have the land again on paying the sums specified. He was induced to make the conveyance by the urgent request of his brother William, and Babcock; his brother told him, if he did not

make it, he would not assist him in his pecuniary matters. On the execution of the deed, none of the notes held by Babcock were cancelled, or surrendered to the witness; but they are still held against him.

The witness says that Babcock promised to keep an account of the receipts of the land conveyed to him; but in his answer he says he kept no account, "because the land and rents and profits were his own, without any liability to account to any one."

Such a transaction as set out in the bill, between brothers-in-law, in the nature of things might be supposed to have taken place in the mutual confidence of the parties; and in the final adjustment there should be no evasions or subterfuges to gain an advantage. So far as regards the deed under consideration, all the material allegations of the bill are proved, and all the material averments of the answer seem to be unfounded. In coming to this conclusion, we do not rest alone on the witnesses, Nehemiah and William Wyman. There are strong circumstances which corroborate the witnesses, and satisfy the mind beyond a reasonable doubt.

In his answer, the defendant avers that the land was conveyed to him in payment of the sums due him personally. It appears from the oaths of both the Wymans that this is not correct; and, in addition, it is shown by the memorandum made out at the time, stating the sums for which the land was conveyed, in the handwriting of the son of the defendant.

Taking the statement of the defendant as true, that he did not intend to make himself responsible for the debt due to him as executor and agent at the time the deed was executed, presents him in an unfavorable light. The land for which he received a deed from Nehemiah Wyman, he was aware, had been previously mortgaged to secure the debt in his hands as executor of Francis Wyman. Could he have carried out this declared intention, he would have been unfaithful to the trust committed to him.

William Wyman seems to be a man of business. He drew the conveyance from his brother Nehemiah to his brother-in-law Babcock, and he took, in other respects, an active agency in the transaction; and he states the facts as alleged in the bill, and his statement is in every respect corroborated by his brother Nehemiah; and although the trust is denied in the answer, there are circumstances in the case which go strongly to establish it.

The defendant admitted all the facts to William Wyman, and promised to settle the account, and spoke of the principles on which it should be adjusted, but eventually he took refuge

under the statutes of frauds, of limitations, and the lapse of time. We think there can be no reasonable doubt that the deed in controversy was intended to be a mortgage. And this brings us to the second point of inquiry:

Can the trust be established by parol testimony?

If the doctrine of this court is to be adhered to, as laid down in the case of Russell *v.* Southard, (12 How., 154,) this is not an open question. In that case the court say: "To insist on what was really a mortgage, as a sale, is in equity a fraud." And in Conway *v.* Alexander, (7 Cranch, 238,) Chief Justice Marshall says: "Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it was a sale or a mortgage." In Morris *v.* Nixon, (1 How., 126,) the court say: "The charge against Nixon is substantially a fraudulent attempt to convert that into an absolute sale, which was originally meant to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face."

In Edrington *v.* Harper, (3 J. J. Marshall, 355,) the court say: "The fact that the real transaction between the parties was a borrowing and lending, will, whenever or however it may appear, show that a deed absolute on its face was intended as a security for money; and whenever it can be ascertained to be a security for money, it is only a mortgage, however artfully it may be disguised."

In Jenkins *v.* Eldredge, (3 Story's Rep., 293,) Mr. Justice Story said: In 4 Kent, 143, (5th edit.,) it is declared, "a deed absolute upon the face of it, and though registered as a deed, will be valid and effectual as a mortgage between the parties, if it was intended by them to be merely a security for a debt. And this would be the case, though the defeasance was by an agreement resting in parol; for parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance had been omitted by fraud or mistake." In 2 Sumner's Rep., 228, 232–'3, Judge Story said: "It is the same, if it be omitted by design upon mutual confidence between the parties; for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice."

In Foy *v.* Foy, (2 Hayward, 141:) "In North Carolina, it is said the law on this subject is the same as the English law was before the statute of frauds, and parol declarations of trust are valid." "Where a testator gave by will all his estate to his wife, having confidence that she would dispose of it according to his views communicated to her, and it being alleged

that the testator, at the time of making the will, desired his wife to give the whole of the property to B, and that she promised to do it, it was held, that the allegation being proved, a trust would be created as to the whole of the property in favor of B." (Podmore *v.* Gunning, 7 Simons, 644.)

Parol proof is admissible to show fraud, and consequently a resulting trust, in a deed absolute on its face, notwithstanding any denial by the answer. (Lloyd *v.* Spillote, 2 Atk. Rep., 150; Ross *v.* Newall, 1 Wash. Rep., 14; Watkins *v.* Stockett, 6 Har. and Johnson, 435; Strong *v.* Stewart, 4 John. Ch. Rep., 167; English *v.* Lane, 1 Porter's Ala. Rep., 318.)

In Boyd *v.* McLean, (1 John. Ch. Rep., 582,) it was held, after an examination of the cases, "that a resulting trust might be established by parol proof, not only against the face of the deed itself, but in opposition to the answer of the nominal purchasers denying the trust, and even after the death of such purchaser." The statute of frauds in Rhode Island contains no exception in favor of resulting trusts, but Mr. Justice Story considered the exception immaterial, for it has been deemed merely affirmative of the general law. (1 Sumner, 187.)

Where a trustee misapplies the fund, it may be followed, however it may have been invested, by parol, as between the parties, or a purchaser with notice. So, where an estate was purchased in the name of one person, and the consideration came from another, a resulting trust may be established by parol—and in all cases where there is a resulting trust.

In Hayworth *v.* Worthington, (5 Black., 361,) it was held that parol evidence is admissible to prove that a bill of sale of goods, absolute on its face, was intended by the parties to be only a mortgage. The court say these decisions are founded upon the assumption that the admission of such evidence is necessary for the prevention of fraud. (Cas. Temp. Talbot, 62; King *v.* Newman, 2 Munf., 40; Strong *v.* Stewart, 4 John. Ch. Rep., 167; Dunham *v.* Dey, 15 John. R., 555; Walton *v.* Cronly's Adm'r, 14 Wend., 63; Van Buren *v.* Olmstead, 5 Paige, 9.)

In the case of Overton *v.* Bigelow, (3 Yerger, 513,) it was held, "that an absolute bill of sale of negroes may be converted into a mortgage by a parol agreement to allow the conveyor to redeem; and this agreement may be inferred from the price given, and the mode of dealing between the parties."

The case of Walker *v.* Locke et al. (5 Cushing, 90) is considered as having no application to the case before us. It is well known that until within a few years the courts of Massachusetts had no chancery jurisdiction. The jurisdiction, when first conferred by statute, was limited to cases of specific exe-

cution of contracts and trusts, not including fraud as a ground of relief. Within some one or two years past, the jurisdiction has been extended to frauds, but this has been done since the decision in the case above cited.

If the decision had been made since the extension of the jurisdiction beyond the construction of the local statutes, we should consider it only as the decision of a highly respectable and learned court, and not as a rule of decision for this court.

It is admitted that the authorities on the question before us are conflicting in this country and in England; but as this court in several cases have decided the point, and it is now and has been for several years past a rule of decision, we are not prepared to balance the State authorities, with the view of ascertaining on which side the scale preponderates.

The third point regards the lapse of time and the statute of limitations.

In his answer, the defendant avers that the pleadings show a possession by him of more than twenty years before the institution of this suit, and that that possession has never been disturbed; and also that the proceeds of sale were received more than six years before the bill was filed, and these facts are relied on to bar the right of the complainant.

It is clear that the statute cannot constitute a bar in the present case. Courts of equity apply the statute by analogy to cases at law; but in this case, the trust being established, there was no adverse possession in favor of which the statute could run. The possession was consistent with the intentions of the parties, until the fraud was discovered, in 1851. Nor can the statute bar the right of the complainant to the proceeds of the land, as Babcock was bound to apply these to the payment of interest on the debt, and in discharge of the principal.

The decree of the Circuit Court is affirmed with costs.

Mr. Justice CATRON and Mr. Justice CAMPBELL dissented.

Mr. Justice CATRON dissenting.

The opinion just pronounced maintains that a deed in fee, without conditions, and made in that form, according to an agreement of the parties at the time, may be proved to have been a mortgage by parol evidence, establishing that a defeasance was part of the agreement when the absolute deed was executed; but that it was left out by design. And that this parol proof may be made, after the lapse of more than twenty years from the date of the deed before the grantee was sued;

he having been in possession of the land conveyed, holding it under the deed from its date up to the time when the suit was brought.

The defendant (among other things) relied on the statute of frauds as a defence to the suit. Lord Hardwicke lays down the rule (in Montacute *v.* Maxwell, 1 P. Williams, 618) to be, that where there was no fraud or mistake in the original transaction, and the word or promise of the defendant was relied on, the statute of frauds declares such promise void, and equity will not interfere. And in this doctrine I understand the Supreme Judicial Court of Massachusetts to concur. (Walker *v.* Locke, 5 Cush., 90.)

The effect of the defeasance here set up, by parol evidence, is, that it defeats the absolute deed, and makes it void on payment of a sum of money. On general principles the rule is, that where there is a *written contract*, all antecedent propositions, negotiations, and parol interlocutions, on the same subject, are deemed to be merged in such contract. (1 Story Com., p. 173, sec. 160; 2 Story, p. 286, sec. 1,018.)

There must be fraud or mistake in making the agreement, if it can be reformed. (Id., sec. 157, p. 169.)

I think the parol proof was inadmissible both by the statute of frauds of Massachusetts, and according to the general rule referred to; and that the decree should be reversed, and the bill dismissed.

Mr. Justice CAMPBELL dissenting.

The defendant, in the year 1828, entered upon the land conveyed to him by Nehemiah Wyman, and retained it until 1844. He then sold it as his own property, and appropriated the price to his own use. During this whole period, there was no act on the part of Wyman from which the relation of a mortgagor or debtor can be inferred, and no account was rendered by the defendant, nor was any *act* performed by him inconsistent with his deed.

The evidence relied on to engraft a trust on this deed consists of conversations reported by Nehemiah Wyman, the debtor, and his brother William, as contemporaneous with the deed, and other conversations reported by William Wyman as occurring in 1844 and 1851; and also the statements of the answer.

No intercourse between Nehemiah Wyman and the defendant took place between 1828 and 1851, directly or mediately, relative to this subject.

The witness, Nehemiah Wyman, is not, in my opinion, a competent witness. This suit is brought by his son upon an

assignment made after the controversy had commenced, and with the acknowledged purpose of using his father as a witness.

It was found that sufficient evidence did not exist to support the claim, and machinery was resorted to, calculated to introduce the evils of champerty and maintenance.

The witness sold his claim, with a concession to the assignee to employ him as a witness to establish it.

Such a practice holds out to parties a strong temptation to commit perjury. (Bell *v.* Smith, 5 B. and C., 188, J. Bayley's Opinion; Maury *v.* Mason, 8 Part., 212; Clifton *v.* Sharpe, 15 Ala. R., 618; 1 Penn. R., 214; 12 Pet., 140.)

The testimony of Edward Wyman is open to much observation; and I feel entirely indisposed to rest a decree upon his evidence. Nor do I see intrinsic difficulties in the inconsistencies of the answer. I cannot shut my eyes to the fact that nothing has been done between these parties for above twenty-three years inconsistent with the relations of vendor and vendee, or consistent with the relations of a creditor and debtor, except the detention of the evidence of the original debt by the defendant, and the most important part of that evidence was cancelled in 1830 by him.

I dissent from the opinion of the court in reference to the jurisdiction of the Circuit Court of the United States in Massachusetts. It is admitted that, in the courts of Massachusetts, this trust could not be incorporated into the deed. The statute of frauds prevents it. (Walker *v.* Locke, 5 Cush., 90.)

This statute constitutes a rule of property for the State. In the present case, the subject of the suit is a contract made in Massachusetts, by citizens of that State, and affecting the title to real property there. In my opinion, the statute law of Massachusetts furnishes a rule of decision to the courts of the United States.

WILLIAM BYERS, APPELLANT, *v.* FRANCIS SURGET.

Where there was a judgment for costs against the plaintiff, in a suit where the defendant pleaded a discharge in bankruptcy, and the attorney for the defendant taxed those costs, directed the property upon which an execution should be levied for their collection, prepared the advertisements for the sale of it, caused a sale to be made of fourteen thousand acres of land, to produce a few dollars as costs, and then became himself the purchaser, the sale will be decreed fraudulent and void, and ordered to be set aside.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Arkansas, sitting in equity.

It was a bill filed by Surget, a citizen of Mississippi, to set aside a sale made under the circumstances, which are fully stated in the opinion of the court.

The Circuit Court decreed that the purchase of the lands by Byers was fraudulent and void, and ordered the sale to be set aside. Byers appealed to this court.

It was argued by *Mr. Lawrence* for the appellee, no counsel appearing for the appellant.

Mr. Justice DANIEL delivered the opinion of the court.

The appellee, Francis Surget, a citizen of the State of Mississippi, instituted his suit in equity in the Circuit Court of the United States for the eastern district of Arkansas, against the appellant, the object of which suit was to annul as fraudulent and void a sale of lands belonging to the appellee, made by the sheriff of Jackson, in Arkansas, on the 18th of May, 1846. These lands, situated in the county and State above mentioned, are described in the pleadings according to the public surveys, amounting to more than fourteen thousand acres, and estimated in value at from forty or seventy thousand dollars, and were sold by the sheriff in satisfaction of a claim for $39, and conveyed to the appellant for the sum of nine dollars thirteen and one-half cents.

The Circuit Court having pronounced the sale and conveyance fraudulent and void, and decreed a surrender and reconveyance of the lands by the appellant to the appellee, the former party has appealed from that decree to this court.

The facts of this cause, as collated from the pleadings, and as established by the proofs, are substantially as follows:

The appellee, during the year 1835, separately, and in his individual right, entered and purchased of the Government of the United States, at their land office at Batesville, in the State of Arkansas, a number of tracts or parcels of land, situated in the county of Jackson, in the State aforesaid, all of which are known and designated on the plats of the public surveys, and are enumerated and set forth in the bill. In the same year, (1835,) about the 10th of November, the appellee, together with John Ker, Stephen Duncan, and William B. Duncan, formed a partnership under the name and style of William B. Duncan & Co., and, in the name and behalf of that firm, entered and purchased of the United States, at their land office at Batesville, various other tracts, lots, and parcels of land, lying in the same county and State, known and designated on the plats of the public surveys, and described and set out in the bill. Sometime in the year 1836, the partnership of Wil-

liam B. Duncan & Co. was, by mutual consent, dissolved; and the property, real and personal, belonging to the firm, including the purchases and entries of land made by them, was by like consent divided, and the portion of each partner allotted to him, and by him held in severalty. The portions assigned and allotted, under this distribution, to Stephen Duncan and William B. Duncan, as members of the partnership of William B. Duncan & Co., are particularly set out and described in the bill. Subsequently to the dissolution of the partnership of William B. Duncan & Co., and to the transfer to each partner of his respective rights and interest therein, Stephen Duncan and William B. Duncan, by deeds bearing date, the one on the 29th of December, 1836, and the other on the 23d of March, 1837, sold and conveyed to the appellee in fee simple, together with sundry other tracts and parcels of land, the lands, lots, and parcels, before mentioned as having been transferred and assigned to said Stephen and William B., as members of the firm of William B. Duncan & Co., all of which lots and parcels of land, so conveyed to the appellee by Stephen and William B. Duncan, as well as the portion thereof belonging to the appellee, as a member of the firm of William B. Duncan & Co., and the several lots and parcels of land originally and separately entered and purchased by the appellee in his own right, were included in the levy and sale impeached by the bill.

In the year 1840, four years after the dissolution of the firm of William B. Duncan & Co., an action was instituted in the name of that firm, by William B. Duncan, in the Circuit Court of Jackson county, in the State of Arkansas, against one Noadiah Marsh, for a breach of covenant; and in that suit, under the plea of a subsequent discharge in bankruptcy, the court gave judgment in favor of the defendant for costs of suit.

The bill charges that this suit instituted against Marsh was posterior in time to the dissolution of the partnership, and was commenced and prosecuted without the authority or knowledge of the other members of the recent partnership, who all resided beyond the limits of the State of Arkansas; and further avers, that the first knowledge of the existence of the suit on the part of the appellee was imparted to him by a communication informing him of the sale of his land. This allegation in the bill with respect to the period at which the suit against Marsh was instituted, and with respect also to the person by whom instituted, and the ignorance on the part of the appellee of the institution of that suit, is fully sustained by the deposition of William B. Duncan, and by the facts that the deeds from the other partners to the appellee, executed

after the dissolution, bear date in the years 1836 and 1837; the action at law against Marsh not having been commenced until 1840, September 5th.

But should it be conceded that the partnership was in full existence at the time of the institution of the suit against Marsh, and that the suit had been ordered or sanctioned by the firm, yet a judgment for costs against them, upon a ground which controverted neither the justice nor the legality of their claim, presents an anomaly in judicial proceedings, as irreconcilable with reason as it is believed to be without precedent.

Upon this extraordinary judgment, the appellant, as the attorney for the defendant in the inferior court, assumed to himself the power to tax the costs adjudged to the defendant; to tax them not in the capacity of clerk, the agent created by law for the performance of that service, nor in that of the legal deputy or subordinate of that officer, but, as it has been asserted, as a sort of *amicus clerici*, and with equal benevolence, or in order to remedy the ignorance and imbecility which, by way of justification of the appellant's acts, it is attempted to be shown, characterized the ministers of the law in that unfortunate locality, assumed to himself the power and the right not only of selecting the final process, but of prescribing also the description and the quantity of the property which he chose to have seized in satisfaction of that process; of furnishing a list of the parcels and amount which he chose to have thus seized; of ordering the sheriff to levy upon the whole of what he had so described; of preparing himself and furnishing to the officer such advertisements for the sale of the property levied upon as he approved; of requiring of the sheriff, under peril of responsibility for refusal, towards the satisfaction of an execution for thirty-nine dollars and ten cents, peremptorily to make sale of more than fourteen thousand acres of land, estimated by the witnesses from forty to seventy thousand dollars; and finally, under a proceeding irregular in its origin, commenced by himself, and by him controlled and managed to its consummation, of becoming the purchaser of the property estimated as above, for the sum of nine dollars thirteen and one-half cents.

Such is the history of a transaction which the appellant asks of this court to sanction; and it seems pertinent here to inquire, under what system of civil polity, under what code of law or ethics, a transaction like that disclosed by the record in this case can be excused, or even palliated? To the appellant must necessarily be imputed full knowledge of this transaction; he was the attorney for the defendant in the State court; he is shown to have been not only the adviser, but

virtually the executor, of every step taken for the enforcement of the judgment of that court; and, as a lawyer, it is reasonable to presume that he must have comprehended the nature and effects of the measures adopted by him and at his instance. The bill impeaches these measures as being contrived by the appellant for purposes of fraud and oppression, as is betrayed—

1. By the anomalous character of the judgment procured by the appellant, without notice or knowledge on the part of the appellee.

2. By the fact, that the process sued out upon the judgment at law was not made out by the only officer legally authorized for that purpose, but was calculated, and drawn up, and determined, and written out, by the appellant himself, and by his authority and direction delivered to the sheriff, who was ordered by this same party on what particular property and to what amount to levy the execution.

3. By the facts, that whatever notices or advertisements may have been given or prepared previously to the sale of the lands levied upon, were prepared not by the sheriff, but by the appellant; and that such as were prepared by him were not published by the sheriff in the mode prescribed by the law, previously to the sale of lands under execution.

4. By the wanton excessiveness of the levy insisted on by the appellant; this being an abuse of the process of the court, and evidence of a fraudulent design, with a view to incite suspicion, and to deter purchasers by reason of that suspicion, and by offering larger portions of property than many persons would be willing or able to purchase.

5. By the peremptory demand upon the sheriff, and in opposition to the remonstrances of this officer, and under threats, in the event of his refusal, to force a sale of this large amount of property, under circumstances calculated to insure its ruinous sacrifice.

6. The gross inadequacy of consideration given by the appellant for this large property, an effect produced by his own fraudulent contrivances.

The ground upon which the defendant below, the appellant here, has rested his case, may in substance be reduced to the two following positions:

1. The strength of his legal title acquired under the execution and sale, and under the conveyance from the sheriff, which execution, sale, and conveyance, he alleges were fair, and not fraudulent; and

2. That sacrifices of land in the section of the State in which this sale occurred, similar to that complained of, were usual in sales under execution.

With respect to the effect of the judgment at law, and of the proceedings taken for its enforcement, it is insisted, in the answer of the appellant, that this judgment having been rendered by a court of competent authority, and still remaining unreversed, neither the validity of that judgment nor the proceedings in virtue thereof can now be questioned.

It is true, that with respect to the regularity of that judgment, or of any legal errors in obtaining it, this court or the Circuit Court could not take cognizance, nor exercise any appellate power for its reversal; and in any collateral attempt at law to impeach that judgment, it must be regarded as binding and operative. But with any fraudulent conduct of parties in obtaining a judgment, or in attempting to avail themselves thereof, this court can regularly, as could the Circuit Court, take cognizance. Such a proceeding is within the legitimate province of courts of equity, and constitutes an extensive ground of their jurisdiction. The true and intrinsic character of proceedings, as well in courts of law as *in pais*, is alike subject to the scrutiny of a court of equity, which will probe, and either sustain or annul them, according to their real character, and as the ends of justice may require.

With reference to the conduct of the appellant, in procuring and enforcing the judgment at law, that conduct has been, by the answer of the appellant and by the argument of his counsel, sought to be sustained, upon the ground that, as attorney for Marsh, the appellant had the power and the right to control the judgment, and to carry it into effect. The power and right thus claimed for the appellant, like every other right and power, are bounded by rules of law and justice, and by consistency with the rights of others. So far as it was necessary to maintain and enforce the legitimate interests of Marsh, it was unquestionably within the competency of his attorney to interpose; but he could not, in pursuance of whatever he may have fancied legitimate, or of whatever he may have deemed judicious or promotive of advantage to his client or himself, usurp the authority and functions of officers on whom the law had devolved its just administration, and by that the preservation of the rights of the citizen.

The offices of clerk and sheriff were never designed to be mere names, nor to be engines and pretexts, to be used at the will of any one. By what authority, then, could the appellant assume the functions of both clerk and sheriff; tax such costs as he deemed proper; order the seizure of property to an amount entirely arbitrary, as his cupidity or indiscretion might incline him, and command peremptorily the sale of the whole subject thus illegally and rapaciously seized upon, without the

slightest reference to the value of the subject, in comparison with the demand to be satisfied, and then to become himself the possessor of the subject thus sacrificed by his own irregular and oppressive conduct, for a pretended consideration so trivial that it may be considered as nominal merely?

In justification or in excuse for this assumption, it has been alleged and relied on by the appellant, (though the position is entirely unsustained by proof,) that it was rendered necessary by the ignorance of those officers to whom the duties of clerk and sheriff had been assigned by law; and had become a common practice in the particular part of the country where this proceeding occurred. If the position thus taken be true in fact, it rather aggravates than extenuates the wrong complained of, as it shows that, by the ignorance or the corruption of those officers of the law, the rights of the complainant had been surrendered to the mercy of one having a direct interest to invade those rights. It evinces, moreover, if true, a practice, in a profession heretofore deemed enlightened and honorable, highly calculated to bring that profession into merited disrepute.

Upon the question of the illegality in the sale for want of notice by advertisement, it has been insisted by the appellant that the bill contains no charge with respect to such illegality, and that therefore no proofs as to that point can be admitted.

It is undoubtedly the rule in equity, as well as at law, that the proofs must correspond with the allegations, and that evidence irrelevant or inapplicable to the latter will be regarded as immaterial. The bill in this case is less searchingly and minutely framed than it might have been on this particular point, yet it is considered as being sufficiently comprehensive, and as sufficiently specific at the same time, to embrace this point, and to justify proofs in relation thereto.

It alleges as illegal and unwarrantable the taxing of the costs, the writing of the execution, the writing of the list and description of the lands required to be levied on, and the notices of sale by the appellant; the manner of publishing or putting those notices and the proceedings under them at the sale—all as being unwarranted by law, and as having been concocted and carried out in fraud; all these allegations it was competent to the appellee to prove. The answer of the appellant—after a general denial of fraud and unfairness, and after admitting the taxing of the costs, the writing of the execution, the description of the land to be levied upon, the directions of the sheriff, and the preparation of the advertisements, all by himself—next insists upon the regularity and propriety of all these acts. He then proceeds to aver the performance of every

prerequisite of the law with respect to such sales. After enumerating these prerequisites in detail, he endeavors to establish them by evidence. He says that the sheriff advertised the lands for twenty days in three of the most public places in each township of the county, in conformity with the statute; and he introduces the evidence of the sheriff and of other witnesses to maintain these averments.

But in contravention of these statements are, first, the admission of the appellant that *he himself*, and not the sheriff, prepared the notices of sale; and, secondly, the evidence of the sheriff introduced and relied on by the appellant, so far from showing a compliance with the requisites of the law, establishes the fact that these were violated and disregarded; for the sheriff declares that he took the list and the description of the property, and the notices prepared by the appellant; and this officer admits that he did not put up advertisements, either in number or locality, as required by law, nor could he swear to such a proceeding by him. He says it was his practice to set up advertisements in places in which it was convenient for him to do so, and to hand over other notices to persons in whom he had confidence.

Here, then, is proof, supplied by the appellant, that the law had not been complied with. The acts of an official deputy are evidence of the acts of his principal, and are binding on all who fall within the legal scope of those acts. But it is not perceived how the rights of suitors can be at all dependent upon the unofficial and individual confidence of one officer, even when that confidence may not have been misplaced. In this case, there is no proof that it has been fulfilled; for no person shows that the notices had been in fact put up and published according to the statute. The mere *belief*, either of the sheriff or any other person, can have no operation where the law calls for full legal proof.

The objections here stated cannot be deemed narrow or technical with reference to a case like the present—a case presenting no claim to favor either in law or in equity; a case in which the respondent was and is bound to pursue the hair line of legal and formal strictness, and from which, if he deviate in never so small a degree, he is doomed to fall. The conduct of the defendant, in all that he has done himself, and in all that he has exacted of others, is essentially important in this case as evidence of the *quo animo* with which this transaction was begun, prosecuted, and consummated. Another pregnant proof of the design of the appellant to grasp and to retain what no principle of liberality or equity could warrant, is the fact, clearly established, of his refusal after the sale to accept from

the appellee, for the redemption of his lands so glaringly sacrificed, a sum of money considerably exceeding in amount the judgment for costs, with all the expenses incidental to the carrying that judgment into effect. The appellant, by his irregular and unconscientious contrivances, achieved what he conceived to be an immense speculation; and he determined to avail himself of it, regardless of its injustice and ruinous consequences to the appellee.

To meet the objection made to the sale in this case, founded on the inadequacy of the price at which the land was sold, it is insisted that inadequacy of consideration, singly, cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualification annexed to it by the courts; namely, unless such inadequacy be so gross as to shock the conscience; for this qualification implies necessarily the affirmation, that if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud. Again, in answer to the same objection, it is insisted, that whatever presumption arising from inadequacy of consideration may be permitted with respect to transactions strictly limited to vendor and vendee, no unfavorable inference from that cause is permissible with respect to sales made under judicial process. Certainly the facts that sales are made by the officers or ministers of the law, and under its authority, may properly weaken the usual presumption arising from gross inadequacy; but to declare that such inadequacy, connected with other facts and circumstances evincing fraud or unfairness, could never be regarded as affecting sales under process, would be as rational as the assertion that process of law could never be abused, and that the ministers of the law must necessarily be intelligent and upright, and incapable of being ever willingly or unwittingly made the instruments of fraud or oppression. But the transaction now under review can with no show of propriety be tested by the single fact of inadequacy of consideration, however gross and extraordinary that inadequacy has been. We perceive in this transaction other ingredients that have been mingled therewith by the appellant, that give to the objection of inadequacy an effect that, standing isolated and alone, could not be ascribed to or deduced from it.

Thus, when we advert to the irregular and extraordinary character of the judgment procured through the agency of the appellant—to his eagerness, that could not await the action of the officer of the court—his assumption of the functions of the clerk, in taxing the costs, and in writing out the execution—his preparation and delivery to the sheriff of a description and list of the lands of the appellee, amounting to more than fourteen

thousand acres—his requisition of a seizure of the whole of those lands in satisfaction of the sum of thirty-nine dollars—his inflexible demand upon the sheriff, under threats of prosecution, to expose to sale the entire levy—his purchase of all these lands for the sum of nine dollars and thirteen and a half cents—and his refusal after the sale and purchase to accept, in redemption of these lands so sacrificed, a sum of money tendered to him much more than equal to the costs, with all the expenses incident to the judgment: when all these acts on the part of the appellant are adverted to, they impel irresistibly to the conclusion, that the gross inadequacy of consideration in the sale and purchase of these lands was the premeditated result which the proceedings by the appellant were put in practice to insure. They betray that *malus dolus* in which the design of the appellant was conceived, which appears to have presided over and regulated the progress of the design from its birth to its consummation; to which design the appellant has tenaciously clung, in the seeming expectation that it was beyond the corrective powers of law or justice.

Upon the whole case, we are constrained to view the entire transaction impeached by the appellee as one that cannot be sustained without the subversion of the principles and rules either of legal or moral justice. We accordingly approve the decision of the Circuit Court in so regarding it, and order that decree to be affirmed.

OLIVER AND DANIEL R. GARRISON, APPELLANTS, *v.* THE MEMPHIS INSURANCE COMPANY.

Where bills of lading for goods, shipped on board of a steamboat in the river Mississippi, mentioned that the carrier was not to be responsible for accidents which happened from the "perils of the river," these words did not include fire amongst those perils; and the carrier was responsible for losses by fire, although the boat was consumed without any negligence or fault of the owners, their agents, or servants.

The evidence of a witness was not admissible, who offered to testify that he had not known a case where the omission of the word "fire," in the exceptions mentioned in the bill of lading, was considered to give a claim against the boat on account of a loss by fire.

There is no ambiguity which requires to be explained, and the evidence fails to establish a usage.

An insurance company, which paid these losses, had a right to seek relief from the owners of the boat.

This relief could be sought in equity, not only upon the general principles of equity jurisprudence, but also because, in this case, a number of shipments were joined in the same bill, and thus a multiplicity of suits was avoided.

THIS was an appeal from the Circuit Court of the United States for the district of Missouri, sitting in equity.

The bill was filed by the Memphis Insurance Company, a corporation created by the laws of Tennessee, and whose stockholders were citizens thereof, against the owners of the steamboat Convoy. In February, 1849, they received on board of their boat a large amount of cotton, to be carried from Memphis to New Orleans. The boat and cargo were destroyed by fire on the downward voyage, without any fault or negligence of the owners, their agents, or servants. The insurance company paid the owners of the cotton the amounts of their several insurances, and then filed this bill to recover such sums from the owners of the boat. The facts are more particularly stated in the opinion of the court. The Circuit Court held the owners of the boat liable, and rendered a decree against them for the amounts paid by the insurance company.

There were fifteen different bills of lading mentioned in the bill. The first five, covering three hundred and eighty-eight bales of cotton, stipulated for the delivery at New Orleans, "the dangers of the river only excepted." In the sixth, seventh, and eighth, covering one hundred and twenty-one bales, "the dangers of the river and unavoidable accidents only" are excepted. In the ninth, fourteenth, and fifteenth, covering two hundred and seventy-four bales, "the unavoidable dangers of the river and fire only" are excepted; and in the tenth, eleventh, twelfth, and thirteenth, "the dangers of the river and fire only" are excepted. The ground upon which the owners of the boat were claimed to be liable upon those bills of lading, where "fire" was excepted, was, that the fire arose from carelessness. But in the progress of the trial this branch of the claim was given up, and the claim of the plaintiffs was declared to rest upon the construction to be given to the bills of lading, in which the vessel was merely exempted from "the dangers of the river," or "the dangers of the river and unavoidable accidents."

The Circuit Court decreed that the owners of the boat were liable upon those bills of lading which contained the exception only of "the dangers of the river," being the first five mentioned in the bill, and dismissed the bill as to the relief sought in respect to the bills of lading in which "the dangers of the river and unavoidable accidents" are excepted, being the sixth, seventh, and eighth, mentioned in the bill. The owners of the boat appealed to this court.

The case was argued by *Mr. Ewing* for the appellants, and *Mr. Geyer* for the appellees.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee filed a bill in the Circuit Court against the appellants, the owners of the steamboat Convoy, a vessel formerly employed in the navigation of the Mississippi river, and which, in 1849, was consumed by fire, with a cargo of cotton.

The appellee is an insurance corporation of Memphis, Tennessee, and insured eleven hundred and fifty-two bales of the cotton belonging to this cargo from loss by fire; this insurance was effected upon fifteen distinct parcels, and shipped mostly from Tennessee to a number of consignees in New Orleans. The company adjusted the losses with the assured on their policies, and bring this suit for reimbursement, by enforcing the claims of the shippers against the owners. *These* answer the bill by a denial of their legal responsibility for the loss. They maintain that fire is one of the perils of the river Mississippi; that all the bills of lading that exempt the carrier from a loss by perils of the river, imply fire as one of those perils; that the variations in the bills of lading, some including "fire," and "unavoidable accidents" as well as fire, are referable to the fact that they are preferred by different shippers, who have different forms for expressing the same legal consequence. That they all understand that a carrier is exempt from a liability for fire on a bill of lading exonerating him from the risks of the river.

It was admitted on the hearing that the boat was consumed, without any negligence or fault of the owners, their agents, or servants. The Circuit Court excused the owners from losses, where the bills of lading contained an exception of fire or unavoidable accidents, but condemned them on the others, to satisfy the demand of the company.

It cannot be denied that the appellants are responsible, according to the strictness of the common-law rule determining the carrier's liability, unless an accidental fire is one of the exceptions included in the term "perils of the river." These words include risks arising from natural accidents peculiar to the river, which do not happen by the intervention of man, nor are to be prevented by human prudence; and have been extended to comprehend losses arising from some irresistible force or overwhelming power which no ordinary skill could anticipate or evade. (Jones *v.* Pitcher, 3 S. and P., 136; 4 Yerg., 48; 5 Yerg., 82; Schooner Reeside, 2 Sum., 568.)

They exonerate a carrier from a liability for a loss arising from an attack of pirates, or from a collision of ships, when there is no negligence or fault on the part of the master and crew. Latterly, the courts have shown an indisposition to extend the comprehension of these words. The destruction of a

vessel by worms at sea is not accounted a loss by the perils of the sea; nor was a damage from bilging, arising in consequence of the insufficiency of tackle for getting her from the dock; nor was damage occasioned to a vessel by her props being carried away by the tide while she was undergoing repairs on the beach, excused, as falling within that exception. In Laveroni *v.* Drury, (8 Ex. R., 166,) a question arose whether a damage to a cargo of cheese, occasioned by rats, was within the exception of the dangers or accidents of the sea and navigation; and the Continental and American authorities were cited to the Barons of the Exchequer, to show that it was, and that the carrier was excused, he having taken the usual and proper precautions against them.

That court decided otherwise, and say "the exception includes only a danger or accident of the sea or navigation, properly so called, (viz: one caused by the violence of the winds and waves, *a vis major*, acting upon a seaworthy and substantial ship,) and does not cover damage by rats, which is a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as cheese is equally liable in a warehouse on land as in a ship at sea." And the court conclude "that the liability of the master and owner of a general ship is *prima facie* that of a common carrier; but that his responsibility may be either enlarged or qualified by the terms of the bill of lading, if there be one; and that the question, whether the defendant is liable or not, is to be ascertained by this document when it exists." The principle of these cases establishes a liability against a carrier for a loss by fire arising from other than a natural cause, whether occurring on a steamboat accidentally, or communicated from another vessel or from the shore; and the fact that fire produces the motive power of the boat does not affect the case. (New J. S. N. Co. *v.* Merchants' Bank, 6 How., 344, 381; Hale *v.* N. J. S. N. Co., 15 Conn., 539; Singleton *v.* Hilliard, 1 Strab., 203; Gilmore *v.* Carman, 1 S. and N., 279.)

In this suit, a witness was introduced, who claims to have been long familiar with the usages of the navigation and the river insurance risks of the Mississippi, and competent to testify in reference to the perils of that river. He says, "those are, sinking, by coming in collision with rocks, snags, or other boats or vessels, and fire; that the most common form of bills of lading contains the exceptions, perils of the river and fire; but that in many instances the word fire is omitted, and he has not known an instance where the want of that word has created a difficulty in adjusting a loss, or was considered to give a claim against a boat on account of a loss by fire." The first inquiry

is, whether this evidence is admissible. In mercantile contracts, evidence is admissible to prove that the words in which the particular contract is expressed, in the particular trade to which the contract refers, are used in a peculiar sense, and different from that which they ordinarily import, and to annex incidents to written contracts, in respect to which they are silent, but which both parties probably contemplated, because usual in such contracts.

But although it is competent to explain what is ambiguous, and to introduce what is omitted, because sanctioned by usage, it is not competent to vary or contradict the terms of the contract. The exceptions in the bills of lading under consideration have been in use in policies of insurance and contracts of affreightment for a long period, and have acquired a distinct signification in the customs of merchants, and the opinions of professional men and courts. It would be surprising if any particular or artificial meaning was attached to them in the customs of the Mississippi river, contrary to, or distinguishable from, that which existed elsewhere in the community of shippers and merchants. In this case, the evidence fails to establish any peculiar sense of these words, as appropriate to the locality where the parties to this contract reside and made their contract. The evidence rather serves to show that the witness did not recognise the liability of a carrier, as it exists in the common law, and was ready to acquit him of responsibility for losses to which he did not contribute, by the negligence or fault either of himself or his agents. In Turney *v.* Wilson, (7 Yerger, 340)—a case decided in the State from which the shipments described in the bill were chiefly made—evidence was offered to show there was an implied contract recognised in the usages of shippers and merchants, which had prevailed from the first settlement of the country, to exempt the carrier from losses, except those proceeding from negligence or dishonesty to explain or construe a bill of lading of the common form. The court decided, that the dangers of the river were such as could not have been prevented by human skill and foresight, and were incident to river navigation. That all evidence was irrelevant that did not show that the loss was occasioned by the act of God, the enemies of the country, or dangers of the river; that the custom could not affect or in anywise alter the written contract of the parties, as contained in the bill of lading, as the language had a definite legal meaning which this custom could not change. A similar question arose in the case of the Schooner Reeside, (2 Sum., 568,) where Justice Story condemns, in pointed language, the habit of admitting loose and inconclusive usages and customs

"to outweigh the well-known and well-settled principles of law." And in Rogers *v.* Mechanics' Insurance Co., (1 Story, 601,) he denies the authority of a usage of a particular port, in a particular trade, to limit or control or qualify the language of mercantile contracts, such as a policy of insurance. A usage such as is pleaded in this suit, if existing, must be notorious and certain, and have been uniform in its application and long established in practice. It must have been exhibited in the transactions of the individuals and corporations concerned, in conducting the business of shipments, transportation, and insurance, through the Mississippi valley.

If the evidence had established that policies of insurance there did not designate fire among the risks assumed; that the words "perils of the river" were used to include that risk, and losses by fire had been uniformly settled under that clause in the policy; that contracts of affreightment had been made and losses adjusted on the same conditions; that these usages had received the sanction of professional and judicial opinion in the States bordering that river—the cause of the appellants would have presented different considerations. The record contains nothing to exempt them from the legal rule of liability, as established by the common law. Seven of the bills of lading produced contain the exception, "perils of the river and fire;" three others add to the perils of the river, "unavoidable accidents;" and in these cases the Circuit Court exonerated the appellants from responsibility.

The appellants further contend that the insurance company is not subrogated to the claims of the shippers of the cotton, whose losses have been adjusted on their policies of insurance; or, if this is so, still their suit should have been at law, in the name of the assured—the remedy being adequate and complete. In Randell *v.* Cochran, (1 Vesey, sen., 98,) the chancellor replied to a similar objection, "that the plaintiff had the plainest equity that could be." The person originally sustaining the loss was the owner; but, after satisfaction made to him, the insurer. And in White *v.* Dabinson, (14 Sim., 273,) an insurer enforced a lien on a judgment recovered by the assured for a loss, where the loss had been partially settled by him, on the policy. (Monticello *v.* Morrison, 17 How., 152.) These cases also show that an insurer may apply to equity whenever an impediment exists to the exercise of his legal remedy in the name of the assured.

The bill discloses fifteen different contracts of affreightment, of a similar character, which have been adjusted by the appellees, and which form the subject of this suit.

They have been joined in the same bill, and much incon-

venience and vexation have been prevented. Without further inquiry, we think a sufficient ground for a resort to equity is disclosed.

Decree affirmed.

THE COMMERCIAL MUTUAL MARINE INSURANCE COMPANY, APPELLANTS, *v.* THE UNION MUTUAL INSURANCE COMPANY OF NEW YORK.

Where application for reinsurance was made on Saturday, upon certain terms, which were declined, and other terms demanded, and on Monday these last-mentioned terms were accepted by the applicant, and assented to by the president, but the policy not made out, because Monday was a holyday, the agreement to issue the policy must be considered as legally binding.

The law of Massachusetts is, that although insurance companies can make valid policies only when attested by the signatures of the president and secretary, yet they can make agreements to issue policies in a less formal mode.

By the common law, a promise for a valuable consideration to make a policy is not required to be in writing, and there is no statute in Massachusetts which is inconsistent with this doctrine.

Where the power of the president to make contracts for insurance is not denied in the answer, or made a point in issue in the court below, it is sufficient to bind the company if the other party shows that such had been the practice, and thereby an idea held out to the public that the president had such power.

It is not essential to the existence of a binding contract to make insurance, that a premium note should have been actually signed and delivered.

THIS was an appeal from the Circuit Court of the United States for the district of Massachusetts, sitting in equity.

The facts are stated in the opinion of the court.

The case was argued by *Mr. Curtis* for the appellants, and *Mr. Goodrich* for the appellees.

Mr. Justice CURTIS delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the district of Massachusetts, in a suit in equity, to compel the specific performance of a contract to make reinsurance on the ship Great Republic. The Circuit Court made a decree in favor of the complainants, and the respondents appealed.

It appears that the complainants, a corporation established in New York, having made insurance of the ship Great Republic to a large amount, authorized Charles W. Storey, at Boston, to apply for and obtain from either of the insurance companies there reinsurance to the extent of ten thousand dollars. Pursuant to this authority, on the 24th December, 1853, Mr. Storey made application to the president of the defendant

corporation for reinsurance, at the same time presenting a paper, partly written and partly printed, as embodying the terms of the application. The paper was as follows:

"Reinsurance is wanted by the Union Mutual Insurance Company, New York, for $10,000, on the ship Great Republic, from December 24, 1853, at noon, for six months ensuing.

"This policy is to be subject to such risks, valuations, and condition, including risk of premium note, as are or may be taken by the said Union Mutual Insurance Company, and payment of loss to be made at the same time. 3 per cent.

"Binding, ——— ———, *President.*

"*New York, December* 24, 1853."

The president, after consultation with one of the directors of the company, declined to take the risk for a premium of three per cent., but offered to take it for three and a half per cent.

Mr. Storey replied, that was more than he was authorized to give, and left the office. He immediately apprised his principals, by a telegraphic despatch, that the risk could be taken for three and a half per cent. for six months, or six per cent. a year. The reply, on the same day, was, "Do it for six months, privilege of cancelling if sold." This reply did not come to the hands of Mr. Storey until Monday, the 26th day of December, when he went to the office of the respondents, and found there the president of the company, but not any other person, as the day was generally observed, by merchants, bankers, and insurers, as a holyday, Christmas having fallen on Sunday.

Mr. Storey informed the president he was willing to pay three and a half per cent. for the reinsurance described in the proposal, took a pen and altered the three per cent. to three and a half per cent., by adding ½ to 3 on the paper, and it is admitted by the answer that the president thereupon assented to the terms contained in the paper, but informed Mr. Storey that no business was done at the office on that day, and that the next day he would attend to it. The president then took the paper and retained it.

To a special interrogatory contained in the bill, the defendants answer:

"That its president did assent to the terms and provisions in said paper, as the terms and provisions of a reinsurance to be completed and executed by this defendant, by the making and execution of a policy in due form, according to the requisitions of the laws of Massachusetts, and the by-laws of this defendant, but they were not assented to as a present insurance."

Upon these facts, we are of opinion there was an agreement to reinsure according to the terms contained in the proposal, concluded by and between Mr. Storey and the president at this interview on Monday the 26th of December. The paper contained every particular essential to a contract to make reinsurance. It ascertained the subject of insurance, the commencement and duration of the risk, the parties, the interest of the assured, and the premium; and for the special risks, the valuations, and conditions, it referred to the original contract of insurance made by the complainants, by reason of which they were seeking reinsurance.

On Saturday, the president had offered to contract in accordance with the paper, saving a difference of one-half per cent. on the premium.

It was argued that it could not be considered an acceptance, on Monday, of a continuing offer made on Saturday, because, when the complainants authorized Mr. Storey to give three and a half per cent., they at the same time imposed a new condition by the words, "privilege of cancelling if sold." But Mr. Storey testifies, and this is not denied by the answer, or by any witness, that when he made the application on Saturday, and before the president had named the premium which he was willing to take, the president said he supposed that they would have to cancel the policy, if the vessel should be sold within the time; and that he (Storey) assented thereto; and that at the interview on Monday, when this point was referred to, the president said the usage in Boston would settle it, and he would not put anything concerning it into the policy; and after some conversation concerning the usage, Mr. Storey agreed to take the policy without any mention of the privilege of cancellation. Under these circumstances, we do not perceive that the requirement of this privilege can be considered as at all varying, in the apprehension and meaning of the parties, the terms of the acceptance on Monday, from the terms of the proposal on Saturday. But whether, under all the circumstances, this should be deemed to have been a continuing offer, we do not think it necessary to determine; because, on Monday, either the president's offer of Saturday was accepted by Mr. Storey, and its acceptance made known to the president, or the proposal was renewed by Mr. Storey, and accepted by the president. The fact that others chose to abstain from business on that day did not prevent these parties from contracting, if they saw fit to do so; and when one of them either accepted a continuing offer, or renewed a proposal which was accepted by the other, they made a binding contract. Nor do we think the allegation of the answer, that the president in-

formed Mr. Storey that no business was done in the office that day, but the next day he would attend to it, can reasonably be interpreted to mean that he had not made, or intended to make, a contract for a policy. Their fair meaning is, that though he had agreed to make the insurance, as the secretary and clerks were not there, and the books not accessible, any action on the agreement must be deferred to the next day. The words cannot be understood to mean, that he would on the next day attend to what he had already done; and he had already made a contract for reinsurance, to be executed on the next day, by issuing a policy in due form to carry that agreement into effect.

On leaving the office of the defendants, Mr. Storey immediately informed the plaintiffs that he had effected this contract, and on the night of the same day the ship Great Republic was destroyed by fire, while lying at a wharf in the city of New York. On the twenty-seventh of December, the complainants tendered their note for the agreed premium, and demanded the policy of reinsurance. The defendants declined to make the policy. Several grounds have been insisted on in support of this refusal:

The first is, that by force of a statute of the State of Massachusetts, (Rev. Stats., ch. 37, secs. 12, 13,) insurance corporations can make valid policies of insurance only by having them signed by the president and countersigned by the secretary. But we are of opinion that this statute only directs the formal mode of signing policies, and has no application to agreements to make insurance.

Such we understand to be the view taken of this statute by the Supreme Court of Massachusetts. (New England Ins. Co. *v.* De Wolf, 8 Pick., 63; [Stat. 1817, ch. 120, sec. 1;] McCullock *v.* The Eagle Ins. Co., 1 Pick., 278; Thayer *v.* The Med. Mu. Ins. Co., 10 Pick., 326. See also Trustees *v.* Brooklyn Fire Ins. Co., 18 Barbour, 69; and Carpenter *v.* The Mu. Safety Ins. Co., 4 Sand. Ch. R., 408.)

It is further insisted, that by the law merchant insurance can be effected only by a contract in writing. We do not doubt that the commercial law of all countries has treated of insurance as made in writing by an instrument, denominated by us a policy; and there may be provisions of positive law, in some countries, requiring an agreement to make a policy to be in writing. But there is no such statute of frauds in the State of Massachusetts.

The common law must therefore determine the question; and under that law, a promise for a valuable consideration to make a policy of insurance is no more required to be in writing

than a promise to execute and deliver a bond, or a bill of exchange, or a negotiable note. So it has been held by other courts, and, we think, on sound principles. (18 Barbour, 69; Hamilton *v.* The Lycoming Company, 5 Barr., 339. See also Sanford *v.* The Trust Fire Ins. Co., 11 Paige, 547.)

The respondents' counsel has argued that their president had not authority to enter into an oral contract binding the company to make insurance. They admit it has been usual for the president to make such contracts; but they say that when he has done so, the policy was not issued until the next day, and no risk is understood to have commenced under such an undertaking until the policy issues. Whether a risk be commenced when the contract for insurance is made, or only when the policy issues, must depend on the terms of the contract. Where, as in the present case, there is an express contract to take the risk from a past day, there is no room for any understanding that it is not to commence until a future day. Such an understanding would be directly repugnant to the express terms of the contract. And if the defendants have held out their president as authorized to make oral contracts for insurance, no secret limitation of this authority would affect third persons, dealing with him in good faith and without notice of such limitation. Besides, the supposed limitation would be inconsistent with the authority itself. It is, in effect, that though the president is authorized to make oral promises to effect insurance, the company are at liberty to execute those promises, or to refuse to do so, at their option.

The power of the president to enter into this contract to make insurance is nowhere denied in the answer. All that can bear on this subject occurs in certain statements concerning the usual course of business of the company. It seems to have been assumed by both parties, that whatever the president actually did in this transaction, he did for the company, and so as to render them responsible for his acts. And no question was raised on this point in the court below. Still it is incumbent on the complainants to offer competent and sufficient evidence of the authority of the president to bind the company, though less evidence may be reasonably sufficient when no issue concerning it is made on the record.

We think such evidence is in the case. Mr. Storey deposes, that during the three years next preceding this transaction, he had effected upwards of three hundred contracts for reinsurance, with the presidents of ten different insurance companies of Boston; and that one, or possibly two, of these presidents usually signed an accepted application—the others all contracted orally. Considering that all the incorporated insurance

companies in Boston have similar charters, and the same kind of officers to conduct their business, we think this is competent evidence, that presidents of such insurance companies in that city are generally held out to the public as having the authority to act in this manner. And upon a point not put in issue in the record, and on which no more than formal proof ought to be demanded, we hold this evidence sufficient. (Fleckner *v.* The Bank of the United States, 3. Whea., 360; Minor *v.* The Mechanics' Bank of Alexandria, 1 Peters, 46.)

The fair inference is, that if the general authority of the president to contract for the corporation had been put in issue, it could have been shown, by the most plenary proof, that the presidents of insurance companies in the city of Boston are generally held out to the public by those companies as their agents, empowered to receive and assent, either orally or in writing, to proposals for insurance, and to bind their principals by such assent.

Nor do we deem it essential to the existence of a binding contract to make insurance, that a premium note should have been actually signed and delivered. The promise of the plaintiffs to give a note for the premium was a sufficient consideration for the promise to make a policy. It is admitted, that the usage is to deliver the note when the policy is handed to the assured. If the defendants had tendered the policy, we have no doubt an action for not delivering the premium note would have at once lain against the plaintiffs; and we think there was a mutual right on their part, after a tender of the note, to maintain an action for non-delivery of the policy. In Tayloe *v.* The Mutual Fire Ins. Co., (9 How., 390,) it was held that a bill in equity for the specific performance of a contract for a policy could be maintained. And it being admitted that in this case the defendants would be liable as for a total loss on the policy, if issued in conformity with the contract, no further question remained to be tried, and it was proper to decree the payment of the money, which would have been payable on the policy, if it had been issued.

The decree of the Circuit Court is affirmed.

EDWARD FIELD, PLAINTIFF IN ERROR, *v.* PARDON G. SEABURY ET AL.

When a grant or patent for land, or legislative confirmation of titles to land, has been given by the sovereignty or legislative authority only having the right to make it, without any provision having been made, in the patent or by the law,

to inquire into its fairness between the grantor and grantee, or between third parties and the grantee, a third party cannot raise, in ejectment, the question of fraud as between the grantor and grantee.

A bill in equity lies to set aside letters patent obtained by fraud, but only between the sovereignty making the grant and the grantee.

Such a patent or grant cannot be collaterally avoided at law for fraud.

The act of March 26, 1851, (California Laws, 764,) makes a grant of all lands of the kind within the limits mentioned in it which had been sold or granted by any alcalde of the city of San Francisco, and confirmed by the ayuntamiento or town or city council thereof, and also registered or recorded in some book of record which was at the date of the act in the office or custody or control of the recorder of the county of San Francisco, on or before the third day of April, one thousand eight hundred and fifty.

The registry of an alcalde grant, in the manner and within the time mentioned in the act, is essential to its confirmation under the act. In that particular, the grant under which the plaintiff in this suit claimed, is deficient. The defendants brought themselves by their documentary evidence within the confirming act of March 26, 1852.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of California.

The case is fully stated in the opinion of the court.

It was argued at December term, 1855, by *Mr. Lockwood* for the plaintiff in error, and *Mr. Holladay* for the defendants, and held under a *curia advisare vult* until the present term.

Mr. Justice WAYNE delivered the opinion of the court.

This case has been brought to this court by writ of error from the Circuit Court of the United States for the district of California.

The circumstances disclosed by the record, and the documentary evidence introduced by the parties in support of their respective rights to the land in controversy, make an extended statement necessary, in order that the points decided may be understood.

The defendant in error brought into the Circuit Court an action of ejectment against Wyman and others, tenants of the plaintiff in error, to recover the possession of lot No. 464, it being a subdivision of a lot of one hundred varas square, numbered 456, of the San Francisco beach and water lots. Field, the plaintiff in error, was admitted to defend, and a verdict having been given for the plaintiffs below, it was agreed by a stipulation in the record that this writ of error should be prosecuted by Field alone, without joining the other defendants.

Both parties claimed title under an act of the Legislature of California, passed the 26th March, 1851, entitled "An act to provide for the disposition of certain property of the State of California," the provisions of which, so far as they relate to this cause, are as follows:

The first section of the act describes the land to be disposed of; and the second section is, that "the use and occupation of all the land described in the first section of the act is hereby granted to the city of San Francisco for the term of ninety-nine years from the date of this act, except as hereinafter provided; all the lands mentioned in the first section of this act, which have been sold by authority of the ayuntamiento, or town or city council, or by any alcalde of the said town or city, at public auction, in accordance with the terms of the grant known as Kearney's grant to the city of San Francisco, or which have been sold or granted by any alcalde of the said city of San Francisco, and confirmed by the ayuntamiento, or town or city council thereof; *and also registered or recorded in some book of record now in the office or custody or control of the recorder of the county of San Francisco, on or before the third day of April, A. D. one thousand eight hundred and fifty, shall be and the same are hereby granted and confirmed to the purchaser or purchasers or grantees aforesaid, by the State relinquishing the use and occupation of the same and her interests therein to the said purchasers or grantees, and each of them, their heirs and assigns, or any person or persons holding under them, for the term of ninety-nine years from and after the passage of this act.*"

SEC. 3. "That the original deed, or other written or printed instrument of conveyance, by which any of the lands mentioned in the first section of this act were conveyed or granted by such common council, ayuntamiento, or alcalde, and in case of its loss, or not being within the control of the party, then a record copy thereof, or a record copy of the material portion thereof, properly authenticated, may be read in evidence in any court of justice in this State, upon the trial of any cause in which the contents may be important to be proved, and shall be *prima facie* evidence of title and possession, to enable the plaintiff to recover the possession of the land so granted."

Kearney's grant mentioned in the act was read in evidence at the trial by the plaintiffs in the action; it is dated March 10th, 1847, and is as follows:

"I, Brigadier General S. W. Kearney, Governor of California, by virtue of authority in me vested by the President of the United States of America, do hereby grant, convey, and release, unto the town of San Francisco, the people or corporate authorities thereof, all the right, title, and interest thereof, of the Government of the United States, and of the Territory of California, in and to the beach and water lots on the east front of said town of San Francisco, including between the points known as the Rincon and Fort Montgomery, excepting such lots as may be selected for the use of the General Gov-

ernment by the senior officers of the army and navy now there, provided the said ground hereby ceded shall be divided into lots, and sold by public auction to the highest bidders, after three months' notice previously given. The proceeds of said sale to be for the benefit of the town of San Francisco."

It was agreed by the parties at the trial that the lot sued for is included in the first section of the act of March 26, 1851, already cited, and also within the locality of the Kearney grant; that it is no part of any Government reservation; and that on the 9th of September, 1850, when California was admitted as a State into the Union, the lot was below high-water mark.

In order to show themselves entitled to the lot in question under the second section of the act cited, the plaintiffs below produced the following documents:

1. A grant by John W. Geary, first alcalde of San Francisco, to Thomas Sprague, dated January 3d, 1850, reciting the Kearney grant, calling it a "decree," and that by virtue thereof, and by direction of the ayuntamiento, a certain portion of said ground, duly divided into lots as aforesaid, after notice, as required by the "decree" or grant, had been exposed to sale at public auction, in conformity with it, on the 3d day of January, 1850; and that one of the lots, numbered on the map 464, had been sold to Thomas Sprague for $1,700, for which he had paid in cash $425, and had obliged himself to pay the sum of $1,275 in three equal instalments, on the 3d of April, 3d of July, and the 3d of October; that Sprague then received a grant for the lot to him, his heirs and assigns, forever, of all the estate that the town of San Francisco had in the same, as fully as the same was held and possessed by it, subject to a proviso that the grant was to be void for failure to pay the instalments.

The foregoing document or grant was not recorded or registered, nor was any evidence given that three months' notice of the sale had been given, other than the recitals in the grant.

2. The plaintiff introduced a deed from Sprague to Seabury, Gifford, and one Horace Gushee, dated May 17, 1850, conveying to them in fee all his right and title to the lot sued for, and also another lot, No. 450, for the sum of $4,000, with a provision that they should pay $1,560 of the instalments payable to the town.

The plaintiffs then introduced a deed from Horace Gushee to the plaintiff Parker, conveying to Parker in fee all his right and title to the water lot No. 464, for the consideration of $100, which was dated April 20th, 1855.

Receipts by the city officers for three of the instalments of

the purchase-money, dated the 3d April, 3d July, and 3d October, were endorsed upon the grant.

The plaintiffs then rested their case upon the foregoing evidence.

Two grounds of defence were relied upon by the defendants: First, that the Geary grant was not within the act of March 26, 1851, for want of the notice of sale required by the Kearney grant; and also that it had never been registered and recorded, as the act required, in some book of record now in the office now in the custody or control of the recorder of the county of San Francisco, on or before the third day of April, one thousand eight hundred and fifty. Second, that the defendants and those under whom they claimed had a good title to the premises under the provisions of the act of March 26, 1851. They also relied upon a possession of the premises for more than five years prior to the institution of the suit. To prove their title, the defendants gave in evidence the following documents:

1st. A grant of the lot one hundred varas square, (of which the lot in question was a subdivision,) dated September 25th, 1848, by Leavenworth, alcalde of San Francisco, to Parker, upon the petition of the latter, both written on the same sheet, as follows:

"*To T. N. Leavenworth, Alcalde and Chief Magistrate, district San Francisco:*

"Your petitioner, the undersigned, a citizen of California, respectfully prays the grant of a title to a certain lot of land in the vicinity of the town of San Francisco, containing one hundred varas square, and bounded on the north by Washington street, on the west by a street dividing said lot from the beach and water survey, on the south by Clay street, and on the east by unsurveyed land, and numbered on the plan marked on page one (1) of district records as four hundred and fifty-six (456.)

WILLIAM C. PARKER."

On the same day the grant was made, as follows:

"TERRITORY OF CALIFORNIA,

"*District of San Francisco, Sept.* 25, *A. D.* 1848.

"Know all men by these presents, that William C. Parker has presented the foregoing petition for a grant of land in the vicinity of the town of San Francisco, as therein described; therefore I, the undersigned, alcalde and magistrate of the district of San Francisco, in Upper California, do bereby give, and grant, and convey, unto the said William C. Parker, his

heirs and assigns, forever, the lot of ground as set forth in the petition, by a good and sufficient title, in consonance with the established customs and regulations, being one hundred varas square, lying and being situated in the eastern vicinity of San Francisco, and outside the limits of the water-lot survey.

"In testimony whereof, I have hereunto set my hand, as alcalde and chief magistrate of the district aforesaid.

"Done at San Francisco, the day and year above written.

"T. M. LEAVENWORTH.

"Recorded in the alcalde's office, in book F of land titles, on page number 18, at 10½ o'clock, A. M., November 28, 1849.

"*Office First Alcalde.* A. BOWMAN, *Reg. Cl'k.*"

Then the defendants called Parker as a witness, to prove the execution of the grant in the manner and at the time as has been just stated, producing at the same time a deed from Parker to Leavenworth, dated the 26th September, 1848, and Parker certified it had been executed by him.

It was also proved that Leavenworth conveyed the premises to George W. Wright, by deed dated the 1st December, 1849. Wright conveyed one undivided half of the lot in fee to Charles T. Botts, and the other undivided half of the same to Edward Field, the now plaintiff in error, except two lots or subdivisions of the same, numbered 467 and 468. A deed from Botts, dated 1st October, 1852, to Joseph C. Palmer and Wright, conveying to them in fee the one undivided half of said lot, except the subdivisions of it 467 and 468, for the consideration of $40,000, reciting the premises conveyed to be ten water lots, and that Botts derived title through the deed from Wright to him; and Palmer then conveyed the last-mentioned premises as they held them to Field, the plaintiff in error, for $75,000, without any recital of the preceding conveyances, and the same was recorded on the 12th January, 1853, the day of the execution of the deed. It is as well to remark, that all of the deeds just mentioned were in the county recorder's office. It was also agreed by the parties, in writing, that the original defendants in the action were in possession of the premises under leases from Field, the plaintiff in error, the production of the leases being dispensed with.

The defendants also gave in evidence book B of the district records, page 1, kept in the alcalde's office, and as such turned over to the recorder of the county of San Francisco, upon the organization of that office in May, 1850, to prove from it that there had been a certificate of the Leavenworth conveyance of the land to Parker, contemporary with the execution of it.

The authenticity of the book B was proved by the testimony of witnesses who had been connected with the office of the alcalde, and afterwards with the office of the recorder of the county. Other testimony was also introduced by the defendants, of another book, F, kept by Alcalde Geary, the predecessor of Leavenworth, in which grants issued by his predecessor were recorded at length, which was turned over to the county recorder at the same time with book B, in which there was a literal transcript of Parker's original petition and Leavenworth's grant, as they have been already recited.

The defendants also gave in evidence a resolution of the ayuntamiento or town council of San Francisco, of the 11th October, 1848, confirming the grants of Leavenworth to several parcels of land adjacent to the town, on the ground that Leavenworth had made them for the purpose of raising funds to defray the necessary expenses of the town and district. A deed from the board of California land commissioners, acting under the act of May 18, 1853, by which they were authorized to sell the interest of the State in the San Francisco beach and water-lot property, was also put in evidence by the defendants, which conveyed in fee to Joseph Palmer and Edward C. Jones all the right, title, and interest, of the State of California in the aforesaid ten water lots, for the consideration of $1,425. It was also proved that Palmer, Cook, & Co., of which Palmer, Wright, and Jones, were members, commenced improving the lot in May, 1850, more than five years before the commencement of the suit, which was on the 7th June, 1855, and that they shortly afterwards leased it to one Gordon, who erected on it valuable improvements; and that they, and others claiming under them, had ever since occupied the premises.

A resolution of the town council, passed on the 5th October, 1849, requesting the alcalde to advertise the sale at the earliest moment, was also put in proof by the defendants, to show that the Geary grant of January 7, 1850, had been made without three months' notice of the sale having been given. Then, at this stage of the trial, the plaintiffs were permitted to discredit the fact that Leavenworth's grant to Parker had been recorded, as has been stated, by showing that there had been mistakes in recording grants in the book of records, and that there were several entries in the book purporting to be copies of grants by Leavenworth in 1849, after he was out of office, which the court permitted to be done—the defendants objecting—on the ground that, by reading from the book the grant to Parker, the defendants had made the entire book evidence; *and that the plaintiffs might read other entries in it, without any proof that the grants had been issued, or in fact dated, in the year* 1849. The

court also permitted Parker, the original grantee of Leavenworth, to be examined as a witness; and also Clark, a member of the town council, to prove that there had been fraud in the issue and confirmation of the Leavenworth grant. And upon the defendants objecting to the admissibility of such evidence, the court overruled their objection, saying "that the act of March 26, 1851, under which the plaintiffs and defendants claimed to have a title to the premises in dispute, was intended to confirm only honest titles, and that the plaintiff might impeach the Leavenworth grant to Parker, and the confirmation of it by the town council, by showing fraud." And under this ruling of the court, the plaintiffs were permitted to read as evidence from the books of records B and F, and from other books purporting to be minutes of grants made by Leavenworth to one Clark, to Jones and Buchelin, prior to October 11, 1848, intending to show by them that the members of the council who voted for the resolution of that date held divers grants which were confirmed by it, and had therefore acted fraudulently. And that was done without any proof of identity between the supposed grantees and other members of council, and without producing any originals of the supposed grants, or proving that any such grants were made. The witnesses, however, introduced to prove fraud in the issue of the Leavenworth grant, denied positively that it existed.

We do not think a more extended statement from the record necessary for the conclusion at which we have arrived in this case. That which has been given is sufficient for the construction of the act of March 26, 1851, under which both parties claim the premises in dispute, and for the decision of the exception taken by the defendants to the ruling of the court in respect to the admissibility of witnesses to prove that Leavenworth had practised a fraud in issuing a grant to Parker for the lot 456.

It is admitted, that neither the plaintiff nor defendant could claim a title to any part of that lot under these alcalde grants, unless they can be brought within the act of March 26, 1851. (Laws of California, 764.) The court below said, in its charge to the jury, that neither of the alcaldes had any power to grant land, and that no estate passed by either of their grants. These documents are only to be considered as ear-marks to designate the legislative grantees, who were intended to take under the act of March 26, 1851. Both parties in the suit bringing themselves within the classes designated, *the defendants, being in possession, as has been ascertained by the evidence, would on principles of law be entitled to a verdict.* In this the court was correct; and its first obligation, when the case was sub-

mitted to the jury, was to determine, by its construction of the act, whether both parties or either of them had, by their documentary evidence, been brought within the classes of grantees designated by the act. This, however, it did not do; but leaving that question undecided, after permitting the plaintiffs to introduce witnesses to prove that the Leavenworth grant had been fraudulently issued by him, it submitted the case to the jury, making it not only competent to find the fact of fraud, but constituting the jurors judges of the legal question, whether the plaintiff who had alleged the fraud was within the classes of grantees which the Legislature meant to confirm, and that the defendant's alcalde grant was not comprehended by the legislative act—thus giving to a party who might not be able to claim a title under the act a chance, by the verdict of a jury, to dispossess another, also without a title under it, who had just been said by the court, in a controversy between them for the land, would be entitled to a verdict in virtue of his being in possession of it. If the plaintiff had no title under the act, though the defendant also was without one, the former could have no complaint against him, nor any legal right to recover in ejectment land of which the defendant was in possession. The court, in this part of its ruling, made the charge of fraud the turning-point in the case, and not the right of title to the premises, by the construction of the act under which both parties claimed a title, and by which it had said either could only claim. The result was, the jury, having been so instructed, found a verdict for the plaintiff upon the question of fraud, without any instruction in any part of its charge that he claimed a title from an alcalde's grant, which was within the act of March 26, 1851, or that the defendant was without one, unless it be the court's intimation to the jury that the defendant might be considered as having no title under the act, if they should find that there had been fraud in the issue of his alcalde grant, or in the confirmation of it. The court's construction of the rights of the parties under the act should have been independent of the question of fraud. The evidence which it allowed to be given of it was inadmissible, and the finding of the jury is of no weight in the case. Fraud, as it is sometimes said, "vitiates every act"—correctly, too, when properly applied to the subject-matter in controversy, and to the parties in it, and in a proper forum. For instance, as when one of them charges the other with an actual fraud; or when one of them, by his omission to do an act in time, which he ought to have done, as in not having recorded a deed, the other, without any knowledge of its existence, becomes in good faith a purchaser of the same property; in such a case a claim,

under the unregistered deed, is said to be fraudulent and void against a subsequent *bona fide* purchaser without notice. But in that case, the latter gains a legal preference by the court's construction of the registry act, under which the first deed ought to have been recorded, and, as a matter of law, so instructs the jury. But these cases are not applicable to the case in hand. Those are cases where the actual or constructive fraud grows out of the conduct of parties directly to each other, or is consequential from such conduct.

This case involves directly the point *whether*, when a grant or patent for land, or legislative confirmation of titles to land, has been given by the sovereignty or legislative authority only having the right to make it, without any provision having been made in the patent or by the law to inquire into its fairness as between the grantor and grantee, or between third parties, a third party cannot raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the patent or grant.

We are not aware that such a proceeding is permitted in any of the courts of law. In England, a bill in equity lies to set aside letters patent obtained from the King by fraud, (Att. Gen. *v.* Vernon, 277, 370; the same case, 2 Ch. Rep., 353,) and it would in the United States; but it is a question exclusively between the sovereignty making the grant and the grantee. But in neither could a patent be collaterally avoided at law for fraud. This court has never declared it could be done. Stoddard and Chambers (2 How., 284) does not do so, as has been supposed. In that case, an act of Congress confirming titles, *excepted* cases where the land had previously been located by any other person than the confirmee, under any law of the United States, or had been surveyed and sold by the United States; and this court held that a location made on land reserved from sale by an act of Congress, or a patent obtained for land so reserved, was not within the exception, and the title of the confirmee was made perfect by the act of confirmation, and without any patent, as against the prior patent, which was simply void; and this valid legal title enured at once to the benefit of an assignee of the confirmee. In this connection it must be remembered that we are speaking of patents for land, and not of transactions between individuals, in which it has been incidentally said, by this court, that deeds fraudulently obtained may be collaterally avoided at law. (Gregg *v.* Sayre, 8 Peters, 244; Swayzer *v.* Burke, 12 Peters, 11.)

But we are also of the opinion that the act of March 26, 1851, to provide for the disposition of certain property of the

State of California, (Cal. Laws, 764,) makes a direct grant of all lands of the kind, and within the limits mentioned in the act, which had been sold or granted by any alcalde of the city of San Francisco, and confirmed by the ayuntamiento, or town or city council thereof, and also *registered or recorded in some book of record which was at the date of the act in the office or custody or control of the recorder of the county of San Francisco, on or before the third day of April, one thousand eight hundred and fifty.* The words of the statute are, "that all the lands mentioned in the first section of it are hereby granted and confirmed to the purchaser or purchasers, or grantees aforesaid, by the State relinquishing the use and occupation of the same, and her interests therein, to the said purchasers or grantees, and each of them, their heirs and assigns, or any person or persons holding under them, for the term of ninety-nine years from and after the passage of the act." This language cannot be misinterpreted. The intention of the Legislature is without doubt, and we cannot make it otherwise by supposing any condition than those expressed in the act; and we also think that the registry of an alcalde's grant, in the manner and within the time mentioned in the act, is essential to its confirmation under the act. In this particular, the Kearney grant, under which the plaintiff claimed, was deficient, and so the court should have instructed the jury upon the prayer of the defendant, without the qualification that the entry made of it in the district records was a registry within the meaning of the act. We do not deem it necessary to say more in this case, than that, in our view, the defendants have brought themselves, by their documentary evidence, completely within the confirming act of the 26th March, 1850, and that the court should have so instructed the jury, as it was asked to do by their counsel.

The judgment of the court below is reversed.

EDWARD FIELD, PLAINTIFF IN ERROR, *v.* PARDON G. SEABURY ET AL.

The decision in the preceding case of Field *v.* Seabury, again affirmed.

THIS, like the preceding case, was brought up, by writ of error, from the Circuit Court of the United States for the district of California. It was argued in connection with the preceding case.

Mr. Justice WAYNE delivered the opinion of the court.

This case was like the preceding, and they were argued together.

For the reasons given in the first of them, the court directs the reversal of the judgment in the court below, in this case.

WILLIAM F. BRYAN AND RUDOLPHUS ROUSE, PLAINTIFFS IN ERROR, *v.* ROBERT FORSYTH.

By the acts of Congress passed on the 15th of May, 1820, and March 3d, 1823, provision was made, that each of the settlers in Peoria, Illinois, should be entitled to a village lot, and the surveyor of public lands was directed to designate upon a plat the lot confirmed to each claimant.

The act of 1823 conferred on the grantee an incipient title; and when the survey was made and approved, by which the limits of the lot were designated, the title then became capable of sustaining an action of ejectment, even before a patent was issued.

In the interval between 1823 and the survey, a patent was taken out, which was issued subject to all the rights of persons claiming under the act of 1823. This patent was controlled by the subsequent survey.

But although it was controlled by the subsequent survey, yet the patent was a fee-simple title upon its face, and sufficient to sustain a plea of the statute of limitations in Illinois, which requires that possession should be by actual residence on the land, under a connected title in law or equity, deducible of record from the United States, &c.

The American State Papers, published by order of Congress, may be read in evidence, in the investigation of claims to land.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the northern district of Illinois.

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

It was argued by *Mr. Ballance* and *Mr. Johnson* for the plaintiffs in error, and submitted on a printed argument by *Mr. Williams* for the defendant.

Mr. Justice CATRON delivered the opinion of the court.

Forsyth sued Bryan and Rouse in ejectment for part of lot No. 7, in the town of Peoria, in the State of Illinois. The action was founded on a patent to Forsyth, from the United States, dated the 16th day of December, 1845, which patent was given in evidence on the trial in the Circuit Court. It was admitted that the defendants were in possession when they were sued, and that they held possession within the bounds of the patent. To overcome this *prima facie* title, the defendants gave in evidence a patent from the United States to John L. Bogardus, containing twenty-three acres, dated January 5th, 1838, which included lot No. 7. To overreach this elder patent, the plaintiff relied on an act of Congress, passed May 15,

1820, for the relief of the inhabitants of the village of Peoria, providing that every person who claims a lot in said village 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 in writing of his or her claim; and it was made the duty of the register to make a report to the Secretary of the Treasury of all claims filed, with the substance of the evidence in support thereof, and also his opinion, and such remarks respecting the claims as he might think proper to make; which report, together with a list of the claims which, in the opinion of the register, ought to be confirmed, shall be laid by the Secretary before Congress, for their determination.

The report was made, and laid before Congress, in January, 1821. As respected lot No. 7, (a part of which is in dispute,) the register reported that Thomas Forsyth claimed it; that it was three hundred feet square, French measure, situate in the village of Peoria, and bounded eastwardly by a street, separating it from the Illinois river; northwardly by a cross street, westwardly by a back street, and southwardly by a lot claimed by Jacques Mette. The remark of the register is: "A part of this lot must have been embraced by the lot claimed by Augustine Rogue." Rogue's claim (No. 2) was for a lot of about an arpent, and bounded, says the register, northwardly by a lot occupied by Maillette, eastwardly by a road separating it from Illinois river, and southwardly and westwardly by the prairie.

The register reported on seventy lots in all. A survey to designate boundaries among the claimants was indispensable, as they were in considerable confusion. Congress again legislated on the subject, by act of March 3, 1823, and provided that each of the settlers, whose names were contained in the report, who had settled a village lot prior to the first of January, 1813, should be entitled thereto; the lot so settled on and improved, not to exceed two acres; and where it exceeded two acres, such claimant should be confirmed in a quantity not exceeding ten acres. It was made the duty of the surveyor of public lands for the district, 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 forward the same to the Secretary of the Treasury, who shall (says the act) cause patents to be issued in favor of each claimant, as in other cases.

The survey was made in 1840, by order of the surveyor general of Illinois and Missouri, which was duly returned, approved, and recorded. We are of opinion that the act of 1823 conferred on the grantee an incipient title, and reserved to the

executive department administering the public lands the authority to settle the boundaries by actual survey among the claimants; and until this was done, the courts of justice could not interfere and establish boundaries. It was competent for Congress to provide, that before a title should be given to a confirmee, the exact limits of his confirmation should be ascertained by a survey executed by authority of the United States. (West *v.* Cochran, 17 How., 415.)

When the surveys were made, and the plats returned and approved, and recorded by the surveyor general of Illinois and Missouri, and recognised as valid at the General Land Office, (as the patent to Forsyth shows it was,) it bound the parties to it, the confirmee and the United States; nor can either side be heard to deny, that the land granted by the act of 1823 is the precise lot Forsyth was entitled to; such being the settled doctrine of this court. (Menard's Heirs *v.* Massey, 8 How., 313.) Neither can Bogardus or his assignee deny that he was concluded by the survey. His patent grants the land to him in fee, "subject, however, to all the rights of any and all persons claiming under the act of Congress of 3d March, 1823, entitled 'An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois.'" This patent is the only title set up by the defendants below; by its terms, all power to perfect the title of Forsyth, according to the act of 1823, was reserved to and retained by the department of public lands, as effectually after the Bogardus patent was issued as before.

The survey having bound the United States, and concluded Bogardus, Forsyth had a title by virtue of the acts of 1820 and 1823, and the survey, which was of a legal character; and he could maintain an action of ejectment on it, even had no patent issued. This is true beyond controversy, if the action had been prosecuted in a State court, where the State laws authorized suits in ejectment on imperfect titles. (Ross *v.* Borland, 1 Pet., 655; Chouteau *v.* Eckhard, 2 How., 372.)

But it is insisted that in the courts of the United States a different rule applies, and that, as a patent carries the fee, it is the better title. The case of Robinson *v.* Campbell (3 Wheat., 212) is supposed to be to this effect. There, the conflicting patents were made by the Commonwealth of Virginia, and the defendant attempted to prove that a settlement had been made on the land in dispute by one Fitzgerald, and which preference right had been assigned to Martin, who obtained a certificate from the commissioners for adjusting titles to unpatented lands; which certificate was of anterior date to the junior patent, and was the source of title. It was nothing more than evidence that Martin had a preference to purchase the land, if

he saw proper to do so; and was not competent evidence in an action of ejectment, according to the laws of Virginia, or even of Tennessee. It was not an entry founded on consideration, but a right of abating an equity at the discretion of the settler. Neither in Virginia nor Kentucky (where the Virginia land laws prevail) is the defendant allowed to go behind the patent in a court of *law*, in order to give the patent a date from that of the entry on which the patent was founded.

The question here is, on the effects of acts of Congress confirming claims to lands as valid, by which legislation the Government is concluded; and as respects these, it is settled, that after a survey is duly made, approved, and recorded at the surveyor general's office, an action of ejectment may be maintained on such titles in the courts of the United States. It is a good *prima facie* title. (Stoddard *v.* Chambers, 2 How., 313; Le Bois *v.* Bramell, 4 How., 456; Bissell *v.* Penrose, 8 How., 317.) In Stoddard *v.* Chambers, this court held "that a confirmation by act of Congress vests in the confirmee the right of the United States, and a patent, if issued, could only be evidence of this." Other cases followed this decision. By the third section of the act of July 4, 1836, it is provided that a patent shall issue to the confirmee in cases confirmed by that act. In this respect, the provisions of the acts of 1823 and 1836 are alike.

Of course the patent in this instance can relate to a title which is valid against another title unaided by the younger patent.

This disposes of the exception taken by the defendants below to the ruling of the court, that Forsyth's title was superior to that of Bogardus.

They next ask the court to instruct the jury, that by the laws of Illinois they had such title as would bar an action of ejectment after seven years, accompanied by actual residence on the land sued for; and if the jury believe from the evidence that the defendants have so long had said possession, the plaintiff cannot succeed in this suit. There were two other instructions asked, requiring the court to instruct the jury that the plaintiff's action was barred by the act of limitations of twenty years.

The court refused to instruct as requested; "but, on the contrary, instructed the jury that the patent to Bogardus did not grant or convey the ground in controversy; and it being conceded that it was the only title the defendant had, there is no such title as under the statute of limitations protects the possession of the defendants." This instruction was founded on an exception in the patent to Bogardus. It grants to him,

and to his heirs and assigns, forever, "subject, however, to all the rights of any and all persons under the act of Congress of March 3d, 1823, entitled 'An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois.'"

When this patent was made, in 1838, the village lots had not been surveyed, and those that interfered with the land granted to Bogardus might never be claimed. Subject to this contingency he took his patent, and had a title in fee till 1840, when the village title of Forsyth was ripened into the better right. After that, those claiming under Bogardus held the position of one who claims protection by the act of limitations under a younger patent against an elder one. He has only the appearance of title. The patent to Bogardus was a fee-simple title on its face, and is such title as will afford protection to those claiming under it, either directly, or, having a title connected with it, with possession for seven years, as required by the statute of Illinois. The court below erred in cutting off this defence.

In the progress of the trial in the Circuit Court, the plaintiff offered in evidence the printed report of Edward Coles, the register of the land office at Edwardsville, as found in the American State Papers, vol. 3, from pages 421 to 431, inclusive, to which the defendant objected, because it was not, without proof of its authenticity, legal evidence. But the court overruled the objection, and the report was given in evidence to the jury, to which ruling the defendants excepted.

These State Papers were published by order of Congress, and selected and edited by the Secretary of the Senate and Clerk of the House. They contain copies of legislative and executive documents, and are as valid evidence as the originals are from which they were copied; and it cannot be denied that a record of the report of Edward Coles, as found in the printed journals of Congress, could be read on mere inspection as evidence that it was the report sent in by the Secretary of the Treasury. The competency of these documents as evidence in the investigation of claims to lands in the courts of justice has not been controverted for twenty years, and is not open to controversy.

It is ordered that the judgment be reversed, and the cause remanded for another trial.

Mr. Justice McLEAN dissenting.

Sometime during the late war with England, a company of militia in the service of the United States, at Peoria, in Illinois, taking offence at the inhabitants of the village, burnt it.

Congress, with the view of ascertaining the extent of the injury and the names of the sufferers, on the 15th May, 1820,

passed an act, "that every person, or the legal representatives of every person, who claims a lot or lots in the village of Peoria, in the State of Illinois, 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 in writing of his or her claim; and it shall be the duty of the said register to make to the Secretary of the Treasury a report of all claims filed with the said register, with the substance of the evidence thereof; and also his opinion, and such remarks respecting the claims as he may think proper to make; which report, together with a list of the claims which in the opinion of the said register ought to be confirmed, shall be laid by the Secretary of the Treasury before Congress, for their determination."

The report was made, as required in the above act, by E. Coles, Esq., register, on the 10th of November, 1820. By that report, No. 7, Thomas Forsyth claims "a lot of three hundred feet in front by three hundred feet in depth, French measure, in the village of Peoria, and bounded eastwardly by a street separating it from the Illinois river, northwardly by a cross street, westwardly by a back street, and southwardly by a lot claimed by Jacques Mette."

On the 3d of March, 1823, Congress passed an act, which declares, "that there is hereby granted to each of the French and Canadian inhabitants, and other settlers, in the village of Peoria, in the State of Illinois, whose claims are contained in a report made by the register of the land office at Edwardsville, in pursuance of the act of Congress approved May the 15th, 1820, and who had settled a lot in the village aforesaid prior to the 1st day of January, 1813, and who had not heretofore received a confirmation of claims or donation of any tract of land or village lot from the United States, the lot so settled on and improved, where the same shall not exceed two acres."

The second section made it the duty of the surveyor of the public lands of the United States, for that district, 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 forward the same to the Secretary of the Treasury, who shall cause patents to be issued in favor of such claimants, as in other cases.

In the action of ejectment brought by Forsyth, as above stated, to recover possession of lot No. 7, described, it was agreed that upon the trial it shall be admitted that the plaintiff has the title of Thomas Forsyth in and to the land sued for, by descent, and purchase, and conveyance; and also that the defendants have had the actual possession of the land for which they are respectively sued, by residence thereon, for ten

years next preceding the commencement of the suit; and that John L. Bogardus, under whom they claim, had possession of the southeast fractional quarter of section nine, in township eight north, of range eight east, upon which the land sued for is situated, claiming the same under pre-emption right more than twenty years before the commencement of these suits, but he never had the actual possession of that part of said fractional quarter section sued for; and that said "defendants respectively had vested in them, before the commencement of this suit, all the right of Bogardus."

A patent was issued to Bogardus for the southern fractional quarter of section nine, in township eight north, of range east, containing twenty-three acres and ninety-three hundredths of an acre, &c.; "subject, however, to all the rights of any and all persons claiming under the act of Congress of 3d March, 1823, entitled 'An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois.' "

The defendants rely on the statute of limitations of 1827, which requires that the possession should be by actual residence on the land, under a connected title in law or equity, deducible of record from the United States.

The court instructed the jury that the title claimed under Bogardus did not protect them under the statute.

This is held by this court to be an error, for which the judgment is reversed.

The error of the court consists in giving a construction not only to a written instrument, but to a patent. That it is the province of the court to construe such a paper, will not be controverted. The patent conveyed to Bogardus the land described, "subject, however, to all the rights of any and all persons claiming under the act of Congress of the 3d March, 1823, entitled 'An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois.' "

The lot in controversy was claimed under the act of 1823, which declared, "that there is hereby granted to each of the French and Canadian inhabitants, and other settlers, in the village of Peoria, in the State of Illinois, whose claims are contained in a report made by the register of the land office at Edwardsville, in pursuance of the act of Congress approved May 15th, 1820, and who had settled a lot in the village aforesaid prior to the 1st of January, 1813, and who have not heretofore received a confirmation of claims or donation of any tract of land or village lot of the United States, the lot so settled upon and improved, where the same shall not exceed two acres," &c.

The right made subject to the patent was a legal right; it

was a grant by Congress, which this court has recognised as the highest grade of title. A patent is issued by a ministerial officer, who is subject to error, but the legislative action is not to be doubted.

The survey of the lot was not made until 1st September, 1840, and the patent was issued to Forsyth, December 16, 1845.

In the case of Ballance *v.* Forsyth, (13 Howard, 24,) this court say: "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." And again: "The statute did not protect the possession of the defendant below. His patent excepted those lots; of course, he had no title under it for the lots excepted."

Until the case before us was reversed for error by the district judges who conformed to the above decision, I did not suppose that any one could doubt the correctness of the decision. Bogardus, in 1838, took a grant from the United States, subject to Forsyth's right, thereby recognising it, and consequently from that time he held it in subordination to Forsyth's title. If it be admitted that the fee did not pass to Forsyth until the patent issued in 1845, the patent had relation back to the act of 1823, and operated from that time. The report of the register defined the boundaries of the lot as specifically as the survey, by reason of which, the lot was as well known, it is presumed, to the public, before the survey as afterwards. This may not have been the case with all the lots.

Let any one read the patent to Bogardus, and ask himself the question, whether the United States intended to convey the lots to which the patent was made subject, and the answer must be, that they did not. By the act of 1823, they granted those lots to the French settlers, who, by the report of the register, were entitled to them under the act of 1820. It would have been an act of bad faith in the Government, after the act of 1823, to convey any one of those lots; and, on reading the patent, it is clear they did not intend to convey any one of them. It is said, suppose the French settlers had not claimed the lots, would not Bogardus have had a right to them? Such a supposition cannot be raised against the facts proved. The title of Forsyth was of prior date, and of a higher nature, than that of Bogardus. His title was subordinate, as expressed upon its face.

In the case of Hawkins *v.* Barney's Lessee, (9 Curtis, 428,) the same question was before this court. Barney conveyed fifty thousand acres of land, in Kentucky, to Oliver; sometime afterwards, Oliver reconveyed the same tract to Barney, in

which deed were recited several conveyances of parcels of the tract to several individuals, and particularly one of 11,000 acres, to one Berriman. Barney brought an ejectment against Hawkins, and proved that he had entered on the fifty thousand acre tract. This court held his action could not be sustained, unless he proved the defendant was not only in possession of the large tract, but he must show that the possession was not upon any one of the tracts sold and conveyed.

To apply the principle to the case before us. Had Bogardus brought an action of ejectment to sustain it, he must have proved the trespasser was within his patent, and outside of any one of the reserved lots. The words, "subject to all the rights of any persons under the act of 1823," showed that those rights were not granted by the patent; and if Bogardus himself could not have recovered, it is strange how the defendants could recover, who claim to be in possession under his patent.

The agreed case admits that the "defendants respectively had vested in them, before the commencement of this suit, all the right of Bogardus." But whether this possession under the right of Bogardus was for a day or a year, is nowhere shown by the evidence; and unless I am mistaken, the statute requires a seven years' possession under title to protect the trespasser, and in effect give him the land.

Bogardus was in possession, claiming a pre-emption, but I do not understand, from the opinion of the court, that such a possession will run, even against the French claimants. Bogardus himself was a trespasser on the lands of the United States, and until he received his patent in 1838, I suppose he could not set up a claim to the land under title.

I hold, and can maintain, that the instruction of the district judge was right, in saying that the patent of Bogardus did not grant or convey the ground in controversy. And if it did, there was no such possession under it, which, by the statute of limitations, protected the right of the defendants.

CHARLES BALLANCE, PLAINTIFF IN ERROR, *v.* ADOLPH PAPIN, HENRY PAPIN, AND MARY ATCHISON.

Under the circumstances described in the preceding case, if there was no sufficient evidence of a survey under the act of 1823, the title claimed under that act could not be held superior to that claimed under a patent issued in the interval between the act of 1823 and the alleged survey.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the northern district of Illinois.

It was similar in most of its features to the preceding case, and was argued by *Mr. Ballance* for the plaintiff in error, and submitted on printed arguments by *Mr. Williams* and *Mr. Gamble* for the defendants.

Mr. Justice CATRON delivered the opinion of the court.

In the case of Charles Ballance against Papin and Atchison, the same title was relied on by the defendant below (Ballance) that was set up in defence in the preceding case of Forsyth *v.* Brien and Rouse. The plaintiff sued to recover a village lot in Peoria, No. 42, confirmed to Fontaine, in right of his wife, Josette Cassarau, dit Fontaine. A plat of lot No. 42 was given in evidence, and is found in the record, but no certificate of the surveyor accompanies this plat, and without such certificate there is no evidence that lot No. 42 was lawfully surveyed. The act of 1823 (sec. 2) required that a survey should be made of each lot confirmed to the claimant, and a plat thereof forwarded to the Secretary. The evidence of a legal United States survey is not a mere plat, without any written description of the land by metes and bounds; neither the plat, nor less proof than a written description, will make a record on which a patent can issue. That most accurate evidence of separate surveys of the village lots of Peoria exists, we know; but as none is found in this record of lot No. 42, it follows, from the reasons given in the previous case, that no title was adduced in the Circuit Court that authorized it to reject the instructions demanded by the defendant; that, comparing the titles of the parties by their face, the defendant's was the better one. But as the same question of the application of the act of limitations arises in this case as it did in the former one, it must of course have been reversed, had the certificate of survey been found in the record. We therefore order that the judgment be reversed, and the cause remanded for another trial to be had therein.

Mr. Justice McLEAN dissented.

THE UNITED STATES, APPELLANTS, *v.* DOMINGO AND VICENTE PERALTA.

Where a claimant of land in California produced documentary evidence in his favor, copied from the archives in the office of the surveyor general and other original grants by Spanish officers, the presumption is in favor of the power of those officers to make the grants.

If the power be denied, the burden of proof is upon the party who denies it.
The history of California, with respect to the power of its Governors to grant land, examined.
The boundaries of the tract of land, as decreed by the District Court, affirmed.

THIS was an appeal from the District Court of the United States for the southern district of California.

The nature of the claim, and a list of the documents in support of it, are given in the opinion of the court.

The decree of the District Court was as follows, viz:

That the claim presented in the petition filed in this case, for the place called San Antonio, is valid to the whole extent of its bounds, to wit: having for its northern boundary a line commencing on the bay of San Francisco, at a point where there are close to the said bay the two cerritos, as described in the first possession given by Martinez to Louis Peralta, on the 16th of August, 1820, running from the said bay eastwardly along by the southern base of the cerritos of San Antonio up a ravine, at the head of which there is a large rock or monument looking to the north, described in evidence as the Sugar-loaf Rock; thence by the southern base of said rock to the comb or crest of the coast range of mountains, or the Sierra; thence for the western boundary a line running along the comb of the said Sierra, until it reaches the eastern extremity of a line, beginning on the said bay of San Francisco at the mouth of the deep creek of San Leandro, and running eastwardly up the said creek to its head or source in the Sierra, and to the comb or crest thereof, which last line is the southern boundary of the land of San Antonio; and by the said bay of San Francisco, from the mouth of the said deep creek of San Leandro up to the beginning of the said line, which has been described as the northern boundary of said tract, which line along the bay constitutes its western boundary.

And it is hereby further adjudged, ordered, and decreed, that there be confirmed to the said Domingo and Vicente Peralta, the northern portion of said land of San Antonio, bounded as follows: On the north by the northern boundary of said tract of San Antonio as above described, on the east by the comb of the said Sierra, on the west by the bay of San Francisco, and on the south by a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in sight of the public road, being the line of division between this land and the land of Antonio Peralta, which line extends from the said bay to the most eastern boundary of the rancho of San Antonio.

The United States appealed from this decree.

It was argued by *Mr. Gillet* for the United States, and by *Mr. Rose* and *Mr. Bibb* for the appellees.

Mr. Justice GRIER delivered the opinion of the court.

This case originated before the commissioners for ascertaining and settling private land claims in California.

Domingo and Vicente Peralta claimed as grantees and devisees of their father, Luis Peralta.

The documentary evidence filed in support of the claim consists of a true copy from the archives in the office of the surveyor general of California, containing, so far as they are material in the present inquiry, the following averments:

1. The petition of Luis Peralta to the Governor for a grant of land, extending from the creek of San Leandro to a small mountain adjoining the sea beach, at the distance of four or five leagues, for the purpose of establishing a rancho, dated June 20, 1820.

2. The decree of Governor Sola, therein directing Captain Luis Antonio Arguello to appoint an officer to place the petitioner in possession of the lands petitioned for, dated August 3, 1820.

3. Order of Captain Arguello, dated August 10, 1820, detailing Lieut. Don Ignacio Martinez for that purpose.

4. The relinquishment of Father Narciso Duran, on behalf of the mission of San José, of any claim to the land, and reserving the privilege of cutting wood on the same, which, he says, should remain in common, dated August 16, 1820.

5. Under the same date, the return of Lieut. Martinez, upon the order to give the possession, describing the boundaries, &c.

6. The decree of the Governor, directing a portion of the lands assigned to Luis Peralta, by the foregoing act of possession, to be withdrawn, upon the reclamation of the mission of San Francisco, who claimed that the said portion of the lands was then in the occupancy of the mission as a sheep ranch.

7. The consent of Father Juan Cabot and Paloz Ordez, ministers of the mission, that the boundaries of the land solicited by Luis Peralta should be established at the rivulet, at the distance of three and a half to four leagues from the rancho-house of the mission.

8. The return of Maximo Martinez upon Governor Sola's second decree for the delivery of possession, filing the boundaries in accordance with the claim of the mission, at a rivulet which runs down from the mountains to the beach, where there is a grove of willows, and about a league and a half from the cerito (little mountain) of San Antonio, in the direction of San Leandro.

9. A document dated October, 1822, and signed Sola, setting out, that on that day was issued in favor of Sergeant Luis Peralta, by the Governor of the province, the certifying document for the land which has been granted him, as appears by the writ of possession which was given him by the lieutenant of his company, Don Ignacio Martinez, in conformity with the orders of the Government.

10. A letter from Luis Peralta, protesting against the claim of the mission, dated October 14th, 1820.

11. A representation from Captain Don Luis Arguello to the Governor, dated June 23, 1821, advocating the rights of Sergeant Peralta, in opposition to those of the mission, to the land in controversy; and, lastly, the description of the land returned by Luis Peralta, in obedience to the Government, of the 7th of October, 1827.

The claimants gave in evidence, also, the original grant from Governor Sola to Luis Peralta, dated 18th of August, 1822; the petition of Luis Peralta to Governor Arguello, praying the restitution of the lands which had been taken from him on the demand of the mission; and the decree of Arguello, making such restitution, and directing him to be again put in possession by the same officer who had executed the former act of possession. To this order, Maximo Martinez made a return, duly executed, certifying that the grantee had been newly put in possession of the place called "Cerito de St. Antonio, and the rivulet which crosses the place, to the coast, where is a rock looking to the north."

It was further shown, from the public records, that on the 9th of April, 1822, the civil and military authorities of California formally recognised and gave in their adhesion to the new Government of Mexico, according to the plan of Iguala and treaty of Cordova. Also, that in 1844, Ignacio Peralta, one of the heirs of Luis Peralta, petitioned the Government for a new title to the land claimed, in consequence of the original title-papers having been lost or mislaid. The archives show, also, that on the 13th of February, 1844, an order was made by Micheltorena, that a title be issued. Of the same date, there is the usual formal document "declaring Don Luis Peralta owner in fee of said land, which is bounded as follows:

"On the southeast by the creek of San Leandro; on the northwest by the creek of *Los Ceritos de San Antonio*, (the small hills of San Antonio;) on the southwest by the sea; and on the northeast by the tops of hills range, without prohibiting the inhabitants of Contra Costa from cutting wood for their own use, they not to sell the same." This document contains an order that "this espediente be transmitted to the depart-

mental assembly for their approval," but nothing further appears to have been done, nor is the signature of Micheltorena attached to the record.

The authenticity of these documents is admitted. The objections urged against their sufficiency to establish the claim are: first, that the officers had no power to make grants of land; and, second, that the northern boundary of the land described does not extend beyond a certain creek or stream, known by the name of San Antonio. This would exclude about one half of the claim.

We are of opinion that neither of these objections is supported by the evidence in the case.

We have frequently decided that "the public acts of public officers, purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified." To adopt a contrary rule would lead to infinite confusion and uncertainty of titles. The presumption arising from the grant itself makes it *prima facie* evidence of the power of the officer making it, and throws the burden of proof on the party denying it. The general powers of the Governors and other Spanish officers to grant lands within the colonies in full property, and without restriction as to quantity, and in reward for important services, were fully considered by this court in the case of United States *v.* Clarke, (8 Peters, 436.)

The appellants, on whom the burden of proof is cast, to show want of authority, have produced no evidence, either documentary or historical, that the Spanish officers who usually acted as Governors of the distant provinces of California were restricted in their powers, and could not make grants of land. The necessity for the exercise of such a power by the Governors, if the Crown desired these distant provinces to be settled, is the greater, because of their distance from the source of power. By the royal order of August 22, 1776, the northern and northwestern provinces of Mexico were formed into a new and distinct organization, called the Internal Provinces of New Spain. This organization included California. It conferred ample powers, civil, military, and political, on the Commandant General. The archives of the former Government also show, that as early as 1786, the Governors of California had authority from the Commandant General to make grants, limiting the number of sitios which should be granted. In 1792, California was annexed to the viceroyalty of Mexico, and so continued till the Spanish authority ceased. An attempt to trace the obscure history of the various decrees, orders, and regulations of

the Spanish Government on this subject, would be tedious and unprofitable. It is sufficient for the case, that the archives of the Mexican Government show that such power has been exercised by the Governors under Spain, and continued to be so exercised under Mexico; and that such grants, made by the Spanish officers, have been confirmed and held valid by the Mexican authorities. Sola styles himself political and military Governor of California. He continued to exercise the same powers after his adhesion to the Mexican Government, under the provisions of the plan of Iguala, and the twelfth section of the treaty of Cordova. The grant in fee, given by Sola, was after the revolution.

The Government of Mexico, since that time, has always respected and confirmed such concessions, when any equitable or inchoate right, followed by possession and cultivation, had been conferred by the Governors under Spain. The case of Arguello (18 How., 540) was that of a permit by Governor Sola, afterwards confirmed by the Mexican Government and by this court. The plaintiff in error has not been able to produce anything from historical documents or the archives of California, tending to show a want of power in the respective officers in this case. On the contrary, the presumption of law is confirmed by both. The order of Micheltorena, in 1844, for the granting the new title to Peralta, is itself evidence of the usage and custom, and that the acts of Sola and Arguello were considered valid, and that the title, whether equitable or legal, conferred to them, should be respected and confirmed by the Government.

As the validity of the petitioner's title has been assailed on the ground of want of authority alone, it is unnecessary to notice more particularly the various documents exhibited in support of it. The grant by Sola of a portion of the tract of which Peralta had been originally put in possession, is a complete grant in fee for that portion. The restoration by Arguello of the original boundaries, by decree and act of the public officer, may not have the character of a complete grant; but it is of little importance to the decision of the case, whether it conferred only an inchoate or equitable title, connected with an undisputed possession of thirty years, and confirmed again in 1844, by the order of the Governor of California; its claim for protection under the treaty with Mexico cannot be doubted, notwithstanding its want of confirmation by the departmental assembly.

The only remaining question is the position of the northern boundary line.

Peralta's original petition, in June, 1820, described the land

desired, as beginning at a creek called San Leandro, "and from this to a white hill, adjoining the sea beach, in the same direction, and along the coast four or five leagues."

The return of Ignacio Martinez, the officer who executed the order for delivery of possession on the 16th of August, 1820, describes "the boundaries which separate the land of Peralta, to be marked out as follows: The deep creek called San Leandro, and at a distance from this, (say five leagues,) there are two small mountains, (cerritos;) the first is close to the beach; next to it follows the San Antonio, serving as boundaries, the rivulet which issues from the mountain range, and runs along the foot of said cerrito of San Antonio, and at the entrance of a little gulch there is a rock elevating itself in the form of a monument, and looking towards the north." This is the description of the northern boundary. It refers to stable monuments—two hills, a rivulet passing at their foot, and a monumental rock. In other documents, Peralta speaks of this line "as the dividing boundary with my neighbor, Francisco Castro." Again, in the return of Ignacio Martinez to the order of the Governor, Arguello, in 1823, to redeliver the possession to Peralta, up to his original boundary, he describes this within boundary by the same monument, "the cerrito San Antonio, the arroyito or rivulet which crosses the place to the coast, where is a rock looking to the north."

Lastly, the title of confirmation by Micheltorena in 1844, as quoted above, though not in the very words of the above documents, clearly describes the same monuments. These hills, rivulet, and rock, are well-known monuments, and their position is satisfactorily proved.

The testimony of the opinions of witnesses who have but lately arrived in the country, who are ignorant of the language and traditions of the neighborhood, and who are all interested in defeating the claim of the petitioners, can have little weight against the knowledge of others who were present when the lines were established, some thirty years ago, and have known these boundaries till the present time.

The decree of the Circuit Court is therefore affirmed.

Mr. Justice DANIEL dissented.

JOHN MCCULLOUGH AND CYRUS D. CULBERTSON, PLAINTIFFS IN ERROR, *v.* GURNSEY Y. ROOTS AND ERASTUS P. COE.

Where a sale was made of merchandise, and two parties, viz: Roots & Coe as one party, and Henry Lewis as the other party, both claimed to be the vendors, and

to be entitled to the purchase-money, it was proper, under the circumstances which existed in the previous relations of these parties towards each other, for the court to instruct the jury as follows, viz:

"1. If they shall find that the merchandise had been made subject to the order of Roots & Coe; that it was sold by them in their own name; that at the time of sale it belonged to them, or that they had an interest in it for advances and commissions, and an authority as agents to dispose of it; and that it was delivered to and received by the vendee in pursuance of such sale, then Roots & Coe were entitled to the purchase-money.

"2. That although the jury may find from the evidence that the merchandise was sold to the purchasers by Henry Lewis, yet if they also find that it belonged to Roots & Coe, or to the persons for whom they acted as agents, and if the latter, that Roots & Coe had an interest in and control over the merchandise to cover advances and commissions; that the purchasers subsequently promised to pay Roots & Coe the purchase-money, and that the suit was instituted before the price had been paid to Henry Lewis, then Roots & Coe were entitled to the purchase-money."

The existence of warehouse receipts, given by another person, was not a sufficient reason to justify the purchasers in refusing to pay for the property which they had purchased, and in the possession of which they had not been disturbed.

Under the circumstances of the case, Roots & Coe had a right to consider Henry Lewis as their agent, and to adopt his acts. The purchaser had no right to allege that Henry Lewis was a tort feasor.

Roots & Coe, having made the contracts, and having an interest to the extent of their commissions, had a right to maintain the suit.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Maryland.

The nature of the case is fully explained in the opinion of the court.

It was argued by *Mr. Schley* for the plaintiffs in error, and by *Mr. Dobbin* and *Mr. Johnson* for the defendants.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiffs below (Roots & Coe) sued the defendants (McCullough et al.) in general indebitatus assumpsit, in the Circuit Court, for the price of a quantity of hams in tierces which they claim to have sold and delivered to them. The plaintiffs are merchants in Cincinnati, Ohio, who, on their own account, and as agents for Adams & Buckingham, of New York, in November, 1853, contracted with Henry Lewis, of the same city, to make advances upon his consignments of bacon, pork, and similar articles of provisions, which these consignees were to dispose of, and, after reimbursing the advances and expenses, were to appropriate the net profits in part to the payment of a pre-existing debt due to those firms. The course of business was, to suffer Henry Lewis to prepare the articles for the market, and to superintend the sales, under a condition of accounting for their proceeds to the consignees. The advances were usually made upon the warehouse receipts of a firm of which Lewis was a partner, generally before the property spe-

cified in them was in the warehouse. The receipts expressed articles which the warehouseman expected either to prepare or to procure otherwise, and the money advanced was generally intended to aid that object. To secure themselves from the contingency of any failure in these anticipations, the plaintiffs (Roots & Coe) sometimes exacted the guaranty of Samuel Lewis, a brother of Henry Lewis. This generally took the form of a warehouse receipt made by him, corresponding to the others. The articles designated in the receipts of Samuel Lewis, it was understood, would be supplied by Henry—Samuel being unconnected with any business of this description on his own account.

In April, 1854, Roots & Coe were the holders of a number of receipts of Samuel Lewis for provisions, which Henry Lewis was unable to supply. The plaintiffs (Roots & Coe) agreed, that if Samuel Lewis would secure the consignment of a quantity of hams, by executing a new receipt therefor, they would extend their advances to Henry Lewis until he could make the best disposition of them. This was assented to, and the contract hereafter mentioned was made.

Samuel Lewis had not interfered with the business of Henry; nor did he control the property which his receipts from time to time specified. The property was left in the charge of Henry Lewis, to be appropriated according to his contract with the plaintiffs, (Roots & Coe,) of which the receipt was treated as a guaranty. The receipts executed at this settlement bear date the 4th of April, 1854, and are as follows:

"Received in store of Henry Lewis, and subject to the order of Roots & Coe, but not accountable for damages by fire, four hundred and fifteen hogsheads sugar-cured hams in pickle, containing nine hundred pounds net weight; said hams to be smoked and canvassed within thirty days, and delivered to said Roots & Coe, or their order, said Roots & Coe being responsible for the smoking and canvassing the same; and it is further agreed between the parties, that when the above hams are delivered to said Roots & Coe, then and in that case my former warehouse receipts for two thousand five hundred barrels of mess pork, four hundred barrels of lard, and one hundred thousand pounds of shoulders from the block, shall be given up and cancelled; but I am not responsible for smoking or canvassing the same, that being a matter between said Henry Lewis and Roots & Coe.

(Signed) SAMUEL LEWIS."

At the same time, Henry Lewis gave the following receipt:

"Whereas Roots & Coe hold Samuel Lewis's warehouse

receipt of this date for four hundred and fifteen hogsheads sugar-cured hams in pickle, each hogshead containing nine hundred pounds net weight, to be delivered within thirty days: Now, I do hereby agree to smoke, canvass, yellow-wash, and pack the same, free of charge to Roots & Coe; and also agree not to require Roots & Coe to refund to me the freight on the same from Indianapolis to this place, being one hundred and fifty cents per hogshead, which I have paid, in consideration of having received an advance on the above-mentioned hams from Adams & Buckingham, through said Roots & Coe. But in case I should purchase and pay for the same within thirty days from this date, then Roots & Coe agree to refund the freight from Indianapolis to this point, being one dollar and fifty cents per hogshead. HENRY LEWIS."

At the time this contract was made, the property specified in it was not in store at Cincinnati, but a portion was delivered to the plaintiffs (Roots & Coe) the day after its date. The remainder came consigned to their order during that and the following month, and was deposited in the warehouse of Henry Lewis, under their directions; and Henry Lewis was employed to canvass, yellow-wash, brand, and pack in tierces the hams, ready for the market; for this, Roots & Coe were to pay Lewis his bill of charges as a further advance. While the property was in this condition, a disagreement arose between Henry Lewis and Roots & Coe, relative to a deficiency in the weight of the hogsheads, and whether the warehouse receipt of Samuel Lewis amounted to a warranty of the weights.

In May and June, 1854, the defendants below purchased two hundred and twelve tierces of these hams, at a specific price. Roots & Coe and Henry Lewis respectively claim to have made this sale, and both were present when it was made.

The money arising from the sale was designed for the former, and the sale was entered on their books, and there is strong evidence to the fact that the defendants promised to pay their bill for the hams in June, 1854. But before the payment, Henry Lewis insisted upon a surrender of the warehouse receipts of Samuel Lewis; and that being refused, he directed the defendants to appropriate the price as a credit on the joint debt of Samuel Lewis and himself to them; and this was done by them accordingly.

Upon the trial in the Circuit Court, the plaintiffs in error moved for fourteen distinct instructions to the jury, which the court declined to give, but gave in their stead the following charge:

"1. If the jury shall find, from the evidence in this case,

that the said two hundred and twelve tierces were part of the hams contained in the four hundred and fifteen hogsheads mentioned in the receipt of April 4, 1854; that they were sold by the said plaintiffs, in their own name, to the said defendants; that at the time of the said sale the said hams belonged to the said plaintiffs, or that they had an interest in the same for advances or commissions, and authority as the agents of Adams & Buckingham to dispose of the same; and that said hams were delivered to, and received by, said defendants, in pursuance of said sale, then the plaintiffs are entitled to recover the full amount or price of the said hams.

"2. That although the jury may find from the evidence that the said hams were sold to defendants by Henry Lewis, yet if they also find that at the date of said sale the said hams belonged to plaintiffs, or to Adams & Buckingham, for whom the plaintiffs acted as agents; and if the latter, that the plaintiffs had an interest in and control over the said hams, to cover advances and commissions; that defendants subsequently promised to pay plaintiffs the same, and that this suit was instituted before the price of said hams had been paid by defendants to Henry Lewis, then and in that event the plaintiffs are entitled to recover."

To this charge McCullough and Culbertson excepted, as well as to the refusal of the instructions moved for, and assign these decisions as errors in this court. The written contract, of November, 1853, which arranged the terms and course of business between the plaintiffs below (Roots & Coe) and Adams & Buckingham, their principal, with Henry Lewis, for the year 1854, confers on the former a plenary power to dispose of the consignments to be made, for advances under that contract. The contract of April did not alter or modify this term in the engagement. Henry Lewis was then in arrears to them. He had involved his brother Samuel in engagements, as his surety, which he could not fulfil. This contract of April was a relief and an accommodation to the brothers. The license to Henry Lewis to prepare the provisions for market, and to select the markets and purchasers, was an indulgence to him, and did not diminish the rights of Roots & Coe in the property or their powers under the contract. Whatever sales were made by him, were made as the agent of Roots & Coe, and they were entitled to control the price. He was not in a condition to dispute their title, and his authority to the plaintiffs in error to appropriate the price as a credit upon another demand was a fraud upon the rights of Roots & Coe and Adams & Buckingham. (Zulueta *v.* Vincent, 12 L. and Eq., 145; Bott *v.* McCoy, 20 Ala., 578; Walcott *v.* Keith, 2 Fost. N. H.

R., 196.) We think the cause was fairly submitted to the jury in the charge of the court. The instructions prayed for by the plaintiffs in error present several questions which will now be considered.

They affirm, that if Samuel Lewis did not assent to the sale, nor waive his right to detain the property until his warehouse receipts were surrendered, and that Roots & Coe from time to time refused to surrender those receipts, and still control them, they cannot maintain an action for this money.

But the existence of these facts does not authorize the defendants (McCullough et al.) to resist the payment of the price of property they had purchased, and their possession of which had not been disturbed. Samuel Lewis had no title to the property, nor any power to sell it, nor any claim on the price. At most, he had only a lien, which he might never claim to exert, and from which the purchasers have experienced no injury. (Holly *v.* Huggerford, 8 Pick., 73; Vibbard *v.* Johnson, 19 John., 77; Wanzer *v.* Truly, 17 How., 584.)

Nor can the purchasers aver that Henry Lewis had no intention to act as the agent of Roots & Coe in making the sale, and in doing so he did not waive any right of Samuel Lewis, nor enlarge or impair the claim of Roots & Coe upon the property; but that he, and those claiming from him, are simply tort feasors, and that Roots & Coe cannot claim the entire purchase-money, because their title does not embrace the entire property and right to possession. The relations of Roots & Coe to Henry Lewis were such that he cannot be deemed a tort feasor, except by their election. They are authorized to adopt his acts, and to claim the benefit of his contracts. He was their bailee, and is estopped to deny their title in any form. It is further insisted that the suit should have been instituted in the names of Adams & Buckingham, and not in those of Roots & Coe. But the contracts for the consignment of the hams, as well as for their preparation for the market and their sale, were made in the names of those persons. They are interested in their result to the extent of their commissions, and their principals reside in another State from themselves. The authorities cited sustain their title to maintain this suit.

Judgment affirmed.

JOSIAH WALTON, ADMINISTRATOR OF PRISCILLA COTTON, ET AL., COMPLAINANTS AND PLAINTIFFS IN ERROR, *v.* ALLEN COTTON, NOAH COTTON, AND WILLIAM E. JONES.

Under the act of Congress passed on the 2d of June, 1832, providing for the relief of certain surviving officers of the Revolution, and its several supplements, the word children in the acts embraces the grandchildren of a deceased pensioner, whether their parents died before or after his decease. And they are entitled, per stirpes, to a distributive share of the deceased parent's pension.

THIS case was brought up, from the Supreme Court of Tennessee, by a writ of error issued under the twenty-fifth section of the judiciary act.

The history of the case is given in the opinion of the court.

It was argued by *Mr. Baxter* for the plaintiffs in error, and by *Mr. Lawrence* for the defendants.

Mr. Justice McLEAN delivered the opinion of the court.

This case comes before us by a writ of error to the Supreme Court of Tennessee.

It was commenced by filing a bill, in Sumner county, before Chancellor Ridley, in which the complainants state they are the children of Priscilla Cotton and Thomas Cotton, who was a captain in the revolutionary war; that after his death, his widow, Priscilla, filed her declaration for a pension, on account of her husband. Josiah Walton made the application; but she died before the pension was granted. Walton administered on the estate, and he renewed the application, at great trouble and expense. The Pension department allowed about one-half the amount claimed. Out of the money drawn by the administrator, he retained what was agreed for his services and the services of counsel, and paid over the residue, in equal shares, to all the children of Priscilla Cotton, and the representatives of her children who were dead.

The bill further represents that William E. Jones, who acts as an agent for pension claims, and Allen Cotton, with the view of getting the business and money into their hands, applied to the County Court of Davidson county, and suppressed from said court the fact that an administration on said estate had been granted in the county of Sumner, and procured Allen Cotton to be appointed as administrator, which was done with the view of depriving the complainants and others of a legal portion of said pension fund.

The new administrator made application for the extension of the pension, so as to cover the whole time from the allow-

ance of the pension to the death of the pensioner, only one-half of which had been granted. The application was successful; and Jones, under a power of attorney from the administrator, received the sum of $3,500 from the Government, which the defendants retain in their hands, and refuse to pay over; three-fifths of the amount of which the complainants are entitled to, if the children who died before the decease of their mother be not entitled to any share, and three-eighths, should they be entitled.

The answer admits many of the allegations of the bill, but denies that the defendants acted improperly in procuring administration in Davidson county. They admit that they applied for and obtained the above sum, with a full knowledge by the Pension Office of the prior administration. The money was paid to them as the only living children of Priscilla Cotton at the time of her death; and they allege that, this being the construction of the Government, it is conclusive.

The chancellor, on the final hearing, decreed that the representatives of Arthur Cotton, John Cotton, and Polly Foxall, were entitled to three-fifths of said $3,500, and interest, to be paid over to said children; and that said defendants, Noah Cotton, Allen Cotton, and William E. Jones, who have received said fund, are liable to pay over said three-fifths of $3,500, amounting to $2,100, with interest as aforesaid, to be paid over to the children of Polly Foxall, one-third; to the children of Arthur Cotton, one-third; and to the children of John Cotton, one-third, after paying the costs and expenses of their suit, the costs to be paid out of the fund in the hands of the defendants.

From this decree, there was an appeal to the Supreme Court of Tennessee, which, on a hearing, reversed the decree of the chancellor, holding that the fund should be distributed among the living children at the time of the pensioner's death, and that no part of it should go to the representatives of deceased children.

As the complainants claim a right under an act of Congress, which by the decree of the Supreme Court has been rejected, the case is brought within the twenty-fifth section of the judiciary act, which gives us jurisdiction.

The first section of the act entitled "An act supplementary to the 'Act for the relief of certain surviving officers of the Revolution,'" dated June 4th, 1832, gave pensions to surviving officers, non-commissioned officers, musicians, soldiers, and Indian spies, who had served in the Continental line, or State troops, volunteers, or militia, at one or more terms—a period of two years—during the war of the Revolution, &c., and

Cotton was entitled to receive his full pay, not exceeding the pay of a captain in the line, from the 4th of March, 1831, during his natural life. The fourth section of the same act provided that the amount of pay which accrued under the act before its date should be paid to the person entitled to the same as soon as may be; and in case of the death of any person embraced by the act, or of the act to which it is supplementary, during the period intervening between the semi-annual payments directed to be made and the death of such person, shall be paid to his widow, or, if he leave no widow, to his children.

The act of July 4th, 1836, in the first section, gives five years' half-pay to widows, or children not sixteen years of age, under certain circumstances. If the soldier had died since the 4th March, 1831, and before the passage of that act, the pension which had accrued during these periods is given by the second section to the widow, and if no widow, to the children. The act of the 7th July, 1838, extends the benefits of the third section of the act of 1836 to widows whose husbands have died since the passage of the act. The act of 19th July, 1840, enacts, in the first section, that any male pensioner dying, leaving children and no widow, the pension due shall be paid to his children, and that it shall not be considered assets of said estate.

The second section provides, when a female pensioner shall die, leaving children, the amount due at the time of her death shall be paid to her representatives, for the benefit of her children. And the third section declares, "that on the death of any pensioner, male or female, leaving children, the amount due may be paid to any one or each of them, as they may prefer, without the intervention of an administrator."

The question in the case turns upon the construction of these statutes. Does a right construction of them give the pension due to the grandchildren of the deceased pensioner; and if so, does the bounty extend to the representatives of his children who died before his decease; or, do the acts restrict the bounty to his children living at the time of his death? This last construction has been adopted and acted upon by the Government.

This view is mainly founded on the considerations, that on the death of the pensioner, the bounty is given to his widow, and, if he leave no widow, to his children; that it was a bounty of the Government, arising from personal considerations of gratitude for services rendered, is not liable to the claims of creditors, and should not be extended, by construction, to persons not named in the act.

The pension is undoubtedly a bounty of the Government, and in the hands of an administrator of a deceased pensioner it would not be liable to the claims of creditors, had the acts of Congress omitted such a provision. But the legislative intent is shown to be in accordance, in this respect, with the law. But should the word children, as used in these statutes, be more restricted than when used in a will? In the construction of wills, unless there is something to control a different meaning, the word children is often held to mean grandchildren. There is no argument which can be drawn from human sympathy, to exclude grandchildren from the bounty, whether we look to the donors or to the chief recipient.

Congress, from high motives of policy, by granting pensions, alleviate, as far as they may, a class of men who suffered in the military service by the hardships they endured and the dangers they encountered. But to withhold any arrearage of this bounty from his grandchildren, who had the misfortune to be left orphans, and give it to his living children, on his decease, would not seem to be a fit discrimination of national gratitude.

Under the construction given by the Department, if a male pensioner die, leaving no widow or children, but grandchildren, the pension cannot be drawn from the Treasury. This would seem to stop short of carrying out the humane motive of Congress. They have not named grandchildren in the acts; but they are included in the equity of the statutes. And the argument that the pension is a gratuity, and was intended to be personal, will apply as well to grandchildren as to children.

There can be no doubt that Congress had a right to distribute this bounty at their pleasure, and to declare it should not be liable to the debts of the beneficiaries. But they will be presumed to have acted under the ordinary influences which lead to an equitable and not a capricious result. And where the language used may be so construed as to carry out a benign policy, within the reasonable intent of Congress, it should be pone.

On a deliberate consideration of the above statutes, we have come to the conclusion that the word children, in the acts, embrace the grandchildren of the deceased pensioner, whether their parents died before or after his decease. And we think they are entitled, per stirpes, to a distributive share of the deceased parent.

This construction does not correspond with the decree of the chancellor, nor with that which was expressed by the Supreme Court in reversing his decree. The decree of the Supreme Court of Tennessee is therefore reversed, and the case

is directed to be transmitted to that court, that the views here given may be carried into effect, in the ordinary mode of proceeding by that court.

Mr. Justice DANIEL, Mr. Justice CURTIS, and Mr. Justice CAMPBELL, dissented.

Mr. Justice CURTIS dissenting.

I cannot concur in so much of the opinion, just delivered, as construes the word "children," in this act of Congress, to mean children and grandchildren. The legal signification of the word children accords with its popular meaning, and designates the immediate offspring. (Adams *v.* Law, 17 How., 419, and cases there cited.) It may be used in a more enlarged sense to include issue; but the intention so to employ it must be manifested by the context, or by the subject-matter. I see nothing in the context or the subject-matter of this act to carry the meaning of the word children beyond its ordinary signification. Nothing has been suggested, save the conviction felt by some members of the court, that grandchildren are proper subjects of this bounty of Congress. This consideration is, in my opinion, too indeterminate to enable me to construe the act to mean what it has not said.

Mr. Justice DANIEL and Mr. Justice CAMPBELL concurred in the above opinion of Mr. Justice CURTIS.

SAMUEL F. PRATT, PASCAL P. PRATT, AND EDWARD P. BEALS, CLAIMANTS OF THE STEAMBOAT SULTANA, APPELLANTS, *v.* CHARLES M. REED, LIBELLANT.

In order to create a maritime lien for supplies furnished to a vessel, there must be a necessity for the supplies themselves, and also that they could be obtained only by a credit upon the vessel.

Hence, where a running account for coal was kept with a vessel trading upon the lakes, the master of which was also the owner, it does not appear that the coal could be procured only by creating a lien upon the vessel.

In a contest, therefore, between a libellant for supplies and mortgagees of the vessel, the latter are entitled to the proceeds of sale of the boat.

This is under the general admiralty law. No opinion is expressed as to the effect of the local laws of the States.

THIS was an appeal from the Circuit Court of the United States for the northern district of New York, sitting in admiralty.

The case is explained in the opinion of the court.

It was argued by *Mr. Rogers* for the appellants, and by *Mr. Ganson* for the appellee.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the northern district of New York, in admiralty.

The libel was filed by Reed, the respondent, against the steamboat Sultana, to recover for supplies furnished said boat.

The claimants in the court below set up, by way of defence, a mortgage executed to them, by the master and owner, upon the Sultana, dated the 31st October, 1853, to secure the sum of five thousand three hundred and fifty-four dollars and ninety-eight cents. The mortgage was duly recorded in the office of the customs at Buffalo, the place of the enrollment of the vessel, and was also filed in the office of the clerk of the county of Erie. The demand claimed in the libel was a running account for the supply of coal at Erie, in the State of Pennsylvania, extending from June, 1852, to May, 1854. The claimants admitted, in their answer, the supply set up in the libel, and also that it was represented to be necessary at the times delivered, to enable the vessel to pursue her business upon Erie and other Western lakes.

The answer denies that the supplies were furnished upon the credit of the boat; but, on the contrary, avers they were furnished on the credit of the master.

The agreed facts in the case admit that there was no representation of the necessity of the supplies, other than that they were directed by the master at the times when furnished, and that the libellant knew, at these several times, that Appleby, the master, was the sole owner of the Sultana; that he usually navigated the boat, as master, and was present when the supplies were furnished. When not present, they were furnished at the request of the person in command.

Although it does not distinctly appear in the case, yet it is fairly to be inferred, that this vessel was engaged in making regular trips upon the Western lakes, in the business of carrying passengers and freight, and procured her supplies of coal at places of convenient distance, according to her necessities, by a previous understanding with the parties furnishing the article. The bill rendered by the libellant contains a running account of debit and credit, through a period of nearly two years.

There is no great doubt in the case, but that the article was necessary for the navigation of the vessel at the times when furnished, though the proof is very loose and indefinite.

It seems to have been taken for granted, that a supply of

coal was essential to the propelling of a steamboat, and, in a general sense, this is doubtless true; but then, to make out a necessity within the admiralty rule, the supply must be really or apparently necessary at the time when it is furnished. But the more serious difficulty in the case, on the part of the libellant, is the entire absence of any proof, to show that there was also a necessity, at the time of procuring the supplies, for a credit upon the vessel. This proof is as essential as that of the necessity of the article itself. The vessel is not subject to a lien for a common debt of the master or owner. It is only under very special circumstances, and in an unforeseen and unexpected emergency, that an implied maritime hypothecation can be created. It seems, also, to be supposed that circumstances of less pressing necessity, for supplies or repairs, and an implied hypothecation of the vessel to procure them, will satisfy the rule, than in a case of a necessity, sufficient to justify a loan of money on bottomry, for the like purpose. We think this a misapprehension.

The only difference is, that before a bottomry bond can be given, an additional fact must appear, namely, that the master could not procure the money, without giving the extraordinary interest incident to that species of security. This distinction was attempted in the case of The Alexander, (1 Wm. Rob., 336,) but was rejected by Dr. Lushington. A principle, also excluding any such distinction, has been laid down at this term, in the case of William Thomas and others *v.* J. W. Osborn.

Now, the supplies having been furnished at a fixed place, according to the account current, and apparently under some general understanding and arrangement, the presumption is, that there could be no necessity for the implied hypothecation of the vessel—there could be no unexpected or unforeseen exigency to require it. For aught that appears, the supplies could have been procured on the personal credit of the master, and in this case especially, as he was also the owner.

We do not say that the mere fact of the master being owner, of itself, excludes the possibility of a case of necessity that would justify an implied hypothecation; but it is undoubtedly a circumstance that should be attended to, in ascertaining whether any such necessity existed in the particular case. (1 Wm. Rob., 369, The Sophie.)

These maritime liens, in the coasting business, and in the business upon the lakes and rivers, are greatly increasing; and, as they are tacit and secret, are not to be encouraged, but should be strictly limited to the necessities of commerce which created them. Any relaxation of the law, in this respect, will

tend to perplex and embarrass business, rather than furnish facilities to carry it forward.

After the fullest consideration, we think the decree below was erroneous, and should be reversed, and that the mortgagees are entitled to the proceeds in the registry.

This is the case of a foreign ship, the vessel belonging at Buffalo as her home port, and the debt contracted at Erie, in the State of Pennsylvania. We do not intend to express any opinion as to the necessity required to create liens upon vessels, under the local law of the States.

Decree reversed, and proceeds ordered to be paid to the mortgagees.

DANIEL TOD, DANIEL P. RHODES, ROBERT C. YATES, AND JAMES FORD, LIBELLANTS AND APPELLANTS, *v.* SAMUEL F. PRATT AND EDWARD P. BEALS, CLAIMANTS OF STEAMBOAT SULTANA, HER ENGINE, BOILER, &C.

The decision in the preceding case of Pratt, &c., claimants, *v.* Reed, again affirmed.

THIS case was similar to the preceding one of Pratt, &c., claimants, *v.* Reed, and was argued by the same counsel.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the northern district of New York, in admiralty.

The libel was filed by the appellants in the court below, to recover for supplies furnished the steamboat Sultana, at Cleveland, in the State of Ohio. The supplies furnished were coal, which, according to the account current, began in April, 1853, and continued from time to time till April, 1854.

The defence set up was the mortgage which has been referred to in the case of Pratt and others *v.* Reed, just decided. There was also a second ground of defence, which it is not material to notice. The District Court decreed in favor of the defendants, except as it respects some five hundred dollars, which item has not been appealed from. The Circuit Court affirmed the decree.

The case falls within the principles stated in that above referred to, and which determined that the mortgagees were entitled to the proceeds of the vessel in the registry. This was the result of the decision of the court below, and the decree is therefore affirmed.

THE UNITED STATES, APPELLANTS, *v.* THOMAS W. SUTHERLAND, GUARDIAN OF VICTORIA, ISABEL, MIGUEL, AND HELINA, MINOR CHILDREN OF MIGUEL DE PEDRORENA, DECEASED.

That the Spanish grants of land in California were large, is no reason why this court should refuse to confirm them.

A grant of a tract of land known by the name of El Cahon, lying near the mission of San Diego, and being that which the map attached to the official papers expresses, which map is of such a character that a surveyor could lay off the land, is good, and must be confirmed.

THIS was an appeal from the District Court of the United States for the southern district of California.

The case is stated in the opinion of the court.

It was argued by *Mr. Cushing* (Attorney General) for the United States, and by *Mr. Rose* for the appellees.

Mr. Justice GRIER delivered the opinion of the court.

The defendants in error filed their petition before the board of commissioners for ascertaining and settling private land claims in California, claiming "a tract of land called El Cahon, containing eleven sitios de ganado mayor, situated in the county of San Diego, by virtue of a grant in fee made to their mother, Doña Maria Antonio Estudillo de Pedrorena, by Pio Pico, Governor of California, bearing date 23d of September, 1845, and approved by the territorial deputation on the 3d of October, 1845."

The only question arising in this case, which has not been disposed of in former decisions of this court, is the objection "that the grant is void for uncertainty," because it defines neither boundaries nor quantity. The authenticity of the grant and confirmation are proved, and do not appear to have been disputed before the commissioners. It is in evidence, also, that Doña Maria and her husband went into possession of the place called "El Cahon" in the year 1845, and have made it "the best-cultivated rancho in the country about San Diego." It had formerly belonged to the mission of San Diego. The mission was in debt to the husband of Doña Maria, and agreed to transfer their right of occupancy on this rancho to her, in satisfaction of her husband's debt.

Judicial possession was not delivered till September, 1846, after the establishment of the American authority, which was in July of that year. And whether void or valid, the espediente of possession made by the officer, Santiago E. Arguello, (who

could not get the assistance of a surveyor,) seems to throw little light on the subject of precise boundary.

But, under the circumstances, the want of such juridical delivery of possession will not affect the title of the petitioners, unless the grant be absolutely void for uncertainty. The description of the land granted is to be found in the following language in the patent or espediente: "A tract of land known by the name of El Cahon, near the mission of San Diego." And again: "The land of which grant is made is that which the map (diseño) attached to the respective espediente expresses," &c. "The judge who may give the possession shall inform the Government of the number of sitios de ganado mayor it contains."

In construing grants of land in California, made under the Spanish or Mexican authorities, we must take into view the state of the country and the policy of the Government. The population of California before its transfer to the United States was very sparse, consisting chiefly of a few military posts and some inconsiderable villages. The millions of acres of land around them, with the exception of a mission or a rancho on some favored spot, were uninhabited and uncultivated. It was the interest and the policy of the King of Spain, and afterwards of the Mexican Government, to make liberal grants of these lands to those who would engage to colonize or settle upon them. Where land is plenty and labor scarce, pasturage and raising of cattle promised the greatest reward with the least labor. Hence, persons who established ranchos required and readily received grants of large tracts of country as a range for pasturage for their numerous herds. Under such circumstances, land was not estimated by acres or arpens. A square league, or "sitio de ganado mayor," appears to have been the only unit in estimating the superficies of land. Eleven of these leagues was the usual extent for a rancho grant. If more or less was intended in the grant, it was carefully stated. Surveying instruments or surveyors were seldom to be obtained in distant locations. The applicant for land usually accompanied his petition with a diseño, or map, showing the natural boundaries or monuments of the tract desired. These were usually rivers, creeks, rivulets, hills, and mountian ranges. The distances between these monuments were often estimated at *about* so many leagues, and fractions of this unit little regarded. To those who deal out land by the acre, such monuments as hills, mountains, &c., though fixed, would appear rather as vague and uncertain boundary lines. But where land had no value, and the unit of measurement was a league, such monuments were considered to be sufficiently certain.

Since this country has become a part of the United States, these extensive rancho grants, which then had little value, have now become very large and very valuable estates. They have been denounced as "enormous monopolies, princedoms," &c., and this court have been urged to deny to the grantees what it is assumed the former Governments have too liberally and lavishly granted. This rhetoric might have a just influence, when urged to those who have a right to give or refuse. But the United States have bound themselves by a treaty to acknowledge and protect all bona fide titles granted by the previous Government; and this court have no discretion to enlarge or curtail such grants, to suit our own sense of property, or defeat just claims, however extensive, by stringent technical rules of construction, to which they were not originally subjected.

The patent to the claimant's mother confers a title in fee to an estate "known by the name of El Cahon," or "The Chest." It describes it as lying "near the mission of San Diego." It therefore assumes, that there is an estate or rancho having such a name, and having some known boundaries.

It is prima facie evidence of such a fact. Those who allege that it is void for uncertainty, must prove either that there are two estates called "El Cahon," near the mission of San Diego, to which the description in the patent would equally apply; in such case it would be void for ambiguity; or they must prove that there is no estate or property known by that name about San Diego. But there is not a particle of such evidence to be found on the record, nor was such a defence set up before the commissioners. For anything that appears, the "El Cahon" was as well known as San Diego itself. But the description of the patent does not end here; it is further described as "that which the diseño attached to the espediente expresses." This map or survey is thus made a part of the patent for the purpose of description. It exhibits a circular valley surrounded by hills or mountains, except at a narrow outlet on the eastern boundary, where a stream of water passes out. The course of the stream through the valley is traced, as also are the roads. The position of corrals, ranchos, cottages, &c., are carefully noted; on the east, a hill or mountain bounds the valley called "El Cahon;" on the west, "Cerro del Porsuele" and "Cerro de la Mesa;" the northern boundary, as a continuous circular hill or mountain without a name; the southern are broken hills, called "Lomas Altas." The cardinal points of the compass are given, and a scale of measurement, a single glance at which would show that the valley traced according to that scale would contain about ten leagues, or possibly eleven, the usual allowance for such estates. There is no evidence what-

ever, tending to show that, with the assistance of this map, a surveyor would find any difficulty in locating it according to its calls.

In the cases of Frémont and of Larkin, the grants were much more vague than the present, and the same remark which was made in the latter case will equally apply to this. "No question appears to have been made as to the practicability of locating the grant in the tribunals below, nor do we see any ground upon which such a question could have been properly raised in the case."

The judgment is therefore affirmed.

Mr. Justice DANIEL dissented.

JOSEPH FELLOWS, SURVIVOR OF ROBERT KENDLE, PLAINTIFF IN ERROR, *v.* SUSAN BLACKSMITH AND ELY S. PARKER, ADMINISTRATORS OF JOHN BLACKSMITH, DECEASED.

The United States made two treaties, one in 1838, and one in 1842, with the Seneca Indians, residing in the State of New York, by which the Indians agreed to remove to the West within five years, and relinquish their possessions to certain assignees of the State of Massachusetts, and the United States agreed that they would appropriate a large sum of money to aid in the removal, and to support the Indians for the first year after their removal to their new residence.

But neither treaty made any provision as to the mode or manner in which the removal of the Indians or surrender of the reservations was to take place.

The grantees of the land, under the Massachusetts assignment, cannot enter upon it and take forcible possession of a farm occupied by an Indian, but are liable to an action of trespass, *quare clausum fregit*, if they do so.

The removal of tribes of Indians is to be made by the authority and under the care of the Government; and a forcible removal, if made at all, must be made under the direction of the United States.

The courts cannot go behind a treaty, when ratified, to inquire whether or not the tribe was properly represented by its head men.

THIS case was brought up from the Supreme Court of the State of New York, by a writ of error issued under the 25th section of the judiciary act.

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

It was argued by *Mr. Gillet* and *Mr. Brown* for the plaintiff in error, and by *Mr. Martindale* for the defendants.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of New York. The case was decided by the Court of Appeals of that State; but the record had been remitted, after the de-

cision, to the Supreme Court, from which the appeal had been taken.

The suit in the Supreme Court was an action of trespass, *quare clausum fregit*, brought by the intestate, John Blacksmith, against the defendants, Joseph Fellows and Robert Kendle, for entering, with force and arms, into the close of the plaintiff, commonly known as an Indian sawmill and yard, at the town of Pembroke, county of Genesee, and then and there having expelled and dispossessed the said plaintiff.

The defendants plead, 1st, not guilty; and 2d, that the said close, &c., was the soil and freehold of the defendant, Fellows, and that the defendant, Fellows, in his own right, and the defendant, Kendle, as his servant, and by his command, broke and entered the said close, &c., as they lawfully might, for the cause aforesaid. To this plea there was a replication, averring that the close, soil, and freehold, was not the close of the defendant, Fellows.

On the trial, it was proved by the plaintiff that the close mentioned in the declaration is situate in the town of Pembroke, county of Genesee, upon a tract of land of twelve thousand eight hundred acres, commonly known as the Tonawanda reservation, and was, at the time of the entry complained of, an Indian improvement upon the same; that said improvement was made about twenty years before the treaty, by the plaintiff and seven other Tonawanda Indians; that the plaintiff is a native Indian, belonging to the Tonawanda band of the Seneca Indians, who reside on that reservation, and are a part of the Seneca Nation, and has so been known for at least thirty-six years; that he has resided on this reservation from his birth, and was in the actual possession of the said improvement at the time of the entry complained of; that on the 13th July, 1846, the defendants entered into and took possession of the said close, and turned the plaintiff out, and in doing so committed the trespass. It was admitted, that a treaty had been made between the United States and the Six Nations of Indians on the 11th November, 1794, by which certain lands in western New York, including this Tonawanda reservation, are declared "to be the property of the Seneca Nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or their Indian friends residing thereon, and united with them in the free use and enjoyment thereof; but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

The plaintiff then rested.

The defendants gave in evidence certain documents and acts

of the Legislatures of the States of New York and Massachusetts, showing that a dispute had arisen, at an early day, between the two States, in respect to the title to a large tract of land within the limits of New York, of which the *locus in quo* is a part. That in 1786, the dispute was amicably settled by a cession from Massachusetts to New York of the sovereignty and jurisdiction over the tract, and by a cession from New York to Massachusetts of the right of pre-emption to the soil from the Indians.

The lands were then in the independent occupancy of the Seneca Nation, and owned by them, and that Massachusetts acquired by the cession the exclusive right of purchasing their title whenever they became disposed to sell; that this right had become duly vested in Thomas L. Ogden and Joseph Fellows, by proper conveyances from Massachusetts, which survived to the latter on the death of Ogden.

A treaty was then given in evidence, between the United States and the New York Indians, bearing date 15th January, 1838, and another between the United States and the Seneca Nation, bearing date the 20th May, 1842, under which the defendant claims that he had acquired the Indian title to the close in question, and by virtue of which it is admitted the defence to the action in this case rests.

The treaty of 1838 (7 U. S. Stat., 551) set apart a tract of country, situated west of the State of Missouri, as a permanent home for all the New York Indians, containing one million eight hundred and twenty-four acres of land, being, as is expressed in the treaty, "three hundred and twenty acres for each soul of said Indians, as their numbers are at present computed." The tract is particularly described and located. It was intended for the future home of nine tribes of Indians, containing, according to the official estimate, a population of five thousand four hundred and eighty-five. The Seneca tribe, including among them their friends, the Onondagas and Cayugas, numbers a population of two thousand six hundred and thirty-three.

By the tenth section of this treaty, special provision was made concerning this tribe and their friends already mentioned. They were to have assigned to them the easterly part of the tract set apart to the New York Indians, and to extend so far as to include one half section of land for each soul. The tribe agrees to remove from New York to their new home within five years, and continue to reside there. The section then recites the purchase of the title of the Seneca Nation to certain lands described in a deed of conveyance by Ogden and Fellows, assignees of the State of Massachusetts, for the consideration

of $202,000, and also that the Nation has agreed that said money shall be paid to the United States, and that out of this sum $102,000 shall be paid to the owners of the improvements on the land so conveyed, the residue to be invested in stocks by the Government, the income of which is to be paid annually to the Nation at their new homes. The improvements were to be appraised, and a distribution of the $102,000 made among the owners, and "to be paid by the United States to the individuals who were entitled to the same, &c., on their relinquishing their respective possessions to Ogden and Fellows."

By the fifteenth section of the treaty, the United States agree that they will appropriate the sum of $400,000, to be applied from time to time, under the direction of the President of the United States, in such proportions as may be most for the interest of the Indians who were parties to the treaty, "to aid them in the removal to their homes, and in supporting them the first year after their removal; to encourage and assist them in education, and in being taught to cultivate their lands; in the erection of mills, houses," &c.

A large tract of land in Wisconsin that had been set apart to certain Indians was relinquished to the Government.

The deed of conveyance from the Seneca Nation to Ogden and Fellows, and referred to in the treaty, is annexed thereto. It conveys four reservations in western New York: the Buffalo Creek reservation, containing 49,920 acres; the Cattaraugus, 21,680 acres; the Allegany, 30,469 acres; and the Tonawanda, 12,800 acres.

Some difficulty occurred in carrying this treaty into execution, which it is not important to refer to. These difficulties raised by the Indians resulted in a modification of it by a second treaty entered into on 20th May, 1842, which, after refering to the first, and to the deed of conveyance to Ogden and Fellows, and to the differences that had arisen between the parties, provides in the first article that Ogden and Fellows, in consideration of the release and agreements afterwards mentioned, stipulate that the Seneca Nation might continue in the occupation and enjoyment of two of the reservations, the Cattaraugus and the Allegany, the same as before the deed of conveyance. And in the second article, the Seneca Nation, in consideration of the foregoing and other stipulations, agree to release and confirm to Ogden and Fellows the two remaining reservations, the Buffalo Creek and the Tonawanda.

The third article provides for reducing the amount of the purchase-money to be paid by Ogden and Fellows, so as to correspond with the relative value of the two reservations released to the value of the four, as fixed in the treaty of 1838.

The fourth article provides for the appraisal of the land and improvements in these two reservations, by appraisers—one to be appointed by the Secretary of War, and the other by Ogden and Fellows—and to report their proceedings to the Secretary, and also to Ogden and Fellows.

The fifth article provides that the possession of the two tracts confirmed to Ogden and Fellows should be surrendered up as follows: the unimproved lands on the tracts within one month after the reports of the appraisers, and the improvements within two years, provided that the amount to be ascertained and awarded as the proportionate value of said improvements shall, on the surrender thereof, be paid to the President of the United States, to be distributed among the owners according to the determination of the appraisers; and provided, also, the consideration for the release and conveyance of the lands shall, at the time of the surrender thereof, be paid or secured to the satisfaction of the Secretary of War, the income of which to be paid to the Seneca Indians annually.

The seventh article provides that the modification in this treaty of 1842 shall be a substitute for that of 1838, wherein it differs from it, and to this extent shall be deemed to repeal it.

It will be seen that the principal change under the second treaty consists in the release, by Ogden and Fellows, to the Indians, of two of the four reservations conveyed to them under the treaty of 1838, and the corresponding reduction of the price to be paid. Most of the other provisions of the treaty are untouched, and remained in force. The assignment by the Government of the large tract of country for the New York Indians west of the Missouri—the special tract therein assigned to this Seneca Nation—their agreement to remove to their new homes, and the large appropriation to aid in their removal and in their support and encouragement after they had arrived—all these provisions remained unaffected by the second treaty.

Neither treaty made any provision as to the mode or manner in which the removal of the Indians or surrender of the reservations was to take place. The grantees have assumed that they were authorized to take forcible possession of the two reservations, or of the four, as the case would have been under the first treaty. The plaintiff in this case was expelled by force; and unless this mode of removal can be sustained, the recovery against the defendants for the trespass was right, and must be affirmed.

The removal of tribes and nations of Indians from their ancient possessions to their new homes in the West, under

treaties made with them by the United States, have been, according to the usage and practice of the Government, by its authority and under its care and superintendence. And, indeed, it is difficult to see how any other mode of a forcible removal can be consistent with the peace of the country, or with the duty of the Government to these dependent people, who have been influenced by its counsel and authority to change their habitations.

The negotiations with them as a quasi nation, possessing some of the attributes of an independent people, and to be dealt with accordingly, would seem to lead to the conclusion, unless otherwise expressly stipulated, that the treaty was to be carried into execution by the authority or power of the Government, which was a party to it; and more especially, when made with a tribe of Indians who are in a state of pupilage, and hold the relation to the Government as a ward to his guardian. It is difficult to believe that it could have been intended by the Government that these people were to be left, after they had parted with their title to their homes, to be expelled by the irregular force and violence of the individuals who had acquired it, or through the intervention of the courts of justice. As we have seen, the Seneca Nation upon the four reservations consisted of a population of some two thousand six hundred and thirty-three souls; and if we include the Tuscaroras, whose lands were also purchased under the same treaty, nearly three thousand. It is obvious that any such litigation would be appalling.

If we look into the provisions of the two treaties, we think the conclusion as clear, from a consideration of them, that no such means or manner of removal were contemplated, as that derived from a consideration of their unfitness and impropriety under the circumstances stated.

The treaty of 1838 contemplated a removal to the tract west of the State of Missouri, and putting the Indians in possession of it. A large fund was appropriated, and in the hands of the Government, to be disbursed in aid of such removal, and of their support and encouragement after their arrival. It did not, therefore, separate these Indians from the care and protection of the Government on its ratification, but contemplated further duties towards them, and for which means were supplied. Besides, the purchase-money for the reservations was to be paid to the Government; and, by the express terms of the treaty of 1842, the appraised value of the improvements was, on the *surrender of the possessions, to be paid to the President of the United States, to be distributed among the owners of the improvements according to the award of the appraisers.* This provision shows,

that the Government was to be present at the surrender and payment for the improvements.

The clause in the treaty of 1838 is still more specific, which was, that the improvements were "to be paid by the United States to the individuals who were entitled to the same," &c., "on their relinquishing their respective possessions to the said Ogden and Fellows." It is also worthy of remark, that the St. Regis Indians, one of the nine tribes of the New York Indians, in giving their assent to the treaty of 1838, deemed it necessary to guard against a forcible removal to the West, by a clause providing that they "shall not be compelled to remove under the treaty;" a removal to the West being in contemplation.

We think, therefore, that the grantees derived no power, under the treaty, to dispossess by force these Indians, or right of entry, so as to sustain an ejectment in a court of law; that no private remedy of this nature was contemplated by the treaty, and that a forcible removal must be made, if made at all, under the direction of the United States; that this interpretation is in accordance with the usages and practice of the Government in providing for the removal of Indian tribes from their ancient possessions, with the fitness and propriety of the thing itself, and with the fair import of the language of the several articles bearing upon the subject.

An objection was taken, on the argument, to the validity of the treaty, on the ground that the Tonawanda band of the Seneca Indians were not represented by the chiefs and head men of the band in the negotiations and execution of it. But the answer to this is, that the treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can behind an act of Congress. (1 Cranch, 103; 6 Pet., 735; 10 How., 442; 2 Pet., 307, 309, 314; 3 Story Const. Law, p. 695.)

The view we have taken of the case makes it unnecessary to examine the ground upon which the learned court below placed their decision; that court held the appraisal of the improvements, and payment therefor, were conditions precedent to the surrender of them by the Indians; and that the refusal of the Tonawanda band to permit the appraisal did not excuse the performance of these conditions. The ground upon which we have placed our judgment is not in conflict with this view. We hold that the performance was not a duty that belonged to the grantees, but for the Government under the treaty.

We think the judgment of the court below right, and should be affirmed.

ENOCH C. ROBERTS, PLAINTIFF IN ERROR, *v.* JAMES M. COOPER.

Where the judgment of the Circuit Court, in an action of ejectment, was against the defendant, in which nominal damages only were awarded, who sued out a writ of error in order to bring the case before this court, this court cannot grant a motion to enlarge the security in the appeal bond, for the purpose of covering apprehended damages, which the plaintiff below thinks he may sustain by being kept out of his land.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Michigan.

It will be seen, by reference to 18 Howard, that this court, at the last term, in a case between these same parties, decided in favor of Cooper's title to a tract of land in Michigan. In order to recover a part of the tract which was not included in the former suit, Cooper brought an ejectment against Roberts, and obtained a judgment against him. Roberts then brought the case up to this court by writ of error.

But in consequence of its being so low upon the docket as not to be reached at the present term, *Mr. Vinton*, counsel for Cooper, moved for an order requiring the plaintiff in error to give additional security in the sum of $25,000, or for such other sum as, in the judgment of the court, would be sufficient to answer all damages and costs which Cooper might suffer if the writ of error should not be prosecuted with effect; and filed an affidavit by Cooper in support thereof.

The motion was argued by *Mr. Vinton* in support, and by *Mr. Romeyn* against it.

Mr. Justice WAYNE delivered the opinion of the court.

In this case, Roberts, who is the plaintiff in error, on the allowance of the writ of error, gave security in the sum of one thousand dollars, conditioned that he would prosecute his writ to effect, and answer all damages and costs if he failed to make his plea good. Cooper now declares that the bond for one thousand dollars is not sufficient to answer all the damages and costs, if Roberts should fail to prosecute his writ to effect, and refers to an affidavit filed by him as the basis of this motion to show that fact.

Mr. Vinton, counsel of Cooper, now moves the court for an order requiring Roberts to give additional security in the sum

of twenty-five thousand dollars, or such other sum as the court may deem to be sufficient to cover all damages which Cooper may suffer, if the writ of error should not be prosecuted with effect.

The case between the parties is for the recovery of land in ejectment. Cooper represents that he holds the legal title to the land in controversy in trust for the National Mining Company, incorporated by the Legislature of the State of Michigan, to carry on the business of mining for copper, and that he is the secretary and treasurer of the company; that he instituted this suit to recover the possession of this land for them, that they might have the use and occupation of it for their chartered purposes. It is also stated by the affiant that a decision had been given by the Supreme Court of the United States at its last term, on a writ of error to the Circuit Court for the district of Michigan, between the same parties in controversy, for the same land, establishing, on the merits of the case, the title of the affiant to the land, and that the mining company, in consequence of it, had prepared to prosecute its mining business to the extent of their ability upon the land, which is known to contain a very valuable deposit of copper ore, which could be worked with great profit; and that the company was prevented from working the deposit, in consequence of the pending writ of error, which Roberts sued out upon a judgment which had been rendered in this case against him, and in favor of the legal title of the affiant, *in the Circuit Court of the United States for the district of Michigan, at its last term.* And the affiant also states that the damages which the company will sustain by the delay caused by the writ of error will amount to at least the sum of twenty-five thousand dollars, and to a larger amount, if Roberts shall not prosecute his writ of error to effect.

We have not been able to find a precedent for this motion. The counsel making it did not cite one, but relied upon that part of the twenty-second, twenty-third, and twenty-fourth sections of the judiciary act of 1789, the first of which declares that every justice or judge signing a citation on any writ of error shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, which, considered in connection with the twenty-third and twenty-fourth sections, he thought, empowered this court to grant the motion. In our interpretation, and the proper application of those sections, regard must be had to the nature of the action upon which a writ of error has been brought, and to the damages to which a plaintiff who has had a verdict and judg-

ment may be entitled. If it be for a money demand, on which a sum certain has been given by a judgment, it is the duty of the judge, who signs the citation on a writ of error, to take care that good and sufficient security is given. Should it be neglected, and it shall be brought to the notice of this court, when such a case is before it upon a writ of error, upon a motion to enlarge the security, this court would take care that the party claiming its intervention should have the full benefit of the security intended by the law, on a case when the writ of error was a supersedeas.

But when a verdict and judgment upon it has been had in ejectment, on which nominal damages are only awarded, (except in cases between landlord and tenant, and that in England, in virtue of the statute of 1 George IV, chap. 87, sec. 2,) and a writ of error has been sued out by the defendant, and security given, as has been done in this case, this court cannot interfere to enlarge the security, to cover damages which a plaintiff may recover in an action for mesne profits, or for any other losses which he may allege he will sustain by being kept out of the possession of his land by any delay there may be in prosecuting the writ of error. Besides, this court cannot award damages in any case brought to it by writ of error, or require an enlargement of a bond given upon a writ of error, except as it is authorized to do in the twenty-third and twenty-fourth sections of the judiciary act of 1789, neither of which comprehend cases of apprehended losses, except when they are a part of the original suit, and then only "when its reversal is in favor of the plaintiff, or petitioner in the original suit, and the damages to be assessed or the matter to be decreed are uncertain; *in which case*, the cause is remanded for a final decision."

We must deny this motion. It is not provided for by any legislation of Congress. And the utmost extent for which the enlargement of security upon nominal damages in ejectment has been found necessary in England, is given by the statute 16 Charles II, sec. 8; and that is, where a defendant there brings error, he may be bound to the plaintiff in such reasonable sum as the court shall think proper, which sum has been settled at double the amount of one year's rent. (4 Burrows, 2,502.) The courts in England will also oblige a defendant in ejectment, who brings error, to enter into a rule or undertaking not to commit waste or destruction pending the writ. (3 Burrows, 1,823; Palmer's Practice in the House of Lords, 159.)

The motion to enlarge the security in this case is overruled.

MARGARET MCREA AND BRACY MCREA, ADMINISTRATORS OF JOHN D. BRACY, APPELLANTS, *v.* THE BRANCH OF THE BANK OF THE STATE OF ALABAMA AT MOBILE.

Where money was borrowed from a bank upon a promissory note, signed by the principal and two sureties, and the principal debtor, by way of counter security, conveyed certain property to a trustee, for the purpose of indemnifying his sureties, it was necessary to make the trustee and the cestui que trust parties to a bill filed by the bank, asserting a special lien upon the property thus conveyed.

But where the principal debtor had made a fraudulent conveyance of the property, which had continued in his possession, after the execution of the first deed, and then died, a bill was good, which was filed by the bank against the administrators, for the purpose of setting aside the fraudulent conveyance, and bringing the property into the assets of the deceased, for the benefit of all creditors who might apply.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Arkansas, sitting in equity.

The bill was filed by the Branch Bank of Alabama, under the circumstances which are stated in the opinion of the court. It had a double aspect; first, setting up a lien upon the slaves, by virtue of the deed of trust to Gale; and secondly, as a creditor in common with others, to set aside the bill of sale to Margaret McRea, as fraudulent and void, as against creditors.

The Circuit Court decreed that the bill of sale from John D. Bracy to Margaret McRea was fraudulent and void, made for the purpose of hindering, delaying, and defrauding the creditors of Bracy, and especially the complainants. They therefore decreed that it should be set aside, and in case the administrators did not pay the account of the Bank, which had been presented to them, that the marshal should sell the slaves for the benefit of all the creditors of Bracy who should signify their willingness to come in and bear their share in the costs and expenses incurred, in the mode which is customary in a creditor's bill.

From this decree the administrators appealed to this court.

The case was argued by *Mr. Lawrence* for the appellee, no counsel appearing for the appellants.

Mr. Justice CURTIS delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the eastern district of Arkansas.

It appears from the allegations of the bill, which are supported by the proofs, that in December, 1843, John D. Bracy, then a resident of Alabama, borrowed of the Branch of the Bank of the State of Alabama at Mobile (the appellees in this

case) the sum of $9,065, and that Maria Matheson, who was his mother, and another person, joined in the promissory note which was given to the bank for the loan. To indemnify Mrs. Matheson, Bracy conveyed certain negro slaves to one Gale, in trust, to save her harmless. The debt not being paid at maturity, the bank recovered a judgment on it in November, 1845. The trustee afterwards sold some of the slaves, and their price was applied to reduce the debt; but some time in the year 1846, Bracy privately left the State of Alabama, and carried away with him the residue of the slaves, and some other property, not leaving, so far as appears, any other property in that State, out of which the judgment in favor of the bank could be satisfied. He appears to have been for a time in the State of Mississippi. Sometime in 1847 he went to Louisiana; and in the year 1848 he removed with these slaves to White county, in the State of Arkansas, where he employed them in making some improvements on a tract of Government land, where he and they resided. In September, 1849, Bracy went to Louisiana, where Margaret McRea, his sister, one of the appellants, then resided, and there made a bill of sale of all the slaves to her. She sent one of her sons to take possession of them; and Bracy also returned to their place of residence, in White county, where he continued to reside until the spring of 1850, when Mrs. McRea moved thither; and from that time they resided together, she having entered the land on which the plantation was, and taken a title in her own name. Bracy continued to reside there, having the principal ostensible management of the business of the plantation, until about a year before his decease, in April, 1852, when he removed to the county town, about six miles distant, to practise his profession as an attorney. He died deeply insolvent, the debts proved against his estate being upwards of fourteen thousand dollars; the sales of all his inventoried effects amounting only to the sum of $345.90. The bill asserts a lien on these slaves by virtue of the trust-deed, of which it avers Mrs. McRea had notice when she purchased. But our opinion is, that Gale, the trustee, and Mrs. Matheson, the *cestui que trust*, are indispensable parties to a bill for the subjection of this property to the claim of the bank, by virtue of the trust-deed. Upon that footing the bill cannot be maintained.

But we are all of opinion, that the sale to Mrs. McRae was in fraud of creditors, and especially of the bank. Without detailing the evidence, we think it enough to say, that the removal of the property from Alabama by Bracy, leaving the judgment of the bank unsatisfied, his insolvency, the relation between the parties, their subsequent residence together, the

manner in which the property was held and managed, are causes of very grave suspicion. The bill charges, that if this property was conveyed to her, "it was so conveyed with intent and for the purpose of hindering, delaying, and defrauding the creditors of the said John D. Bracy." The answer of Mrs. McRae does not deny this allegation.

In the course of responding to the claim of the bill founded on the trust-deed, her answer says: "She therefore charges, that there was no encumbrance whatever on the said slaves, or any of them, at the time she purchased them; and avers that she purchased them in good faith, and without any notice or knowledge whatever of a subsisting lien upon them by virtue of said deed of trust." We understand this averment of good faith on her part to relate simply to her ignorance of a lien by the trust-deed, and that it does not meet the explicit allegation in the bill, that the purpose of the sale was to conceal the property from creditors; and though the failure of the answer to meet this charge in the bill does not operate as a technical confession of its truth, it does lay a foundation for the belief that if the defendant could have truly denied it, she would not have foregone the decided advantage of such a denial in an answer which puts the complainant on proof of the contested fact by more than one witness.

The answer alleges, that the agreed price of the sale was $3,500, payable in instalments of $875 each, in five, six, seven, and eight years; and that four promissory notes were executed accordingly. It does not say what was done with the notes, after they were executed. No such notes were found among the effects of Bracy, to be inventoried. Neither of these notes, if in existence, had become payable when this bill was filed, and we think the attempt to show that something had been paid on account of them by the delivery of some cotton is not successful.

In our opinion, the charge in the bill, that the sale was fraudulent as to creditors, is made out in proof, and this is sufficient to sustain the decree of the Circuit Court.

The decree of the Circuit Court is affirmed with costs.

THE MICHIGAN CENTRAL RAILROAD COMPANY, PLAINTIFFS IN ERROR, *v.* THE MICHIGAN SOUTHERN RAILROAD COMPANY ET AL.

Where a case is brought up to this court by a writ of error issued to the Supreme Court of a State, under the twenty-fifth section of the judiciary act, if it appears

that the judgment of the State court only involved the construction of State statutes which both parties in the cause admitted to be valid, the writ of error will be dismissed on motion.

THIS case was brought up from the Supreme Court of the State of Michigan, by a writ of error issued under the twenty-fifth section of the judiciary act.

The case is fully stated in the opinion of the court.

Mr. Walker moved to dismiss the writ of error for want of jurisdiction, which motion was sustained by himself in argument, and opposed by *Mr. Joy* on behalf of the plaintiffs in error.

Mr. Justice GRIER delivered the opinion of the court.

This case is before us on a motion to dismiss for want of jurisdiction.

It is a bill in chancery originating in the Circuit Court of Wayne county, in the State of Michigan, and afterwards taken by appeal to the Supreme Court of the State.

In order to give this court jurisdiction under the 25th section of the judiciary act, the record of the case must show, by direct averment or necessary intendment, that one of the questions enumerated in that section did arise, and was decided by the State court, as required.

If the subject of complaint be, that a State statute is repugnant to the Constitution of the United States, and therefore void, and that the State court has declared it to be valid, this fact should appear by some direct averment, either on the bill or answer, or in the decree of the court.

After scrutinizing with great care the rather prolix pleadings of this case, we are unable to find any complaint, by the bill or answer, that the Legislature of Michigan have passed any act affecting the rights of either party which "impairs the obligation of a contract;" nor is there an intimation in the decree that any such question arose in the case; nor is there any necessary intendment that such a question did arise, and was necessarily decided, from anything that does appear in the pleadings, evidence, or decree; on the contrary, it shows affirmatively that no such question did or could arise.

This will clearly appear from an examination of the bill and answer.

The bill alleges, that the complainants were incorporated by an act entitled "An act to authorize the sale of the Central railroad and to incorporate the Michigan Central Railroad Company," approved March 28, 1846; that they purchased the Central railroad, according to the terms of their charter, and

have since that time completed and run said railroad; that, at the time of the act, the State of Michigan owned both the Central and Southern railroads; that the management of the Central road was found onerous and unprofitable; that it was an object to sell the same; that the road was not worth, to exceed $800,000; and that the franchises and exclusive rights secured by the charter alone made it worth the sum they paid, viz: $2,000,000; and that it was for the interest of the State to grant such franchises and exclusive rights, and that the exclusive privileges secured to them by the following provision in section five of their charter were especially valuable to them, and without which they would not have purchased said road:

"And no railroad or railroads from the eastern or southern boundary of the State shall be built or constructed or maintained, or shall be authorized to be built, constructed, or maintained, by or under any law of this State, any portion of which shall approach, westwardly of Wayne county, within five miles of the line of said railroad, as designated in this act, without the consent of this company."

The bill further alleges, that the State at the same time resolved to sell the Southern railroad, but that said sale was only to take effect on the completion of the sale of the said Central railroad; that it was well understood by the complainants, the State, and the defendants, (the Southern Railroad Company,) that the sale of said Southern railroad was subordinate to the sale of the Central railroad, and that the act incorporating the said Michigan Southern Railroad Company, approved May 9, 1846, was subject to the complainants' charter; and that, by the sixth section of that act of incorporation, it is provided as follows:

"And the said Southern Railroad Company shall also, within three years after the passage of this act, extend, construct, and complete the Tecumseh branch from the village of Tecumseh, by way of Clinton, to the village of Jackson, by way of Manchester, and along the line of railroads formerly authorized to be constructed by the Jacksonburgh and Palmyra Railroad Company, *or so far along the same as may not conflict* with the *provisions of an act entitled* 'An act to authorize the sale of the Central railroad, and to incorporate the Michigan Central Railroad Company,' approved March 28, 1846, and put the same in operation, with sufficient motive power to do the business of the country depending on said branch."

The bill further alleges, that the defendants are threatening to construct, and are taking the preliminary steps for constucting, said Tecumseh branch to the village of Jackson, and that ten miles of said branch railroad, if constructed, will be within

five miles of the complainants' railroad; and that said branch, together with the Erie and Kalamazoo railroad from Toledo to Adrian, and the Michigan Southern railroad to Monroe, will, in fact and effect, constitute one railroad, both to the eastern and southern boundary of the State, and therefore will be an invasion of the rights and privileges guarantied to the complainants by that provision of their charter before cited, and *beyond the powers granted to said Southern company;* and therefore an injunction is prayed for.

The answer of the defendants denies that the provision of the complainants' charter above cited applies to such a road as the Tecumseh branch, but only to parallel roads, or those nearly so; it avers that the Legislature could not grant powers so large and exclusive as those set up by the complainants; and that the Tecumseh branch, if built, would not, in fact or effect, together with the other railroads named, constitute one line of railroads, either to the eastern or southern boundary of the State, and the construction of the same would be no violation of the rights and privileges guarantied to the complainants by their charter, and that by their own charter they are not only authorized, but required, to construct said branch to Jackson.

The gravamen of the bill is, that the defendants are acting *without legislative authority*, and are usurping rights not granted to them by their charter. It nowhere asserts that they are acting under authority conferred on them by a legislative act which infringes the rights previously granted in the complainants' charter, or impairs the obligation of their contract. The answer puts in issue nothing but the construction of certain statutes which both parties admit to be valid. It is therefore abundantly apparent that this court has no jurisdiction to review the judgment of the Supreme Court of Michigan in this case.

A manuscript opinion of one of the judges of the Supreme Court of Michigan has been referred to by the counsel, in their argument in support of our jurisdiction. But even if this opinion had introduced some speculations on points not involved in the pleadings of the case, this court cannot resort to anything therein contained in order to support their jurisdiction. In the case of the Ocean Insurance Company *v.* Polleys, we have decided, "that it is to the record, and to the record alone, that this court can resort to ascertain its appellate jurisdiction under the twenty-fifth section of the judiciary act."

The writ of error must therefore be dismissed for want of jurisdiction.

ALBERT BALLARD, CHARLES CHADBOURNE, ELIPHALET GILMAN, AND HENRY W. HEIRD, TRADING UNDER THE FIRM OF BALLARD, CHADBOURNE, & Co., *v.* PHILIP F. THOMAS, COLLECTOR.

In estimating the duty payable at the custom-house upon imported iron, it was proper to levy it on the prices at which the iron was charged in the invoices; and the entry in the invoices, that the importer would be entitled to a deduction for prompt payment, could not affect the amount of duty chargeable.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Maryland.

The case is stated in the opinion of the court.

It was argued by *Mr. Schley* for the plaintiffs in error, and by *Mr. Cushing* (Attorney General) for the defendant.

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 Maryland.

The suit was brought in the court below by the plaintiffs against the defendant, collector of the port of Baltimore, to recover back an excess of duties paid under protest on an importation of iron.

The iron was shipped from Liverpool, and, on an appraisal at the custom-house in Baltimore, the invoice price was adopted as the minimum market value upon which to assess the duties. The plaintiffs claimed that the iron ought to be appraised at the actual cash market value, or cash wholesale price, instead of the actual market value or wholesale price at a credit of four months, the usual time in the purchase of iron. But the collector insisted upon the invoice price as the minimum valuation. Two invoices are given in the record as specimens of those produced at the trial. One of them contains the price of the iron, with a deduction of two and a half per cent. for prompt payment, which means cash; the other adds at the foot, four months credit, which is the customary credit in the trade.

The court charged the jury, that it being admitted that the duties were levied on the prices at which the iron was charged in the invoices, they were lawfully exacted, and the plaintiffs not entitled to recover; and that the entry in the invoice, that the plaintiffs would be entitled to a deduction for prompt payment, could not affect the amount of duty chargeable.

The eighth section of the act of 1846 (9 U. S. St., p. 43) provides, "that under no circumstances shall the duty be assessed

upon an amount less than the invoice value, any law of Congress to the contrary notwithstanding."

It is claimed that this section has been repealed by the act of Congress of March 3, 1851, (9 St. U. S., p. 629,) which provides that the collector shall "cause the actual market value, or wholesale price thereof at the period of the exportation to the United States, in the principal markets of the country from which the same shall have been imported, &c., to be appraised, &c., and to such value or price shall be added all costs and charges, &c., as the true value at the port where the same may be entered," &c.

Previous to this act, the time when the value of the article in the foreign market was to be ascertained, was the time of the purchase, (Act 30th August, 1842, sec. 16, 5 St. U. S., p. 563;) now, by the act of 1851, the time of exportation. There is no change, however, in the rule which must govern in making the valuation—it is the actual market value or wholesale price in the principal markets of the country from which the article shall have been imported. The only real change, therefore, in respect to this matter, under the law of 1851, from that of 1842 and 1846, would seem to be a change of the time when the valuation is to take place, without intending to interfere with any other of the regulations in the former laws. This was the interpretation given by the Department of the Government having charge of this subject, soon after the passage of the act in question, and, we think, may be sustained upon the principles that this court has uniformly applied in interpreting these revenue laws.

The construction is also borne out by the case of Stairs et al. *v.* Peaslee, (18 How., 522.) That case recognises the eighth section of the act of 1846 as in force since the act of 1851, and the clause in question is a part of it.

In respect to the deduction from the price on account of prompt payment, we think the fact does not vary or affect the price of the article, as stated in the invoice. It relates simply to the mode of payment, which may, if observed, operate as a satisfaction of the price to be paid by the acceptance of a less sum.

We think the ruling of the court below right, and that the judgment should be affirmed.

OBADIAH H. PLATT, PLAINTIFF IN ERROR, *v.* CHAUNCEY JEROME.

The competent parties to agree that a case shall be settled, and the writ of error dismissed, are usually the parties upon the record. If either of them has assigned his interest, and it be made known to the court, the interest of such assignee would be protected.

But where there was a judgment for costs in the court below, and the attorney claimed to have a lien upon such judgment for his fees, it is not a sufficient reason for this court to prevent the parties from agreeing to dismiss the case.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the southern district of New York.

Mr. Collamer, counsel for the plaintiff in error, moved that the writ of error be dismissed, and in support thereof filed the following paper, viz:

"This cause, which is now pending, on writ of error, from the United States Circuit Court of New York, is hereby settled and discontinued by mutual consent, each party to pay their own cost, and satisfaction is hereby acknowledged of all claims and demands between the parties hereto.

"Dated Waterbury, December 20, 1856.

"CHAUNCEY JEROME.
"O. H. PLATT."

On the 24th of December, it was dismissed.

On the 9th of January, 1857, *Mr. Foster*, counsel for Jerome, moved to set aside the order of dismissal, and reinstate the case upon the docket, upon the ground that the agreement to dismiss was made by the party himself, when he was represented by counsel in court; and that Jerome had become insolvent, whereby all his interest, which was only for costs, had passed to his assignee. By dismissing the writ of error, the lien of defendant's counsel for fees, in this court and in the court below, would be lost.

This motion was argued by *Mr. Foster* in support thereof, and by *Mr. Collamer* in opposition thereto.

Mr. Justice NELSON delivered the opinion of the court.

This is a motion, on behalf of the attorney for the defendant in error, to restore the cause on the docket, which has been dismissed upon a stipulation of a settlement between the parties. The judgment was for the defendant, Jerome, in the court below, for costs of suit, upon which the plaintiff took out

a writ of error. The attorney claims that he had a lien on the judgment for his costs.

It is quite clear that he can have no lien for any costs in this court, as none have been recovered against the plaintiff in error. The suit is still pending; and as to the question of the dismissal of the writ, the court looks no further than to see that the application for the dismissal is made by the competent parties, which are usually the parties to the record. No doubt, if either party had assigned his interest to a third person, by which such third person had become possessed of the beneficial interest, and the party to the record merely nominal, the court would protect such interest, and give him the control of the suit. As in the present case, if the application had been made by the insolvent assignee of Jerome, and he had shown that he had succeeded to the interest of the insolvent, the court might protect his rights.

The attorney, however, even if he has a lien on the judgment, according to the course of proceedings in the court where it was recovered, stands in a different situation. He is not a party to the suit, nor does he stand in the place of the party in interest. He is in no way responsible for the costs of the proceedings, and to permit him to control them would, in effect, be compelling the client to carry on the litigation at his own expense, simply for the contingent benefit of the attorney.

We think, therefore, that this cause has been dismissed from the docket by the competent parties, for aught that appears before us, and that the motion to restore it should be denied.

THE UNITED STATES, PLAINTIFFS, *v.* THE CITY BANK OF COLUMBUS.

Where a question was certified from the Circuit Court to this court, viz: whether a certain letter, written by the cashier of a bank without the knowledge of the directory, though copied at the time of its date in the letter-book of the bank, was a legal and valid act of authority; and the record afforded no evidence relevant to the acts and authority of the cashier, or to the practice of the bank in ratifying or rejecting similar acts, this court cannot answer the question, and the case must be remanded to the Circuit Court, to be tried in the usual manner.

THIS case came up on a certificate of division in opinion between the judges of the Circuit Court of the United States for the southern district of Ohio.

The case is stated in the opinion of the court.

It was argued by *Mr. Cushing* (Attorney General) for the United States, and by *Mr. Stanberry* for the defendant.

Mr. Justice DANIEL delivered the opinion of the court.

This cause is brought before us upon a certificate of a division of opinion between the judges of the Circuit Court of the United States for the southern district of Ohio.

The United States instituted their action of assumpsit against the defendants, for the recovery of a sum of money, laying their damages at two hundred thousand dollars.

The declaration consisted of two counts. The first was upon an alleged agreement between the United States and the City Bank of Columbus, whereby the latter, on the 1st day of November, 1850, contracted and undertook to transfer for the plaintiffs the sum of one hundred thousand dollars, the money of the plaintiffs, from the city of New York to the city of New Orleans, and to deposit the same at the latter place, in the treasury of the United States, by the 1st day of January, 1851, free of charge.

In this count, the receipt of the money by the bank, viz: one hundred thousand dollars, for the purposes stated, the failure to make the transfer and deposit in conformity with the agreement, the conversion of the money so received by the bank to its own use, are all expressly averred.

The second count was the common *indebitatus assumpsit* for money had and received to the plaintiffs' use. Upon the trial before the jury of the issues joined by the parties, at the October term of the Circuit Court, in the year 1855, the plaintiffs, in order to establish the alleged agreement and undertaking on the part of the bank, gave in evidence the following papers, viz:

First, a letter from Thomas Moodie, cashier of the City Bank of Columbus, in these words:

"CITY BANK OF COLUMBUS,
Columbus, Ohio, October 26, 1850.

"*Hon. Thomas Corwin,*
Secretary of the Treasury, Washington city.

"SIR: The bearer, Col. William Miner, a director of this bank, is authorized, on behalf of this institution, to make proposals for the purchase of United States stocks to the amount of one hundred thousand dollars. Any arrangement he may make will be recognised and fully carried out by this bank. He is also authorized, if consistent with the rules of the Treasury Department, to contract on behalf of this institution for the transfer of money from the East to the South or West, for the Government.

"I have the honor to be, sir, your obedient servant,
"THOMAS MOODIE, *Cashier.*"

Second. The following contract:

"W. CITY, *November* 1, 1850.

"This will certify that I have contracted with the United States Treasury, as the agent of the City Bank of Columbus, to transfer $100,000 from New York to New Orleans, to be deposited in the treasury at the latter-named city by the first day of January, 1851, free of charge. I have, in pursuance of said contract, this day received a draft in my own name for $100,000 on the United States Treasury at New York city, which is to be accounted for on said contract.

"WILLIAM MINER."

"Upon the production of these papers, and proof of their execution, and further proof that said letter was the act of said cashier alone, without the knowledge or sanction of the directory of said bank, before, at the time of, or subsequent thereto, but was copied in the letter-book of the bank at the time of its execution, a question arose as to the validity thereof, upon which question the judges of this court were divided in opinion. It is therefore, by the request of both the parties, hereby ordered, that the said question be certified to the Supreme Court of the United States—that is to say, 'Do said papers, so made, constitute a valid contract between the parties to this suit?' It was agreed that the defendant is an independent bank under the act of the General Assembly of the State of Ohio of 1844–'5, to incorporate the State Bank of Ohio and other banking companies.

" *Wednesday, November* 28, 1855.

(Signed) "JOHN MCLEAN. [*Seal.*]
"H. H. LEAVITT. [*Seal.*]"

In considering this certificate of division, and the inquiry it propounds, an insuperable difficulty is perceived, arising from the partial and imperfect form in which the facts assumed as the foundation of the inquiry are presented, and from the obvious absence of facts and circumstances pertinent to the case, and by which, if disclosed, its complexion might be entirely controlled.

This court is asked to say, whether the above-cited letter of the cashier of the City Bank of Columbus, written without the knowledge of the directory, though copied at the time of its date in the letter-book of the bank, was a legal and valid act and authority.

Now, it must be obvious that the legality or validity of the letter of the cashier, and his authority to write that letter, do not depend solely and necessarily upon the fact of *knowledge* in

the directory at the time of writing that letter, nor on that of express direction or permission given at the time of its composition. The letter might have been legal and valid in the absence of either such knowledge or direction, or of both.

The powers of the cashier of a bank are such as are incident to, and implied in, his official character, as generally understood, as cash keeper, cash receiver, or payer, as negotiator and correspondent for the corporation, or as agent for various acts that are necessary and appropriate to the functions of such an officer, and inseparable from the operations of the bank; or those powers and duties may be created by a general or special authority declared in the charter or in the by-laws of the corporation. It would seem inconsistent with these considerations to determine upon an isolated fact or act of the cashier, not absolutely irreconcilable with the customary functions of such an officer, as being decisive of his capacities and duties; and this, irrespective of reference or inquiry as to the powers with which he might have been clothed, but, on the contrary, by cutting off all proofs as to the existence of any such powers, when by the introduction of those proofs the competency of such powers, or the recognition of them by the bank, might perhaps have been shown.

The true character of this cause seems not to have been developed before the Circuit Court, nor is it made apparent upon the certificate now before this court.

We think that all the evidence relevant to the acts and authority of the cashier, either inherent and exercised strictly *virtute officii*, or as an agent, general or special, of the bank, under either the authority of its charter or its by-laws, and proof, if any, of the ratification or rejection by the bank of this or of similar acts of the cashier, should have been fully brought out, to be passed upon by the jury under instructions from the court, or in the mode of a certificate of division, in the event of a disagreement between the judges. This court, therefore, refusing to respond upon the question, as propounded to them upon the certificate from the Circuit Court, remands this case to that court for trial.

PATRICK BURKE, PLAINTIFF IN ERROR, *v.* WILLIAM H. GAINES AND WIFE, ET AL.

Where a party brought an ejectment in a State court, founding his title upon documents showing a settlement claim under the laws of the United States, and the Supreme Court of the State decided in favor of that title, the opposite party cannot bring the case to this court under the 25th section of the judiciary act. This court has no jurisdiction over such a case.

THIS case was brought up from the Supreme Court of the State of Arkansas, by a writ of error issued under the twenty-fifth section of the judiciary act.

The case is stated in the opinion of the court.

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

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

This is a writ of error to the Supreme Court of the State of Arkansas. A brief summary of the case will be sufficient to show that this court have no jurisdiction.

The defendants in error, who were the plaintiffs in the court below, brought their action of ejectment in the State court to recover certain premises described in the declaration.

By a statute of Arkansas, a party may maintain an ejectment upon an equitable title. And the defendants in error, in order to show such a title in themselves, offered in evidence certain documents tending to prove that a certain Ludovicus Belding had, by settlement in 1829, acquired a pre-emption right to the land in question, and that they are his heirs at law, and have paid to the proper officer the price fixed by the Government.

The plaintiff in error offered no evidence of title in himself, although he was in possession of the land. And at the trial, the defendants in error asked the court to instruct the jury that the papers and documents read in evidence by them were sufficient to maintain the action, if the defendant in error was in possession of any part of the land at the commencement of the suit, and also that they were entitled to recover, by way of damages, reasonable rents and profits.

The plaintiff in error, on his part, asked the court to instruct the jury that the certificates and documents offered by the defendants in error were void, and conferred no title to the premises.

This is the substance of the instructions asked for by the respective parties, although drawn out at greater length, and shows the questions presented for the decision of the court. The court gave the instructions asked for by the defendants in error, and refused those requested by the plaintiff.

Under these instructions, the jury found a verdict in favor of the defendants in error, and a judgment was entered accordingly, which was afterwards affirmed in the Supreme Court of the State; and upon that judgment, this writ of error was brought.

It appears, therefore, that no right was claimed by the plaintiff in error under any act of Congress, or under any authority derived from the United States. He merely objected to the validity of the title claimed by the defendants in error. As the case appears on the record, he was a mere trespasser, holding possession in opposition to a title claimed under the United States. The decision of the State court in favor of the title thus claimed by the defendants in error can certainly give the plaintiff no right to bring this writ under the twenty-fifth section of the act of 1789. He claimed no right under the United States, and consequently can have no foundation for his writ of error.

The case cannot be distinguished from that of Fulton and others *v.* McAffea, (16 Pet., 149,) and the writ must be dismissed for want of jurisdiction.

GEORGE BULKLEY, PLAINTIFF IN ERROR, *v.* CHRISTIAN HONOLD.

The law of Louisiana imposes on the seller the obligation of warranting the thing sold against its hidden defects, which are those which could not be discovered by simple inspection; and the purchaser may retain the thing sold, and have an action for reduction of the price by reason of the difference in value between the thing as warranted and as it was in fact.

Where a vessel was purchased, which was then partly laden as a general ship for an outward foreign voyage, and after she went to sea she was found to be unseaworthy, and had to return, the defects were hidden defects, under the above law.

A vessel is included within the terms of the law.

The purchaser was not bound to renounce the vessel. This privilege is provided for in another and distinct article of the code.

The contract must be governed by the laws of Louisiana, where it was made and performed.

Such a sale is not governed by the general commercial law, but by the civil code of Louisiana.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the eastern district of Louisiana.

The case is stated in the opinion of the court.

It was argued by *Mr. Taylor* for the plaintiff in error, and by *Mr. Benjamin* for the defendant.

Mr. Taylor contended that, if the law of Louisiana governed, there was error, because—

1. The defect in the ship was an apparent defect, in the legal sense of the term, the existence of which imposed no responsibility on the vendor.

2. Because the obligation of warranty, implied in sales of

ships, does not extend to cases of decay, to which they are, from their nature, liable.

3. The defendant in error, by failing to offer to place the defendant in the court below in the position he was in before the sale, by tendering back the ship, &c., lost all right to maintain his action in redhibition or in diminution of the price.

He contended, also, that the case was not governed by the law of Louisiana, but by the law of New York, where the vendor had his domicil, or by the commercial law of the United States.

Mr. Justice CURTIS delivered the opinion of the court.

The defendant in error brought his action in the Circuit Court of the United States for the eastern district of Louisiana, founded on the allegations, that he purchased at New Orleans, of the plaintiff in error and others, a vessel called the Ashland, for the sum of $27,500; that the vessel was then partly laden as a general ship for an outward foreign voyage, and it was agreed the purchaser should take on himself the expenses and advantages of that condition of the vessel; that, accordingly, the cargo was completed and the vessel went to sea, but was found to be unseaworthy, returned to New Orleans, the cargo was removed, and the hull examined and ascertained to be so decayed and rotten as to be of no value without very extensive and costly repairs. The court found these facts proved, and allowed to the plaintiff below damages equal to the difference between the price paid and the actual value of the vessel, adding the expenses of the vessel and cargo, incurred by the plaintiff below by reason of the sale.

The petition averred a fraudulent concealment by the vendors of the defects of the vessel, but the court found this not proved.

The law of Louisiana imposes on the seller the obligation of warranting the thing sold against its hidden defects. (Civ. Code, arts. 2,450, 2,451.) Hidden defects are those which could not be discovered by simple inspection. (Civ. Code, art. 2,497.) In case the seller desires to rescind the contract by reason of the breach of such a warranty, he may do so by an action of redhibition. But he may also retain the thing sold, and have an action for reduction of the price by reason of the difference in value between the thing as warranted and as it was in fact. (Civ. Code, arts. 2,519, 2,520.) And in this action only such a part of the price as will indemnify the vendee for the difference between the value of the thing as warranted and the thing actually sold, together with the expenses incurred on the thing, after deducting its fruits, can be recovered. (Civ. Code, arts. 2,522, 2,509.)

The Circuit Court appears to have strictly pursued these rules in framing its judgment.

But it is insisted the defects were apparent, and not hidden defects. We do not think so. Certainly they were discoverable, but not on what the code terms simple inspection. It was necessary to strip or bore the vessel, to ascertain the state of its frame; and this, we think, the vendee was not bound to do under the law of Louisiana.

It is further argued that the implied warranty does not extend to the soundness of a vessel, because it is known to all, that, from the nature of the thing, it must decay, and the purchaser may be considered as knowing this, and making allowance therefor in the price. It is true that vessels must, after some time, decay; and it is also true that most subjects of sale must at some time become of less or of no value. But it is not true that vessels exposed to sale are generally unsound and unseaworthy. The buyer has no notice, from the nature of the article, that any particular vessel offered to be sold is unseaworthy by reason of the decayed state of that part of its frame which is concealed from sight. We do not perceive, therefore, why any different rule should be applicable to vessels, from that applied to most other subjects of sale. (See De Armas *v.* Gray et al., 10 Louis. R., 575.)

Another objection is, that the plaintiff below did not offer to restore the vessel. But this proceeds on a misapprehension of the nature of the remedy. In an action of redhibition, such an offer would be necessary. Here, the contract is to stand unrescinded, and the buyer retains the thing, the price only being lessened as much as is necessary to do justice.

It was also argued that this contract was not to be governed by the laws of Louisiana, but by the laws of New York, where the vendors resided. But the contract was made and performed in Louisiana, and must be governed by its laws. (Boyle *v.* Zacharie, 6 Peters, 635; Cox *v.* United States, 6 Peters, 172; Bell *v.* Bruin, 1 How., 169.)

The counsel for the plaintiff in error also urged, that if the law of Louisiana ought to govern the contract, that law was to be found, not in the civil code of that State, but in the general commercial law of the country. Without pausing upon the difficulties which otherwise might attend this proposition, we think it sufficient to say, that we find the subject of sales, with the obligations which attend them, regulated by the civil code of Louisiana, and we see no sound reason why sales of vessels are not within those laws.

The judgment of the Circuit Court is affirmed.

LATHROP L. STURGIS, PLAINTIFF IN ERROR, *v.* CHRISTIAN HONOLD.

The decision in the preceding case again affirmed.

THIS, like the preceding case, of which it constituted a branch, was brought up, by writ of error, from the Circuit Court of the United States for the eastern district of Louisiana.

It was similar in all respects to the preceding case, except that Honold purchased five-sixteenths of the ship from Sturgis, and four-sixteenths from Bulkley. The two cases proceeded through the courts *pari passu*, and were argued together in this court.

Mr. Justice CURTIS delivered the opinion of the court.

This case depends on the same facts and principles as the preceding case, and the judgment of the Circuit Court therein is affirmed.

DRED SCOTT, PLAINTIFF IN ERROR, *v.* JOHN F. A. SANDFORD.

I.

1. Upon a writ of error to a Circuit Court of the United States, the transcript of the record of all the proceedings in the case is brought before this court, and is open to its inspection and revision.
2. When a plea to the jurisdiction, in abatement, is overruled by the court upon demurrer, and the defendant pleads in bar, and upon these pleas the final judgment of the court is in his favor—if the plaintiff brings a writ of error, the judgment of the court upon the plea in abatement is before this court, although it was in favor of the plaintiff—and if the court erred in overruling it, the judgment must be reversed, and a mandate issued to the Circuit Court to dismiss the case for want of jurisdiction.
3. In the Circuit Courts of the United States, the record must show that the case is one in which, by the Constitution and laws of the United States, the court had jurisdiction—and if this does not appear, and the court gives judgment either for plaintiff or defendant, it is error, and the judgment must be reversed by this court—and the parties cannot by consent waive the objection to the jurisdiction of the Circuit Court.
4. A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a "citizen" within the meaning of the Constitution of the United States.
5. When the Constitution was adopted, they were not regarded in any of the States as members of the community which constituted the State, and were not numbered among its "people or citizens." Consequently, the special rights and immunities guarantied to citizens do not apply to them. And not being "citizens" within the meaning of the Constitution, they are not entitled to sue in that character in a court of the United States, and the Circuit Court has not jurisdiction in such a suit.
6. The only two clauses in the Constitution which point to this race, treat them as persons whom it was morally lawful to deal in as articles of property and to hold as slaves.
7. Since the adoption of the Constitution of the United States, no State can by any subsequent law make a foreigner or any other description of persons citizens of

the United States, nor entitle them to the rights and privileges secured to citizens by that instrument.

8. A State, by its laws passed since the adoption of the Constitution, may put a foreigner or any other description of persons upon a footing with its own citizens, as to all the rights and privileges enjoyed by them within its dominion and by its laws. But that will not make him a citizen of the United States, nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another State.
9. The change in public opinion and feeling in relation to the African race, which has taken place since the adoption of the Constitution, cannot change its construction and meaning, and it must be construed and administered now according to its true meaning and intention when it was formed and adopted.
10. The plaintiff having admitted, by his demurrer to the plea in abatement, that his ancestors were imported from Africa and sold as slaves, he is not a citizen of the State of Missouri according to the Constitution of the United States, and was not entitled to sue in that character in the Circuit Court.
11. This being the case, the judgment of the court below, in favor of the plaintiff on the plea in abatement, was erroneous.

II.

1. But if the plea in abatement is not brought up by this writ of error, the objection to the citizenship of the plaintiff is still apparent on the record, as he himself, in making out his case, states that he is of African descent, was born a slave, and claims that he and his family became entitled to freedom by being taken, by their owner, to reside in a Territory where slavery is prohibited by act of Congress—and that, in addition to this claim, he himself became entitled to freedom by being taken to Rock Island, in the State of Illinois—and being free when he was brought back to Missouri, he was by the laws of that State a citizen.
2. If, therefore, the facts he states do not give him or his family a right to freedom, the plaintiff is still a slave, and not entitled to sue as a "citizen," and the judgment of the Circuit Court was erroneous on that ground also, without any reference to the plea in abatement.
3. The Circuit Court can give no judgment for plaintiff or defendant in a case where it has not jurisdiction, no matter whether there be a plea in abatement or not. And unless it appears upon the face of the record, when brought here by writ of error, that the Circuit Court had jurisdiction, the judgment must be reversed.

The case of Capron *v.* Van Noorden (2 Cranch, 126) examined, and the principles thereby decided, reaffirmed.

4. When the record, as brought here by writ of error, does not show that the Circuit Court had jurisdiction, this court has jurisdiction to revise and correct the error, like any other error in the court below. It does not and cannot dismiss the case for want of jurisdiction here; for that would leave the erroneous judgment of the court below in full force, and the party injured without remedy. But it must reverse the judgment, and, as in any other case of reversal, send a mandate to the Circuit Court to conform its judgment to the opinion of this court.
5. The difference of the jurisdiction in this court in the cases of writs of error to State courts and to Circuit Courts of the United States, pointed out; and the mistakes made as to the jurisdiction of this court in the latter case, by confounding it with its limited jurisdiction in the former.
6. If the court reverses a judgment upon the ground that it appears by a particular part of the record that the Circuit Court had not jurisdiction, it does not take away the jurisdiction of this court to examine into and correct, by a reversal of the judgment, any other errors, either as to the jurisdiction or any other matter, where it appears from other parts of the record that the Circuit Court had fallen into error. On the contrary, it is the daily and familiar practice of this court to reverse on several grounds, where more than one error appears to have been committed. And the error of a Circuit Court in its jurisdic-

tion stands on the same ground, and is to be treated in the same manner as any other error upon which its judgment is founded.

7. The decision, therefore, that the judgment of the Circuit Court upon the plea in abatement is erroneous, is no reason why the alleged error apparent in the exception should not also be examined, and the judgment reversed on that ground also, if it discloses a want of jurisdiction in the Circuit Court.
8. It is often the duty of this court, after having decided that a particular decision of the Circuit Court was erroneous, to examine into other alleged errors, and to correct them if they are found to exist. And this has been uniformly done by this court, when the questions are in any degree connected with the controversy, and the silence of the court might create doubts which would lead to further and useless litigation.

III.

1. The facts upon which the plaintiff relies, did not give him his freedom, and make him a citizen of Missouri.
2. The clause in the Constitution authorizing Congress to make all needful rules and regulations for the government of the territory and other property of the United States, applies only to territory within the chartered limits of some one of the States when they were colonies of Great Britain, and which was surrendered by the British Government to the old Confederation of the States, in the treaty of peace. It does not apply to territory acquired by the present Federal Government, by treaty or conquest, from a foreign nation.

The case of the American and Ocean Insurance Companies *v.* Canter (1 Peters, 511) referred to and examined, showing that the decision in this case is not in conflict with that opinion, and that the court did not, in the case referred to, decide upon the construction of the clause of the Constitution above mentioned, because the case before them did not make it necessary to decide the question.

3. The United States, under the present Constitution, cannot acquire territory to be held as a colony, to be governed at its will and pleasure. But it may acquire territory which, at the time, has not a population that fits it to become a State, and may govern it as a Territory until it has a population which, in the judgment of Congress, entitles it to be admitted as a State of the Union.
4. During the time it remains a Territory, Congress may legislate over it within the scope of its constitutional powers in relation to citizens of the United States—and may establish a Territorial Government—and the form of this local Government must be regulated by the discretion of Congress—but with powers not exceeding those which Congress itself, by the Constitution, is authorized to exercise over citizens of the United States, in respect to their rights of persons or rights of property.

IV.

1. The territory thus acquired, is acquired by the people of the United States for their common and equal benefit, through their agent and trustee, the Federal Government. Congress can exercise no power over the rights of persons or property of a citizen in the Territory which is prohibited by the Constitution. The Government and the citizen, whenever the Territory is open to settlement, both enter it with their respective rights defined and limited by the Constitution.
2. Congress have no right to prohibit the citizens of any particular State or States from taking up their home there, while it permits citizens of other States to do so. Nor has it a right to give privileges to one class of citizens which it refuses to another. The territory is acquired for their equal and common benefit—and if open to any, it must be open to all upon equal and the same terms.
3. Every citizen has a right to take with him into the Territory any article of property which the Constitution of the United States recognises as property.
4. The Constitution of the United States recognises slaves as property, and pledges the Federal Government to protect it. And Congress cannot exercise any more authority over property of that description than it may constitutionally exercise over property of any other kind.
5. The act of Congress, therefore, prohibiting a citizen of the United States from

taking with him his slaves when he removes to the Territory in question to reside, is an exercise of authority over private property which is not warranted by the Constitution—and the removal of the plaintiff, by his owner, to that Territory, gave him no title to freedom.

V.

1. The plaintiff himself acquired no title to freedom by being taken, by his owner, to Rock Island, in Illinois, and brought back to Missouri. This court has heretofore decided that the *status* or condition of a person of African descent depended on the laws of the State in which he resided.
2. It has been settled by the decisions of the highest court in Missouri, that, by the laws of that State, a slave does not become entitled to his freedom, where the owner takes him to reside in a State where slavery is not permitted, and afterwards brings him back to Missouri.

Conclusion. It follows that it is apparent upon the record that the court below erred in its judgment on the plea in abatement, and also erred in giving judgment for the defendant, when the exception shows that the plaintiff was not a citizen of the United States. And as the Circuit Court had no jurisdiction, either in the case stated in the plea in abatement, or in the one stated in the exception, its judgment in favor of the defendant is erroneous, and must be reversed.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

It was an action of trespass *vi et armis* instituted in the Circuit Court by Scott against Sandford.

Prior to the institution of the present suit, an action was brought by Scott for his freedom in the Circuit Court of St. Louis county, (State court,) where there was a verdict and judgment in his favor. On a writ of error to the Supreme Court of the State, the judgment below was reversed, and the case remanded to the Circuit Court, where it was continued to await the decision of the case now in question.

The declaration of Scott contained three counts: one, that Sandford had assaulted the plaintiff; one, that he had assaulted Harriet Scott, his wife; and one, that he had assaulted Eliza Scott and Lizzie Scott, his children.

Sandford appeared, and filed the following plea:

DRED SCOTT
v.
JOHN F. A. SANDFORD,
} *Plea to the Jurisdiction of the Court.*

APRIL TERM, 1854.

And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action, and each and every of them, (if any such have accrued to the said Dred Scott,) accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that, to wit: the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because

he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid.

JOHN F. A. SANDFORD.

To this plea there was a demurrer in the usual form, which was argued in April, 1854, when the court gave judgment that the demurrer should be sustained.

In May, 1854, the defendant, in pursuance of an agreement between counsel, and with the leave of the court, pleaded in bar of the action:

1. Not guilty.

2. That the plaintiff was a negro slave, the lawful property of the defendant, and, as such, the defendant gently laid his hands upon him, and thereby had only restrained him, as the defendant had a right to do.

3. That with respect to the wife and daughters of the plaintiff, in the second and third counts of the declaration mentioned, the defendant had, as to them, only acted in the same manner, and in virtue of the same legal right.

In the first of these pleas, the plaintiff joined issue; and to the second and third, filed replications alleging that the defendant, of his own wrong and without the cause in his second and third pleas alleged, committed the trespasses, &c.

The counsel then filed the following agreed statement of facts, viz:

In the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the army of the United States. In that year, 1834, said Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States.

In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and said Harriet at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried, and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them and each of them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza, and Lizzie, and imprisoned them, doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times.

Further proof may be given on the trial for either party.

It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis county; that there was a verdict and judgment in his favor; that on a writ of error to the Supreme Court, the judgment below was reversed, and the same remanded to the Circuit Court, where it has been continued to await the decision of this case.

In May, 1854, the cause went before a jury, who found the following verdict, viz: "As to the first issue joined in this case, we of the jury find the defendant not guilty; and as to the issue secondly above joined, we of the jury find that before and at the time when, &c., in the first count mentioned, the said Dred Scott was a negro slave, the lawful property of the defendant; and as to the issue thirdly above joined, we, the jury, find that before and at the time when, &c., in the second and third counts mentioned, the said Harriet, wife of

said Dred Scott, and Eliza and Lizzie, the daughters of the said Dred Scott, were negro slaves, the lawful property of the defendant."

Whereupon, the court gave judgment for the defendant.

After an ineffectual motion for a new trial, the plaintiff filed the following bill of exceptions.

On the trial of this cause by the jury, the plaintiff, to maintain the issues on his part, read to the jury the following agreed statement of facts, (see agreement above.) No further testimony was given to the jury by either party. Thereupon the plaintiff moved the court to give to the jury the following instruction, viz:

"That, upon the facts agreed to by the parties, they ought to find for the plaintiff. The court refused to give such instruction to the jury, and the plaintiff, to such refusal, then and there duly excepted."

The court then gave the following instruction to the jury, on motion of the defendant:

"The jury are instructed, that upon the facts in this case, the law is with the defendant." The plaintiff excepted to this instruction.

Upon these exceptions, the case came up to this court.

It was argued at December term, 1855, and ordered to be reargued at the present term.

It was now argued by *Mr. Blair* and *Mr. G. F. Curtis* for the plaintiff in error, and by *Mr. Geyer* and *Mr. Johnson* for the defendant in error.

The reporter regrets that want of room will not allow him to give the arguments of counsel; but he regrets it the less, because the subject is thoroughly examined in the opinion of the court, the opinions of the concurring judges, and the opinions of the judges who dissented from the judgment of the court.

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

This case has been twice argued. After the argument at the last term, differences of opinion were found to exist among the members of the court; and as the questions in controversy are of the highest importance, and the court was at that time much pressed by the ordinary business of the term, it was deemed advisable to continue the case, and direct a re-argument on some of the points, in order that we might have an opportunity of giving to the whole subject a more deliberate

consideration. It has accordingly been again argued by counsel, and considered by the court; and I now proceed to deliver its opinion.

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And

2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant, in the State of Missouri; and he brought this action in the Circuit Court of the United States for that district, to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court overruled the plea, and gave judgment that the defendant should answer over. And he thereupon put in sundry pleas in bar, upon which issues were joined; and at the trial the verdict and judgment were in his favor. Whereupon the plaintiff brought this writ of error.

Before we speak of the pleas in bar, it will be proper to dispose of the questions which have arisen on the plea in abatement.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated.

If the question raised by it is legally before us, and the court should be of opinion that the facts stated in it disqualify the plaintiff from becoming a citizen, in the sense in which that word is used in the Constitution of the United States, then the judgment of the Circuit Court is erroneous, and must be reversed.

It is suggested, however, that this plea is not before us; and that as the judgment in the court below on this plea was in favor of the plaintiff, he does not seek to reverse it, or bring it before the court for revision by his writ of error; and also that the defendant waived this defence by pleading over, and thereby admitted the jurisdiction of the court.

But, in making this objection, we think the peculiar and limited jurisdiction of courts of the United States has not been adverted to. This peculiar and limited jurisdiction has made it necessary, in these courts, to adopt different rules and principles of pleading, so far as jurisdiction is concerned, from those which regulate courts of common law in England, and in the different States of the Union which have adopted the common-law rules.

In these last-mentioned courts, where their character and rank are analogous to that of a Circuit Court of the United States; in other words, where they are what the law terms courts of general jurisdiction; they are presumed to have jurisdiction, unless the contrary appears. No averment in the pleadings of the plaintiff is necessary, in order to give jurisdiction. If the defendant objects to it, he must plead it specially, and unless the fact on which he relies is found to be true by a jury, or admitted to be true by the plaintiff, the jurisdiction cannot be disputed in an appellate court.

Now, it is not necessary to inquire whether in courts of that description a party who pleads over in bar, when a plea to the jurisdiction has been ruled against him, does or does not waive his plea; nor whether upon a judgment in his favor on the pleas in bar, and a writ of error brought by the plaintiff, the question upon the plea in abatement would be open for revision in the appellate court. Cases that may have been decided in such courts, or rules that may have been laid down by common-law pleaders, can have no influence in the decision in this court. Because, under the Constitution and laws of the United States, the rules which govern the pleadings in its courts, in questions of jurisdiction, stand on different principles and are regulated by different laws.

This difference arises, as we have said, from the peculiar character of the Government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution. And in regulating the judicial department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined; and they are not authorized to take cognizance of any case which does not come within the description therein specified. Hence, when a plaintiff sues in a court of the United States, it is necessary that he should

show, in his pleading, that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there. And if he omits to do this, and should, by any oversight of the Circuit Court, obtain a judgment in his favor, the judgment would be reversed in the appellate court for want of jurisdiction in the court below. The jurisdiction would not be presumed, as in the case of a common-law English or State court, unless the contrary appeared. But the record, when it comes before the appellate court, must show, affirmatively, that the inferior court had authority, under the Constitution, to hear and determine the case. And if the plaintiff claims a right to sue in a Circuit Court of the United States, under that provision of the Constitution which gives jurisdiction in controversies between citizens of different States, he must distinctly aver in his pleading that they are citizens of different States; and he cannot maintain his suit without showing that fact in the pleadings.

This point was decided in the case of Bingham *v.* Cabot, (in 3 Dall., 382,) and ever since adhered to by the court. And in Jackson *v.* Ashton, (8 Pet., 148,) it was held that the objection to which it was open could not be waived by the opposite party, because consent of parties could not give jurisdiction.

It is needless to accumulate cases on this subject. Those already referred to, and the cases of Capron *v.* Van Noorden, (in 2 Cr., 126,) and Montalet *v.* Murray, (4 Cr., 46,) are sufficient to show the rule of which we have spoken. The case of Capron *v.* Van Noorden strikingly illustrates the difference between a common-law court and a court of the United States.

If, however, the fact of citizenship is averred in the declaration, and the defendant does not deny it, and put it in issue by plea in abatement, he cannot offer evidence at the trial to disprove it, and consequently cannot avail himself of the objection in the appellate court, unless the defect should be apparent in some other part of the record. For if there is no plea in abatement, and the want of jurisdiction does not appear in any other part of the transcript brought up by the writ of error, the undisputed averment of citizenship in the declaration must be taken in this court to be true. In this case, the citizenship is averred, but it is denied by the defendant in the manner required by the rules of pleading, and the fact upon which the denial is based is admitted by the demurrer. And, if the plea and demurrer, and judgment of the court below upon it, are before us upon this record, the question to be decided is, whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

We think they are before us. The plea in abatement and the judgment of the court upon it, are a part of the judicial proceedings in the Circuit Court, and are there recorded as such; and a writ of error always brings up to the superior court the whole record of the proceedings in the court below. And in the case of the United States *v.* Smith, (11 Wheat., 172,) this court said, that the case being brought up by writ of error, the whole record was under the consideration of this court. And this being the case in the present instance, the plea in abatement is necessarily under consideration; and it becomes, therefore, our duty to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate

right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordi-

nate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the

rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true; every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State

which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognised as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more

uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different colonies furnishes positive and indisputable proof of this fact.

It would be tedious, in this opinion, to enumerate the various laws they passed upon this subject. It will be sufficient, as a sample of the legislation which then generally prevailed throughout the British colonies, to give the laws of two of them; one being still a large slaveholding State, and the other the first State in which slavery ceased to exist.

The province of Maryland, in 1717, (ch. 13, s. 5,) passed a law declaring "that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the justices of the county court, where such marriage so happens, shall think fit; to be applied by them towards the support of a public school within the said county. And any white man or white woman who shall intermarry as aforesaid, with any negro or mulatto, such white man or white woman shall become servants during the term of seven years, and shall be disposed of by the justices as aforesaid, and be applied to the uses aforesaid."

The other colonial law to which we refer was passed by Massachusetts in 1705, (chap. 6.) It is entitled "An act for the better preventing of a spurious and mixed issue," &c.; and it provides, that "if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at

the discretion of the justices before whom the offender shall be convicted."

And "that none of her Majesty's English or Scottish subjects, nor of any other Christian nation, within this province, shall contract matrimony with any negro or mulatto; nor shall any person, duly authorized to solemnize marriage, presume to join any such in marriage, on pain of forfeiting the sum of fifty pounds; one moiety thereof to her Majesty, for and towards the support of the Government within this province, and the other moiety to him or them that shall inform and sue for the same, in any of her Majesty's courts of record within the province, by bill, plaint, or information."

We give both of these laws in the words used by the respective legislative bodies, because the language in which they are framed, as well as the provisions contained in them, show, too plainly to be misunderstood, the degraded condition of this unhappy race. They were still in force when the Revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State Constitutions and Governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted. It is necessary to do this, in order to determine whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The language of the Declaration of Independence is equally conclusive:

It begins by declaring that, "when in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to

assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation."

It then proceeds to say: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It de-

clares that it is formed by the *people* of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the *people* of the United States, and of *citizens* of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood, that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. By the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the Government they then formed should endure. And these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not

even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

It is very true, that in that portion of the Union where the labor of the negro race was found to be unsuited to the climate and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence; and when the Constitution was adopted, it had entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race; but because it was discovered, from experience, that slave labor was unsuited to the climate and productions of these States: for some of the States, where it had ceased or nearly ceased to exist, were actively engaged in the slave trade, procuring cargoes on the coast of Africa, and transporting them for sale to those parts of the Union where their labor was found to be profitable, and suited to the climate and productions. And this traffic was openly carried on, and fortunes accumulated by it, without reproach from the people of the States where they resided. And it can hardly be supposed that, in the States where it was then countenanced in its worst form—that is, in the seizure and transportation—the people could have regarded those who were emancipated as entitled to equal rights with themselves.

And we may here again refer, in support of this proposition, to the plain and unequivocal language of the laws of the several States, some passed after the Declaration of Independence and before the Constitution was adopted, and some since the Government went into operation.

We need not refer, on this point, particularly to the laws of the present slaveholding States. Their statute books are full of provisions in relation to this class, in the same spirit with the Maryland law which we have before quoted. They have continued to treat them as an inferior class, and to subject them to strict police regulations, drawing a broad line of distinction between the citizen and the slave races, and legislating in relation to them upon the same principle which prevailed at the time of the Declaration of Independence. As relates to these States, it is too plain for argument, that they have never been regarded as a part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their pleas-

ure. And as long ago as 1822, the Court of Appeals of Kentucky decided that free negroes and mulattoes were not citizens within the meaning of the Constitution of the United States; and the correctness of this decision is recognised, and the same doctrine affirmed, in 1 Meigs's Tenn. Reports, 331.

And if we turn to the legislation of the States where slavery had worn out, or measures taken for its speedy abolition, we shall find the same opinions and principles equally fixed and equally acted upon.

Thus, Massachusetts, in 1786, passed a law similar to the colonial one of which we have spoken. The law of 1786, like the law of 1705, forbids the marriage of any white person with any negro, Indian, or mulatto, and inflicts a penalty of fifty pounds upon any one who shall join them in marriage; and declares all such marriages absolutely null and void, and degrades thus the unhappy issue of the marriage by fixing upon it the stain of bastardy. And this mark of degradation was renewed, and again impressed upon the race, in the careful and deliberate preparation of their revised code published in 1836. This code forbids any person from joining in marriage any white person with any Indian, negro, or mulatto, and subjects the party who shall offend in this respect, to imprisonment, not exceeding six months, in the common jail, or to hard labor, and to a fine of not less than fifty nor more than two hundred dollars; and, like the law of 1786, it declares the marriage to be absolutely null and void. It will be seen that the punishment is increased by the code upon the person who shall marry them, by adding imprisonment to a pecuniary penalty.

So, too, in Connecticut. We refer more particularly to the legislation of this State, because it was not only among the first to put an end to slavery within its own territory, but was the first to fix a mark of reprobation upon the African slave trade. The law last mentioned was passed in October, 1788, about nine months after the State had ratified and adopted the present Constitution of the United States; and by that law it prohibited its own citizens, under severe penalties, from engaging in the trade, and declared all policies of insurance on the vessel or cargo made in the State to be null and void. But, up to the time of the adoption of the Constitution, there is nothing in the legislation of the State indicating any change of opinion as to the relative rights and position of the white and black races in this country, or indicating that it meant to place the latter, when free, upon a level with its citizens. And certainly nothing which would have led the slaveholding States to suppose, that Connecticut designed to claim for them, under

the new Constitution, the equal rights and privileges and rank of citizens in every other State.

The first step taken by Connecticut upon this subject was as early as 1774, when it passed an act forbidding the further importation of slaves into the State. But the section containing the prohibition is introduced by the following preamble:

"And whereas the increase of slaves in this State is injurious to the poor, and inconvenient."

This recital would appear to have been carefully introduced, in order to prevent any misunderstanding of the motive which induced the Legislature to pass the law, and places it distinctly upon the interest and convenience of the white population—excluding the inference that it might have been intended in any degree for the benefit of the other.

And in the act of 1784, by which the issue of slaves, born after the time therein mentioned, were to be free at a certain age, the section is again introduced by a preamble assigning a similar motive for the act. It is in these words:

"Whereas sound policy requires that the abolition of slavery should be effected as soon as may be consistent with the rights of individuals, and the public safety and welfare"—showing that the right of property in the master was to be protected, and that the measure was one of policy, and to prevent the injury and inconvenience, to the whites, of a slave population in the State.

And still further pursuing its legislation, we find that in the same statute passed in 1774, which prohibited the further importation of slaves into the State, there is also a provision by which any negro, Indian, or mulatto servant, who was found wandering out of the town or place to which he belonged, without a written pass such as is therein described, was made liable to be seized by any one, and taken before the next authority to be examined and delivered up to his master—who was required to pay the charge which had accrued thereby. And a subsequent section of the same law provides, that if any free negro shall travel without such pass, and shall be stopped, seized, or taken up, he shall pay all charges arising thereby. And this law was in full operation when the Constitution of the United States was adopted, and was not repealed till 1797. So that up to that time free negroes and mulattoes were associated with servants and slaves in the police regulations established by the laws of the State.

And again, in 1833, Connecticut passed another law, which made it penal to set up or establish any school in that State for the instruction of persons of the African race not inhabitants of the State, or to instruct or teach in any such school or

institution, or board or harbor for that purpose, any such person, without the previous consent in writing of the civil authority of the town in which such school or institution might be.

And it appears by the case of Crandall *v.* The State, reported in 10 Conn. Rep., 340, that upon an information filed against Prudence Crandall for a violation of this law, one of the points raised in the defence was, that the law was a violation of the Constitution of the United States; and that the persons instructed, although of the African race, were citizens of other States, and therefore entitled to the rights and privileges of citizens in the State of Connecticut. But Chief Justice Dagget, before whom the case was tried, held, that persons of that description were not citizens of a State, within the meaning of the word citizen in the Constitution of the United States, and were not therefore entitled to the privileges and immunities of citizens in other States.

The case was carried up to the Supreme Court of Errors of the State, and the question fully argued there. But the case went off upon another point, and no opinion was expressed on this question.

We have made this particular examination into the legislative and judicial action of Connecticut, because, from the early hostility it displayed to the slave trade on the coast of Africa, we may expect to find the laws of that State as lenient and favorable to the subject race as those of any other State in the Union; and if we find that at the time the Constitution was adopted, they were not even there raised to the rank of citizens, but were still held and treated as property, and the laws relating to them passed with reference altogether to the interest and convenience of the white race, we shall hardly find them elevated to a higher rank anywhere else.

A brief notice of the laws of two other States, and we shall pass on to other considerations.

By the laws of New Hampshire, collected and finally passed in 1815, no one was permitted to be enrolled in the militia of the State, but free white citizens; and the same provision is found in a subsequent collection of the laws, made in 1855. Nothing could more strongly mark the entire repudiation of the African race. The alien is excluded, because, being born in a foreign country, he cannot be a member of the community until he is naturalized. But why are the African race, born in the State, not permitted to share in one of the highest duties of the citizen? The answer is obvious; he is not, by the institutions and laws of the State, numbered among its people. He forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it.

Again, in 1822, Rhode Island, in its revised code, passed a law forbidding persons who were authorized to join persons in marriage, from joining in marriage any white person with any negro, Indian, or mulatto, under the penalty of two hundred dollars, and declaring all such marriages absolutely null and void; and the same law was again re-enacted in its revised code of 1844. So that, down to the last-mentioned period, the strongest mark of inferiority and degradation was fastened upon the African race in that State.

It would be impossible to enumerate and compress in the space usually allotted to an opinion of a court, the various laws, marking the condition of this race, which were passed from time to time after the Revolution, and before and since the adoption of the Constitution of the United States. In addition to those already referred to, it is sufficient to say, that Chancellor Kent, whose accuracy and research no one will question, states in the sixth edition of his Commentaries, (published in 1848, 2 vol., 258, note *b*,) that in no part of the country except Maine, did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights.

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police

regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.

Besides, this want of foresight and care would have been utterly inconsistent with the caution displayed in providing for the admission of new members into this political family. For, when they gave to the citizens of each State the privileges and immunities of citizens in the several States, they at the same time took from the several States the power of naturalization, and confined that power exclusively to the Federal Government. No State was willing to permit another State to determine who should or should not be admitted as one of its citizens, and entitled to demand equal rights and privileges with their own people, within their own territories. The right of naturalization was therefore, with one accord, surrendered by the States, and confided to the Federal Government. And this power granted to Congress to establish an uniform rule of *naturalization* is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign Government. It is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class. And when we find the States guarding themselves from the indiscreet or improper admission by other States of emigrants from other countries, by giving the power exclusively to Congress, we cannot fail to see that they could never have left with the States a much

more important power—that is, the power of transforming into citizens a numerous class of persons, who in that character would be much more dangerous to the peace and safety of a large portion of the Union, than the few foreigners one of the States might improperly naturalize. The Constitution upon its adoption obviously took from the States all power by any subsequent legislation to introduce as a citizen into the political family of the United States any one, no matter where he was born, or what might be his character or condition; and it gave to Congress the power to confer this character upon those only who were born outside of the dominions of the United States. And no law of a State, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory.

A clause similar to the one in the Constitution, in relation to the rights and immunities of citizens of one State in the other States, was contained in the Articles of Confederation. But there is a difference of language, which is worthy of note. The provision in the Articles of Confederation was, "that the *free inhabitants* of each of the States, paupers, vagabonds, and fugitives from justice, excepted, should be entitled to all the privileges and immunities of free citizens in the several States."

It will be observed, that under this Confederation, each State had the right to decide for itself, and in its own tribunals, whom it would acknowledge as a free inhabitant of another State. The term *free inhabitant*, in the generality of its terms, would certainly include one of the African race who had been manumitted. But no example, we think, can be found of his admission to all the privileges of citizenship in any State of the Union after these Articles were formed, and while they continued in force. And, notwithstanding the generality of the words "free inhabitants," it is very clear that, according to their accepted meaning in that day, they did not include the African race, whether free or not: for the fifth section of the ninth article provides that Congress should have the power "to agree upon the number of land forces to be raised, and to make requisitions from each State for its quota in proportion to the number of *white* inhabitants in such State, which requisition should be binding."

Words could hardly have been used which more strongly mark the line of distinction between the citizen and the subject; the free and the subjugated races. The latter were not even counted when the inhabitants of a State were to be embodied in proportion to its numbers for the general defence. And it cannot for a moment be supposed, that a class of

persons thus separated and rejected from those who formed the sovereignty of the States, were yet intended to be included under the words "free inhabitants," in the preceding article, to whom privileges and immunities were so carefully secured in every State.

But although this clause of the Articles of Confederation is the same in principle with that inserted in the Constitution, yet the comprehensive word *inhabitant*, which might be construed to include an emancipated slave, is omitted; and the privilege is confined to *citizens* of the State. And this alteration in words would hardly have been made, unless a different meaning was intended to be conveyed, or a possible doubt removed. The just and fair inference is, that as this privilege was about to be placed under the protection of the General Government, and the words expounded by its tribunals, and all power in relation to it taken from the State and its courts, it was deemed prudent to describe with precision and caution the persons to whom this high privilege was given—and the word *citizen* was on that account substituted for the words *free inhabitant.* The word citizen excluded, and no doubt intended to exclude, foreigners who had not become citizens of some one of the States when the Constitution was adopted; and also every description of persons who were not fully recognised as citizens in the several States. This, upon any fair construction of the instruments to which we have referred, was evidently the object and purpose of this change of words.

To all this mass of proof we have still to add, that Congress has repeatedly legislated upon the same construction of the Constitution that we have given. Three laws, two of which were passed almost immediately after the Government went into operation, will be abundantly sufficient to show this. The two first are particularly worthy of notice, because many of the men who assisted in framing the Constitution, and took an active part in procuring its adoption, were then in the halls of legislation, and certainly understood what they meant when they used the words "people of the United States" and "citizen" in that well-considered instrument.

The first of these acts is the naturalization law, which was passed at the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens "*to aliens being free white persons.*"

Now, the Constitution does not limit the power of Congress in this respect to white persons. And they may, if they think proper, authorize the naturalization of any one, of any color, who was born under allegiance to another Government. But the language of the law above quoted, shows that citizenship

at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.

Congress might, as we before said, have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their then untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they had but recently committed, when they were the allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. No one supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word white was not used with any particular reference to them.

Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore there was no necessity for using particular words to exclude them.

It would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery, and governed at their own pleasure.

Another of the early laws of which we have spoken, is the first militia law, which was passed in 1792, at the first session of the second Congress. The language of this law is equally plain and significant with the one just mentioned. It directs that every "free able-bodied white male citizen" shall be enrolled in the militia. The word *white* is evidently used to exclude the African race, and the word "citizen" to exclude unnaturalized foreigners; the latter forming no part of the sovereignty, owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the Government, whether they were slave or free; but it is repudiated, and rejected from the duties and obligations of citizenship in marked language.

The third act to which we have alluded is even still more decisive; it was passed as late as 1813, (2 Stat., 809,) and it provides: "That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, *or* persons of color, natives of the United States.

Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons, and authorized to be employed, if born in the United States.

And even as late as 1820, (chap. 104, sec. 8,) in the charter to the city of Washington, the corporation is authorized "to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes," thus associating them together in its legislation; and after prescribing the punishment that may be inflicted on the slaves, proceeds in the following words: "And to punish such free negroes and mulattoes by penalties not exceeding twenty dollars for any one offence; and in case of the inability of any such free negro or mulatto to pay any such penalty and cost thereon, to cause him or her to be confined to labor for any time not exceeding six calendar months." And in a subsequent part of the same section, the act authorizes the corporation "to prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city."

This law, like the laws of the States, shows that this class of persons were governed by special legislation directed expressly to them, and always connected with provisions for the government of slaves, and not with those for the government of free white citizens. And after such an uniform course of legislation as we have stated, by the colonies, by the States, and by Congress, running through a period of more than a century, it would seem that to call persons thus marked and stigmatized, "citizens" of the United States, "fellow-citizens," a constituent part of the sovereignty, would be an abuse of terms, and not calculated to exalt the character of an American citizen in the eyes of other nations.

The conduct of the Executive Department of the Government has been in perfect harmony upon this subject with this course of legislation. The question was brought officially before the late William Wirt, when he was the Attorney General of the United States, in 1821, and he decided that the words "citizens of the United States" were used in the acts of Congress in the same sense as in the Constitution; and that free persons of color were not citizens, within the meaning of the Constitution and laws; and this opinion has been confirmed by that of the late Attorney General, Caleb Cushing, in a recent case, and acted upon by the Secretary of State, who refused to grant passports to them as "citizens of the United States."

But it is said that a person may be a citizen, and entitled to

that character, although he does not possess all the rights which may belong to other citizens; as, for example, the right to vote, or to hold particular offices; and that yet, when he goes into another State, he is entitled to be recognised there as a citizen, although the State may measure his rights by the rights which it allows to persons of a like character or class resident in the State, and refuse to him the full rights of citizenship.

This argument overlooks the language of the provision in the Constitution of which we are speaking.

Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States, does not apply to them.

Neither does it apply to a person who, being the citizen of a State, migrates to another State. For then he becomes subject to the laws of the State in which he lives, and he is no longer a citizen of the State from which he removed. And the State in which he resides may then, unquestionably, determine his *status* or condition, and place him among the class of persons who are not recognised as citizens, but belong to an inferior and subject race; and may deny him the privileges and immunities enjoyed by its citizens.

But so far as mere rights of person are concerned, the provision in question is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the State, as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the government of another. But if he ranks as a citizen in the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the

State. And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation; and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guaranties rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States.

The case of Legrand *v.* Darnall (2 Peters, 664) has been referred to for the purpose of showing that this court has decided that the descendant of a slave may sue as a citizen in a court of the United States; but the case itself shows that the question did not arise and could not have arisen in the case.

It appears from the report, that Darnall was born in Maryland, and was the son of a white man by one of his slaves, and his father executed certain instruments to manumit him, and devised to him some landed property in the State. This property Darnall afterwards sold to Legrand, the appellant, who gave his notes for the purchase-money. But becoming afterwards apprehensive that the appellee had not been emancipated according to the laws of Maryland, he refused to pay the notes until he could be better satisfied as to Darnall's right to convey. Darnall, in the mean time, had taken up his residence in Pennsylvania, and brought suit on the notes, and recovered judgment in the Circuit Court for the district of Maryland.

The whole proceeding, as appears by the report, was an amicable one; Legrand being perfectly willing to pay the money, if he could obtain a title, and Darnall not wishing him to pay unless he could make him a good one. In point of fact, the whole proceeding was under the direction of the counsel who argued the case for the appellee, who was the mutual friend of the parties, and confided in by both of them, and whose only

object was to have the rights of both parties established by judicial decision in the most speedy and least expensive manner.

Legrand, therefore, raised no objection to the jurisdiction of the court in the suit at law, because he was himself anxious to obtain the judgment of the court upon his title. Consequently, there was nothing in the record before the court to show that Darnall was of African descent, and the usual judgment and award of execution was entered. And Legrand thereupon filed his bill on the equity side of the Circuit Court, stating that Darnall was born a slave, and had not been legally emancipated, and could not therefore take the land devised to him, nor make Legrand a good title; and praying an injunction to restrain Darnall from proceeding to execution on the judgment, which was granted. Darnall answered, averring in his answer that he was a free man, and capable of conveying a good title. Testimony was taken on this point, and at the hearing the Circuit Court was of opinion that Darnall was a free man and his title good, and dissolved the injunction and dismissed the bill; and that decree was affirmed here, upon the appeal of Legrand.

Now, it is difficult to imagine how any question about the citizenship of Darnall, or his right to sue in that character, can be supposed to have arisen or been decided in that case. The fact that he was of African descent was first brought before the court upon the bill in equity. The suit at law had then passed into judgment and award of execution, and the Circuit Court, as a court of law, had no longer any authority over it. It was a valid and legal judgment, which the court that rendered it had not the power to reverse or set aside. And unless it had jurisdiction as a court of equity to restrain him from using its process as a court of law, Darnall, if he thought proper, would have been at liberty to proceed on his judgment, and compel the payment of the money, although the allegations in the bill were true, and he was incapable of making a title. No other court could have enjoined him, for certainly no State equity court could interfere in that way with the judgment of a Circuit Court of the United States.

But the Circuit Court as a court of equity certainly had equity jurisdiction over its own judgment as a court of law, without regard to the character of the parties; and had not only the right, but it was its duty—no matter who were the parties in the judgment—to prevent them from proceeding to enforce it by execution, if the court was satisfied that the money was not justly and equitably due. The ability of Darnall to convey did not depend upon his citizenship, but upon his title to freedom. And if he was free, he could hold and

convey property, by the laws of Maryland, although he was not a citizen. But if he was by law still a slave, he could not. It was therefore the duty of the court, sitting as a court of equity in the latter case, to prevent him from using its process, as a court of common law, to compel the payment of the purchase-money, when it was evident that the purchaser must lose the land. But if he was free, and could make a title, it was equally the duty of the court not to suffer Legrand to keep the land, and refuse the payment of the money, upon the ground that Darnall was incapable of suing or being sued as a citizen in a court of the United States. The character or citizenship of the parties had no connection with the question of jurisdiction, and the matter in dispute had no relation to the citizenship of Darnall. Nor is such a question alluded to in the opinion of the court.

Besides, we are by no means prepared to say that there are not many cases, civil as well as criminal, in which a Circuit Court of the United States may exercise jurisdiction, although one of the African race is a party; that broad question is not before the court. The question with which we are now dealing is, whether a person of the African race can be a citizen of the United States, and become thereby entitled to a special privilege, by virtue of his title to that character, and which, under the Constitution, no one but a citizen can claim. It is manifest that the case of Legrand and Darnall has no bearing on that question, and can have no application to the case now before the court.

This case, however, strikingly illustrates the consequences that would follow the construction of the Constitution which would give the power contended for to a State. It would in effect give it also to an individual. For if the father of young Darnall had manumitted him in his lifetime, and sent him to reside in a State which recognised him as a citizen, he might have visited and sojourned in Maryland when he pleased, and as long as he pleased, as a citizen of the United States; and the State officers and tribunals would be compelled, by the paramount authority of the Constitution, to receive him and treat him as one of its citizens, exempt from the laws and police of the State in relation to a person of that description, and allow him to enjoy all the rights and privileges of citizenship, without respect to the laws of Maryland, although such laws were deemed by it absolutely essential to its own safety.

The only two provisions which point to them and include them, treat them as property, and make it the duty of the Government to protect it; no other power, in relation to this race, is to be found in the Constitution; and as it is a Govern-

ment of special, delegated, powers, no authority beyond these two provisions can be constitutionally exercised. The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require. The States evidently intended to reserve this power exclusively to themselves.

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since, the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and the word "people."

And upon a full and careful consideration of the subject,

the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

We are aware that doubts are entertained by some of the members of the court, whether the plea in abatement is legally before the court upon this writ of error; but if that plea is regarded as waived, or out of the case upon any other ground, yet the question as to the jurisdiction of the Circuit Court is presented on the face of the bill of exception itself, taken by the plaintiff at the trial; for he admits that he and his wife were born slaves, but endeavors to make out his title to freedom and citizenship by showing that they were taken by their owner to certain places, hereinafter mentioned, where slavery could not by law exist, and that they thereby became free, and upon their return to Missouri became citizens of that State.

Now, if the removal of which he speaks did not give them their freedom, then by his own admission he is still a slave; and whatever opinions may be entertained in favor of the citizenship of a free person of the African race, no one supposes that a slave is a citizen of the State or of the United States. If, therefore, the acts done by his owner did not make them free persons, he is still a slave, and certainly incapable of suing in the character of a citizen.

The principle of law is too well settled to be disputed, that a court can give no judgment for either party, where it has no jurisdiction; and if, upon the showing of Scott himself, it appeared that he was still a slave, the case ought to have been dismissed, and the judgment against him and in favor of the defendant for costs, is, like that on the plea in abatement, erroneous, and the suit ought to have been dismissed by the Circuit Court for want of jurisdiction in that court.

But, before we proceed to examine this part of the case, it may be proper to notice an objection taken to the judicial authority of this court to decide it; and it has been said, that as this court has decided against the jurisdiction of the Circuit Court on the plea in abatement, it has no right to examine any question presented by the exception; and that anything it may say upon that part of the case will be extra-judicial, and mere obiter dicta.

This is a manifest mistake; there can be no doubt as to the jurisdiction of this court to revise the judgment of a Circuit Court, and to reverse it for any error apparent on the record,

whether it be the error of giving judgment in a case over which it had no jurisdiction, or any other material error; and this, too, whether there is a plea in abatement or not.

The objection appears to have arisen from confounding writs of error to a State court, with writs of error to a Circuit Court of the United States. Undoubtedly, upon a writ of error to a State court, unless the record shows a case that gives jurisdiction, the case must be dismissed for want of jurisdiction in *this court.* And if it is dismissed on that ground, we have no right to examine and decide upon any question presented by the bill of exceptions, or any other part of the record. But writs of error to a State court, and to a Circuit Court of the United States, are regulated by different laws, and stand upon entirely different principles. And in a writ of error to a Circuit Court of the United States, the whole record is before this court for examination and decision; and if the sum in controversy is large enough to give jurisdiction, it is not only the right, but it is the judicial duty of the court, to examine the whole case as presented by the record; and if it appears upon its face that any material error or errors have been committed by the court below, it is the duty of this court to reverse the judgment, and remand the case. And certainly an error in passing a judgment upon the merits in favor of either party, in a case which it was not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit.

The plea in abatement is not a plea to the jurisdiction of this court, but to the jurisdiction of the Circuit Court. And it appears by the record before us, that the Circuit Court committed an error, in deciding that it had jurisdiction, upon the facts in the case, admitted by the pleadings. It is the duty of the appellate tribunal to correct this error; but that could not be done by dismissing the case for want of jurisdiction here—for that would leave the erroneous judgment in full force, and the injured party without remedy. And the appellate court therefore exercises the power for which alone appellate courts are constituted, by reversing the judgment of the court below for this error. It exercises its proper and appropriate jurisdiction over the judgment and proceedings of the Circuit Court, as they appear upon the record brought up by the writ of error.

The correction of one error in the court below does not deprive the appellate court of the power of examining further into the record, and correcting any other material errors which may have been committed by the inferior court. There is certainly no rule of law—nor any practice—nor any decision of a

court—which even questions this power in the appellate tribunal. On the contrary, it is the daily practice of this court, and of all appellate courts where they reverse the judgment of an inferior court for error, to correct by its opinions whatever errors may appear on the record material to the case; and they have always held it to be their duty to do so where the silence of the court might lead to misconstruction or future controversy, and the point has been relied on by either side, and argued before the court.

In the case before us, we have already decided that the Circuit Court erred in deciding that it had jurisdiction upon the facts admitted by the pleadings. And it appears that, in the further progress of the case, it acted upon the erroneous principle it had decided on the pleadings, and gave judgment for the defendant, where, upon the facts admitted in the exception, it had no jurisdiction.

We are at a loss to understand upon what principle of law, applicable to appellate jurisdiction, it can be supposed that this court has not judicial authority to correct the last-mentioned error, because they had before corrected the former; or by what process of reasoning it can be made out, that the error of an inferior court in actually pronouncing judgment for one of the parties, in a case in which it had no jurisdiction, cannot be looked into or corrected by this court, because we have decided a similar question presented in the pleadings. The last point is distinctly presented by the facts contained in the plaintiff's own bill of exceptions, which he himself brings here by this writ of error. It was the point which chiefly occupied the attention of the counsel on both sides in the argument—and the judgment which this court must render upon both errors is precisely the same. It must, in each of them, exercise jurisdiction over the judgment, and reverse it for the errors committed by the court below; and issue a mandate to the Circuit Court to conform its judgment to the opinion pronounced by this court, by dismissing the case for want of jurisdiction in the Circuit Court. This is the constant and invariable practice of this court, where it reverses a judgment for want of jurisdiction in the Circuit Court.

It can scarcely be necessary to pursue such a question further. The want of jurisdiction in the court below may appear on the record without any plea in abatement. This is familiarly the case where a court of chancery has exercised jurisdiction in a case where the plaintiff had a plain and adequate remedy at law, and it so appears by the transcript when brought here by appeal. So also where it appears that a court of admiralty has exercised jurisdiction in a case belonging ex-

clusively to a court of common law. In these cases there is no plea in abatement. And for the same reason, and upon the same principles, where the defect of jurisdiction is patent on the record, this court is bound to reverse the judgment, although the defendant has not pleaded in abatement to the jurisdiction of the inferior court.

The cases of Jackson *v.* Ashton and of Capron *v.* Van Noorden, to which we have referred in a previous part of this opinion, are directly in point. In the last-mentioned case, Capron brought an action against Van Noorden in a Circuit Court of the United States, without showing, by the usual averments of citizenship, that the court had jurisdiction. There was no plea in abatement put in, and the parties went to trial upon the merits. The court gave judgment in favor of the defendant with costs. The plaintiff thereupon brought his writ of error, and this court reversed the judgment given in favor of the defendant, and remanded the case with directions to dismiss it, because it did not appear by the transcript that the Circuit Court had jurisdiction.

The case before us still more strongly imposes upon this court the duty of examining whether the court below has not committed an error, in taking jurisdiction and giving a judgment for costs in favor of the defendant; for in Capron *v.* Van Noorden the judgment was reversed, because it did *not appear* that the parties were citizens of different States. They might or might not be. But in this case it *does appear* that the plaintiff was born a slave; and if the facts upon which he relies have not made him free, then it appears affirmatively on the record that he is not a citizen, and consequently his suit against Sandford was not a suit between citizens of different States, and the court had no authority to pass any judgment between the parties. The suit ought, in this view of it, to have been dismissed by the Circuit Court, and its judgment in favor of Sandford is erroneous, and must be reversed.

It is true that the result either way, by dismissal or by a judgment for the defendant, makes very little, if any, difference in a pecuniary or personal point of view to either party. But the fact that the result would be very nearly the same to the parties in either form of judgment, would not justify this court in sanctioning an error in the judgment which is patent on the record, and which, if sanctioned, might be drawn into precedent, and lead to serious mischief and injustice in some future suit.

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom.

The case, as he himself states it, on the record brought here by his writ of error, is this:

The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the army of the United States. In the year 1834, he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and Harriet intermarried, at Fort Snelling, with the consent of Dr. Emerson, who then claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States herein-

before mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.

A brief summary of the history of the times, as well as the careful and measured terms in which the article is framed, will show the correctness of this proposition.

It will be remembered that, from the commencement of the Revolutionary war, serious difficulties existed between the States, in relation to the disposition of large and unsettled territories which were included in the chartered limits of some of the States. And some of the other States, and more especially Maryland, which had no unsettled lands, insisted that as the unoccupied lands, if wrested from Great Britain, would owe their preservation to the common purse and the common sword, the money arising from them ought to be applied in just proportion among the several States to pay the expenses of the war, and ought not to be appropriated to the use of the State in whose chartered limits they might happen

to lie, to the exclusion of the other States, by whose combined efforts and common expense the territory was defended and preserved against the claim of the British Government.

These difficulties caused much uneasiness during the war, while the issue was in some degree doubtful, and the future boundaries of the United States yet to be defined by treaty, if we achieved our independence.

The majority of the Congress of the Confederation obviously concurred in opinion with the State of Maryland, and desired to obtain from the States which claimed it a cession of this territory, in order that Congress might raise money on this security to carry on the war. This appears by the resolution passed on the 6th of September, 1780, strongly urging the States to cede these lands to the United States, both for the sake of peace and union among themselves, and to maintain the public credit; and this was followed by the resolution of October 10th, 1780, by which Congress pledged itself, that if the lands were ceded, as recommended by the resolution above mentioned, they should be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which should become members of the Federal Union, and have the same rights of sovereignty, and freedom, and independence, as other States.

But these difficulties became much more serious after peace took place, and the boundaries of the United States were established. Every State, at that time, felt severely the pressure of its war debt; but in Virginia, and some other States, there were large territories of unsettled lands, the sale of which would enable them to discharge their obligations without much inconvenience; while other States, which had no such resource, saw before them many years of heavy and burdensome taxation; and the latter insisted, for the reasons before stated, that these unsettled lands should be treated as the common property of the States, and the proceeds applied to their common benefit.

The letters from the statesmen of that day will show how much this controversy occupied their thoughts, and the dangers that were apprehended from it. It was the disturbing element of the time, and fears were entertained that it might dissolve the Confederation by which the States were then united.

These fears and dangers were, however, at once removed, when the State of Virginia, in 1784, voluntarily ceded to the United States the immense tract of country lying northwest of the river Ohio, and which was within the acknowledged limits of the State. The only object of the State, in making

this cession, was to put an end to the threatening and exciting controversy, and to enable the Congress of that time to dispose of the lands, and appropriate the proceeds as a common fund for the common benefit of the States. It was not ceded, because it was inconvenient to the State to hold and govern it, nor from any expectation that it could be better or more conveniently governed by the United States.

The example of Virginia was soon afterwards followed by other States, and, at the time of the adoption of the Constitution, all of the States, similarly situated, had ceded their unappropriated lands, except North Carolina and Georgia. The main object for which these cessions were desired and made, was on account of their money value, and to put an end to a dangerous controversy, as to who was justly entitled to the proceeds when the lands should be sold. It is necessary to bring this part of the history of these cessions thus distinctly into view, because it will enable us the better to comprehend the phraseology of the article in the Constitution, so often referred to in the argument.

Undoubtedly the powers of sovereignty and the eminent domain were ceded with the land. This was essential, in order to make it effectual, and to accomplish its objects. But it must be remembered that, at that time, there was no Government of the United States in existence with enumerated and limited powers; what was then called the United States, were thirteen separate, sovereign, independent States, which had entered into a league or confederation for their mutual protection and advantage, and the Congress of the United States was composed of the representatives of these separate sovereignties, meeting together, as equals, to discuss and decide on certain measures which the States, by the Articles of Confederation, had agreed to submit to their decision. But this Confederation had none of the attributes of sovereignty in legislative, executive, or judicial power. It was little more than a congress of ambassadors, authorized to represent separate nations, in matters in which they had a common concern.

It was this Congress that accepted the cession from Virginia. They had no power to accept it under the Articles of Confederation. But they had an undoubted right, as independent sovereignties, to accept any cession of territory for their common benefit, which all of them assented to; and it is equally clear, that as their common property, and having no superior to control them, they had the right to exercise absolute dominion over it, subject only to the restrictions which Virginia had imposed in her act of cession. There was, as we have said, no Government of the United States then in existence

with special enumerated and limited powers. The territory belonged to sovereignties, who, subject to the limitations above mentioned, had a right to establish any form of government they pleased, by compact or treaty among themselves, and to regulate rights of person and rights of property in the territory, as they might deem proper. It was by a Congress, representing the authority of these several and separate sovereignties, and acting under their authority and command, (but not from any authority derived from the Articles of Confederation,) that the instrument usually called the ordinance of 1787 was adopted; regulating in much detail the principles and the laws by which this territory should be governed; and among other provisions, slavery is prohibited in it. We do not question the power of the States, by agreement among themselves, to pass this ordinance, nor its obligatory force in the territory, while the confederation or league of the States in their separate sovereign character continued to exist.

This was the state of things when the Constitution of the United States was formed. The territory ceded by Virginia belonged to the several confederated States as common property, and they had united in establishing in it a system of government and jurisprudence, in order to prepare it for admission as States, according to the terms of the cession. They were about to dissolve this federative Union, and to surrender a portion of their independent sovereignty to a new Government, which, for certain purposes, would make the people of the several States one people, and which was to be supreme and controlling within its sphere of action throughout the United States; but this Government was to be carefully limited in its powers, and to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from the language of the instrument, and the objects it was intended to accomplish; and as this league of States would, upon the adoption of the new Government, cease to have any power over the territory, and the ordinance they had agreed upon be incapable of execution, and a mere nullity, it was obvious that some provision was necessary to give the new Government sufficient power to enable it to carry into effect the objects for which it was ceded, and the compacts and agreements which the States had made with each other in the exercise of their powers of sovereignty. It was necessary that the lands should be sold to pay the war debt; that a Government and system of jurisprudence should be maintained in it, to protect the citizens of the United States who should migrate to the territory, in their rights of person and of property. It was also necessary that the new Government, about to be

adopted, should be authorized to maintain the claim of the United States to the unappropriated lands in North Carolina and Georgia, which had not then been ceded, but the cession of which was confidently anticipated upon some terms that would be arranged between the General Government and these two States. And, moreover, there were many articles of value besides this property in land, such as arms, military stores, munitions, and ships of war, which were the common property of the States, when acting in their independent characters as confederates, which neither the new Government nor any one else would have a right to take possession of, or control, without authority from them; and it was to place these things under the guardianship and protection of the new Government, and to clothe it with the necessary powers, that the clause was inserted in the Constitution which gives Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." It was intended for a specific purpose, to provide for the things we have mentioned. It was to transfer to the new Government the property then held in common by the States, and to give to that Government power to apply it to the objects for which it had been destined by mutual agreement among the States before their league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire.

The language used in the clause, the arrangement and combination of the powers, and the somewhat unusual phraseology it uses, when it speaks of the political power to be exercised in the government of the territory, all indicate the design and meaning of the clause to be such as we have mentioned. It does not speak of *any* territory, nor of *Territories*, but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to *the* territory of the United States—that is, to a territory then in existence, and then known or claimed as the territory of the United States. It begins its enumeration of powers by that of disposing, in other words, making sale of the lands, or raising money from them, which, as we have already said, was the main object of the cession, and which is accordingly the first thing provided for in the article. It then gives the power which was necessarily associated with the disposition and sale of the lands—that is, the power of making needful rules and regulations respecting the territory. And whatever construction may now be given to these words, every one, we think,

must admit that they are not the words usually employed by statesmen in giving supreme power of legislation. They are certainly very unlike the words used in the power granted to legislate over territory which the new Government might afterwards itself obtain by cession from a State, either for its seat of Government, or for forts, magazines, arsenals, dock yards, and other needful buildings.

And the same power of making needful rules respecting the territory is, in precisely the same language, applied to the *other* property belonging to the United States—associating the power over the territory in this respect with the power over movable or personal property—that is, the ships, arms, and munitions of war, which then belonged in common to the State sovereignties. And it will hardly be said, that this power, in relation to the last-mentioned objects, was deemed necessary to be thus specially given to the new Government, in order to authorize it to make needful rules and regulations respecting the ships it might itself build, or arms and munitions of war it might itself manufacture or provide for the public service.

No one, it is believed, would think a moment of deriving the power of Congress to make needful rules and regulations in relation to property of this kind from this clause of the Constitution. Nor can it, upon any fair construction, be applied to any property but that which the new Government was about to receive from the confederated States. And if this be true as to this property, it must be equally true and limited as to the territory, which is so carefully and precisely coupled with it—and like it referred to as property in the power granted. The concluding words of the clause appear to render this construction irresistible; for, after the provisions we have mentioned, it proceeds to say, "that nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

Now, as we have before said, all of the States, except North Carolina and Georgia, had made the cession before the Constitution was adopted, according to the resolution of Congress of October 10, 1780. The claims of other States, that the unappropriated lands in these two States should be applied to the common benefit, in like manner, was still insisted on, but refused by the States. And this member of the clause in question evidently applies to them, and can apply to nothing else. It was to exclude the conclusion that either party, by adopting the Constitution, would surrender what they deemed their rights. And when the latter provision relates so obviously to the unappropriated lands not yet ceded by the States, and the first clause makes provision for those then actually ceded, it is

impossible, by any just rule of construction, to make the first provision general, and extend to all territories, which the Federal Government might in any way afterwards acquire, when the latter is plainly and unequivocally confined to a particular territory; which was a part of the same controversy, and involved in the same dispute, and depended upon the same principles. The union of the two provisions in the same clause shows that they were kindred subjects; and that the whole clause is local, and relates only to lands, within the limits of the United States, which had been or then were claimed by a State; and that no other territory was in the mind of the framers of the Constitution, or intended to be embraced in it. Upon any other construction it would be impossible to account for the insertion of the last provision in the place where it is found, or to comprehend why, or for what object, it was associated with the previous provision.

This view of the subject is confirmed by the manner in which the present Government of the United States dealt with the subject as soon as it came into existence. It must be borne in mind that the same States that formed the Confederation also formed and adopted the new Government, to which so large a portion of their former sovereign powers were surrendered. It must also be borne in mind that all of these same States which had then ratified the new Constitution were represented in the Congress which passed the first law for the government of this territory; and many of the members of that legislative body had been deputies from the States under the Confederation—had united in adopting the ordinance of 1787, and assisted in forming the new Government under which they were then acting, and whose powers they were then exercising. And it is obvious from the law they passed to carry into effect the principles and provisions of the ordinance, that they regarded it as the act of the States done in the exercise of their legitimate powers at the time. The new Government took the territory as it found it, and in the condition in which it was transferred, and did not attempt to undo anything that had been done. And, among the earliest laws passed under the new Government, is one reviving the ordinance of 1787, which had become inoperative and a nullity upon the adoption of the Constitution. This law introduces no new form or principles for its government, but recites, in the preamble, that it is passed in order that this ordinance may continue to have full effect, and proceeds to make only those rules and regulations which were needful to adapt it to the new Government, into whose hands the power had fallen. It appears, therefore, that this Congress regarded the purposes

to which the land in this Territory was to be applied, and the form of government and principles of jurisprudence which were to prevail there, while it remained in the Territorial state, as already determined on by the States when they had full power and right to make the decision; and that the new Government, having received it in this condition, ought to carry substantially into effect the plans and principles which had been previously adopted by the States, and which no doubt the States anticipated when they surrendered their power to the new Government. And if we regard this clause of the Constitution as pointing to this Territory, with a Territorial Government already established in it, which had been ceded to the States for the purposes hereinbefore mentioned—every word in it is perfectly appropriate and easily understood, and the provisions it contains are in perfect harmony with the objects for which it was ceded, and with the condition of its government as a Territory at the time. We can, then, easily account for the manner in which the first Congress legislated on the subject—and can also understand why this power over the territory was associated in the same clause with the other property of the United States, and subjected to the like power of making needful rules and regulations. But if the clause is construed in the expanded sense contended for, so as to embrace any territory acquired from a foreign nation by the present Government, and to give it in such territory a despotic and unlimited power over persons and property, such as the confederated States might exercise in their common property, it would be difficult to account for the phraseology used, when compared with other grants of power—and also for its association with the other provisions in the same clause.

The Constitution has always been remarkable for the felicity of its arrangement of different subjects, and the perspicuity and appropriateness of the language it uses. But if this clause is construed to extend to territory acquired by the present Government from a foreign nation, outside of the limits of any charter from the British Government to a colony, it would be difficult to say, why it was deemed necessary to give the Government the power to sell any vacant lands belonging to the sovereignty which might be found within it; and if this was necessary, why the grant of this power should precede the power to legislate over it and establish a Government there; and still more difficult to say, why it was deemed necessary so specially and particularly to grant the power to make needful rules and regulations in relation to any personal or movable property it might acquire there. For the words, *other property* necessarily, by every known rule of interpretation, must mean

property of a different description from territory or land. And the difficulty would perhaps be insurmountable in endeavoring to account for the last member of the sentence, which provides that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State," or to say how any particular State could have claims in or to a territory ceded by a foreign Government, or to account for associating this provision with the preceding provisions of the clause, with which it would appear to have no connection.

The words "needful rules and regulations" would seem, also, to have been cautiously used for some definite object. They are not the words usually employed by statesmen, when they mean to give the powers of sovereignty, or to establish a Government, or to authorize its establishment. Thus, in the law to renew and keep alive the ordinance of 1787, and to re-establish the Government, the title of the law is: "An act to provide for the government of the territory northwest of the river Ohio." And in the Constitution, when granting the power to legislate over the territory that may be selected for the seat of Government independently of a State, it does not say Congress shall have power "to make all needful rules and regulations respecting the territory;" but it declares that "Congress shall have power to exercise exclusive legislation in all cases whatsoever over such District (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States.

The words "rules and regulations" are usually employed in the Constitution in speaking of some particular specified power which it means to confer on the Government, and not, as we have seen, when granting general powers of legislation. As, for example, in the particular power to Congress "to make rules for the government and regulation of the land and naval forces, or the particular and specific power to regulate commerce;" "to establish an uniform *rule* of naturalization;" "to coin money and *regulate* the value thereof." And to construe the words of which we are speaking as a general and unlimited grant of sovereignty over territories which the Government might afterwards acquire, is to use them in a sense and for a purpose for which they were not used in any other part of the instrument. But if confined to a particular Territory, in which a Government and laws had already been established, but which would require some alterations to adapt it to the new Government, the words are peculiarly applicable and appropriate for that purpose.

The necessity of this special provision in relation to property and the rights or property held in common by the confederated States, is illustrated by the first clause of the sixth article. This clause provides that "all debts, contracts, and engagements entered into before the adoption of this Constitution, shall be as valid against the United States under this Government as under the Confederation." This provision, like the one under consideration, was indispensable if the new Constitution was adopted. The new Government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new Government, it was a new political body, a new nation, then for the first time taking its place in the family of nations. It took nothing by succession from the Confederation. It had no right, as its successor, to any property or rights of property which it had acquired, and was not liable for any of its obligations. It was evidently viewed in this light by the framers of the Constitution. And as the several States would cease to exist in their former confederated character upon the adoption of the Constitution, and could not, in that character, again assemble together, special provisions were indispensable to transfer to the new Government the property and rights which at that time they held in common; and at the same time to authorize it to lay taxes and appropriate money to pay the common debt which they had contracted; and this power could only be given to it by special provisions in the Constitution. The clause in relation to the territory and other property of the United States provided for the first, and the clause last quoted provided for the other. They have no connection with the general powers and rights of sovereignty delegated to the new Government, and can neither enlarge nor diminish them. They were inserted to meet a present emergency, and not to regulate its powers as a Government.

Indeed, a similar provision was deemed necessary, in relation to treaties made by the Confederation; and when in the clause next succeeding the one of which we have last spoken, it is declared that treaties shall be the supreme law of the land, care is taken to include, by express words, the treaties made by the confederated States. The language is: "and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Whether, therefore, we take the particular clause in question, by itself, or in connection with the other provisions of the Constitution, we think it clear, that it applies only to the par-

ticular territory of which we have spoken, and cannot, by any just rule of interpretation, be extended to territory which the new Government might afterwards obtain from a foreign nation. Consequently, the power which Congress may have lawfully exercised in this Territory, while it remained under a Territorial Government, and which may have been sanctioned by judicial decision, can furnish no justification and no argument to support a similar exercise of power over territory afterwards acquired by the Federal Government. We put aside, therefore, any argument, drawn from precedents, showing the extent of the power which the General Government exercised over slavery in this Territory, as altogether inapplicable to the case before us.

But the case of the American and Ocean Insurance Companies *v.* Canter (1 Pet., 511) has been quoted as establishing a different construction of this clause of the Constitution. There is, however, not the slightest conflict between the opinion now given and the one referred to; and it is only by taking a single sentence out of the latter and separating it from the context, that even an appearance of conflict can be shown. We need not comment on such a mode of expounding an opinion of the court. Indeed it most commonly misrepresents instead of expounding it. And this is fully exemplified in the case referred to, where, if one sentence is taken by itself, the opinion would appear to be in direct conflict with that now given; but the words which immediately follow that sentence show that the court did not mean to decide the point, but merely affirmed the power of Congress to establish a Government in the Territory, leaving it an open question, whether that power was derived from this clause in the Constitution, or was to be necessarily inferred from a power to acquire territory by cession from a foreign Government. The opinion on this part of the case is short, and we give the whole of it to show how well the selection of a single sentence is calculated to mislead.

The passage referred to is in page 542, in which the court, in speaking of the power of Congress to establish a Territorial Government in Florida until it should become a State, uses the following language:

"In the mean time Florida continues to be a Territory of the United States, governed by that clause of the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States. Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result, necessarily, from the facts that it is not within the jurisdiction of any par-

ticular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. *Whichever may be the source from which the power is derived, the possession of it is unquestionable.*"

It is thus clear, from the whole opinion on this point, that the court did not mean to decide whether the power was derived from the clause in the Constitution, or was the necessary consequence of the right to acquire. They do decide that the power in Congress is unquestionable, and in this we entirely concur, and nothing will be found in this opinion to the contrary. The power stands firmly on the latter alternative put by the court—that is, as "*the inevitable consequence of the right to acquire territory.*"

And what still more clearly demonstrates that the court did not mean to decide the question, but leave it open for future consideration, is the fact that the case was decided in the Circuit Court by Mr. Justice Johnson, and his decision was affirmed by the Supreme Court. His opinion at the circuit is given in full in a note to the case, and in that opinion he states, in explicit terms, that the clause of the Constitution applies only to the territory then within the limits of the United States, and not to Florida, which had been acquired by cession from Spain. This part of his opinion will be found in the note in page 517 of the report. But he does not dissent from the opinion of the Supreme Court; thereby showing that, in his judgment, as well as that of the court, the case before them did not call for a decision on that particular point, and the court abstained from deciding it. And in a part of its opinion subsequent to the passage we have quoted, where the court speak of the legislative power of Congress in Florida, they still speak with the same reserve. And in page 546, speaking of the power of Congress to authorize the Territorial Legislature to establish courts there, the court say: "They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."

It has been said that the construction given to this clause is new, and now for the first time brought forward. The case of which we are speaking, and which has been so much discussed, shows that the fact is otherwise. It shows that precisely the same question came before Mr. Justice Johnson, at his circuit, thirty years ago—was fully considered by him, and the same construction given to the clause in the Constitution which is now given by this court. And that upon an appeal

from his decision the same question was brought before this court, but was not decided because a decision upon it was not required by the case before the court.

There is another sentence in the opinion which has been commented on, which even in a still more striking manner shows how one may mislead or be misled by taking out a single sentence from the opinion of a court, and leaving out of view what precedes and follows. It is in page 546, near the close of the opinion, in which the court say: "In legislating for them," (the territories of the United States,) "Congress exercises the combined powers of the General and of a State Government." And it is said, that as a State may unquestionably prohibit slavery within its territory, this sentence decides in effect that Congress may do the same in a Territory of the United States, exercising there the powers of a State, as well as the power of the General Government.

The examination of this passage in the case referred to, would be more appropriate when we come to consider in another part of this opinion what power Congress can constitutionally exercise in a Territory, over the rights of person or rights of property of a citizen. But, as it is in the same case with the passage we have before commented on, we dispose of it now, as it will save the court from the necessity of referring again to the case. And it will be seen upon reading the page in which this sentence is found, that it has no reference whatever to the power of Congress over rights of person or rights of property—but relates altogether to the power of establishing judicial tribunals to administer the laws constitutionally passed, and defining the jurisdiction they may exercise.

The law of Congress establishing a Territorial Government in Florida, provided that the Legislature of the Territory should have legislative powers over "all rightful objects of legislation; but no law should be valid which was inconsistent with the laws and Constitution of the United States."

Under the power thus conferred, the Legislature of Florida passed an act, erecting a tribunal at Key West to decide cases of salvage. And in the case of which we are speaking, the question arose whether the Territorial Legislature could be authorized by Congress to establish such a tribunal, with such powers; and one of the parties, among other objections, insisted that Congress could not under the Constitution authorize the Legislature of the Territory to establish such a tribunal with such powers, but that it must be established by Congress itself; and that a sale of cargo made under its order, to pay salvors, was void, as made without legal authority, and passed no property to the purshaser.

It is in disposing of this objection that the sentence relied on occurs, and the court begin that part of the opinion by stating with great precision the point which they are about to decide.

They say: "It has been contended that by the Constitution of the United States, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of the judicial power must be vested 'in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish.' Hence it has been argued that Congress cannot vest admiralty jurisdiction in courts created by the Territorial Legislature."

And after thus clearly stating the point before them, and which they were about to decide, they proceed to show that these Territorial tribunals were not constitutional courts, but merely legislative, and that Congress might, therefore, delegate the power to the Territorial Government to establish the court in question; and they conclude that part of the opinion in the following words: "Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the General and State Governments."

Thus it will be seen by these quotations from the opinion, that the court, after stating the question it was about to decide in a manner too plain to be misunderstood, proceeded to decide it, and announced, as the opinion of the tribunal, that in organizing the judicial department of the Government in a Territory of the United States, Congress does not act under, and is not restricted by, the third article in the Constitution, and is not bound, in a Territory, to ordain and establish courts in which the judges hold their offices during good behaviour, but may exercise the discretionary power which a State exercises in establishing its judicial department, and regulating the jurisdiction of its courts, and may authorize the Territorial Government to establish, or may itself establish, courts in which the judges hold their offices for a term of years only; and may vest in them judicial power upon subjects confided to the judiciary of the United States. And in doing this, Congress undoubtedly exercises the combined power of the General and a State Government. It exercises the discretionary power of a State Government in authorizing the establishment of a court in which the judges hold their appointments for a term of years only, and not during good behaviour; and it exercises the power of the General Government in investing that

court with admiralty jurisdiction, over which the General Government had exclusive jurisdiction in the Territory.

No one, we presume, will question the correctness of that opinion; nor is there anything in conflict with it in the opinion now given. The point decided in the case cited has no relation to the question now before the court. That depended on the construction of the third article of the Constitution, in relation to the judiciary of the United States, and the power which Congress might exercise in a Territory in organizing the judicial department of the Government. The case before us depends upon other and different provisions of the Constitution, altogether separate and apart from the one above mentioned. The question as to what courts Congress may ordain or establish in a Territory to administer laws which the Constitution authorizes it to pass, and what laws it is or is not authorized by the Constitution to pass, are widely different—are regulated by different and separate articles of the Constitution, and stand upon different principles. And we are satisfied that no one who reads attentively the page in Peters's Reports to which we have referred, can suppose that the attention of the court was drawn for a moment to the question now before this court, or that it meant in that case to say that Congress had a right to prohibit a citizen of the United States from taking any property which he lawfully held into a Territory of the United States.

This brings us to examine by what provision of the Constitution the present Federal Government, under its delegated and restricted powers, is authorized to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the person or property of a citizen of the United States, while it remains a Territory, and until it shall be admitted as one of the States of the Union.

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers, and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character.

And indeed the power exercised by Congress to acquire territory and establish a Government there, according to its own unlimited discretion, was viewed with great jealousy by the

leading statesmen of the day. And in the Federalist, (No. 38,) written by Mr. Madison, he speaks of the acquisition of the Northwestern Territory by the confederated States, by the cession from Virginia, and the establishment of a Government there, as an exercise of power not warranted by the Articles of Confederation, and dangerous to the liberties of the people. And he urges the adoption of the Constitution as a security and safeguard against such an exercise of power.

We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion. It is a question for the political department of the Government, and not the judicial; and whatever the political department of the Government shall recognise as within the limits of the United States, the judicial department is also bound to recognise, and to administer in it the laws of the United States, so far as they apply, and to maintain in the Territory the authority and rights of the Government, and also the personal rights and rights of property of individual citizens, as secured by the Constitution. All we mean to say on this point is, that, as there is no express regulation in the Constitution defining the power which the General Government may exercise over the person or property of a citizen in a Territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution, and its distribution of powers, for the rules and principles by which its decision must be governed.

Taking this rule to guide us, it may be safely assumed that citizens of the United States who migrate to a Territory belonging to the people of the United States, cannot be ruled as mere colonists, dependent upon the will of the General Government, and to be governed by any laws it may think proper to impose. The principle upon which our Governments rest, and upon which alone they continue to exist, is the union of States, sovereign and independent within their own limits in

their internal and domestic concerns, and bound together as one people by a General Government, possessing certain enumerated and restricted powers, delegated to it by the people of the several States, and exercising supreme authority within the scope of the powers granted to it, throughout the dominion of the United States. A power, therefore, in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form. Whatever it acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.

At the time when the Territory in question was obtained by cession from France, it contained no population fit to be associated together and admitted as a State; and it therefore was absolutely necessary to hold possession of it, as a Territory belonging to the United States, until it was settled and inhabited by a civilized community capable of self-government, and in a condition to be admitted on equal terms with the other States as a member of the Union. But, as we have before said, it was acquired by the General Government, as the representative and trustee of the people of the United States, and it must therefore be held in that character for their common and equal benefit; for it was the people of the several States, acting through their agent and representative, the Federal Government, who in fact acquired the Territory in question, and the Government holds it for their common use until it shall be associated with the other States as a member of the Union.

But until that time arrives, it is undoubtedly necessary that some Government should be established, in order to organize society, and to protect the inhabitants in their persons and property; and as the people of the United States could act in this matter only through the Government which represented them, and through which they spoke and acted when the Territory was obtained, it was not only within the scope of its powers, but it was its duty to pass such laws and establish such a Government as would enable those by whose authority they acted to reap the advantages anticipated from its acquisition, and to gather there a population which would enable it to assume the position to which it was destined among the States of the Union. The power to acquire necessarily carries with it the power to preserve and apply to the purposes for which it was acquired. The form of government to be estab-

lished necessarily rested in the discretion of Congress. It was their duty to establish the one that would be best suited for the protection and security of the citizens of the United States, and other inhabitants who might be authorized to take up their abode there, and that must always depend upon the existing condition of the Territory, as to the number and character of its inhabitants, and their situation in the Territory. In some cases a Government, consisting of persons appointed by the Federal Government, would best subserve the interests of the Territory, when the inhabitants were few and scattered, and new to one another. In other instances, it would be more advisable to commit the powers of self-government to the people who had settled in the Territory, as being the most competent to determine what was best for their own interests. But some form of civil authority would be absolutely necessary to organize and preserve civilized society, and prepare it to become a State; and what is the best form must always depend on the condition of the Territory at the time, and the choice of the mode must depend upon the exercise of a discretionary power by Congress, acting within the scope of its constitutional authority, and not infringing upon the rights of person or rights of property of the citizen who might go there to reside, or for any other lawful purpose. It was acquired by the exercise of this discretion, and it must be held and governed in like manner, until it is fitted to be a State.

But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Gov-

ernment can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.

A reference to a few of the provisions of the Constitution will illustrate this proposition.

For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances.

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are

concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.

It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. The powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. And if the Constitution recognises the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect

it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

We have so far examined the case, as it stands under the Constitution of the United States, and the powers thereby delegated to the Federal Government.

But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this court, upon much consideration, in the case of Strader et al. *v.* Graham, reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their *status* or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction turned upon it, as will be seen by the report of the case.

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his *status*, as free or slave, depended on the laws of Missouri, and not of Illinois.

It has, however, been urged in the argument, that by the laws of Missouri he was free on his return, and that this case,

therefore, cannot be governed by the case of Strader et al. *v.* Graham, where it appeared, by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may, at one time, have been entertained upon this subject, we are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen.

Moreover, the plaintiff, it appears, brought a similar action against the defendant in the State court of Missouri, claiming the freedom of himself and his family upon the same grounds and the same evidence upon which he relies in the case before the court. The case was carried before the Supreme Court of the State; was fully argued there; and that court decided that neither the plaintiff nor his family were entitled to freedom, and were still the slaves of the defendant; and reversed the judgment of the inferior State court, which had given a different decision. If the plaintiff supposed that this judgment of the Supreme Court of the State was erroneous, and that this court had jurisdiction to revise and reverse it, the only mode by which he could legally bring it before this court was by writ of error directed to the Supreme Court of the State, requiring it to transmit the record to this court. If this had been done, it is too plain for argument that the writ must have been dismissed for want of jurisdiction in this court. The case of Strader and others *v.* Graham is directly in point; and, indeed, independent of any decision, the language of the 25th section of the act of 1789 is too clear and precise to admit of controversy.

But the plaintiff did not pursue the mode prescribed by law for bringing the judgment of a State court before this court for revision, but suffered the case to be remanded to the inferior State court, where it is still continued, and is, by agreement of parties, to await the judgment of this court on the point. All of this appears on the record before us, and by the printed report of the case.

And while the case is yet open and pending in the inferior State court, the plaintiff goes into the Circuit Court of the United States, upon the same case and the same evidence, and against the same party, and proceeds to judgment, and then brings here the same case from the Circuit Court, which the law would not have permitted him to bring directly from the

State court. And if this court takes jurisdiction in this form, the result, so far as the rights of the respective parties are concerned, is in every respect substantially the same as if it had in open violation of law entertained jurisdiction over the judgment of the State court upon a writ of error, and revised and reversed its judgment upon the ground that its opinion upon the question of law was erroneous. It would ill become this court to sanction such an attempt to evade the law, or to exercise an appellate power in this circuitous way, which it is forbidden to exercise in the direct and regular and invariable forms of judicial proceedings.

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction.

Mr. Justice WAYNE.

Concurring as I do entirely in the opinion of the court, as it has been written and read by the Chief Justice—without any qualification of its reasoning or its conclusions—I shall neither read nor file an opinion of my own in this case, which I prepared when I supposed it might be necessary and proper for me to do so.

The opinion of the court meets fully and decides every point which was made in the argument of the case by the counsel on either side of it. Nothing belonging to the case has been left undecided, nor has any point been discussed and decided which was not called for by the record, or which was not necessary for the judicial disposition of it, in the way that it has been done, by more than a majority of the court.

In doing this, the court neither sought nor made the case. It was brought to us in the course of that administration of the laws which Congress has enacted, for the review of cases from the Circuit Courts by the Supreme Court.

In our action upon it, we have only discharged our duty as a distinct and efficient department of the Government, as the framers of the Constitution meant the judiciary to be, and as the States of the Union and the people of those States intended it should be, when they ratified the Constitution of the United States.

The case involves private rights of value, and constitutional principles of the highest importance, about which there had

become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision.

It would certainly be a subject of regret, that the conclusions of the court have not been assented to by all of its members, if I did not know from its history and my own experience how rarely it has happened that the judges have been unanimous upon constitutional questions of moment, and if our decision in this case had not been made by as large a majority of them as has been usually had on constitutional questions of importance.

Two of the judges, Mr. Justices McLean and Curtis, dissent from the opinion of the court. A third, Mr. Justice Nelson, gives a separate opinion upon a single point in the case, with which I concur, assuming that the Circuit Court had jurisdiction; but he abstains altogether from expressing any opinion upon the eighth section of the act of 1820, known commonly as the Missouri Compromise law, and six of us declare that it was unconstitutional.

But it has been assumed, that this court has acted extra-judicially in giving an opinion upon the eighth section of the act of 1820, because, as it has decided that the Circuit Court had no jurisdiction of the case, this court had no jurisdiction to examine the case upon its merits.

But the error of such an assertion has arisen in part from a misapprehension of what has been heretofore decided by the Supreme Court, in cases of a like kind with that before us; in part, from a misapplication to the Circuit Courts of the United States, of the rules of pleading concerning pleas to the jurisdiction which prevail in common-law courts; and from its having been forgotten that this case was not brought to this court by appeal or writ of error from a State court, but by a writ of error to the Circuit Court of the United States.

The cases cited by the Chief Justice to show that this court has now only done what it has repeatedly done before in other cases, without any question of its correctness, speak for themselves. The differences between the rules concerning pleas to the jurisdiction in the courts of the United States and common-law courts have been stated and sustained by reasoning and adjudged cases; and it has been shown that writs of error to a State court and to the Circuit Courts of the United States are to be determined by different laws and principles. In the first, it is our duty to ascertain if this court has jurisdiction, under the twenty-fifth section of the judiciary act, to review the case *from the State court;* and if it shall be found that it has not, the case is at end, so far as this court is concerned; for our power

to review the case upon its merits has been made, by the twenty-fifth section, to depend upon its having jurisdiction; when it has not, this court cannot criticise, controvert, or give any opinion upon the merits of a case from a State court.

But in a case brought to this court, by appeal or by writ of error from *a Circuit Court of the United States*, we begin a review of it, *not by inquiring if this court has jurisdiction*, but if that court has it. If the case has been decided by that court upon its merits, but the record shows it to be deficient in those averments which by the law of the United States must be made by the plaintiff in the action, to give the court jurisdiction of his case, we send it back to the court from which it was brought, with directions to be dismissed, though it has been decided there upon its merits.

So, in a case containing the averments by the plaintiff which are necessary to give the Circuit Court jurisdiction, if the defendant shall file his plea in abatement denying the truth of them, and the plaintiff shall demur to it, and the court should *erroneously sustain the plaintiff's demurrer, or declare the plea to be insufficient, and by doing so require the defendant to answer over by a plea to the merits, and shall decide the case upon such pleading*, this court has the same authority to inquire into the jurisdiction of that court to do so, and to correct its error in that regard, that it had in the other case to correct its error, in trying a case in which the plaintiff had not made those averments which were necessary to give the court jurisdiction. In both cases the record is resorted to, to determine the point of jurisdiction; but, as the power of review of cases from a Federal court, by this court, is not limited by the law to a part of the case, this court may correct an error upon the merits; and there is the same reason for correcting an erroneous judgment of the Circuit Court, where the want of jurisdiction appears from any part of the record, that there is for declaring a want of jurisdiction for a want of necessary averments. Any attempt to control the court from doing so by the technical common-law rules of pleading in cases of jurisdiction, when a defendant has been denied his plea to it, would tend to enlarge the jurisdiction of the Circuit Court, by limiting this court's review of its judgments in that particular. But I will not argue a point already so fully discussed. I have every confidence in the opinion of the court upon the point of jurisdiction, and do not allow myself to doubt that the error of a contrary conclusion will be fully understood by all who shall read the argument of the Chief Justice.

I have already said that the opinion of the court has my unqualified assent.

Mr. Justice NELSON.

I shall proceed to state the grounds upon which I have arrived at the conclusion, that the judgment of the court below should be affirmed. The suit was brought in the court below by the plaintiff, for the purpose of asserting his freedom, and that of Harriet, his wife, and two children.

The defendant plead, in abatement to the suit, that the cause of action, if any, accrued to the plaintiff out of the jurisdiction of the court, and exclusively within the jurisdiction of the courts of the State of Missouri; for, that the said plaintiff is not a citizen of the State of Missouri, as alleged in the declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court below sustained the demurrer, holding that the plea was insufficient in law to abate the suit.

The defendant then plead over in bar of the action:

1. The general issue. 2. That the plaintiff was a negro slave, the lawful property of the defendant. And 3. That Harriet, the wife of said plaintiff, and the two children, were the lawful slaves of the said defendant. Issue was taken upon these pleas, and the cause went down to trial before the court and jury, and an agreed state of facts was presented, upon which the trial proceeded, and resulted in a verdict for the defendant, under the instructions of the court.

The facts agreed upon were substantially as follows:

That in the year 1834, the plaintiff, Scott, was a negro slave of Dr. Emerson, who was a surgeon in the army of the United States; and in that year he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At this date, Dr. Emerson removed, with the plaintiff, from the Rock Island post to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory of Upper Louisiana, and north of the latitude thirty-six degrees thirty minutes, and north of the State of Missouri. That he held the plaintiff in slavery, at Fort Snelling, from the last-mentioned date until the year 1838.

That in the year 1835, Harriet, mentioned in the declaration, was a negro slave of Major Taliaferro, who belonged to the army of the United States; and in that year he took her to Fort Snelling, already mentioned, and kept her there as a slave until the year 1836, and then sold and delivered her to Dr. Emerson, who held her in slavery, at Fort Snelling, until the year 1838. That in the year 1836, the plaintiff and Harriet

were married, at Fort Snelling, with the consent of their master. The two children, Eliza and Lizzie, are the fruit of this marriage. The first is about fourteen years of age, and was born on board the steamboat Gipsey, north of the State of Missouri, and upon the Mississippi river; the other, about seven years of age, was born in the State of Missouri, at the military post called Jefferson Barracks.

In 1838, Dr. Emerson removed the plaintiff, Harriet, and their daughter Eliza, from Fort Snelling to the State of Missouri, where they have ever since resided. And that, before the commencement of this suit, they were sold by the Doctor to Sandford, the defendant, who has claimed and held them as slaves ever since.

The agreed case also states that the plaintiff brought a suit for his freedom, in the Circuit Court of the State of Missouri, on which a judgment was rendered in his favor; but that, on a writ of error from the Supreme Court of the State, the judgment of the court below was reversed, and the cause remanded to the circuit for a new trial.

On closing the testimony in the court below, the counsel for the plaintiff prayed the court to instruct the jury, upon the agreed state of facts, that they ought to find for the plaintiff; when the court refused, and instructed them that, upon the facts, the law was with the defendant.

With respect to the plea in abatement, which went to the citizenship of the plaintiff, and his competency to bring a suit in the Federal courts, the common-law rule of pleading is, that upon a judgment against the plea on demurrer, and that the defendant answer over, and the defendant submits to the judgment, and pleads over to the merits, the plea in abatement is deemed to be waived, and is not afterwards to be regarded as a part of the record in deciding upon the rights of the parties. There is some question, however, whether this rule of pleading applies to the peculiar system and jurisdiction of the Federal courts. As, in these courts, if the facts appearing on the record show that the Circuit Court had no jurisdiction, its judgment will be reversed in the appellate court for that cause, and the case remanded with directions to be dismissed.

In the view we have taken of the case, it will not be necessary to pass upon this question, and we shall therefore proceed at once to an examination of the case upon its merits. The question upon the merits, in general terms, is, whether or not the removal of the plaintiff, who was a slave, with his master, from the State of Missouri to the State of Illinois, with a view to a temporary residence, and after such residence and

return to the slave State, such residence in the free State works an emancipation.

As appears from an agreed statement of facts, this question has been before the highest court of the State of Missouri, and a judgment rendered that this residence in the free State has no such effect; but, on the contrary, that his original condition continued unchanged.

The court below, the Circuit Court of the United States for Missouri, in which this suit was afterwards brought, followed the decision of the State court, and rendered a like judgment against the plaintiff.

The argument against these decisions is, that the laws of Illinois, forbidding slavery within her territory, had the effect to set the slave free while residing in that State, and to impress upon him the condition and status of a freeman; and that, by force of these laws, this status and condition accompanied him on his return to the slave State, and of consequence he could not be there held as a slave.

This question has been examined in the courts of several of the slaveholding States, and different opinions expressed and conclusions arrived at. We shall hereafter refer to some of them, and to the principles upon which they are founded. Our opinion is, that the question is one which belongs to each State to decide for itself, either by its Legislature or courts of justice; and hence, in respect to the case before us, to the State of Missouri—a question exclusively of Missouri law, and which, when determined by that State, it is the duty of the Federal courts to follow it. In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction.

As a practical illustration of the principle, we may refer to the legislation of the free States in abolishing slavery, and prohibiting its introduction into their territories. Confessedly, except as restrained by the Federal Constitution, they exercised, and rightfully, complete and absolute power over the subject. Upon what principle, then, can it be denied to the State of Missouri? The power flows from the sovereign character of the States of this Union; sovereign, not merely as respects the Federal Government—except as they have consented to its limitation—but sovereign as respects each other. Whether, therefore, the State of Missouri will recognise or give effect to the laws of Illinois within her territories on the subject of slavery, is a question for her to determine. Nor is there any constitutional power in this Government that can rightfully control her.

Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held, and the condition, capacity, and state, of all persons therein; and, also, the remedy and modes of administering justice. And it is equally true, that no State or nation can affect or bind property out of its territory, or persons not residing within it. No State, therefore, can enact laws to operate beyond its own dominions, and, if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extra-territorially. This is the necessary result of the independence of distinct and separate sovereignties.

Now, it follows from these principles, that whatever force or effect the laws of one State or nation may have in the territories of another, must depend solely upon the laws and municipal regulations of the latter, upon its own jurisprudence and polity, and upon its own express or tacit consent.

Judge Story observes, in his Conflict of Laws, (p. 24,) "that a State may prohibit the operation of all foreign laws, and the rights growing out of them, within its territories." "And that when its code speaks positively on the subject, it must be obeyed by all persons who are within reach of its sovereignty; when its customary unwritten or common law speaks directly on the subject, it is equally to be obeyed."

Nations, from convenience and comity, and from mutual interest, and a sort of moral necessity to do justice, recognise and administer the laws of other countries. But, of the nature, extent, and utility, of them, respecting property, or the state and condition of persons within her territories, each nation judges for itself; and is never bound, even upon the ground of comity, to recognise them, if prejudicial to her own interests. The recognition is purely from comity, and not from any absolute or paramount obligation.

Judge Story again observes, (398,) "that the true foundation and extent of the obligation of the laws of one nation within another is the voluntary consent of the latter, and is inadmissible when they are contrary to its known interests." And he adds, "in the silence of any positive rule affirming or denying or restraining the operation of the foreign laws, courts of justice presume the tacit adoption of them by their own Government, unless they are repugnant to its policy or prejudicial to its interests." (See also 2 Kent Com., p. 457; 13 Peters, 519, 589.)

These principles fully establish, that it belongs to the sover-

eign State of Missouri to determine by her laws the question of slavery within her jurisdiction, subject only to such limitations as may be found in the Federal Constitution; and, further, that the laws of other States of the Confederacy, whether enacted by their Legislatures or expounded by their courts, can have no operation within her territory, or affect rights growing out of her own laws on the subject. This is the necessary result of the independent and sovereign character of the State. The principle is not peculiar to the State of Missouri, but is equally applicable to each State belonging to the Confederacy. The laws of each have no extra-territorial operation within the jurisdiction of another, except such as may be voluntarily conceded by her laws or courts of justice. To the extent of such concession upon the rule of comity of nations, the foreign law may operate, as it then becomes a part of the municipal law of the State. When determined that the foreign law shall have effect, the municipal law of the State retires, and gives place to the foreign law.

In view of these principles, let us examine a little more closely the doctrine of those who maintain that the law of Missouri is not to govern the status and condition of the plaintiff. They insist that the removal and temporary residence with his master in Illinois, where slavery is inhibited, had the effect to set him free, and that the same effect is to be given to the law of Illinois, within the State of Missouri, after his return. Why was he set free in Illinois? Because the law of Missouri, under which he was held as a slave, had no operation by its own force extra-territorially; and the State of Illinois refused to recognise its effect within her limits, upon principles of comity, as a state of slavery was inconsistent with her laws, and contrary to her policy. But, how is the case different on the return of the plaintiff to the State of Missouri? Is she bound to recognise and enforce the law of Illinois? For, unless she is, the status and condition of the slave upon his return remains the same as originally existed. Has the law of Illinois any greater force within the jurisdiction of Missouri, than the laws of the latter within that of the former? Certainly not. They stand upon an equal footing. Neither has any force extra-territorially, except what may be voluntarily conceded to them.

It has been supposed, by the counsel for the plaintiff, that a rule laid down by Huberus had some bearing upon this question. Huberus observes that "personal qualities, impressed by the laws of any place, surround and accompany the person wherever he goes, with this effect: that in every place he enjoys and is subject to the same law which other persons of his

class elsewhere enjoy or are subject to." (De Confl. Leg., lib. 1, tit. 3, sec. 12; 4 Dallas, 375 n.; 1 Story Con. Laws, pp. 59, 60.)

The application sought to be given to the rule was this: that as Dred Scott was free while residing in the State of Illinois, by the laws of that State, on his return to the State of Missouri he carried with him the personal qualities of freedom, and that the same effect must be given to his status there as in the former State. But the difficulty in the case is in the total misapplication of the rule.

These personal qualities, to which Huberus refers, are those impressed upon the individual by the law of the domicil; it is this that the author claims should be permitted to accompany the person into whatever country he might go, and should supersede the law of the place where he had taken up a temporary residence.

Now, as the domicil of Scott was in the State of Missouri, where he was a slave, and from whence he was taken by his master into Illinois for a temporary residence, according to the doctrine of Huberus, the law of his domicil would have accompanied him, and during his residence there he would remain in the same condition as in the State of Missouri. In order to have given effect to the rule, as claimed in the argument, it should have been first shown that a domicil had been acquired in the free State, which cannot be pretended upon the agreed facts in the case. But the true answer to the doctrine of Huberus is, that the rule, in any aspect in which it may be viewed, has no bearing upon either side of the question before us, even if conceded to the extent laid down by the author; for he admits that foreign Governments give effect to these laws of the domicil no further than they are consistent with their own laws, and not prejudicial to their own subjects; in other words, their force and effect depend upon the law of comity of the foreign Government. We should add, also, that this general rule of Huberus, referred to, has not been admitted in the practice of nations, nor is it sanctioned by the most approved jurists of international law. (Story Con., sec. 91, 96, 103, 104; 2 Kent. Com., p. 457, 458; 1 Burge Con. Laws, pp. 12, 127.)

We come now to the decision of this court in the case of Strader et al. *v.* Graham, (10 How., p. 2.) The case came up from the Court of Appeals, in the State of Kentucky. The question in the case was, whether certain slaves of Graham, a resident of Kentucky, who had been employed temporarily at several places in the State of Ohio, with their master's consent, and had returned to Kentucky into his service, had thereby

become entitled to their freedom. The Court of Appeals held that they had not. The case was brought to this court under the twenty-fifth section of the judiciary act. This court held that it had no jurisdiction, for the reason, the question was one that belonged exclusively to the State of Kentucky. The Chief Justice, in delivering the opinion of the court, observed that "every State has an undoubted right to determine the status or domestic and social condition of the persons domiciled within its territory, except in so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States, he observes, that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine, for herself, whether their employment in another State should or should not make them free on their return."

It has been supposed, in the argument on the part of the plaintiff, that the eighth section of the act of Congress passed March 6, 1820, (3 St. at Large, p. 544,) which prohibited slavery north of thirty-six degrees thirty miutes, within which the plaintiff and his wife temporarily resided at Fort Snelling, possessed some superior virtue and effect, extra-territorially, and within the State of Missouri, beyond that of the laws of Illinois, or those of Ohio in the case of Strader et al. *v.* Graham. A similar ground was taken and urged upon the court in the case just mentioned, under the ordinance of 1787, which was enacted during the time of the Confederation, and re-enacted by Congress after the adoption of the Constitution, with some amendments adapting it to the new Government. (1 St. at Large, p. 50.)

In answer to this ground, the Chief Justice, in delivering the opinion of the court, observed: "The argument assumes that the six articles which that ordinance declares to be perpetual, are still in force in the States since formed within the territory, and admitted into the Union. If this proposition could be maintained, it would not alter the question; for the regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular Territory, could have no force beyond its limits. It certainly could not restrict the power of the States, within their respective territories, nor in any manner interfere with their laws and institutions, nor give this court control over them.

"The ordinance in question, he observes, if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that State."

This view, thus authoritatively declared, furnishes a conclusive answer to the distinction attempted to be set up between the extra-territorial effect of a State law and the act of Congress in question.

It must be admitted that Congress possesses no power to regulate or abolish slavery within the States; and that, if this act had attempted any such legislation, it would have been a nullity. And yet the argument here, if there be any force in it, leads to the result, that effect may be given to such legislation; for it is only by giving the act of Congress operation within the State of Missouri, that it can have any effect upon the question between the parties. Having no such effect directly, it will be difficult to maintain, upon any consistent reasoning, that it can be made to operate indirectly upon the subject.

The argument, we think, in any aspect in which it may be viewed, is utterly destitute of support upon any principles of constitutional law, as, according to that, Congress has no power whatever over the subject of slavery within the State; and is also subversive of the established doctrine of international jurisprudence, as, according to that, it is an axiom that the laws of one Government have no force within the limits of another, or extra-territorially, except from the consent of the latter.

It is perhaps not unfit to notice, in this connection, that many of the most eminent statesmen and jurists of the country entertain the opinion that this provision of the act of Congress, even within the territory to which it relates, was not authorized by any power under the Constitution. The doctrine here contended for, not only upholds its validity in the territory, but claims for it effect beyond and within the limits of a sovereign State—an effect, as insisted, that displaces the laws of the State, and substitutes its own provisions in their place.

The consequences of any such construction are apparent. If Congress possesses the power, under the Constitution, to abolish slavery in a Territory, it must necessarily possess the like power to establish it. It cannot be a one-sided power, as may suit the convenience or particular views of the advocates. It is a power, if it exists at all, over the whole subject; and then, upon the process of reasoning which seeks to extend its influence beyond the Territory, and within the limits of a State, if Congress should establish, instead of abolish, slavery, we do

not see but that, if a slave should be removed from the Territory into a free State, his status would accompany him, and continue, notwithstanding its laws against slavery. The laws of the free State, according to the argument, would be displaced, and the act of Congress, in its effect, be substituted in their place. We do not see how this conclusion could be avoided, if the construction against which we are contending should prevail. We are satisfied, however, it is unsound, and that the true answer to it is, that even conceding, for the purposes of the argument, that this provision of the act of Congress is valid within the Territory for which it was enacted, it can have no operation or effect beyond its limits, or within the jurisdiction of a State. It can neither displace its laws, nor change the status or condition of its inhabitants.

Our conclusion, therefore, is, upon this branch of the case, that the question involved is one depending solely upon the law of Missouri, and that the Federal court sitting in the State, and trying the case before us, was bound to follow it.

The remaining question for consideration is, What is the law of the State of Missouri on this subject? And it would be a sufficient answer to refer to the judgment of the highest court of the State in the very case, were it not due to that tribunal to state somewhat at large the course of decision and the principles involved, on account of some diversity of opinion in the cases. As we have already stated, this case was originally brought in the Circuit Court of the State, which resulted in a judgment for the plaintiff. The case was carried up to the Supreme Court for revision. That court reversed the judgment below, and remanded the cause to the circuit, for a new trial. In that state of the proceeding, a new suit was brought by the plaintiff in the Circuit Court of the United States, and tried upon the issues and agreed case before us, and a verdict and judgment for the defendant, that court following the decision of the Supreme Court of the State. The judgment of the Supreme Court is reported in the 15 Misso. R., p. 576. The court placed the decision upon the temporary residence of the master with the slaves in the State and Territory to which they removed, and their return to the slave State; and upon the principles of international law, that foreign laws have no extra-territorial force, except such as the State within which they are sought to be enforced may see fit to extend to them, upon the doctrine of comity of nations.

This is the substance of the grounds of the decision.

The same question has been twice before that court since, and the same judgment given, (15 Misso. R., 595; 17 Ib., 434.) It must be admitted, therefore, as the settled law of the State,

and, according to the decision in the case of Strader et al. *v.* Graham, is conclusive of the case in this court.

It is said, however, that the previous cases and course of decision in the State of Missouri on this subject were different, and that the courts had held the slave to be free on his return from a temporary residence in the free State. We do not see, were this to be admitted, that the circumstance would show that the settled course of decision, at the time this case was tried in the court below, was not to be considered the law of the State. Certainly, it must be, unless the first decision of a principle of law by a State court is to be permanent and irrevocable. The idea seems to be, that the courts of a State are not to change their opinions, or, if they do, the first decision is to be regarded by this court as the law of the State. It is certain, if this be so, in the case before us, it is an exception to the rule governing this court in all other cases. But what court has not changed its opinions? What judge has not changed his?

Waiving, however, this view, and turning to the decisions of the courts of Missouri, it will be found that there is no discrepancy between the earlier and the present cases upon this subject. There are some eight of them reported previous to the decision in the case before us, which was decided in 1852. The last of the earlier cases was decided in 1836. In each one of these, with two exceptions, the master or mistress removed into the free State with the slave, with a view to a permanent residence—in other words, to make that his or her domicil. And in several of the cases, this removal and permanent residence were relied on, as the ground of the decision in favor of the plaintiff. All these cases, therefore, are not necessarily in conflict with the decision in the case before us, but consistent with it. In one of the two excepted cases, the master had hired the slave in the State of Illinois from 1817 to 1825. In the other, the master was an officer in the army, and removed with his slave to the military post of Fort Snelling, and at Prairie du Chien, in Michigan, temporarily, while acting under the orders of his Government. It is conceded the decision in this case was departed from in the case before us, and in those that have followed it. But it is to be observed that these subsequent cases are in conformity with those in all the slave States bordering on the free—in Kentucky, (2 Marsh., 476; 5 B. Munroe, 176; 9 Ib., 565)—in Virginia, (1 Rand., 15; 1 Leigh, 172; 10 Grattan, 495)—in Maryland, (4 Harris and McHenry, 295, 322, 325.) In conformity, also, with the law of England on this subject, Ex parte Grace, (2 Hagg. Adm., R., 94,) and with the opinions of the

most eminent jurists of the country. (Story's Confl., 396 a; 2 Kent Com., 258 n.; 18 Pick., 193, Chief Justice Shaw. See Corresp. between Lord Stowell and Judge Story, 1 vol. Life of Story, p. 552, 558.)

Lord Stowell, in communicating his opinion in the case of the slave Grace to Judge Story, states, in his letter, what the question was before him, namely: "Whether the emancipation of a slave brought to England insured a complete emancipation to him on his return to his own country, or whether it only operated as a suspension of slavery in England, and his original character devolved on him again upon his return." He observed, "the question had never been examined since an end was put to slavery fifty years ago," having reference to the decision of Lord Mansfield in the case of Somersett; but the practice, he observed, "has regularly been, that on his return to his own country, the slave resumed his original character of slave." And so Lord Stowell held in the case.

Judge Story, in his letter in reply, observes: "I have read with great attention your judgment in the slave case, &c. Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should have certainly arrived at the same result." Again he observes: "In my native State, (Massachusetts,) the state of slavery is not recognised as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law attached upon him, and that his servile character would be redintegrated."

We may remark, in this connection, that the case before the Maryland court, already referred to, and which was decided in 1799, presented the same question as that before Lord Stowell, and received a similar decision. This was nearly thirty years before the decision in that case, which was in 1828. The Court of Appeals observed, in deciding the Maryland case, that "however the laws of Great Britain in such instances, operating upon such persons there, might interfere so as to prevent the exercise of certain acts by the masters, not permitted, as in the case of Somersett, yet, upon the bringing Ann Joice into this State, (then the province of Maryland,) the relation of master and slave continued in its extent, as authorized by the laws of this State." And Luther Martin, one of the counsel in that case, stated, on the argument, that the question had been previously decided the same way in the case of slaves returning from a residence in Pennsylvania, where they had become free under her laws.

The State of Louisiana, whose courts had gone further in

holding the slave free on his return from a residence in a free State than the courts of her sister States, has settled the law, by an act of her Legislature, in conformity with the law of the court of Missouri in the case before us. (Sess. Law, 1846.)

The case before Lord Stowell presented much stronger features for giving effect to the law of England in the case of the slave Grace than exists in the cases that have arisen in this country, for in that case the slave returned to a colony of England over which the Imperial Government exercised supreme authority. Yet, on the return of the slave to the colony, from a temporary residence in England, he held that the original condition of the slave attached. The question presented in cases arising here is as to the effect and operation to be given to the laws of a foreign State, on the return of the slave within an independent sovereignty.

Upon the whole, it must be admitted that the current of authority, both in England and in this country, is in accordance with the law as declared by the courts of Missouri in the case before us, and we think the court below was not only right, but bound to follow it.

Some question has been made as to the character of the residence in this case in the free State. But we regard the facts as set forth in the agreed case as decisive. The removal of Dr. Emerson from Missouri to the military posts was in the discharge of his duties as surgeon in the army, and under the orders of his Government. He was liable at any moment to be recalled, as he was in 1838, and ordered to another post. The same is also true as it respects Major Taliaferro. In such a case, the officer goes to his post for a temporary purpose, to remain there for an uncertain time, and not for the purpose of fixing his permanent abode. The question we think too plain to require argument. The case of the Attorney General *v.* Napier, (6 Welsh, Hurtst. and Gordon Exch. Rep., 217,) illustrates and applies the principle in the case of an officer of the English army.

A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it.

Our conclusion is, that the judgment of the court below should be affirmed.

Mr. Justice GRIER.

I concur in the opinion delivered by Mr. Justice Nelson on the questions discussed by him.

I also concur with the opinion of the court as delivered by the Chief Justice, that the act of Congress of 6th March, 1820, is unconstitutional and void; and that, assuming the facts as stated in the opinion, the plaintiff cannot sue as a citizen of Missouri in the courts of the United States. But, that the record shows a prima facie case of jurisdiction, requiring the court to decide all the questions properly arising in it; and as the decision of the pleas in bar shows that the plaintiff is a slave, and therefore not entitled to sue in a court of the United States, the form of the judgment is of little importance; for, whether the judgment be affirmed or dismissed for want of jurisdiction, it is justified by the decision of the court, and is the same in effect between the parties to the suit.

Mr. Justice DANIEL.

It may with truth be affirmed, that since the establishment of the several communities now constituting the States of this Confederacy, there never has been submitted to any tribunal within its limits questions surpassing in importance those now claiming the consideration of this court. Indeed it is difficult to imagine, in connection with the systems of polity peculiar to the United States, a conjuncture of graver import than that must be, within which it is aimed to comprise, and to control, not only the faculties and practical operation appropriate to the American Confederacy as such, but also the rights and powers of its separate and independent members, with reference alike to their internal and domestic authority and interests, and the relations they sustain to their confederates.

To my mind it is evident, that nothing less than the ambitious and far-reaching pretension to compass these objects of vital concern, is either directly essayed or necessarily implied in the positions attempted in the argument for the plaintiff in error.

How far these positions have any foundation in the nature of the rights and relations of separate, equal, and independent Governments, or in the provisions of our own Federal compact, or the laws enacted under and in pursuance of the authority of that compact, will be presently investigated.

In order correctly to comprehend the tendency and force of those positions, it is proper here succinctly to advert to the

facts upon which the questions of law propounded in the argument have arisen.

This was an action of trespass *vi et armis*, instituted in the Circuit Court of the United States for the district of Missouri, in the name of the plaintiff in error, *a negro* held as a slave, for the recovery of freedom for himself, his wife, and two children, *also negroes.*

To the declaration in this case the defendant below, who is also the defendant in error, pleaded in abatement that the court could not take cognizance of the cause, because the plaintiff was not *a citizen* of the State of Missouri, as averred in the declaration, but was a *negro of African descent*, and that his ancestors were of pure African blood, and were brought into this country and sold as *negro slaves;* and hence it followed, from the second section of the third article of the Constitution, which creates the judicial power of the United States, with respect to controversies between citizens of different States, that the Circuit Court could not take cognizance of the action.

To this plea in abatement, a demurrer having been interposed on behalf of the plaintiff, it was sustained by the court. After the decision sustaining the demurrer, the defendant, in pursuance of a previous agreement between counsel, and with the leave of the court, pleaded in bar of the action: 1*st, not guilty;* 2*dly, that the plaintiff was a negro slave, the lawful property of the defendant, and as such the defendant gently laid his hands upon him, and thereby had only restrained him, as the defendant had a right to do;* 3*dly, that with respect to the wife and daughters of the plaintiff, in the second and third counts of the declaration mentioned, the defendant had, as to them, only acted in the same manner, and in virtue of the same legal right.*

Issues having been joined upon the above pleas in bar, the following statement, comprising all the evidence in the cause, was agreed upon and signed by the counsel of the respective parties, viz:

"In the year 1834, the plaintiff was a negro slave belonging to Doctor Emerson, who was a surgeon in the army of the United States. In that year, 1834, said Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six

degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last-mentioned date until the year 1838.

"In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Dr. Emerson, hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

"In the year 1836, the plaintiff and said Harriet, at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried, and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at a military post called Jefferson barracks.

"In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided.

"Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them and each of them as slaves.

"At the times mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza, and Lizzie, and imprisoned them, doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times.

"Further proof may be given on the trial for either party.

"R. M. Field, *for Plaintiff.*

"H. A. Garland, *for Defendant.*

"It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis county; that there was a verdict and judgment in his favor; that on a writ of error to the Supreme Court, the judgment below was reversed, and the

cause remanded to the Circuit Court, where it has been continued to await the decision of this case.

"Field, *for Plaintiff.*
"Garland, *for Defendant.*"

Upon the aforegoing agreed facts, the plaintiff prayed the court to instruct the jury that they ought to find for the plaintiff, and upon the refusal of the instruction thus prayed for, the plaintiff excepted to the court's opinion. The court then, upon the prayer of the defendant, instructed the jury, that upon the facts of this case agreed as above, the law was with the defendant. To this opinion, also, the plaintiff's counsel excepted, as he did to the opinion of the court denying to the plaintiff a new trial after the verdict of the jury in favor of the defendant.

The question first in order presented by the record in this cause, is that which arises upon the plea in abatement, and the demurrer to that plea; and upon this question it is my opinion that the demurrer should have been overruled, and the plea sustained.

On behalf of the plaintiff it has been urged, that by the pleas interposed in bar of a recovery in the court below, (which pleas both in fact and in law are essentially the same with the objections averred in abatement,) the defence in abatement has been displaced or waived; that it could therefore no longer be relied on in the Circuit Court, and cannot claim the consideration of this court in reviewing this cause. This position is regarded as wholly untenable. On the contrary, it would seem to follow conclusively from the peculiar character of the courts of the United States, as organized under the Constitution and the statutes, and as defined by numerous and unvarying adjudications from this bench, that there is not one of those courts whose jurisdiction and powers can be deduced from mere custom or tradition; not one, whose jurisdiction and powers must not be traced palpably to, and invested exclusively by, the Constitution and statutes of the United States; not one that is not bound, therefore, at all times, and at all stages of its proceedings, to look to and to regard the special and declared extent and bounds of its commission and authority. There is no such tribunal of the United States as a court of *general jurisdiction*, in the sense in which that phrase is applied to the superior courts under the common law; and even with respect to the courts existing under that system, it is a well-settled principle, that *consent* can never give jurisdiction.

The principles above stated, and the consequences regularly deducible from them, have, as already remarked, been repeat-

edly and unvaryingly propounded from this bench. Beginning with the earliest decisions of this court, we have the cases of Bingham *v.* Cabot et al., (3 Dallas, 382;) Turner *v.* Eurille, (4 Dallas, 7;) Abercrombie *v.* Dupuis et al., (1 Cranch, 343;) Wood *v.* Wagnon, (2 Cranch, 9;) The United States *v.* The brig Union et al., (4 Cranch, 216;) Sullivan *v.* The Fulton Steamboat Company, (6 Wheaton, 450;) Mollan et al. *v.* Torrence, (9 Wheaton, 537;) Brown *v.* Keene, (8 Peters, 112,) and Jackson *v.* Ashton, (8 Peters, 148;) ruling, in uniform and unbroken current, the doctrine that it is essential to the jurisdiction of the courts of the United States, that the facts upon which it is founded should appear upon the record. Nay, to such an extent and so inflexibly has this requisite to the jurisdiction been enforced, that in the case of Capron *v.* Van Noorden, (2 Cranch, 126,) it is declared, that the plaintiff in this court may assign for error his own omission in the pleadings in the court below, where they go to the jurisdiction. This doctrine has been, if possible, more strikingly illustrated in a later decision, the case of The State of Rhode Island *v.* The State of Massachusetts, in the 12th of Peters.

In this case, on page 718 of the volume, this court, with reference to a motion to dismiss the cause *for want of jurisdiction*, have said: "*However late this objection has been made, or may be made, in any cause in an inferior or appellate court of the United States*, it must be considered and decided before any court can move one farther step in the cause, as any movement is necessarily to exercise the jurisdiction. Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit; to adjudicate or exercise any judicial power over them. The question is, whether on the case before the court their action is judicial or extra-judicial; with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. A motion to dismiss a cause pending in the courts of the United States, is not analogous to a plea to the jurisdiction of a court of common law or equity in England; there, the superior courts have a general jurisdiction over all persons within the realm, and all causes of action between them. It depends on the subject-matter, whether the jurisdiction shall be exercised by a court of law or equity; but that court to which it appropriately belongs can act judicially upon the party and the subject of the suit, unless it shall be made apparent to the court that the judicial determination of the case has been withdrawn from the court of general jurisdiction to an inferior and limited one. It is a necessary presumption that the court of general jurisdiction can act upon the given case, when nothing to the

contrary appears; hence has arisen the rule that the party claiming an exemption from its process must set out the reason by a special plea in abatement, and show that some inferior court of law or equity has the exclusive cognizance of the case, otherwise the superior court must proceed in virtue of its general jurisdiction. A motion to dismiss, therefore, cannot be entertained, as it does not disclose a case of exception; and if a plea in abatement is put in, it must not only make out the exception, but point to the particular court to which the case belongs. There are other classes of cases where the objection to the jurisdiction is of a different nature, as on a bill in chancery, that the subject-matter is cognizable only by the King in Council, or that the parties defendant cannot be brought before any municipal court on account of their sovereign character or the nature of the controversy; or to the very common cases which present the question, whether the cause belong to a court of law or equity. To such cases, a plea in abatement would not be applicable, because the plaintiff could not sue in an inferior court. The objection goes to a denial of any jurisdiction of a municipal court in the one class of cases, and to the jurisdiction of any court of equity or of law in the other, on which last the court decides according to its discretion.

"An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue; but when the objection goes to the power of the court over the parties or the subject-matter, the defendant need not, for he cannot, give the plaintiff a better writ. Where an inferior court can have no jurisdiction of a case of law or equity, the ground of objection is not taken by plea in abatement, as an exception of the given case from the otherwise general jurisdiction of the court; appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer, *or at the trial or hearing.* As a denial of jurisdiction over the subject-matter of a suit between parties within the realm, over which and whom the court has power to act, cannot be successful in an English court of general jurisdiction, a motion like the present could not be sustained consistently with the principles of its constitution. *But as this court is one of limited and special original jurisdiction,* its action must be confined to the particular cases, controversies, and parties, over which the Constitution and laws have authorized it to act; any proceeding without the limits prescribed is *coram non judice,* and its action a nullity. And whether the want or excess of power is objected by a party, or is apparent

to the court, it must surcease its action or proceed extra-judicially."

In the constructing of pleadings either in abatement or in bar, every fact or position constituting a portion of the public law, or of known or general history, is necessarily implied. Such fact or position need not be specially averred and set forth; it is what the world at large and every individual are presumed to know—nay, are bound to know and to be governed by.

If, on the other hand, there exist facts or circumstances by which a particular case would be withdrawn or exempted from the influence of public law or necessary historical knowledge, such facts and circumstances form an exception to the general principle, and these must be specially set forth and *established* by those who would avail themselves of such exception.

Now, the following are truths which a knowledge of the history of the world, and particularly of that of our own country, compels us to know—that the African negro race never have been acknowledged as belonging to the family of nations; that as amongst them there never has been known or recognised by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase; as subjects of commerce or traffic; and that the introduction of that race into every section of this country was not as members of civil or political society, but as slaves, as *property* in the strictest sense of the term.

In the plea in abatement, the character or capacity of citizen on the part of the plaintiff is denied; and the causes which show the absence of that character or capacity are set forth by averment. The verity of those causes, according to the settled rules of pleading, being admitted by the demurrer, it only remained for the Circuit Court to decide upon their legal sufficiency to abate the plaintiff's action. And it now becomes the province of this court to determine whether the plaintiff below, (and in error here,) admitted to be a *negro* of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as negro slaves—such being his *status*, and such the circumstances surrounding his position—whether he can, by correct legal induction from that *status* and those circumstances, be clothed with the character and capacities of a citizen of the State of Missouri?

It may be assumed as a postulate, that to a slave, as such, there appertains and can appertain no relation, civil or political, with the State or the Government. He is himself strictly *property*, to be used in subserviency to the interests, the con-

venience, or the will, of his owner; and to suppose, with respect to the former, the existence of any privilege or discretion, or of any obligation to others incompatible with the magisterial rights just defined, would be by implication, if not directly, to deny the relation of master and slave, since none can possess and enjoy, as his own, that which another has a paramount right and power to withhold. Hence it follows, necessarily, that a slave, the *peculium* or property of a master, and possessing within himself no civil nor political rights or capacities, cannot be a CITIZEN. For who, it may be asked, is a citizen? What do the character and *status* of citizen import? Without fear of contradiction, it does not import the condition of being private property, the subject of individual power and ownership. Upon a principle of etymology alone, the term *citizen*, as derived from *civitas*, conveys the ideas of connection or identification with the State or Government, and a participation of its functions. But beyond this, there is not, it is believed, to be found, in the theories of writers on Government, or in any actual experiment heretofore tried, an exposition of the term *citizen*, which has not been understood as conferring the actual possession and enjoyment, or the perfect right of acquisition and enjoyment, of an entire equality of privileges, civil and political.

Thus Vattel, in the preliminary chapter to his Treatise on the Law of Nations, says: "Nations or States are bodies politic; societies of men united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their mutual strength. Such a society has her affairs and her interests; she deliberates and takes resolutions *in common;* thus becoming a moral person, who possesses an understanding and a will peculiar to herself." Again, in the first chapter of the first book of the Treatise just quoted, the same writer, after repeating his definition of a State, proceeds to remark, that, "from the very design that induces a number of men to form a society, which has its common interests and which is to act in concert, it is necessary that there should be established a public authority, to order and direct what is to be done by each, in relation to the end of the association. This political authority is the *sovereignty.*" Again this writer remarks: "The authority of *all* over each member essentially belongs to the body politic or the State."

By this same writer it is also said: "The citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority; they *equally* participate in its advantages. The natives, or natural-born citizens, are those born in the country, of parents who are citizens. As so-

ciety cannot perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their parents, and succeed to all their rights." Again: "I say, to be *of the country*, it is necessary to be born of a person who is a *citizen;* for if he be born there of a foreigner, it will be only the place of his *birth*, and not his *country*. The inhabitants, as distinguished from citizens, are foreigners who are permitted to settle and stay in the country." (Vattel, Book 1, cap. 19, p. 101.)

From the views here expressed, and they seem to be unexceptionable, it must follow, that with the *slave*, with one devoid of rights or capacities, *civil or political*, there could be no pact; that one thus situated could be no party to, or actor in, the association of those possessing free will, power, discretion. He could form no part of the design, no constituent ingredient or portion of a society based upon *common*, that is, upon *equal* interests and powers. He could not at the same time be the sovereign and the slave.

But it has been insisted, in argument, that the emancipation of a slave, effected either by the direct act and assent of the master, or by causes operating in contravention of his will, produces a change in the *status* or capacities of the slave, such as will transform him from a mere subject of property, into a being possessing a social, civil, and political equality with a citizen. In other words, will make him a citizen of the State within which he was, previously to his emancipation, a slave.

It is difficult to conceive by what magic the mere *surcease* or renunciation of an interest in a subject of *property*, by an individual possessing that interest, can alter the essential character of that property with respect to persons or communities unconnected with such renunciation. Can it be pretended that an individual in any State, by his single act, though voluntarily or designedly performed, yet without the co-operation or warrant of the Government, perhaps in opposition to its policy or its guaranties, can create a citizen of that State? Much more emphatically may it be asked, how such a result could be accomplished by means wholly extraneous, and entirely foreign to the Government of the State? The argument thus urged must lead to these extraordinary conclusions. It is regarded at once as wholly untenable, and as unsustained by the direct authority or by the analogies of history.

The institution of slavery, as it exists and has existed from the period of its introduction into the United States, though more humane and mitigated in character than was the same institution, either under the republic or the empire of Rome, bears, both in its tenure and in the simplicity incident to the

mode of its exercise, a closer resemblance to Roman slavery than it does to the condition of *villanage*, as it formerly existed in England. Connected with the latter, there were peculiarities, from custom or positive regulation, which varied it materially from the slavery of the Romans, or from slavery at any period within the United States.

But with regard to slavery amongst the Romans, it is by no means true that emancipation, either during the republic or the empire, conferred, by the act itself, or implied, the *status* or the rights of citizenship.

The proud title of Roman citizen, with the immunities and rights incident thereto, and as contradistinguished alike from the condition of conquered subjects or of the lower grades of native domestic residents, was maintained throughout the duration of the republic, and until a late period of the eastern empire, and at last was in *effect* destroyed less by an elevation of the inferior classes than by the degradation of the free, and the previous possessors of rights and immunities civil and political, to the indiscriminate abasement incident to absolute and simple despotism.

By the learned and elegant historian of the Decline and Fall of the Roman Empire, we are told that "In the *decline* of the Roman empire, the proud distinctions of the republic were gradually abolished; and the reason or instinct of Justinian completed the simple form of an absolute monarchy. The emperor could not eradicate the popular reverence which always waits on the possession of hereditary wealth or the memory of famous ancestors. He delighted to honor with titles and emoluments his generals, magistrates, and senators, and his precarious indulgence communicated some rays of their glory to their wives and children. But in the eye of the law all Roman citizens were equal, and all subjects of the empire were citizens of Rome. That inestimable character was *degraded* to an obsolete and empty name. The voice of a Roman could no longer enact his laws, or create the annual ministers of his powers; his constitutional rights might have checked the arbitrary will of a master; and the bold adventurer from Germany or Arabia was admitted with equal favor to the civil and military command which the *citizen* alone had been once entitled to assume over the conquests of his fathers. The first Cæsars had scrupulously guarded the distinction of *ingenuous* and *servile* birth, which was decided by the condition of the mother. The slaves who were liberated by a generous master immediately entered into the middle class of *libertini* or freedmen; but they could never be enfranchised from the duties of obedience and gratitude; whatever were the fruits of

their industry, their patron and his family inherited the third part, or even the whole of their fortune, if they died without children and without a testament. Justinian respected the rights of patrons, but his indulgence removed the badge of disgrace from the two inferior orders of freedmen; whoever ceased to be a slave, obtained without reserve or delay the station of a citizen; and at length the dignity of an ingenuous birth *was created* or *supposed* by the omnipotence of the emperor."*

The above account of slavery and its modifications will be found in strictest conformity with the Institutes of Justinian. Thus, book 1st, title 3d, it is said: "The first general division of persons in respect to their rights is into freemen and slaves." The same title, sec. 4th: "Slaves are born such, or become so. They are born such of bondwomen; they become so either by *the law of nations*, as by capture, or by the civil law. Section 5th: "In the condition of slaves there is no diversity; but among free persons there are many. Thus some are *ingenui* or freemen, others *libertini* or freedmen."

Tit. 4th. De Ingenuis.—"A freeman is one who is born free by being born in matrimony, of parents who both are free, or both freed; or of parents one free and the other freed. But one born of a free mother, although the father be a slave or unknown, is free."

Tit. 5th. De Libertinis.—"Freedmen are those who have been manumitted from just servitude."

Section third of the same title states that "freedmen were formerly distinguished by a threefold division." But the emperor proceeds to say: "Our *piety* leading us to reduce all things into a better state, we have amended our laws, and reestablished the ancient usage; for anciently liberty was simple and undivided—that is, was conferred upon the slave as his manumittor possessed it, admitting this single difference, that the person manumitted became only a *freed man*, although his manumittor was a *free* man." And he further declares: "We have made all freed men in general become citizens of Rome, regarding neither the age of the manumitted, nor the manumittor, nor the ancient forms of manumission. We have also introduced many new methods by which *slaves* may become Roman citizens."

By the references above given it is shown, from the nature and objects of civil and political associations, and upon the direct authority of history, that citizenship was not conferred

* Vide Gibbons's Decline and Fall of the Roman Empire. London edition of 1825, vol. 3d, chap. 44, p. 183.

by the simple fact of emancipation, but that such a result was deduced therefrom in violation of the fundamental principles of free political association; by the exertion of despotic will to establish, under a false and misapplied denomination, one equal and universal slavery; and to effect this result required the exertions of absolute power—of a power both in theory and practice, being in its most plenary acceptation the SOVEREIGNTY, THE STATE ITSELF—it could not be produced by a less or inferior authority, much less by the will or the act of one who, with reference to civil and political rights, was himself a *slave.* The master might abdicate or abandon his interest or ownership in his property, but his act would be a mere abandonment. It seems to involve an absurdity to impute to it the investiture of rights which the sovereignty alone had power to impart. There is not perhaps a community in which slavery is recognised, in which the power of emancipation and the modes of its exercise are not regulated by law—that is, by the sovereign authority; and none can fail to comprehend the necessity for such regulation, for the preservation of order, and even of political and social existence.

By the argument for the plaintiff in error, a power equally despotic is vested in every member of the association, and the most obscure or unworthy individual it comprises may arbitrarily invade and derange its most deliberate and solemn ordinances. At assumptions anomalous as these, so fraught with mischief and ruin, the mind at once is revolted, and goes directly to the conclusions, that to change or to abolish a fundamental principle of the society, must be the act of the society itself—of the *sovereignty;* and that none other can admit to a participation of that high attribute. It may further expose the character of the argument urged for the plaintiff, to point out some of the revolting consequences which it would authorize. If that argument possesses any integrity, it asserts the power in any citizen, or *quasi* citizen, or a resident foreigner of any one of the States, from a motive either of corruption or caprice, not only to infract the inherent and necessary authority of such State, but also materially to interfere with the organization of the Federal Government, and with the authority of the separate and independent States. He may emancipate his negro slave, by which process he first transforms that slave into a citizen of his own State; he may next, under color of article fourth, section second, of the Constitution of the United States, obtrude him, and on terms of civil and political equality, upon any and every State in this Union, in defiance of all regulations of necessity or policy, ordained by those States for their internal happiness or safety. Nay, more: this manumitted slave

may, by a proceeding springing from the will or act of his master alone, be mixed up with the institutions of the Federal Government, to which he is not a party, and in opposition to the laws of that Government which, in authorizing the extension by naturalization of the rights and immunities of citizens of the United States to those not originally parties to the Federal compact, have restricted that boon to *free white aliens alone.* If the rights and immunities connected with or practiced under the institutions of the United States can by any indirection be claimed or deduced from sources or modes other than the Constitution and laws of the United States, it follows that the power of naturalization vested in Congress is not exclusive—that it has *in effect* no existence, but is repealed or abrogated.

But it has been strangely contended that the jurisdiction of the Circuit Court might be maintained upon the ground that the plaintiff was a *resident* of Missouri, and that, for the purpose of vesting the court with jurisdiction over the parties, *residence* within the State was sufficient.

The first, and to my mind a conclusive reply to this singular argument is presented in the fact, that the language of the Constitution restricts the jurisdiction of the courts to cases in which the parties shall be *citizens*, and is entirely silent with respect to residence. A second answer to this strange and latitudinous notion is, that it so far stultifies the sages by whom the Constitution was framed, as to impute to them ignorance of the material distinction existing between *citizenship* and mere *residence* or *domicil*, and of the well-known facts, that a person confessedly an *alien* may be permitted to reside in a country in which he can possess no civil or political rights, or of which he is neither a citizen nor subject; and that for certain purposes a man may have a *domicil* in different countries, in no one of which he is an actual personal resident.

The correct conclusions upon the question here considered would seem to be these:

That in the establishment of the several communities now the States of this Union, and in the formation of the Federal Government, the African was not deemed politically a person. He was regarded and owned in every State in the Union as *property* merely, and as such was not and could not be a party or an actor, much less a *peer* in any compact or form of government established by the States or the United States. That if, since the adoption of the State Governments, he has been or could have been elevated to the possession of political rights or powers, this result could have been effected by no authority less potent than that of the sovereignty—the State—exert-

ed to that end, either in the form of legislation, or in some other mode of operation. It could certainly never have been accomplished by the will of an individual operating independently of the sovereign power, and even contravening and controlling that power. That so far as rights and immunities appertaining to citizens have been defined and secured by the Constitution and laws of the United States, the African race is not and never was recognised either by the language or purposes of the former; and it has been expressly excluded by every act of Congress providing for the creation of citizens by *naturalization*, these laws, as has already been remarked, being restricted to *free white aliens* exclusively.

But it is evident that, after the formation of the Federal Government by the adoption of the Constitution, the highest exertion of State power would be incompetent to bestow a character or status created by the Constitution, or conferred in virtue of its authority only. Upon those, therefore, who were not originally parties to the Federal compact, or who are not admitted and adopted as parties thereto, in the mode prescribed by its paramount authority, no State could have power to bestow the character or the rights and privileges exclusively reserved by the States for the action of the Federal Government by that compact.

The States, in the exercise of their political power, might, with reference to their peculiar Government and jurisdiction, guaranty the rights of person and property, and the enjoyment of civil and political privileges, to those whom they should be disposed to make the objects of their bounty; but they could not reclaim or exert the powers which they had vested exclusively in the Government of the United States. They could not add to or change in any respect the class of persons to whom alone the character of citizen of the United States appertained at the time of the adoption of the Federal Constitution. They could not create citizens of the United States by any direct or indirect proceeding.

According to the view taken of the law, as applicable to the demurrer to the plea in abatement in this cause, the questions subsequently raised upon the several pleas in bar might be passed by, as requiring neither a particular examination, nor an adjudication directly upon them. But as these questions are intrinsically of primary interest and magnitude, and have been elaborately discussed in argument, and as with respect to them the opinions of a majority of the court, including my own, are perfectly coincident, to me it seems proper that they should here be fully considered, and, so far as it is practicable for this court to accomplish such an end, finally put to rest.

The questions then to be considered upon the several pleas in bar, and upon the agreed statement of facts between the counsel, are: 1st. Whether the admitted master and owner of the plaintiff, holding him as his slave in the State of Missouri, and in conformity with his rights guarantied to him by the laws of Missouri then and still in force, by carrying with him for his own benefit and accommodation, and as his own slave, the person of the plaintiff into the State of Illinois, within which State slavery had been prohibited by the Constitution thereof, and by retaining the plaintiff during the commorancy of the master within the State of Illinois, had, upon his return with his slave into the State of Missouri, forfeited his rights as master, by reason of any supposed operation of the prohibitory provision in the Constitution of Illinois, beyond the proper territorial jurisdiction of the latter State? 2d. Whether a similar removal of the plaintiff by his master from the State of Missouri, and his retention in service at a point included within no State, but situated north of thirty-six degrees thirty minutes of north latitude, worked a forfeiture of the right of property of the master, and the manumission of the plaintiff?

In considering the first of these questions, the acts or declarations of the master, as expressive of his purpose to emancipate, may be thrown out of view, since none will deny the right of the owner to relinquish his interest in any subject of property, at any time or in any place. The inquiry here bears no relation to acts or declarations of the owner as expressive of his intent or purpose to make such a relinquishment; it is simply a question whether, irrespective of such purpose, and in opposition thereto, that relinquishment can be enforced against the owner of property within his own country, in defiance of every guaranty promised by its laws; and this through the instrumentality of a claim to power entirely foreign and extraneous with reference to himself, to the origin and foundation of his title, and to the independent authority of his country. A conclusive negative answer to such an inquiry is at once supplied, by announcing a few familiar and settled principles and doctrines of public law.

Vattel, in his chapter on the general principles of the laws of nations, section 15th, tells us, that "nations being free and independent of each other in the same manner that men are naturally free and independent, the second general law of their society is, that each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature."

"The natural society of nations," says this writer, "cannot subsist unless the natural rights of each be respected." In

section 16th he says, "as a consequence of that liberty and independence, it exclusively belongs to each nation to form her own judgment of what her conscience prescribes for her—of what it is proper or improper for her to do; and of course it rests solely with her to examine and determine whether she can perform any office for another nation without neglecting the duty she owes to herself. In all cases, therefore, in which a nation has the right of judging what her duty requires, no other nation can compel her to act in such or such a particular manner, for any attempt at such compulsion would be an infringement on the liberty of nations." Again, in section 18th, of the same chapter, "nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not produce any difference. A small republic is no less a sovereign state than the most powerful kingdom."

So, in section 20: "A nation, then, is mistress of her own actions, so long as they do not affect the proper and *perfect rights* of any other nation—so long as she is only *internally* bound, and does not lie under any *external* and *perfect* obligation. If she makes an ill use of her liberty, she is guilty of a breach of duty; but other nations are bound to acquiesce in her conduct, since they have no right to dictate to her. Since nations are *free*, *independent*, and *equal*, and since each possesses the right of judging, according to the dictates of her conscience, what conduct she is to pursue, in order to fulfil her duties, the effect of the whole is to produce, at least externally, in the eyes of mankind, a perfect equality of rights between nations, in the administration of their affairs, and in the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment."

Chancellor Kent, in the 1st volume of his Commentaries, lecture 2d, after collating the opinions of Grotius, Heineccius, Vattel, and Rutherford, enunciates the following positions as sanctioned by these and other learned publicists, viz: that "nations are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions or strength, or however greatly they may differ in government, religion, or manners. This perfect equality and entire independence of all distinct States is a fundamental principle of public law. It is a necessary consequence of this equality, that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government or religion, or a course of inter-

nal policy, to another." This writer gives some instances of the violation of this great national immunity, and amongst them the constant interference by the ancient Romans, under the pretext of settling disputes between their neighbors, but with the real purpose of reducing those neighbors to bondage; the interference of Russia, Prussia, and Austria, for the dismemberment of Poland; the more recent invasion of Naples by Austria in 1821, and of Spain by the French Government in 1823, under the excuse of suppressing a dangerous spirit of internal revolution and reform.

With reference to this right of self-government in independent sovereign States, an opinion has been expressed, which, whilst it concedes this right as inseparable from and as a necessary attribute of sovereignty and independence, asserts nevertheless some implied and paramount authority of a supposed international law, to which this right of self-government must be regarded and exerted as subordinate; and from which independent and sovereign States can be exempted only by a protest, or by some public and formal rejection of that authority. With all respect for those by whom this opinion has been professed, I am constrained to regard it as utterly untenable, as palpably inconsistent, and as presenting in argument a complete *felo de se.*

Sovereignty, independence, and a perfect right of self-government, can signify nothing less than a superiority to and an exemption from all claims by any extraneous power, however expressly they may be asserted, and render all attempts to enforce such claims merely attempts at usurpation. Again, could such claims from extraneous sources be regarded as legitimate, the effort to resist or evade them, by protest or denial, would be as irregular and unmeaning as it would be futile. It could in no wise affect the question of superior right. For the position here combatted, no respectable authority has been, and none it is thought can be adduced. It is certainly irreconcilable with the doctrines already cited from the writers upon public law.

Neither the case of Lewis Somersett, (Howell's State Trials, vol. 20,) so often vaunted as the proud evidence of devotion to freedom under a Government which has done as much perhaps to extend the reign of slavery as all the world besides; nor does any decision founded upon the authority of Somersett's case, when correctly expounded, assail or impair the principle of national equality enunciated by each and all of the publicists already referred to. In the case of Somersett, although the applicant for the *habeas corpus* and the individual claiming property in that applicant were both subjects and residents

within the British empire, yet the decision cannot be correctly understood as ruling absolutely and under all circumstances against the right of property in the claimant. That decision goes no farther than to determine, that *within the realm of England* there was no authority to justify the detention of an individual in private bondage. If the decision in Somersett's case had gone beyond this point, it would have presented the anomaly of a repeal by laws enacted for and limited in their operation to the realm alone, of other laws and institutions established for places and subjects without the limits of the realm of England; laws and institutions at that very time, and long subsequently, sanctioned and maintained under the authority of the British Government, and which the full and combined action of the King and Parliament was required to abrogate.

But could the decision in Somersett's case be correctly interpreted as ruling the doctrine which it has been attempted to deduce from it, still that doctrine must be considered as having been overruled by the lucid and able opinion of Lord Stowell in the more recent case of the slave Grace, reported in the second volume of Haggard, p. 94; in which opinion, whilst it is conceded by the learned judge that there existed no power to coerce the slave whilst in England, that yet, upon her return to the island of Antigua, her *status* as a slave was revived, or, rather, that the title of the owner to the slave as property had never been extinguished, but had always existed in that island. If the principle of this decision be applicable as between different portions of one and the same empire, with how much more force does it apply as between nations or Governments entirely separate, and absolutely independent of each other? For in this precise attitude the States of this Union stand with reference to this subject, and with reference to the tenure of every description of property vested under their laws and held within their territorial jurisdiction.

A strong illustration of the principle ruled by Lord Stowell, and of the effect of that principle even in a case of express *contract*, is seen in the case of Lewis *v.* Fullerton, decided by the Supreme Court of Virginia, and reported in the first volume of Randolph, p. 15. The case was this: A female slave, the property of a citizen of Virginia, whilst with her master in the State of Ohio, was taken from his possession under a writ of *habeas corpus*, and set at liberty. Soon, or immediately after, by agreement between this slave and her master, a deed was executed in Ohio by the latter, containing a stipulation that this slave should return to Virginia, and, after a service of two years in that State, should there be free. The law of Virginia

regulating emancipation required that deeds of emancipation should, within a given time from their date, be recorded in the court of the county in which the grantor resided, and declared that deeds with regard to which this requisite was not complied with should be void. Lewis, an infant son of this female, under the rules prescribed in such cases, brought an action, *in forma pauperis*, in one of the courts of Virginia, for the recovery of his freedom, claimed in virtue of the transactions above mentioned. Upon an appeal to the Supreme Court from a judgment against the plaintiff, Roane, Justice, in delivering the opinion of the court, after disposing of other questions discussed in that case, remarks:

"As to the deed of emancipation contained in the record, that deed, taken in connection with the evidence offered in support of it, shows that it had a reference to the State of Virginia; and the testimony shows that it formed a part of this contract, whereby the slave Milly was to be brought back (as she was brought back) into the State of Virginia. Her object was therefore to secure her freedom by the deed within the State of Virginia, after the time should have expired for which she had indented herself, and when she should be found abiding within the State of Virginia.

"If, then, this contract had an eye to the State of Virginia for its operation and effect, the *lex loci* ceases to operate. In that case it must, to have its effect, conform to the laws of Virginia. It is insufficient under those laws to effectuate an emancipation, for want of a due recording in the county court, as was decided in the case of Givens *v.* Mann, in this court. It is also ineffectual within the Commonwealth of Virginia for another reason. The *lex loci* is also to be taken subject to the exception, that it is not to be enforced in another country, when it violates some moral duty or the policy of that country, or is not consistent with a positive right secured to a third person or party by the laws of that country in which it is sought to be enforced. In such a case we are told, '*magis jus nostrum, quam jus alienum servemus.*'" (Huberus, tom. 2, lib. 1, tit. 3; 2 Fontblanque, p. 444.) "That third party in this instance is the Commonwealth of Virginia, and her policy and interests are also to be attended to. These turn the scale against the *lex loci* in the present instance."

The second or last-mentioned position assumed for the plaintiff under the pleas in bar, as it rests mainly if not solely upon the provision of the act of Congress of March 6, 1820, prohibiting slavery in Upper Louisiana north of thirty-six degrees thirty minutes north latitude, popularly called the *Missouri Compromise*, that assumption renews the question, formerly so

zealously debated, as to the validity of the provision in the act of Congress, and upon the constitutional competency of Congress to establish it.

Before proceeding, however, to examine the validity of the prohibitory provision of the law, it may, so far as the rights involved in this cause are concerned, be remarked, that conceding to that provision the validity of a legitimate exercise of power, still this concession could by no rational interpretation imply the slightest authority for its operation beyond the territorial limits comprised within its terms; much less could there be inferred from it a power to destroy or in any degree to control rights, either of person or property, entirely within the bounds of a distinct and independent sovereignty—rights invested and fortified by the guaranty of that sovereignty. These surely would remain in all their integrity, whatever effect might be ascribed to the prohibition within the limits defined by its language.

But, beyond and in defiance of this conclusion, inevitable and undeniable as it appears, upon every principle of justice or sound induction, it has been attempted to convert this prohibitory provision of the act of 1820 not only into a weapon with which to assail the inherent—the *necessarily* inherent—powers of independent sovereign Governments, but into a mean of forfeiting that equality of rights and immunities which are the birthright or the donative from the Constitution of every citizen of the United States within the length and breadth of the nation. In this attempt, there is asserted a power in Congress, whether from incentives of interest, ignorance, faction, partiality, or prejudice, to bestow upon a portion of the citizens of this nation that which is the common property and privilege of all—the power, in fine, of confiscation, in retribution for no offence, or, if for an offence, for that of accidental locality only.

It may be that, with respect to future cases, like the one now before the court, there is felt an assurance of the impotence of such a pretension; still, the fullest conviction of that result can impart to it no claim to forbearance, nor dispense with the duty of antipathy and disgust at its sinister aspect, whenever it may be seen to scowl upon the justice, the order, the tranquillity, and fraternal feeling, which are the surest, nay, the only means, of promoting or preserving the happiness and prosperity of the nation, and which were the great and efficient incentives to the formation of this Government.

The power of Congress to impose the prohibition in the eighth section of the act of 1820 has been advocated upon an attempted construction of the second clause of the third section

of the fourth article of the Constitution, which declares that "Congress shall have power to dispose of and to make all needful rules and regulations respecting the *territory* and *other property belonging* to the United States."

In the discussions in both houses of Congress, at the time of adopting this eighth section of the act of 1820, great weight was given to the peculiar language of this clause, viz: *territory* and *other property belonging* to the United States, as going to show that the power of disposing of and regulating, thereby vested in Congress, was restricted to a *proprietary interest in the territory or land* comprised therein, and did not extend to the personal or political rights of citizens or settlers, inasmuch as this phrase in the Constitution, "*territory or other property*," identified *territory* with *property*, and inasmuch as *citizens* or *persons* could not be property, and especially were not property *belonging* to the United States. And upon every principle of reason or necessity, this power to dispose of and to regulate the *territory* of the nation could be designed to extend no farther than to its preservation and appropriation to the uses of those to whom it belonged, viz: the nation. Scarcely anything more illogical or extravagant can be imagined than the attempt to deduce from this provision in the Constitution a power to destroy or in any wise to impair the civil and political rights of the citizens of the United States, and much more so the power to establish inequalities amongst those citizens by creating privileges in one class of those citizens, and by the disfranchisement of other portions or classes, by degrading them from the position they previously occupied.

There can exist no rational or natural connection or affinity between a pretension like this and the power vested by the Constitution in Congress with regard to the Territories; on the contrary, there is an absolute incongruity between them.

But whatever the power vested in Congress, and whatever the precise subject to which that power extended, it is clear that the power related to a subject appertaining to the *United States*, and one to be disposed of and regulated for the benefit and under the authority of the *United States*. Congress was made simply the agent or *trustee* for the United States, and could not, without a breach of trust and a fraud, appropriate the subject of the trust to any other beneficiary or *cestui que trust* than the United States, or to the people of the United States, upon equal grounds, legal or equitable. Congress could not appropriate that subject to any one class or portion of the people, to the exclusion of others, politically and constitutionally equals; but every citizen would, if any *one*

could claim it, have the like rights of purchase, settlement, occupation, or any other right, in the national territory.

Nothing can be more conclusive to show the equality of this with every other right in all the citizens of the United States, and the iniquity and absurdity of the pretension to exclude or to disfranchise a portion of them because they are the owners of slaves, than the fact that the same instrument, which imparts to Congress its very existence and its every function, guaranties to the slaveholder the title to his property, and gives him the right to its reclamation throughout the entire extent of the nation; and, farther, that the only private property which the Constitution has *specifically recognised*, and has imposed it as a direct obligation both on the States and the Federal Government to protect and *enforce*, is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a similar guaranty.

Can there be imputed to the sages and patriots by whom the Constitution was framed, or can there be detected in the text of that Constitution, or in any rational construction or implication deducible therefrom, a contradiction so palpable as would exist between a pledge to the slaveholder of an equality with his fellow-citizens, and of the formal and solemn assurance for the security and enjoyment of his property, and a warrant given, as it were *uno flatu*, to another, to rob him of that property, or to subject him to proscription and disfranchisement for possessing or for endeavoring to retain it? The injustice and extravagance necessarily implied in a supposition like this, cannot be rationally imputed to the patriotic or the honest, or to those who were merely sane.

A conclusion in favor of the prohibitory power in Congress, as asserted in the eighth section of the act of 1820, has been attempted, as deducible from the precedent of the ordinance of the convention of 1787, concerning the cession by Virginia of the territory northwest of the Ohio; the provision in which ordinance, relative to slavery, it has been attempted to impose upon other and subsequently-acquired territory.

The first circumstance which, in the consideration of this provision, impresses itself upon my mind, is its utter futility and want of authority. This court has, in repeated instances, ruled, that whatever may have been the force accorded to this ordinance of 1787 at the period of its enactment, its authority and effect ceased, and yielded to the paramount authority of the Constitution, from the period of the adoption of the latter. Such is the principle ruled in the cases of Pollard's Lessee *v.* Hagan, (3 How., 212,) Parmoli *v.* The First Municipality of

New Orleans, (3 How., 589,) Strader *v.* Graham, (16 How., 82.) But apart from the superior control of the Constitution, and anterior to the adoption of that instrument, it is obvious that the inhibition in question never had and never could have any legitimate and binding force. We may seek in vain for any power in the convention, either to require or to accept a condition or restriction upon the cession like that insisted on; a condition inconsistent with, and destructive of, the object of the grant. The cession was, as recommended by the old Congress in 1780, made originally and completed *in terms* to *the United States*, and for the benefit of the United States, i. e., for *the people*, *all the people*, of the United States. The condition subsequently sought to be annexed in 1787, (declared, too, to be perpetual and immutable,) being contradictory to the terms and destructive of the purposes of the cession, and after the cession was consummated, and the powers of the ceding party terminated, and the rights of the grantees, *the people of the United States*, vested, must necessarily, so far, have been *ab initio* void. With respect to the power of the convention to impose this inhibition, it seems to be pertinent in this place to recur to the opinion of one cotemporary with the establishment of the Government, and whose distinguished services in the formation and adoption of our national charter, point him out as the *artifex maximus* of our Federal system. James Madison, in the year 1819, speaking with reference to the prohibitory power claimed by Congress, then threatening the very existence of the Union, remarks of the language of the second clause of the third section of article fourth of the Constitution, "that it cannot be well extended beyond a power over the territory *as property*, and the power to make provisions really needful or necessary for the government of settlers, until ripe for admission into the Union."

Again he says, "with respect to what has taken place in the Northwest territory, it may be observed that the ordinance giving it its distinctive character on the subject of slaveholding proceeded from the old Congress, acting with the best intentions, but under a charter which contains no shadow of the authority exercised; and it remains to be decided how far the States formed within that territory, and admitted into the Union, are on a different footing from its other members as to their legislative sovereignty. As to the power of admitting new States into the Federal compact, the questions offering themselves are, whether Congress can attach conditions, or the new States concur in conditions, which after admission would *abridge* or *enlarge* the constitutional rights of legislation common to other States; whether Congress can, by a compact

with a new State, take power either to or from itself, or place the new member above or below the equal rank and rights possessed by the others; whether all such stipulations expressed or implied would not be nullities, and be so pronounced when brought to a practical test. It falls within the scope of your inquiry to state the fact, that there was a proposition in the convention to discriminate between the old and the new States by an article in the Constitution. The proposition, happily, was rejected. The effect of such a discrimination is sufficiently evident."*

In support of the ordinance of 1787, there may be adduced the semblance at least of obligation deducible from *compact*, the *form* of assent or agreement between the grantor and grantee; but this form or similitude, as is justly remarked by Mr. Madison, is rendered null by the absence of power or authority in the contracting parties, and by the more intrinsic and essential defect of incompatibility with the rights and avowed purposes of those parties, and with their relative duties and obligations to others. If, then, with the attendant *formalities* of assent or compact, the restrictive power claimed was void as to the immediate subject of the ordinance, how much more unfounded must be the pretension to such a power as derived from that source, (viz: the ordinance of 1787,) with respect to territory acquired by purchase or conquest under the supreme authority of the Constitution—territory not the subject of *mere donation*, but obtained *in the name of all, by the combined efforts and resources of all*, and with no condition annexed or pretended.

In conclusion, my opinion is, that the decision of the Circuit Court, upon the law arising upon the several pleas in bar, is correct, but that it is erroneous in having sustained the demurrer to the plea in abatement of the jurisdiction; that for this error the decision of the Circuit Court should be reversed, and the cause remanded to that court, with instructions to abate the action, for the reason set forth and pleaded in the plea in abatement.

In the aforegoing examination of this cause, the circumstance that the questions involved therein had been previously adjudged between these parties by the court of the State of Missouri, has not been adverted to; for although it has been ruled by this court, that in instances of concurrent jurisdiction, the court first obtaining possession or cognizance of the controversy should retain and decide it, yet, as in this case there had

* Letter from James Madison to Robert Walsh, November 27th, 1819, on the subject of the Missouri Compromise.

been no plea, either of a former judgment or of *autre action pendent*, it was thought that the fact of a prior decision, however conclusive it might have been if regularly pleaded, could not be incidentally taken into view.

Mr. Justice CAMPBELL.

I concur in the judgment pronounced by the Chief Justice, but the importance of the cause, the expectation and interest it has awakened, and the responsibility involved in its determination, induce me to file a separate opinion.

The case shows that the plaintiff, in the year 1834, was a negro slave in Missouri, the property of Dr. Emerson, a surgeon in the army of the United States. In 1834, his master took him to the military station at Rock Island, on the border of Illinois, and in 1836 to Fort Snelling, in the present Minnesota, then Wisconsin, Territory. While at Fort Snelling, the plaintiff married a slave who was there with her master, and two children have been born of this connection; one during the journey of the family in returning to Missouri, and the other after their return to that State.

Since 1838, the plaintiff and the members of his family have been in Missouri in the condition of slaves. The object of this suit is to establish their freedom. The defendant, who claims the plaintiff and his family, under the title of Dr. Emerson, denied the jurisdiction of the Circuit Court, by the plea that the plaintiff was a negro of African blood, the descendant of Africans who had been imported and sold in this country as slaves, and thus he had no capacity as a citizen of Missouri to maintain a suit in the Circuit Court. The court sustained a demurrer to this plea, a trial was then had upon the general issue, and special pleas to the effect that the plaintiff and his family were slaves belonging to the defendant.

My opinion in this case is not affected by the plea to the jurisdiction, and I shall not discuss the questions it suggests. The claim of the plaintiff to freedom depends upon the effect to be given to his absence from Missouri, in company with his master, in Illinois and Minnesota, and this effect is to be ascertained by a reference to the laws of Missouri. For the trespass complained of was committed upon one claiming to be a freeman and a citizen, in that State, and who had been living for years under the dominion of its laws. And the rule is, that whatever is a justification where the thing is done, must be a justification in the forum where the case is tried. (20 How. St. Tri., 234; Cowp. S. C., 161.)

The Constitution of Missouri recognises slavery as a legal condition, extends guaranties to the masters of slaves, and in-

vites immigrants to introduce them, as property, by a promise of protection. The laws of the State charge the master with the custody of the slave, and provide for the maintenance and security of their relation.

The Federal Constitution and the acts of Congress provide for the return of escaping slaves within the limits of the Union. No removal of the slave beyond the limits of the State, against the consent of the master, nor residence there in another condition, would be regarded as an effective manumission by the courts of Missouri, upon his return to the State. "Sicut liberis captis status restituitur sic servus domino." Nor can the master emancipate the slave within the State, except through the agency of a public authority. The inquiry arises, whether the manumission of the slave is effected by his removal, with the consent of the master, to a community where the law of slavery does not exist, in a case where neither the master nor slave discloses a purpose to remain permanently, and where both parties have continued to maintain their existing relations. What is the law of Missouri in such a case? Similar inquiries have arisen in a great number of suits, and the discussions in the State courts have relieved the subject of much of its difficulty. (12 B. M. Ky. R., 545; Foster *v.* Foster, 10 Gratt. Va. R., 485; 4 Har. and McH. Md. R., 295; Scott *v.* Emerson, 15 Misso., 576; 4 Rich. S. C. R., 186; 17 Misso., 434; 15 Misso., 596; 5 B. M., 173; 8 B. M., 540, 633; 9 B. M., 565; 5 Leigh, 614; 1 Raud., 15; 18 Pick., 193.)

The result of these discussions is, that in general, the *status*, or civil and political capacity of a person, is determined, in the first instance, by the law of the domicil where he is born; that the legal effect on persons, arising from the operation of the law of that domicil, is not indelible, but that a new capacity or *status* may be acquired by a change of domicil. That questions of *status* are closely connected with considerations arising out of the social and political organization of the State where they originate, and each sovereign power must determine them within its own territories.

A large class of cases has been decided upon the second of the propositions above stated, in the Southern and Western courts—cases in which the law of the actual domicil was adjudged to have altered the native condition and *status* of the slave, although he had never actually possessed the *status* of freedom in that domicil. (Rankin *v.* Lydia, 2 A. K. M.; Herny *v.* Decker, Walk., 36; 4 Mart., 385; 1 Misso., 472; Hunter *v.* Fulcher, 1 Leigh.)

I do not impugn the authority of these cases. No evidence is found in the record to establish the existence of a domicil

acquired by the master and slave, either in Illinois or Minnesota. The master is described as an officer of the army, who was transferred from one station to another, along the Western frontier, in the line of his duty, and who, after performing the usual tours of service, returned to Missouri; these slaves returned to Missouri with him, and had been there for near fifteen years, in that condition, when this suit was instituted. But absence, in the performance of military duty, without more, is a fact of no importance in determining a question of a change of domicil. Questions of that kind depend upon acts and intentions, and are ascertained from motives, pursuits, the condition of the family, and fortune of the party, and no change will be inferred, unless evidence shows that one domicil was abandoned, and there was an intention to acquire another. (11 L. and Eq., 6; 6 Exch., 217; 6 M. and W., 511; 2 Curt. Ecc. R., 368.)

The cases first cited deny the authority of a foreign law to dissolve relations which have been legally contracted in the State where the parties are, and have their actual domicil—relations which were never questioned during their absence from that State—relations which are consistent with the native capacity and condition of the respective parties, and with the policy of the State where they reside; but which relations were inconsistent with the policy or laws of the State or Territory within which they had been for a time, and from which they had returned, with these relations undisturbed. It is upon the assumption, that the law of Illinois or Minnesota was indelibly impressed upon the slave, and its consequences carried into Missouri, that the claim of the plaintiff depends. The importance of the case entitles the doctrine on which it rests to a careful examination.

It will be conceded, that in countries where no law or regulation prevails, opposed to the existence and consequences of slavery, persons who are born in that condition in a foreign State would not be liberated by the accident of their introgression. The relation of domestic slavery is recognised in the law of nations, and the interference of the authorities of one State with the rights of a master belonging to another, without a valid cause, is a violation of that law. (Wheat. Law of Na., 724; 5 Stats. at Large, 601; Calh. Sp., 378; Reports of the Com. U. S. and G. B., 187, 238, 241.)

The public law of Europe formerly permitted a master to reclaim his bondsman, within a limited period, wherever he could find him, and one of the capitularies of Charlemagne abolishes the rule of prescription. He directs, "that wheresoever, within the bounds of Italy, either the runaway slave of the king, or of

the church, or of any other man, shall be found by his master, he shall be restored without any bar or prescription of years; yet upon the provision that the master be a Frank or German, or of any other nation (foreign;) but if he be a Lombard or a Roman, he shall acquire or receive his slaves by that law which has been established from ancient times among them." Without referring for precedents abroad, or to the colonial history, for similar instances, the history of the Confederation and Union affords evidence to attest the existence of this ancient law. In 1783, Congress directed General Washington to continue his remonstrances to the commander of the British forces respecting the permitting negroes belonging to the citizens of these States to leave New York, and to insist upon the discontinuance of that measure. In 1788, the resident minister of the United States at Madrid was instructed to obtain from the Spanish Crown orders to its Governors in Louisiana and Florida, "to permit and facilitate the apprehension of fugitive slaves from the States, promising that the States would observe the like conduct respecting fugitives from Spanish subjects." The committee that made the report of this resolution consisted of Hamilton, Madison, and Sedgwick, (2 Hamilton's Works, 473;) and the clause in the Federal Constitution providing for the restoration of fugitive slaves is a recognition of this ancient right, and of the principle that a change of place does not effect a change of condition. The diminution of the power of a master to reclaim his escaping bondsman in Europe commenced in the enactment of laws of prescription in favor of privileged communes. Bremen, Spire, Worms, Vienna, and Ratisbon, in Germany; Carcassonne, Béziers, Toulouse, and Paris, in France, acquired privileges on this subject at an early period. The ordinance of William the Conqueror, that a residence of any of the servile population of England, for a year and a day, without being claimed, in any city, burgh, walled town, or castle of the King, should entitle them to perpetual liberty, is a specimen of these laws.

The earliest publicist who has discussed this subject is Bodin, a jurist of the sixteenth century, whose work was quoted in the early discussions of the courts in France and England on this subject. He says: "In France, although there be some remembrance of old servitude, yet it is not lawful here to make a slave or to buy any one of others, insomuch as the slaves of strangers, so soon as they set their foot within France, become frank and free, as was determined by an old decree of the court of Paris against an ambassador of Spain, who had brought a slave with him into France." He states another case, which arose in the city of Toulouse, of a Genoese merchant, who had

carried a slave into that city on his voyage from Spain; and when the matter was brought before the magistrates, the "procureur of the city, out of the records, showed certain ancient privileges given unto them of Tholouse, wherein it was granted that slaves, so soon as they should come into Tholouse, should be free." These cases were cited with much approbation in the discussion of the claims of the West India slaves of Verdelin for freedom, in 1738, before the judges in admiralty, (15 Causes Celébrés, p. 1; 2 Masse Droit Com., sec. 58,) and were reproduced before Lord Mansfield, in the cause of Somersett, in 1772. Of the cases cited by Bodin, it is to be observed that Charles V of France exempted all the inhabitants of Paris from serfdom, or other feudal incapacities, in 1371, and this was confirmed by several of his successors, (3 Dulaire Hist. de Par., 546; Broud. Cout. de Par., 21,) and the ordinance of Toulouse is preserved as follows: "*Civitas Tholosana fuit et erit sine fine libera, adeo ut servi et ancillæ, sclavi et sclavæ, dominos sive dominas habentes, cum rebus vel sine rebus suis, ad Tholosam vel infrà terminos extra urbem terminatos accedentes acquirant libertatem.*" (Hist. de Langue, tome 3, p. 69; Ibid. 6, p. 8; Loysel Inst., b. 1, sec. 6.)

The decisions were made upon special ordinances, or charters, which contained positive prohibitions of slavery, and where liberty had been granted as a privilege; and the history of Paris furnishes but little support for the boast that she was a "*sacro sancta civitas*," where liberty always had an asylum, or for the "self-complacent rhapsodies" of the French advocates in the case of Verdelin, which amused the grave lawyers who argued the case of Somersett. The case of Verdelin was decided upon a special ordinance, which prescribed the conditions on which West India slaves might be introduced into France, and which had been disregarded by the master.

The case of Somersett was that of a Virginia slave carried to England by his master in 1770, and who remained there two years. For some cause, he was confined on a vessel destined to Jamaica, where he was to be sold. Lord Mansfield, upon a return to a *habeas corpus*, states the question involved. "Here, the person of the slave himself," he says, "is the immediate subject of inquiry, Can any dominion, authority, or coercion, be exercised in this country, according to the American laws?" He answers: "The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme, and yet many of those consequences are absolutely contrary to the municipal law of England." Again, he says: "The return states that the slave departed, and refused to serve; whereupon, he was kept to be sold abroad." "So high

an act of dominion must be recognised by the law of the country where it is used. The power of the master over his slave has been extremely different in different countries." "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, are erased from the memory. It is so odious, that nothing can be suffered to support it but positive law." That there is a difference in the systems of States, which recognise and which do not recognise the institution of slavery, cannot be disguised. Constitutional law, punitive law, police, domestic economy, industrial pursuits, and amusements, the modes of thinking and of belief of the population of the respective communities, all show the profound influence exerted upon society by this single arrangement. This influence was discovered in the Federal Convention, in the deliberations on the plan of the Constitution. Mr. Madison observed, "that the States were divided into different interests, not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves. These two causes concur in forming the great division of interests in the United States."

The question to be raised with the opinion of Lord Mansfield, therefore, is not in respect to the incongruity of the two systems, but whether slavery was absolutely contrary to the law of England; for if it was so, clearly, the American laws could not operate there. Historical research ascertains that at the date of the Conquest the rural population of England were generally in a servile condition, and under various names, denoting slight variances in condition, they were sold with the land like cattle, and were a part of its living money. Traces of the existence of African slaves are to be found in the early chronicles. Parliament in the time of Richard II, and also of Henry VIII, refused to adopt a general law of emancipation. Acts of emancipation by the last-named monarch and by Elizabeth are preserved.

The African slave trade had been carried on, under the unbounded protection of the Crown, for near two centuries, when the case of Somersett was heard, and no motion for its suppression had ever been submitted to Parliament; while it was forced upon and maintained in unwilling colonies by the Parliament and Crown of England at that moment. Fifteen thousand negro slaves were then living in that island, where they had been introduced under the counsel of the most illustrious jurists of the realm, and such slaves had been publicly

sold for near a century in the markets of London. In the northern part of the kingdom of Great Britain there existed a class of from 30,000 to 40,000 persons, of whom the Parliament said, in 1775, (15 George III, chap. 28,) "many colliers, coal-heavers, and salters, are in a state of slavery or bondage, bound to the collieries and salt works, where they work for life, transferable with the collieries and salt works when their original masters have no use for them; and whereas the emancipating or setting free the colliers, coal-heavers, and salters, in Scotland, who are now in a state of servitude, gradually and upon reasonable conditions, would be the means of increasing the number of colliers, coal-heavers, and salters, to the great benefit of the public, without doing any injury to the present masters, and would remove the reproach of allowing such a state of servitude to exist in a free country," &c.; and again, in 1799, "they declare that many colliers and coal-heavers still continue in a state of bondage." No statute, from the Conquest till the 15 George III, had been passed upon the subject of personal slavery. These facts have led the most eminent civilian of England to question the accuracy of this judgment, and to insinuate that in this judgment the offence of *ampliare jurisdictionem* by private authority was committed by the eminent magistrate who pronounced it.

This sentence is distinguishable from those cited from the French courts in this: that there positive prohibitions existed against slavery, and the right to freedom was conferred on the immigrant slave by positive law; whereas here the consequences of slavery merely—that is, the public policy—were found to be contrary to the law of slavery. The case of the slave Grace, (2 Hagg.,) with four others, came before Lord Stowell in 1827, by appeals from the West India vice admiralty courts. They were cases of slaves who had returned to those islands, after a residence in Great Britain, and where the claim to freedom was first presented in the colonial forum. The learned judge in that case said: "This suit fails in its foundation. She (Grace) was not a free person; no injury is done her by her continuance in slavery, and she has no pretensions to any other station than that which was enjoyed by every slave of a family. If she depends upon such freedom conveyed by a mere residence in England, she complains of a violation of right which she possessed no longer than whilst she resided in England, but which totally expired when that residence ceased, and she was imported into Antigua."

The decision of Lord Mansfield was, "that so high an act of dominion" as the master exercises over his slave, in sending him abroad for sale, could not be exercised in England

under the American laws, and contrary to the spirit of their own.

The decision of Lord Stowell is, that the authority of the English laws terminated when the slave departed from England. That the laws of England were not imported into Antigua, with the slave, upon her return, and that the colonial forum had no warrant for applying a foreign code to dissolve relations which had existed between persons belonging to that island, and which were legal according to its own system. There is no distinguishable difference between the case before us and that determined in the admiralty of Great Britain.

The complaint here, in my opinion, amounts to this: that the judicial tribunals of Missouri have not denounced as odious the Constitution and laws under which they are organized, and have not superseded them on their own private authority, for the purpose of applying the laws of Illinois, or those passed by Congress for Minnesota, in their stead. The eighth section of the act of Congress of the 6th of March, 1820, (3 Statutes at Large, 545,) entitled, "An act to authorize the people of Missouri to form a State Government," &c., &c., is referred to, as affording the authority to this court to pronounce the sentence which the Supreme Court of Missouri felt themselves constrained to refuse. That section of the act prohibits slavery in the district of country west of the Mississippi, north of thirty-six degrees thirty minutes north latitude, which belonged to the ancient province of Louisiana, not included in Missouri.

It is a settled doctrine of this court, that the Federal Government can exercise no power over the subject of slavery within the States, nor control the intermigration of slaves, other than fugitives, among the States. Nor can that Government affect the duration of slavery within the States, other than by a legislation over the foreign slave trade. The power of Congress to adopt the section of the act above cited must therefore depend upon some condition of the Territories which distinguishes them from States, and subjects them to a control more extended. The third section of the fourth article of the Constitution is referred to as the only and all-sufficient grant to support this claim. It is, that "new States may be admitted by the Congress to this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other prop-

erty belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

It is conceded, in the decisions of this court, that Congress may secure the rights of the United States in the public domain, provide for the sale or lease of any part of it, and establish the validity of the titles of the purchasers, and may organize Territorial Governments, with powers of legislation. (3 How., 212; 12 How., 1; 1 Pet., 511; 13 P., 436; 16 H., 164.)

But the recognition of a plenary power in Congress to dispose of the public domain, or to organize a Government over it, does not imply a corresponding authority to determine the internal polity, or to adjust the domestic relations, or the persons who may lawfully inhabit the territory in which it is situated. A supreme power to make needful rules respecting the public domain, and a similar power of framing laws to operate upon persons and things within the territorial limits where it lies, are distinguished by broad lines of demarcation in American history. This court has assisted us to define them. In Johnson *v.* McIntosh, (8 Wheat., 595—543,) they say: "According to the theory of the British Constitution, all vacant lands are vested in the Crown; and the exclusive power to grant them is admitted to reside in the Crown, as a branch of the royal prerogative.

"All the lands we hold were originally granted by the Crown, and the establishment of a royal Government has never been considered as impairing its right to grant lands within the chartered limits of such colony."

And the British Parliament did claim a supremacy of legislation coextensive with the absoluteness of the dominion of the sovereign over the Crown lands. The American doctrine, to the contrary, is embodied in two brief resolutions of the people of Pennsylvania, in 1774: 1st. "That the inhabitants of these colonies are entitled to the same rights and liberties, within the colonies, that the subjects born in England are entitled within the realm." 2d. "That the power assumed by Parliament to bind the people of these colonies by statutes, in all cases whatever, is unconstitutional, and therefore the source of these unhappy difficulties." The Congress of 1774, in their statement of rights and grievances, affirm "a free and exclusive power of legislation" in their several Provincial Legislatures, "in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed." (1 Jour. Cong., 32.)

The unanimous consent of the people of the colonies, then,

to the power of their sovereign, "to dispose of and make all needful rules and regulations respecting the territory" of the Crown, in 1774, was deemed by them as entirely consistent with opposition, remonstrance, the renunciation of allegiance, and proclamation of civil war, in preference to submission to his claim of supreme power in the territories.

I pass now to the evidence afforded during the Revolution and Confederation. The American Revolution was not a social revolution. It did not alter the domestic condition or capacity of persons within the colonies, nor was it designed to disturb the domestic relations existing among them. It was a political revolution, by which thirteen dependent colonies became thirteen independent States. "The Declaration of Independence was not," says Justice Chase, "a declaration that the United Colonies jointly, in a collective capacity, were independent States, &c., &c., &c., but that each of them was a sovereign and independent State; that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any other power on earth." (3 Dall., 199; 4 Cr., 212.)

These sovereign and independent States, being united as a Confederation, by various public acts of cession, became jointly interested in territory, and concerned to dispose of and make all needful rules and regulations respecting it. It is a conclusion not open to discussion in this court, "that there was no territory within the (original) United States, that was claimed by them in any other right than that of some of the confederate States." (Harcourt *v.* Gaillord, 12 Wh., 523.) "The question whether the vacant lands within the United States," says Chief Justice Marshall, "became joint property, or belonged to the separate States, was a momentous question, which threatened to shake the American Confederacy to its foundations. This important and dangerous question has been compromised, and the compromise is not now to be contested." (6 C. R., 87.)

The cessions of the States to the Confederation were made on the condition that the territory ceded should be laid out and formed into distinct republican States, which should be admitted as members to the Federal Union, having the same rights of sovereignty, freedom, and independence, as the other States. The first effort to fulfil this trust was made in 1785, by the offer of a charter or compact to the inhabitants who might come to occupy the land.

Those inhabitants were to form for themselves temporary State Governments, founded on the Constitutions of any of the States, but to be alterable at the will of their Legislature; and

permanent Governments were to succeed these, whenever the population became sufficiently numerous to authorize the State to enter the Confederacy; and Congress assumed to obtain powers from the States to facilitate this object. Neither in the deeds of cession of the States, nor in this compact, was a sovereign power for Congress to govern the Territories asserted. Congress retained power, by this act, "to dispose of and to make rules and regulations respecting the public domain," but submitted to the people to organize a Government harmonious with those of the confederate States.

The next stage in the progress of colonial government was the adoption of the ordinance of 1787, by eight States, in which the plan of a Territorial Government, established by act of Congress, is first seen. This was adopted while the Federal Convention to form the Constitution was sitting. The plan placed the Government in the hands of a Governor, Secretary, and Judges, appointed by Congress, and conferred power on them to select suitable laws from the codes of the States, until the population should equal 5,000. A Legislative Council, elected by the people, was then to be admitted to a share of the legislative authority, under the supervision of Congress; and States were to be formed whenever the number of the population should authorize the measure.

This ordinance was addressed to the inhabitants as a fundamental compact, and six of its articles define the conditions to be observed in their Constitution and laws. These conditions were designed to fulfil the trust in the agreements of cession, that the States to be formed of the ceded Territories should be "distinct republican States." This ordinance was submitted to Virginia in 1788, and the 5th article, embodying as it does a summary of the entire act, was specifically ratified and confirmed by that State. This was an incorporation of the ordinance into her act of cession. It was conceded, in the argument, that the authority of Congress was not adequate to the enactment of the ordinance, and that it cannot be supported upon the Articles of Confederation. To a part of the engagements, the assent of nine States was required, and for another portion no provision had been made in those articles. Mr. Madison said, in a writing nearly contemporary, but before the confirmatory act of Virginia, "Congress have proceeded to form new States, to erect temporary Governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy; all this has been done, and done without the least color of constitutional authority." (Federalist, No. 38.) Richard Henry Lee, one of the committee who reported the ordinance to Con-

gress, transmitted it to General Washington, (15th July, 1787,) saying, "It seemed necessary, for the security of property among uninformed and perhaps licentious people, as the greater part of those who go there are, that a strong-toned Government should exist, and the rights of property be clearly defined." The consent of all the States represented in Congress, the consent of the Legislature of Virginia, the consent of the inhabitants of the Territory, all concur to support the authority of this enactment. It is apparent, in the frame of the Constitution, that the Convention recognised its validity, and adjusted parts of their work with reference to it. The authority to admit new States into the Union, the omission to provide distinctly for Territorial Governments, and the clause limiting the foreign slave trade to States then existing, which might not prohibit it, show that they regarded this Territory as provided with a Government, and organized permanently with a restriction on the subject of slavery. Justice Chase, in the opinion already cited, says of the Government before, and it is in some measure true during the Confederation, that "the powers of Congress originated from necessity, and arose out of and were only limited by events, or, in other words, they were revolutionary in their very nature. Their extent depended upon the exigencies and necessities of public affairs;" and there is only one rule of construction, in regard to the acts done, which will fully support them, viz: that the powers actually exercised were rightfully exercised, wherever they were supported by the implied sanction of the State Legislatures, and by the ratifications of the people.

The clauses in the 3d section of the 4th article of the Constitution, relative to the admission of new States, and the disposal and regulation of the territory of the United States, were adopted without debate in the Convention.

There was a warm discussion on the clauses that relate to the subdivision of the States, and the reservation of the claims of the United States and each of the States from any prejudice. The Maryland members revived the controversy in regard to the Crown lands of the Southwest. There was nothing to indicate any reference to a government of Territories not included within the limits of the Union; and the whole discussion demonstrates that the Convention was consciously dealing with a Territory whose condition, as to government, had been arranged by a fundamental and unalterable compact.

An examination of this clause of the Constitution, by the light of the circumstances in which the Convention was placed, will aid us to determine its significance. The first clause is, "that new States may be admitted by the Congress to this

Union." The condition of Kentucky, Vermont, Rhode Island, and the new States to be formed in the Northwest, suggested this, as a necessary addition to the powers of Congress. The next clause, providing for the subdivision of States, and the parties to consent to such an alteration, was required, by the plans on foot, for changes in Massachusetts, New York, Pennsylvania, North Carolina, and Georgia. The clause which enables Congress to dispose of and make regulations respecting the public domain, was demanded by the exigencies of an exhausted treasury and a disordered finance, for relief by sales, and the preparation for sales, of the public lands; and the last clause, that nothing in the Constitution should prejudice the claims of the United States or a particular State, was to quiet the jealousy and irritation of those who had claimed for the United States all the unappropriated lands. I look in vain, among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no restriction but the discretion of Congress. This disturbing element of the Union entirely escaped the apprehensive previsions of Samuel Adams, George Clinton, Luther Martin, and Patrick Henry; and, in respect to dangers from power vested in a central Government over distant settlements, colonies, or provinces, their instincts were always alive. Not a word escaped them, to warn their countrymen, that here was a power to threaten the landmarks of this federative Union, and with them the safeguards of popular and constitutional liberty; or that under this article there might be introduced, on our soil, a single Government over a vast extent of country—a Government foreign to the persons over whom it might be exercised, and capable of binding those not represented, by statutes, in all cases whatever. I find nothing to authorize these enormous pretensions, nothing in the expositions of the friends of the Constitution, nothing in the expressions of alarm by its opponents—expressions which have since been developed as prophecies. Every portion of the United States was then provided with a municipal Government, which this Constitution was not designed to supersede, but merely to modify as to its conditions.

The compacts of cession by North Carolina and Georgia are subsequent to the Constitution. They adopt the ordinance of 1787, except the clause respecting slavery. But the precautionary repudiation of that article forms an argument quite as satisfactory to the advocates for Federal power, as its intro-

duction would have done. The refusal of a power to Congress to legislate in one place, seems to justify the seizure of the same power when another place for its exercise is found.

This proceeds from a radical error, which lies at the foundation of much of this discussion. It is, that the Federal Government may lawfully do whatever is not directly prohibited by the Constitution. This would have been a fundamental error, if no amendments to the Constitution had been made. But the final expression of the will of the people of the States, in the 10th amendment, is, that the powers of the Federal Government are limited to the grants of the Constitution.

Before the cession of Georgia was made, Congress asserted rights, in respect to a part of her territory, which require a passing notice. In 1798 and 1800, acts for the settlement of limits with Georgia, and to establish a Government in the Mississippi Territory, were adopted. A Territorial Government was organized, between the Chattahoochee and Mississippi rivers. This was within the limits of Georgia. These acts dismembered Georgia. They established a separate Government upon her soil, while they rather derisively professed, "that the establishment of that Government shall in no respects impair the rights of the State of Georgia, either to the jurisdiction or soil of the Territory." The Constitution provided that the importation of such persons as any of the existing States shall think proper to admit, shall not be prohibited by Congress before 1808. By these enactments, a prohibition was placed upon the importation of slaves into Georgia, although her Legislature had made none.

This court have repeatedly affirmed the paramount claim of Georgia to this Territory. They have denied the existence of any title in the United States. (6 C. R., 87; 12 Wh., 523; 3 How., 212; 13 How., 381.) Yet these acts were cited in the argument as precedents to show the power of Congress in the Territories. These statutes were the occasion of earnest expostulation and bitter remonstrance on the part of the authorities of the State, and the memory of their injustice and wrong remained long after the legal settlement of the controversy by the compact of 1802. A reference to these acts terminates what I have to say upon the Constitutions of the Territory within the original limits of the United States. These Constitutions were framed by the concurrence of the States making the cessions, and Congress, and were tendered to immigrants who might be attracted to the vacant territory. The legislative powers of the officers of this Government were limited to the selection of laws from the States; and provision was made for the introduction of popular institutions, and their emanci-

pation from Federal control, whenever a suitable opportunity occurred. The limited reservation of legislative power to the officers of the Federal Government was excused, on the plea of *necessity;* and the probability is, that the clauses respecting slavery embody some compromise among the statesmen of that time; beyond these, the distinguishing features of the system which the patriots of the Revolution had claimed as their birthright, from Great Britain, predominated in them.

The acquisition of Louisiana, in 1803, introduced another system into the United States. This vast province was ceded by Napoleon, and its population had always been accustomed to a viceroyal Government, appointed by the Crowns of France or Spain. To establish a Government constituted on similar principles, and with like conditions, was not an unnatural proceeding.

But there was great difficulty in finding constitutional authority for the measure. The third section of the fourth article of the Constitution was introduced into the Constitution, on the motion of Mr. Gouverneur Morris. In 1803, he was appealed to for information in regard to its meaning. He answers: "I am very certain I had it not in contemplation to insert a decree *de coercendo imperio* in the Constitution of America. * * * I knew then, as well as I do now, that all North America must at length be annexed to us. Happy indeed, if the lust of dominion stop here. It would therefore have been perfectly utopian to oppose a paper restriction to the violence of popular sentiment, in a popular Government." (3 Mor. Writ., 185.) A few days later, he makes another reply to his correspondent. "I perceive," he says, "I mistook the drift of your inquiry, which substantially is, whether Congress can admit, as a new State, territory which did not belong to the United States when the Constitution was made. In my opinion, they cannot. I always thought, when we should acquire Canada and Louisiana, it would be proper to GOVERN THEM AS PROVINCES, AND ALLOW THEM NO VOICE *in our councils. In wording the third* SECTION OF THE *fourth article, I went as far as circumstances would permit, to establish the exclusion.* CANDOR OBLIGES ME TO ADD MY BELIEF, THAT HAD IT BEEN MORE POINTEDLY EXPRESSED, A STRONG OPPOSITION WOULD HAVE BEEN MADE." (3 Mor. Writ., 192.) The first Territorial Government of Louisiana was an Imperial one, founded upon a French or Spanish model. For a time, the Governor, Judges, Legislative Council, Marshal, Secretary, and officers of the militia, were appointed by the President.*

*Mr. Varnum said: "The bill provided such a Government as had never been known in the United States." Mr. Eustis: "The Government laid down in this

Besides these anomalous arrangements, the acquisition gave rise to jealous inquiries, as to the influence it would exert in determining the men and States that were to be "the arbiters and rulers" of the destinies of the Union; and unconstitutional opinions, having for their aim to promote sectional divisions, were announced and developed. "Something," said an eminent statesman, "something has suggested to the members of Congress the policy of acquiring geographical majorities. This is a very direct step towards disunion, for it must foster the geographical enmities by which alone it can be effected. This something must be a contemplation of particular advantages to be derived from such majorities; and is it not notorious that they consist of nothing else but usurpations over persons and property, by which they can regulate the internal *wealth and prosperity of States and individuals?*"

The most dangerous of the efforts to employ a geographical political power, to perpetuate a geographical preponderance in the Union, is to be found in the deliberations upon the act of the 6th of March, 1820, before cited. The attempt consisted of a proposal to exclude Missouri from a place in the Union, unless her people would adopt a Constitution containing a prohibition upon the subject of slavery, according to a prescription of Congress. The sentiment is now general, if not universal, that Congress had no constitutional power to impose the restriction. This was frankly admitted at the bar, in the course of this argument. The principles which this court have pronounced condemn the pretension then made on behalf of the legislative department. In Groves *v.* Slaughter, (15 Pet.,) the Chief Justice said: "The power over this subject is exclusively with the several States, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits." Justice McLean said: "The Constitution of the United States operates alike in all the States, and one State has the same power over the subject of slavery as every other State." In Pollard's Lessee *v.* Hagan, (3 How., 212,) the court say: "The United States have no constitutional capacity to exercise municipal

bill is certainly a new thing in the United States." Mr. Lucas: "It has been remarked, that this bill establishes elementary principles never previously introduced in the Government of any Territory of the United States. Granting the truth of this observation," &c., &c. Mr. Macon: "My first objection to the principle contained in this section is, that it establishes a species of government unknown to the United States." Mr. Boyle: "Were the President an angel instead of a man, I would not clothe him with this power." Mr. G. W. Campbell: "On examining the section, it will appear that it really establishes a complete despotism." Mr. Sloan: "Can anything be more repugnant to the principles of just government? Can anything be more despotic?"—*Annals of Congress*, 1803–'4.

jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact."

This is a necessary consequence, resulting from the nature of the Federal Constitution, which is a federal compact among the States, establishing a limited Government, with powers delegated by the people of distinct and independent communities, who reserved to their State Governments, and to themselves, the powers they did not grant. This claim to impose a restriction upon the people of Missouri involved a denial of the constitutional relations between the people of the States and Congress, and affirmed a concurrent right for the latter, with their people, to constitute the social and political system of the new States. A successful maintenance of this claim would have altered the basis of the Constitution. The new States would have become members of a Union defined in part by the Constitution and in part by Congress. They would not have been admitted to "this Union." Their sovereignty would have been restricted by Congress as well as the Constitution. The demand was unconstitutional and subversive, but was prosecuted with an energy, and aroused such animosities among the people, that patriots, whose confidence had not failed during the Revolution, began to despair for the Constitution.* Amid the utmost violence of this extraordinary contest, the expedient contained in the eighth section of this act was proposed, to moderate it, and to avert the catastrophe it menaced. It was not seriously debated, nor were its constitutional aspects severely scrutinized by Congress. For the first time, in the history of the country, has its operation been embodied in a case at law, and been presented to this court for their judgment. The inquiry is, whether there are conditions in the Constitutions of the Territories which subject the capacity and *status* of persons within their limits to the direct action of Congress. Can Congress determine the condition and *status* of persons who inhabit the Territories?

The Constitution permits Congress to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States. This power applies as well to territory belonging to the United States within the States, as beyond them. It comprehends all the public domain, wherever it may be. The argument is, that

* Mr. Jefferson wrote: "The Missouri question is the most portentous one that ever threatened our Union. In the gloomiest moments of the revolutionary war, I never had any apprehension equal to that I feel from this source."

the power to make "ALL needful rules and regulations" "is a power of legislation," "a full legislative power;" "that it includes all subjects of legislation in the territory," and is without any limitations, except the positive prohibitions which affect all the powers of Congress. Congress may then regulate or prohibit slavery upon the public domain within the new States, and such a prohibition would permanently affect the capacity of a slave, whose master might carry him to it. And why not? Because no power has been conferred on Congress. This is a conclusion universally admitted. But the power to "make rules and regulations respecting the territory" is not restrained by State lines, nor are there any constitutional prohibitions upon its exercise in the domain of the United States within the States; and whatever rules and regulations respecting territory Congress may constitutionally make are supreme, and are not dependent on the *situs* of "the territory."

The author of the Farmer's Letters, so famous in the ante-revolutionary history, thus states the argument made by the American loyalists in favor of the claim of the British Parliament to legislate in all cases whatever over the colonies: "It has been urged with great vehemence against us," he says, "and it seems to be thought their FORT by our adversaries, that a power of regulation is a power of legislation; and a power of legislation, if constitutional, must be universal and supreme, in the utmost sense of the word. It is therefore concluded that the colonies, by acknowledging the power of regulation, acknowledged every other power."

This sophism imposed upon a portion of the patriots of that day. Chief Justice Marshall, in his life of Washington, says "that many of the best-informed men in Massachusetts had perhaps adopted the opinion of the parliamentary right of internal government over the colonies;" "that the English statute book furnishes many instances of its exercise;" "that in no case recollected, was their authority openly controverted;" and "that the General Court of Massachusetts, on a late occasion, openly recognised the principle." (Marsh. Wash., v. 2, p. 75, 76.)

But the more eminent men of Massachusetts rejected it; and another patriot of the time employs the instance to warn us of "the stealth with which oppression approaches," and "the enormities towards which precedents travel." And the people of the United States, as we have seen, appealed to the last argument, rather than acquiesce in their authority. Could it have been the purpose of Washington and his illustrious associates, by the use of ambiguous, equivocal, and expansive

words, such as "rules," "regulations," "territory," to re-establish in the Constitution of their country that *fort* which had been prostrated amid the toils and with the sufferings and sacrifices of seven years of war? Are these words to be understood as the Norths, the Grenvilles, Hillsboroughs, Hutchinsons, and Dunmores—in a word, as George III would have understood them—or are we to look for their interpretation to Patrick Henry or Samuel Adams, to Jefferson, and Jay, and Dickinson; to the sage Franklin, or to Hamilton, who from his early manhood was engaged in combating British constructions of such words? We know that the resolution of Congress of 1780 contemplated that the new States to be formed under their recommendation were to have the same rights of sovereignty, freedom, and independence, as the old. That every resolution, cession, compact, and ordinance, of the States, observed the same liberal principle. That the Union of the Constitution is a union formed of equal States; and that new States, when admitted, were to enter "this Union." Had another union been proposed in "any pointed manner," it would have encountered not only "strong" but successful opposition. The disunion between Great Britain and her colonies originated in the antipathy of the latter to "rules and regulations" made by a remote power respecting their internal policy. In forming the Constitution, this fact was ever present in the minds of its authors. The people were assured by their most trusted statesmen "that the jurisdiction of the Federal Government is limited to certain enumerated objects, which concern all members of the republic," and "that the local or municipal authorities form distinct portions of supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere." Still, this did not content them. Under the lead of Hancock and Samuel Adams, of Patrick Henry and George Mason, they demanded an explicit declaration that no more power was to be exercised than they had delegated. And the ninth and tenth amendments to the Constitution were designed to include the reserved rights of the States, and the people, within all the sanctions of that instrument, and to bind the authorities, State and Federal, by the judicial oath it prescribes, to their recognition and observance. Is it probable, therefore, that the supreme and irresponsible power, which is now claimed for Congress over boundless territories, the use of which cannot fail to react upon the political system of the States, to its subversion, was ever within the contemplation of the statesmen who conducted the counsels of the people in the formation of this Constitution? When

the questions that came to the surface upon the acquisition of Louisiana were presented to the mind of Jefferson, he wrote: "I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power as boundless. If it is, then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the Federal Government, and gives the powers necessary to carry them into execution." The publication of the journals of the Federal Convention in 1819, of the debates reported by Mr. Madison in 1840, and the mass of private correspondence of the early statesmen before and since, enable us to approach the discussion of the aims of those who made the Constitution, with some insight and confidence.

I have endeavored, with the assistance of these, to find a solution for the grave and difficult question involved in this inquiry. My opinion is, that the claim for Congress of supreme power in the Territories, under the grant to "dispose of and make all needful rules and regulations respecting *territory*," is not supported by the historical evidence drawn from the Revolution, the Confederation, or the deliberations which preceded the ratification of the Federal Constitution. The ordinance of 1787 depended upon the action of the Congress of the Confederation, the assent of the State of Virginia, and the acquiescence of the people who recognised the validity of that plea of necessity which supported so many of the acts of the Governments of that time; and the Federal Government accepted the ordinance as a recognised and valid engagement of the Confederation.

In referring to the precedents of 1798 and 1800, I find the Constitution was plainly violated by the invasion of the rights of a sovereign State, both of soil and jurisdiction; and in reference to that of 1804, the wisest statesmen protested against it, and the President more than doubted its policy and the power of the Government.

Mr. John Quincy Adams, at a later period, says of the last act, "that the President found Congress mounted to the pitch of passing those acts, without inquiring where they acquired the authority, and he conquered his own scruples as they had done theirs." But this court cannot undertake for themselves the same conquest. They acknowledge that our peculiar se-

curity is in the possession of a written Constitution, and they cannot make it blank paper by construction.

They look to its delineation of the operations of the Federal Government, and they must not exceed the limits it marks out, in their administration. The court have said "that Congress cannot exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, beyond what has been delegated." We are then to find the authority for supreme power in the Territories in the Constitution. What are the limits upon the operations of a Government invested with legislative, executive, and judiciary powers, and charged with the power to dispose of and to make all needful rules and regulations respecting a vast public domain? The feudal system would have recognised the claim made on behalf of the Federal Government for supreme power over persons and things in the Territories, as an incident to this title—that is, the title to dispose of and make rules and regulations respecting it.

The Norman lawyers of William the Conqueror would have yielded an implicit assent to the doctrine, that a supreme sovereignty is an inseparable incident to a grant to dispose of and to make all needful rules and regulations respecting the public domain. But an American patriot, in contrasting the European and American systems, may affirm, "that European sovereigns give lands to their colonists, but reserve to themselves a power to control their property, liberty, and privileges; but the American Government sells the lands belonging to the people of the several States (i. e., United States) to their citizens, who are already in the possession of personal and political rights, which the Government did not give, and cannot take away." And the advocates for Government sovereignty in the Territories have been compelled to abate a portion of the pretensions originally made in its behalf, and to admit that the constitutional prohibitions upon Congress operate in the Territories. But a constitutional prohibition is not requisite to ascertain a limitation upon the authority of the several departments of the Federal Government. Nor are the States or people restrained by any enumeration or definition of their rights or liberties.

To impair or diminish either, the department must produce an authority from the people themselves, in their Constitution; and, as we have seen, a power to make rules and regulations respecting the public domain does not confer a municipal sovereignty over persons and things upon it. But as this is "thought their fort" by our adversaries, I propose a more definite examination of it. We have seen, Congress does not

dispose of or make rules and regulations respecting domain belonging to themselves, but belonging to the United States.

These conferred on their mandatory, Congress, authority to dispose of the territory which belonged to them in common; and to accomplish that object beneficially and effectually, they gave an authority to make suitable rules and regulations respecting it. When the power of disposition is fulfilled, the authority to make rules and regulations terminates, for it attaches only upon territory "belonging to the United States."

Consequently, the power to make rules and regulations, from the nature of the subject, is restricted to such administrative and conservatory acts as are needful for the preservation of the public domain, and its preparation for sale or disposition. The system of land surveys; the reservations for schools, internal improvements, military sites, and public buildings; the preemption claims of settlers; the establishment of land offices, and boards of inquiry, to determine the validity of land titles; the modes of entry, and sale, and of conferring titles; the protection of the lands from trespass and waste; the partition of the public domain into municipal subdivisions, having reference to the erection of Territorial Governments and States; and perhaps the selection, under their authority, of suitable laws for the protection of the settlers, until there may be a sufficient number of them to form a self-sustaining municipal Government—these important rules and regulations will sufficiently illustrate the scope and operation of the 3d section of the 4th article of the Constitution. But this clause in the Constitution does not exhaust the powers of Congress within the territorial subdivisions, or over the persons who inhabit them. Congress may exercise there all the powers of Government which belong to them as the Legislature of the United States, of which these Territories make a part. (Loughborough *v.* Blake, 5 Wheat., 317.) Thus the laws of taxation, for the regulation of foreign, Federal, and Indian commerce, and so for the abolition of the slave trade, for the protection of copyrights and inventions, for the establishment of postal communication and courts of justice, and for the punishment of crimes, are as operative there as within the States. I admit that to mark the bounds for the jurisdiction of the Government of the United States within the Territory, and of its power in respect to persons and things within the municipal subdivisions it has created, is a work of delicacy and difficulty, and, in a great measure, is beyond the cognizance of the judiciary department of that Government. How much municipal power may be exercised by the people of the Territory, before their admission to the Union, the courts of justice cannot decide. This must depend, for

the most part, on political considerations, which cannot enter into the determination of a case of law or equity. I do not feel called upon to define the jurisdiction of Congress. It is sufficient for the decision of this case to ascertain whether the residuary sovereignty of the States or people has been invaded by the 8th section of the act of 6th March, 1820, I have cited, in so far as it concerns the capacity and *status* of persons in the condition and circumstances of the plaintiff and his family.

These States, at the adoption of the Federal Constitution, were organized communities, having distinct systems of municipal law, which, though derived from a common source, and recognising in the main similar principles, yet in some respects had become unlike, and on a particular subject promised to be antagonistic.

Their systems provided protection for life, liberty, and property, among their citizens, and for the determination of the condition and capacity of the persons domiciled within their limits. These institutions, for the most part, were placed beyond the control of the Federal Government. The Constitution allows Congress to coin money, and regulate its value; to regulate foreign and Federal commerce; to secure, for a limited period, to authors and inventors, a property in their writings and discoveries; and to make rules concerning captures in war; and, within the limits of these powers, it has exercised, rightly, to a greater or less extent, the power to determine what shall and what shall not be property.

But the great powers of war and negotiation, finance, postal communication, and commerce, in general, when employed in respect to the property of a citizen, refer to, and depend upon, the municipal laws of the States, to ascertain and determine what is property, and the rights of the owner, and the tenure by which it is held.

Whatever these Constitutions and laws validly determine to be property, it is the duty of the Federal Government, through the domain of jurisdiction merely Federal, to recognise to be property.

And this principle follows from the structure of the respective Governments, State and Federal, and their reciprocal relations. They are different agents and trustees of the people of the several States, appointed with different powers and with distinct purposes, but whose acts, within the scope of their respective jurisdictions, are mutually obligatory. They are respectively the depositories of such powers of legislation as the people were willing to surrender, and their duty is to co-operate within their several jurisdictions to maintain the rights of the same citizens under both Governments unim-

paired. A proscription, therefore, of the Constitution and laws of one or more States, determining property, on the part of the Federal Government, by which the stability of its social system may be endangered, is plainly repugnant to the conditions on which the Federal Constitution was adopted, or which that Government was designed to accomplish. Each of the States surrendered its powers of war and negotiation, to raise armies and to support a navy, and all of these powers are sometimes required to preserve a State from disaster and ruin. The Federal Government was constituted to exercise these powers for the preservation of the States, respectively, and to secure to all their citizens the enjoyment of the rights which were not surrendered to the Federal Government. The provident care of the statesmen who projected the Constitution was signalized by such a distribution of the powers of Government as to exclude many of the motives and opportunities for promoting provocations and spreading discord among the States, and for guarding against those partial combinations, so destructive of the community of interest, sentiment, and feeling, which are so essential to the support of the Union. The distinguishing features of their system consist in the exclusion of the Federal Government from the local and internal concerns of, and in the establishment of an independent internal Government within, the States. And it is a significant fact in the history of the United States, that those controversies which have been productive of the greatest animosity, and have occasioned most peril to the peace of the Union, have had their origin in the well-sustained opinion of a minority among the people, that the Federal Government had overstepped its constitutional limits to grant some exclusive privilege, or to disturb the legitimate distribution of property or power among the States or individuals. Nor can a more signal instance of this be found than is furnished by the act before us. No candid or rational man can hesitate to believe, that if the subject of the eighth section of the act of March, 1820, had never been introduced into Congress and made the basis of legislation, no interest common to the Union would have been seriously affected. And, certainly, the creation, within this Union, of large confederacies of unfriendly and frowning States, which has been the tendency, and, to an alarming extent, the result, produced by the agitation arising from it, does not commend it to the patriot or statesman. This court have determined that the intermigration of slaves was not committed to the jurisdiction or control of Congress. Wherever a master is entitled to go within the United States, his slave may accompany him, without any impediment from, or fear of, Congres-

sional legislation or interference. The question then arises, whether Congress, which can exercise no jurisdiction over the relations of master and slave within the limits of the Union, and is bound to recognise and respect the rights and relations that validly exist under the Constitutions and laws of the States, can deny the exercise of those rights, and prohibit the continuance of those relations, within the Territories.

And the citation of State statutes prohibiting the immigration of slaves, and of the decisions of State courts enforcing the forfeiture of the master's title in accordance with their rule, only darkens the discussion. For the question is, have Congress the municipal sovereignty in the Territories which the State Legislatures have derived from the authority of the people, and exercise in the States?

And this depends upon the construction of the article in the Constitution before referred to.

And, in my opinion, that clause confers no power upon Congress to dissolve the relations of the master and slave on the domain of the United States, either within or without any of the States.

The eighth section of the act of Congress of the 6th of March, 1820, did not, in my opinion, operate to determine the domestic condition and *status* of the plaintiff and his family during their sojourn in Minnesota Territory, or after their return to Missouri.

The question occurs as to the judgment to be given in this case. It appeared upon the trial that the plaintiff, in 1834, was in a state of slavery in Missouri, and he had been in Missouri for near fifteen years in that condition when this suit was brought. Nor does it appear that he at any time possessed another state or condition, *de facto*. His claim to freedom depends upon his temporary elocation, from the domicil of his origin, in company with his master, to communities where the law of slavery did not prevail. My examination is confined to the case, as it was submitted upon uncontested evidence, upon appropriate issues to the jury, and upon the instructions given and refused by the court upon that evidence. My opinion is, that the opinion of the Circuit Court was correct upon all the claims involved in those issues, and that the verdict of the jury was justified by the evidence and instructions.

The jury have returned that the plaintiff and his family are slaves.

Upon this record, it is apparent that this is not a controversy between citizens of different States; and that the plaintiff, at no period of the life which has been submitted to the view of the court, has had a capacity to maintain a suit in the courts

of the United States. And in so far as the argument of the Chief Justice upon the plea in abatement has a reference to the plaintiff or his family, in any of the conditions or circumstances of their lives, as presented in the evidence, I concur in that portion of his opinion. I concur in the judgment which expresses the conclusion that the Circuit Court should not have rendered a general judgment.

The capacity of the plaintiff to sue is involved in the pleas in bar, and the verdict of the jury discloses an incapacity under the Constitution. Under the Constitution of the United States, his is an incapacity to sue in their courts, while, by the laws of Missouri, the operation of the verdict would be more extensive. I think it a safe conclusion to enforce the lesser disability imposed by the Constitution of the United States, and leave to the plaintiff all his rights in Missouri. I think the judgment should be affirmed, on the ground that the Circuit Court had no jurisdiction, or that the case should be reversed and remanded, that the suit may be dismissed.

Mr. Justice CATRON.

The defendant pleaded to the jurisdiction of the Circuit Court, that the plaintiff was a negro of African blood; the descendant of Africans, who had been imported and sold in this country as slaves, and thus had no capacity as a citizen of Missouri to maintain a suit in the Circuit Court. The court sustained a demurrer to this plea, and a trial was had upon the pleas, of the general issue, and also that the plaintiff and his family were slaves, belonging to the defendant. In this trial, a verdict was given for the defendant.

The judgment of the Circuit Court upon the plea in abatement is not open, in my opinion, to examination in this court upon the plaintiff's writ.

The judgment was given for him conformably to the prayer of his demurrer. He cannot assign an error in such a judgment. (Tidd's Pr., 1163; 2 Williams's Saund., 46 a; 2 Iredell N. C., 87; 2 W. and S., 391.) Nor does the fact that the judgment was given on a plea to the jurisdiction, avoid the application of this rule. (Capron *v.* Van Noorden, 2 Cr., 126; 6 Wend., 465; 7 Met., 598; 5 Pike, 1005.)

The declaration discloses a case within the jurisdiction of the court—a controversy between citizens of different States. The plea in abatement, impugning these jurisdictional averments, was waived when the defendant answered to the declaration by pleas to the merits. The proceedings on that plea remain a part of the technical record, to show the history of the case, but are not open to the review of this court by a writ

of error. The authorities are very conclusive on this point. Shepherd *v.* Graves, 14 How., 505; Bailey *v.* Dozier, 6 How., 23; 1 Stewart, (Alabama,) 46; 10 Ben. Monroe, (Kentucky,) 555; 2 Stewart, (Alabama,) 370, 443; 2 Scammon, (Illinois,) 78. Nor can the court assume, as admitted facts, the averments of the plea from the confession of the demurrer. That confession was for a single object, and cannot be used for any other purpose than to test the validity of the plea. Tompkins *v.* Ashley, 1 Moody and Mackin, 32; 33 Maine, 96, 100.

There being nothing in controversy here but the merits, I will proceed to discuss them.

The plaintiff claims to have acquired property in himself, and became free, by being kept in Illinois during two years.

The Constitution, laws, and policy, of Illinois, are somewhat peculiar respecting slavery. Unless the master becomes an inhabitant of that State, the slaves he takes there do not acquire their freedom; and if they return with their master to the slave State of his domicil, they cannot assert their freedom after their return. For the reasons and authorities on this point, I refer to the opinion of my brother Nelson, with which I not only concur, but think his opinion is the most conclusive argument on the subject within my knowledge.

It is next insisted for the plaintiff, that his freedom (and that of his wife and eldest child) was obtained by force of the act of Congress of 1820, usually known as the Missouri compromise act, which declares: "That in all that territory ceded by France to the United States, which lies north of thirty-six degrees thirty minutes north latitude, slavery and involuntary servitude shall be, and are hereby, *forever prohibited.*"

From this prohibition, the territory now constituting the State of Missouri was excepted; which exception to the stipulation gave it the designation of a compromise.

The first question presented on this act is, whether Congress had power to make such compromise. For, if power was wanting, then no freedom could be acquired by the defendant under the act.

That Congress has no authority to pass laws and bind men's rights beyond the powers conferred by the Constitution, is not open to controversy. But it is insisted that, by the Constitution, Congress has power to legislate for and govern the Territories of the United States, and that by force of the power to govern, laws could be enacted, prohibiting slavery in any portion of the Louisiana Territory; and, of course, to abolish slavery *in all* parts of it, whilst it was, or is, governed as a Territory.

My opinion is, that Congress is vested with power to govern

the Territories of the United States by force of the third section of the fourth article of the Constitution. And I will state my reasons for this opinion.

Almost every provision in that instrument has a history that must be understood, before the brief and sententious language employed can be comprehended in the relations its authors intended. We must bring before us the state of things presented to the Convention, and in regard to which it acted, when the compound provision was made, declaring: 1st. That "new States may be admitted by the Congress into this Union." 2d. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. And nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular State."

Having ascertained the historical facts giving rise to these provisions, the difficulty of arriving at the true meaning of the language employed will be greatly lessened.

The history of these facts is substantially as follows:

The King of Great Britain, by his proclamation of 1763, virtually claimed that the country west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the treaty of Paris of that year, and he says: "We reserve it under our sovereignty, protection, and dominion, for the use of the Indians."

This country was conquered from the Crown of Great Britain, and surrendered to the United States by the treaty of peace of 1783. The colonial charters of Virginia, North Carolina, and Georgia, included it. Other States set up pretensions of claim to some portions of the territory north of the Ohio, but they were of no value, as I suppose. (5 Wheat., 375.)

As this vacant country had been won by the blood and treasure of all the States, those whose charters did not reach it, insisted that the country belonged to the States united, and that the lands should be disposed of for the benefit of the whole; and to which end, the western territory should be ceded to the States united. The contest was stringent and angry, long before the Convention convened, and deeply agitated that body. As a matter of justice, and to quiet the controversy, Virginia consented to cede the country north of the Ohio as early as 1783; and in 1784 the deed of cession was executed, by her delegates in the Congress of the Confederation, conveying to the United States in Congress assembled, for the benefit of said States, "all right, title, and claim, as well of soil as of jurisdiction, which this Commonwealth hath to the *territory* or tract of country within the limits of the Vir-

ginia charter, situate, lying, and being to the northwest of the river Ohio." In 1787, (July 13,) the ordinance was passed by the old Congress to govern the Territory.

Massachusetts had ceded her pretension of claim to western territory in 1785, Connecticut hers in 1786, and New York had ceded hers. In August, 1787, South Carolina ceded to the Confederation her pretension of claim to territory west of that State. And North Carolina was expected to cede hers, which she did do, in April, 1790. And so Georgia was confidently expected to cede her large domain, now constituting the territory of the States of Alabama and Mississippi.

At the time the Constitution was under consideration, there had been ceded to the United States, or was shortly expected to be ceded, all the western country, from the British Canada line to Florida, and from the head of the Mississippi almost to its mouth, except that portion which now constitutes the State of Kentucky.

Although Virginia had conferred on the Congress of the Confederation power to govern the Territory north of the Ohio, still, it cannot be denied, as I think, that power was wanting to admit a new State under the Articles of Confederation.

With these facts prominently before the Convention, they proposed to accomplish these ends:

1st. To give power to admit new States.

2d. To dispose of the public lands in the Territories, and such as might remain undisposed of in the new States after they were admitted.

And, thirdly, to give power to govern the different Territories as incipient States, not of the Union, and fit them for admission. No one in the Convention seems to have doubted that these powers were necessary. As early as the third day of its session, (May 29th,) Edmund Randolph brought forward a set of resolutions containing nearly all the germs of the Constitution, the tenth of which is as follows:

"*Resolved*, That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole."

August 18th, Mr. Madison submitted, in order to be referred to the committee of detail, the following powers as proper to be added to those of the General Legislature:

"To dispose of the unappropriated lands of the United States." "To institute temporary Governments for new States arising therein." (3 Madison Papers, 1353.)

These, with the resolution, that a district for the location of the seat of Government should be provided, and some others, were referred, without a dissent, to the committee of detail, to arrange and put them into satisfactory language.

Gouverneur Morris constructed the clauses, and combined the views of a majority on the two provisions, to admit new States; and secondly, to dispose of the public lands, and to govern the Territories, in the mean time, between the cessions of the States and the admission into the Union of new States arising in the ceded territory. (3 Madison Papers, 1456 to 1466.)

It was hardly possible to separate the power "to make all needful rules and regulations" respecting the government of the territory and the disposition of the public lands.

North of the Ohio, Virginia conveyed the lands, and vested the jurisdiction in the thirteen original States, before the Constitution was formed. She had the sole title and sole sovereignty, and the same power to cede, on any terms she saw proper, that the King of England had to grant the Virginia colonial charter of 1609, or to grant the charter of Pennsylvania to William Penn. The thirteen States, through their representatives and deputed ministers in the old Congress, had the same right to govern that Virginia had before the cession. (Baldwin's Constitutional Views, 90.) And the sixth article of the Constitution adopted all engagements entered into by the Congress of the Confederation, as valid against the United States; and that the laws, made in pursuance of the new Constitution, to carry out this engagement, should be the supreme law of the land, and the judges bound thereby. To give the compact, and the ordinance, which was part of it, full effect under the new Government, the act of August 7th, 1789, was passed, which declares, "Whereas, in order that the ordinance of the United States in Congress assembled, for the government of the Territory northwest of the river Ohio, may have full effect, it is requisite that certain provisions should be made, so as to adapt the same to the present Constitution of the United States." It is then provided that the Governor and other officers should be appointed by the President, with the consent of the Senate; and be subject to removal, &c., in like manner that they were by the old Congress, whose functions had ceased.

By the powers to govern, given by the Constitution, those amendments to the ordinance could be made, but Congress guardedly abstained from touching the compact of Virginia, further than to adapt it to the new Constitution.

It is due to myself to say, that it is asking much of a judge,

who has for nearly twenty years been exercising jurisdiction, from the western Missouri line to the Rocky Mountains, and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had been all the while acting in mistake, and as an usurper.

More than sixty years have passed away since Congress has exercised power to govern the Territories, by its legislation directly, or by Territorial charters, subject to repeal at all times, and it is now too late to call that power into question, if this court could disregard its own decisions; which it cannot do, as I think. It was held in the case of Cross *v.* Harrison, (16 How., 193–'4,) that the sovereignty of California was in the United States, in virtue of the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power to admit new States into the Union. That decision followed preceding ones, there cited. The question was then presented, how it was possible for the judicial mind to conceive that the United States Government, created solely by the Constitution, could, by a lawful treaty, acquire territory over which the acquiring power had no jurisdiction to hold and govern it, by force of the instrument under whose authority the country was acquired; and the foregoing was the conclusion of this court on the proposition. What was there announced, was most deliberately done, and with a purpose. The only question here is, as I think, how far the power of Congress is limited.

As to the Northwest Territory, Virginia had the right to abolish slavery there; and she did so agree in 1787, with the other States in the Congress of the Confederation, by assenting to and adopting the ordinance of 1787, for the government of the Northwest Territory. She did this also by an act of her Legislature, passed afterwards, which was a treaty in fact.

Before the new Constitution was adopted, she had as much right to treat and agree as any European Government had. And, having excluded slavery, the new Government was bound by that engagement by article six of the new Constitution. This only meant that slavery should not exist whilst the United States exercised the power of government, in the Territorial form; for, when a new State came in, it might do so, with or without slavery.

My opinion is, that Congress had no power, in face of the compact between Virginia and the twelve other States, to *force* slavery into the Northwest Territory, because there, it was bound to that "engagement," and could not break it.

In 1790, North Carolina ceded her western territory, now the State of Tennessee, and stipulated that the inhabitants thereof should enioy all the privileges and advantages of the ordinance for governing the territory north of the Ohio river, and that Congress should assume the government, and accept the cession, under the express conditions contained in the ordinance: *Provided*, "That no regulation made, or to be made, by Congress, shall tend to emancipate slaves."

In 1802, Georgia ceded her western territory to the United States, with the provision that the ordinance of 1787 should in all its parts extend to the territory ceded, "that article only excepted which forbids slavery." Congress had no more power to legislate slavery *out* from the North Carolina and Georgia cessions, than it had power to legislate slavery in, north of the Ohio. No power existed in Congress to legislate at all, affecting slavery, in either case. The inhabitants, as respected this description of property, stood protected whilst they were governed by Congress, in like manner that they were protected before the cession was made, and when they were, respectively, parts of North Carolina and Georgia.

And how does the power of Congress stand west of the Mississippi river? The country there was acquired from France, by treaty, in 1803. It declares, that the First Consul, in the name of the French Republic, doth hereby cede to the United States, in full sovereignty, the colony or province of Louisiana, with all the rights and appurtenances of the said territory. And, by article third, that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States; and, in the mean time, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

Louisiana was a province where slavery was not only lawful, but where property in slaves was the most valuable of all personal property. The province was ceded as a unit, with an equal right pertaining to all its inhabitants, in every part thereof, to own slaves. It was, to a great extent, a vacant country, having in it few civilized inhabitants. No one portion of the colony, of a proper size for a State of the Union had a sufficient number of inhabitants to claim admission into the Union. To enable the United States to fulfil the treaty, additional population was indispensable, and obviously desired with anxiety by both sides, so that the whole country should, as soon as possible, become States of the Union. And for this

contemplated future population, the treaty as expressly provided as it did for the inhabitants residing in the province when the treaty was made. All these were to be protected "*in the mean time;*" that is to say, at all times, between the date of the treaty and the time when the portion of the Territory where the inhabitants resided was admitted into the Union as a State.

At the date of the treaty, each inhabitant had the right to the *free* enjoyment of his property, alike with his liberty and his religion, in every part of Louisiana; the province then being one country, he might go everywhere in it, and carry his liberty, property, and religion, with him, and in which he was to be maintained and protected, until he became a citizen of a State of the Union of the United States. This cannot be denied to the original inhabitants and their descendants. And, if it be true that immigrants were equally protected, it must follow that they can also stand on the treaty.

The settled doctrine in the State courts of Louisiana is, that a French subject coming to the Orleans Territory, after the treaty of 1803 was made, and before Louisiana was admitted into the Union, and being an inhabitant at the time of the admission, became a citizen of the United States by that act; that he was one of the inhabitants contemplated by the third article of the treaty, which referred to all the inhabitants embraced within the new State on its admission.

That this is the true construction, I have no doubt.

If power existed to draw a line at thirty-six degrees thirty minutes north, so Congress had equal power to draw the line on the thirtieth degree—that is, due west from the city of New Orleans—and to declare that north of *that line* slavery should never exist. Suppose this had been done before 1812, when Louisiana came into the Union, and the question of infraction of the treaty had then been presented on the present assumption of power to prohibit slavery, who doubts what the decision of this court would have been on such an act of Congress; yet, the difference between the supposed line, and that on thirty-six degrees thirty minutes north, is only in the degree of grossness presented by the lower line.

The Missouri compomise line of 1820 was very aggressive; it declared that slavery was abolished forever throughout a country reaching from the Mississippi river to the Pacific ocean, stretching over thirty-two degrees of longitude, and twelve and a half degrees of latitude on its eastern side, sweeping over four-fifths, to say no more, of the original province of Louisiana.

That the United States Government stipulated in favor of

the inhabitants to the extent here contended for, has not been seriously denied, as far as I know; but the argument is, that Congress had authority to *repeal* the third article of the treaty of 1803, in so far as it secured the right to hold slave property, in a portion of the ceded territory, leaving the right to exist in other parts. In other words, that Congress could repeal the third article entirely, at its pleasure. This I deny.

The compacts with North Carolina and Georgia were treaties also, and stood on the same footing of the Louisiana treaty; on the assumption of power to repeal the one, it must have extended to all, and Congress could have excluded the slaveholder of North Carolina from the enjoyment of his lands in the Territory now the State of Tennessee, where the citizens of the mother State were the principal proprietors.

And so in the case of Georgia. Her citizens could have been refused the right to emigrate to the Mississippi or Alabama Territory, unless they left their most valuable and cherished property behind them.

The Constitution was framed in reference to facts then existing or likely to arise: the instrument looked to no theories of Government. In the vigorous debates in the Convention, as reported by Mr. Madison and others, surrounding facts, and the condition and necessities of the country, gave rise to almost every provision; and among those facts, it was prominently true, that Congress dare not be intrusted with power to provide that, if North Carolina or Georgia ceded her western territory, the citizens of the State (in either case) could be prohibited, at the pleasure of Congress, from removing to their lands, then granted to a large extent, in the country likely to be ceded, unless they left their slaves behind. That such an attempt, in the face of a population fresh from the war of the Revolution, and then engaged in war with the great confederacy of Indians, extending from the mouth of the Ohio to the Gulf of Mexico, would end in open revolt, all intelligent men knew.

In view of these facts, let us inquire how the question stands by the terms of the Constitution, aside from the treaty? How it stood in public opinion when the Georgia cession was made, in 1802, is apparent from the fact that no guaranty was required by Georgia of the United States, for the protection of slave property. The Federal Constitution was relied on, to secure the rights of Georgia and her citizens during the Territorial condition of the country. She relied on the indisputable truths, that the States were by the Constitution made equals in political rights, and equals in the right to participate in the common property of all the States united, and held in trust for

them. The Constitution having provided that "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," the right to enjoy the territory as equals was reserved to the States, and to the citizens of the States, respectively. The cited clause is not that citizens of the United States shall have equal privileges in the Territories, but the citizen of each State shall come there in right of his State, and enjoy the common property. He secures his equality through the equality of his State, by virtue of that great fundamental condition of the Union—the equality of the States.

Congress cannot do indirectly what the Constitution prohibits directly. If the slaveholder is prohibited from going to the Territory with his slaves, who are parts of his family in name and in fact, it will follow that men owning lawful property in their own States, carrying with them the equality of their State to enjoy the common property, may be told, you cannot come here with your slaves, and he will be held out at the border. By this subterfuge, owners of slave property, to the amount of thousand of millions, might be almost as effectually excluded from removing into the Territory of Louisiana north of thirty-six degrees thirty minutes, as if the law declared that owners of slaves, as a class, should be excluded, even if their slaves were left behind.

Just as well might Congress have said to those of the North, you shall not introduce into the territory south of said line your cattle or horses, as the country is already overstocked; nor can you introduce your tools of trade, or machines, as the policy of Congress is to encourage the culture of sugar and cotton south of the line, and so to provide that the Northern people shall manufacture for those of the South, and barter for the staple articles slave labor produces. And thus the Northern farmer and mechanic would be held out, as the slaveholder was for thirty years, by the Missouri restriction.

If Congress could prohibit one species of property, lawful throughout Louisiana when it was acquired, and lawful in the State from whence it was brought, so Congrsss might exclude any or all property.

The case before us will illustrate the construction contended for. Dr. Emerson was a citizen of Missouri; he had an equal right to go to the Territory with every citizen of other States. This is undeniable, as I suppose. Scott was Dr. Emerson's lawful property in Missouri; he carried his Missouri title with him; and the precise question here is, whether Congress had the power to annul that title. It is idle to say, that if Congress could not defeat the title *directly*, that it might be done

indirectly, by drawing a narrow circle around the slave population of Upper Louisiana, and declaring that if the slave went beyond it, he should be free. Such assumption is mere evasion, and entitled to no consideration. And it is equally idle to contend, that because Congress has express power to regulate commerce among the Indian tribes, and to prohibit intercourse with the Indians, that therefore Dr. Emerson's title might be defeated within the country ceded by the Indians to the United States as early as 1805, and which embraces Fort Snelling. (Am. State Papers, vol. 1, p. 734.) We *must* meet the question, whether Congress had the power to declare that a citizen of a State, carrying with him his equal rights, secured to him through his State, could be stripped of his goods and slaves, and be deprived of any participation in the common property? If this be the true meaning of the Constitution, equality of rights to enjoy a common country (equal to a thousand miles square) may be cut off by a geographical line, and a great portion of our citizens excluded from it.

Ingenious, indirect evasions of the Constitution have been attempted and defeated heretofore. In the passenger cases, (7 How. R.,) the attempt was made to impose a tax on the masters, crews, and passengers of vessels, the Constitution having prohibited a tax on the vessel itself; but this court held the attempt to be a mere evasion, and pronounced the tax illegal.

I admit that Virginia could, and lawfully did, prohibit slavery northwest of the Ohio, by her charter of cession, and that the territory was taken by the United States with this condition imposed. I also admit that France could, by the treaty of 1803, have prohibited slavery in any part of the ceded territory, and imposed it on the United States as a fundamental condition of the cession, in the mean time, till new States were admitted in the Union.

I concur with Judge Baldwin, that Federal power is exercised over all the territory within the United States, pursuant to the Constitution; *and*, the conditions of the cession, whether it was a part of the original territory of a State of the Union, or of a foreign State, ceded by deed or treaty; the right of the United States in or over it depends on the contract of cession, which operates to incorporate as well the Territory as its inhabitants into the Union. (Baldwin's Constitutional Views, 84.)

My opinion is, that the third article of the treaty of 1803, ceding Louisiana to the United States, stands protected by the Constitution, and cannot be repealed by Congress.

And, secondly, that the act of 1820, known as the Missouri

compromise, violates the most leading feature of the Constitution—a feature on which the Union depends, and which secures to the respective States and their citizens an entire EQUALITY of rights, privileges, and immunities.

On these grounds, I hold the compromise act to have been void; and, consequently, that the plaintiff, Scott, can claim no benefit under it.

For the reasons above stated, I concur with my brother judges that the plaintiff, Scott, is a slave, and was so when this suit was brought.

Mr. Justice McLEAN and Mr. Justice CURTIS dissented.

Mr. Justice McLEAN dissenting.

This case is before us on a writ of error from the Circuit Court for the district of Missouri.

An action of trespass was brought, which charges the defendant with an assault and imprisonment of the plaintiff, and also of Harriet Scott, his wife, Eliza and Lizzie, his two children, on the ground that they were his slaves, which was without right on his part, and against law.

The defendant filed a plea in abatement, "that said causes of action, and each and every of them, if any such accrued to the said Dred Scott, accrued out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that to wit, said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro slaves; and this the said Sandford is ready to verify; wherefore he prays judgment whether the court can or will take further cognizance of the action aforesaid."

To this a demurrer was filed, which, on argument, was sustained by the court, the plea in abatement being held insufficient; the defendant was ruled to plead over. Under this rule he pleaded: 1. Not guilty; 2. That Dred Scott was a negro slave, the property of the defendant; and 3. That Harriet, the wife, and Eliza and Lizzie, the daughters of the plaintiff, were the lawful slaves of the defendant.

Issue was joined on the first plea, and replications of *de injuria* were filed to the other pleas.

The parties agreed to the following facts: In the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the army of the United States. In that year, Dr. Emerson took the plaintiff from the State of Missouri to

the post of Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, Dr. Emerson removed the plaintiff from Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the territory known as Upper Louisiana, acquired by the United States of France, and situate north of latitude thirty-six degrees thirty minutes north, and north of the State of Missouri. Dr. Emerson held the plaintiff in slavery, at Fort Snelling, from the last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, Major Taliaferro took Harriet to Fort Snelling, a military post situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at Fort Snelling, unto Dr. Emerson, who held her in slavery, at that place, until the year 1838.

In the year 1836, the plaintiff and Harriet were married at Fort Snelling, with the consent of Dr. Emerson, who claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, Dr. Emerson removed the plaintiff and said Harriet and their daughter Eliza from Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of the suit, Dr. Emerson sold and conveyed the plaintiff, Harriet, Eliza, and Lizzie, to the defendant, as slaves, and he has ever since claimed to hold them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be the owner, laid his hands upon said plaintiff, Harriet, Eliza, and Lizzie, and imprisoned them; doing in this respect, however, no more than he might lawfully do, if they were of right his slaves at such times.

In the first place, the plea to the jurisdiction is not before us, on this writ of error. A demurrer to the plea was sustained, which ruled the plea bad, and the defendant, on leave, pleaded over.

The decision on the demurrer was in favor of the plaintiff; and as the plaintiff prosecutes this writ of error, he does not complain of the decision on the demurrer. The defendant

might have complained of this decision, as against him, and have prosecuted a writ of error, to reverse it. But as the case, under the instruction of the court to the jury, was decided in his favor, of course he had no ground of complaint.

But it is said, if the court, on looking at the record, shall clearly perceive that the Circuit Court had no jurisdiction, it is a ground for the dismissal of the case. This may be characterized as rather a sharp practice, and one which seldom, if ever, occurs. No case was cited in the argument as authority, and not a single case precisely in point is recollected in our reports. The pleadings do not show a want of jurisdiction. This want of jurisdiction can only be ascertained by a judgment on the demurrer to the special plea. No such case, it is believed, can be cited. But if this rule of practice is to be applied in this case, and the plaintiff in error is required to answer and maintain as well the points ruled in his favor, as to show the error of those ruled against him, he has more than an ordinary duty to perform. Under such circumstances, the want of jurisdiction in the Circuit Court must be so clear as not to admit of doubt. Now, the plea which raises the question of jurisdiction, in my judgment, is radically defective. The gravamen of the plea is this: "That the plaintiff is a negro of African descent, his ancestors being of pure African blood, and were brought into this country, and sold as negro slaves."

There is no averment in this plea which shows or conduces to show an inability in the plaintiff to sue in the Circuit Court. It does not allege that the plaintiff had his domicil in any other State, nor that he is not a free man in Missouri. He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri, within the meaning of the act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicil in the State under whose laws his rights are protected, and to which he owes allegiance.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is "a freeman." Being a freeman, and having his domicil in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him.

It has often been held, that the jurisdiction, as regards parties, can only be exercised between citizens of different States,

and that a mere residence is not sufficient; but this has been said to distinguish a temporary from a permanent residence.

To constitute a good plea to the jurisdiction, it must negative those qualities and rights which enable an individual to sue in the Federal courts. This has not been done; and on this ground the plea was defective, and the demurrer was properly sustained. No implication can aid a plea in abatement or in bar; it must be complete in itself; the facts stated, if true, must abate or bar the right of the plaintiff to sue. This is not the character of the above plea. The facts stated, if admitted, are not inconsistent with other facts, which may be presumed, and which bring the plaintiff within the act of Congress.

The pleader has not the boldness to allege that the plaintiff is a slave, as that would assume against him the matter in controversy, and embrace the entire merits of the case in a plea to the jurisdiction. But beyond the facts set out in the plea, the court, to sustain it, must assume the plaintiff to be a slave, which is decisive on the merits. This is a short and an effectual mode of deciding the cause; but I am yet to learn that it is sanctioned by any known rule of pleading.

The defendant's counsel complain, that if the court take jurisdiction on the ground that the plaintiff is free, the assumption is against the right of the master. This argument is easily answered. In the first place, the plea does not show him to be a slave; it does not follow that a man is not free whose ancestors were slaves. The reports of the Supreme Court of Missouri show that this assumption has many exceptions; and there is no averment in the plea that the plaintiff is not within them.

By all the rules of pleading, this is a fatal defect in the plea. If there be doubt, what rule of construction has been established in the slave States? In Jacob *v.* Sharp, (Meigs's Rep., Tennessee, 114,) the court held, when there was doubt as to the construction of a will which emancipated a slave, "it must be construed to be subordinate to the higher and more important right of freedom."

No injustice can result to the master, from an exercise of jurisdiction in this cause. Such a decision does not in any degree affect the merits of the case; it only enables the plaintiff to assert his claims to freedom before this tribunal. If the jurisdiction be ruled against him, on the ground that he is a slave, it is decisive of his fate.

It has been argued that, if a colored person be made a citizen of a State, he cannot sue in the Federal court. The Constitution declares that Federal jurisdiction "may be exercised between citizens of different States," and the same is provided

in the act of 1789. The above argument is properly met by saying that the Constitution was intended to be a practical instrument; and where its language is too plain to be misunderstood, the argument ends."

In Chiræ *v.* Chiræ, (2 Wheat., 261; 4 Curtis, 99,) this court says: "That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted." No person can legally be made a citizen of a State, and consequently a citizen of the United States, of foreign birth, unless he be naturalized under the acts of Congress. Congress has power "to establish a uniform rule of naturalization."

It is a power which belongs exclusively to Congress, as intimately connected with our Federal relations. A State may authorize foreigners to hold real estate within its jurisdiction, but it has no power to naturalize foreigners, and give them the rights of citizens. Such a right is opposed to the acts of Congress on the subject of naturalization, and subversive of the Federal powers. I regret that any countenance should be given from this bench to a practice like this in some of the States, which has no warrant in the Constitution.

In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and in this view have recognised them as citizens; and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held, that the people of these Territories did not become citizens under the treaty. They have exercised all the rights of citizens, without being naturalized under the acts of Congress.

There are several important principles involved in this case, which have been argued, and which may be considered under the following heads:

1. The locality of slavery, as settled by this court and the courts of the States.

2. The relation which the Federal Government bears to slavery in the States.

3. The power of Congress to establish Territorial Governments, and to prohibit the introduction of slavery therein.

4. The effect of taking slaves into a new State or Territory, and so holding them, where slavery is prohibited.

5. Whether the return of a slave under the control of his

master, after being entitled to his freedom, reduces him to his former condition.

6. Are the decisions of the Supreme Court of Missouri, on the questions before us, binding on this court, within the rule adopted.

In the course of my judicial duties, I have had occasion to consider and decide several of the above points.

1. As to the locality of slavery. The civil law throughout the Continent of Europe, it is believed, without an exception, is, that slavery can exist only within the territory where it is established; and that, if a slave escapes, or is carried beyond such territory, his master cannot reclaim him, unless by virtue of some express stipulation. (Grotius, lib. 2, chap. 15, 5, 1; lib. 10, chap. 10, 2, 1; Wicqueposts Ambassador, lib. 1, p. 418; 4 Martin, 385; Case of the Creole in the House of Lords, 1842; 1 Phillimore on International Law, 316, 335.)

There is no nation in Europe which considers itself bound to return to his master a fugitive slave, under the civil law or the law of nations. On the contrary, the slave is held to be free where there is no treaty obligation, or compact in some other form, to return him to his master. The Roman law did not allow freedom to be sold. An ambassador or any other public functionary could not take a slave to France, Spain, or any other country of Europe, without emancipating him. A number of slaves escaped from a Florida plantation, and were received on board of ship by Admiral Cochrane; by the King's Bench, they were held to be free. (2 Barn. and Cres., 440.)

In the great and leading case of Prigg *v.* The State of Pennsylvania, (16 Peters, 594; 14 Curtis, 421,) this court say that, by the general law of nations, no nation is bound to recognise the state of slavery, as found within its territorial dominions, where it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is organized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognised in Somersett's case, (Lafft's Rep., 1; 20 Howell's State Trials, 79,) which was decided before the American Revolution.

There was some contrariety of opinion among the judges on certain points ruled in Prigg's case, but there was none in regard to the great principle, that slavery is limited to the range of the laws under which it is sanctioned.

No case in England appears to have been more thoroughly examined than that of Somersett. The judgment pronounced

by Lord Mansfield was the judgment of the Court of King's Bench. The cause was argued at great length, and with great ability, by Hargrave and others, who stood among the most eminent counsel in England. It was held under advisement from term to term, and a due sense of its importance was felt and expressed by the Bench.

In giving the opinion of the court, Lord Mansfield said:

"The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, is erased from the memory; it is of a nature that nothing can be suffered to support it but positive law."

He referred to the contrary opinion of Lord Hardwicke, in October, 1749, as Chancellor: "That he and Lord Talbot, when Attorney and Solicitor General, were of opinion that no such claim, as here presented, for freedom, was valid."

The weight of this decision is sought to be impaired, from the terms in which it was described by the exuberant imagination of Curran. The words of Lord Mansfield, in giving the opinion of the court, were such as were fit to be used by a great judge, in a most important case. It is a sufficient answer to all objections to that judgment, that it was pronounced before the Revolution, and that it was considered by this court as the highest authority. For near a century, the decision in Somersett's case has remained the law of England. The case of the slave Grace, decided by Lord Stowell in 1827, does not, as has been supposed, overrule the judgment of Lord Mansfield. Lord Stowell held that, during the residence of the slave in England, "No dominion, authority, or coercion, can be exercised over him." Under another head, I shall have occasion to examine the opinion in the case of Grace.

To the position, that slavery can only exist except under the authority of law, it is objected, that in few if in any instances has it been established by statutory enactment. This is no answer to the doctrine laid down by the court. Almost all the principles of the common law had their foundation in usage. Slavery was introduced into the colonies of this country by Great Britain at an early period of their history, and it was protected and cherished, until it became incorporated into the colonial policy. It is immaterial whether a system of slavery was introduced by express law, or otherwise, if it have the authority of law. There is no slave State where the institution is not recognised and protected by statutory enactments and judicial decisions. Slaves are made property by the laws of the slave States, and as such are liable to the claims of cred-

itors; they descend to heirs, are taxed, and in the South they are a subject of commerce.

In the case of Rankin *v.* Lydia, (2 A. K. Marshall's Rep.,) Judge Mills, speaking for the Court of Appeals of Kentucky, says: "In deciding the question, (of slavery,) we disclaim the influence of the general principles of liberty, which we all admire, and conceive it ought to be decided by the law as it is, and not as it ought to be. Slavery is sanctioned by the laws of this State, and the right to hold slaves under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law."

I will now consider the relation which the Federal Government bears to slavery in the States:

Slavery is emphatically a State institution. In the ninth section of the first article of the Constitution, it is provided "that the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

In the Convention, it was proposed by a committee of eleven to limit the importation of slaves to the year 1800, when Mr. Pinckney moved to extend the time to the year 1808. This motion was carried—New Hampshire, Massachusetts, Connecticut, Maryland, North Carolina, South Carolina, and Georgia, voting in the affirmative; and New Jersey, Pennsylvania, and Virginia, in the negative. In opposition to the motion, Mr. Madison said: "Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves; so long a term will be more dishonorable to the American character than to say nothing about it in the Constitution." (Madison Papers.)

The provision in regard to the slave trade shows clearly that Congress considered slavery a State institution, to be continued and regulated by its individual sovereignty; and to conciliate that interest, the slave trade was continued twenty years, not as a general measure, but for the "benefit of such States as shall think proper to encourage it."

In the case of Groves *v.* Slaughter, (15 Peters, 449; 14 Curtis, 137,) Messrs. Clay and Webster contended that, under the commercial power, Congress had a right to regulate the slave trade among the several States; but the court held that Congress had no power to interfere with slavery as it exists in the States, or to regulate what is called the slave trade among

them. If this trade were subject to the commercial power, it would follow that Congress could abolish or establish slavery in every State of the Union.

The only connection which the Federal Government holds with slaves in a State, arises from that provision of the Constitution which declares that "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due."

This being a fundamental law of the Federal Government, it rests mainly for its execution, as has been held, on the judicial power of the Union; and so far as the rendition of fugitives from labor has become a subject of judicial action, the Federal obligation has been faithfully discharged.

In the formation of the Federal Constitution, care was taken to confer no power on the Federal Government to interfere with this institution in the States. In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution.

We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country. This system was imposed upon our colonial settlements by the mother country, and it is due to truth to say that the commercial colonies and States were chiefly engaged in the traffic. But we know as a historical fact, that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man.

I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground. Our independence was a great epoch in the history of freedom; and while I admit the Government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised the rights of suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.

Many of the States, on the adoption of the Constitution, or

shortly afterward, took measures to abolish slavery within their respective jurisdictions; and it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it would become extinct. The increased value of slave labor, in the culture of cotton and sugar, prevented the realization of this expectation. Like all other communities and States, the South were influenced by what they considered to be their own interests.

But if we are to turn our attention to the dark ages of the world, why confine our view to colored slavery? On the same principles, white men were made slaves. All slavery has its origin in power, and is against right.

The power of Congress to establish Territorial Governments, and to prohibit the introduction of slavery therein, is the next point to be considered.

After the cession of western territory by Virginia and other States, to the United States, the public attention was directed to the best mode of disposing of it for the general benefit. While in attendence on the Federal Convention, Mr. Madison, in a letter to Edmund Randolph, dated the 22d April, 1787, says: "Congress are deliberating on the plan most eligible for disposing of the western territory not yet surveyed. Some alteration will probably be made in the ordinance on that subject." And in the same letter he says: "The inhabitants of the Illinois complain of the land jobbers, &c., who are purchasing titles among them. Those of St. Vincent's complain of the defective criminal and civil justice among them, as well as of military protection." And on the next day he writes to Mr. Jefferson: "The government of the settlements on the Illinois and Wabash is a subject very perplexing in itself, and rendered more so by our ignorance of the many circumstances on which a right judgment depends. The inhabitants at those places claim protection against the savages, and some provision for both civil and criminal justice."

In May, 1787, Mr. Edmund Randolph submitted to the Federal Convention certain propositions, as the basis of a Federal Government, among which was the following:

"*Resolved*, That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole."

Afterward, Mr. Madison submitted to the Convention, in order to be referred to the committee of detail, the following powers, as proper to be added to those of general legislation:

"To dispose of the unappropriated lands of the United States. To institute temporary Governments for new States arising therein. To regulate affairs with the Indians, as well within as without the limits of the United States."

Other propositions were made in reference to the same subjects, which it would be tedious to enumerate. Mr. Gouverneur Morris proposed the following:

"The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution contained shall be so construed as to prejudice any claims either of the United States or of any particular State."

This was adopted as a part of the Constitution, with two verbal alterations—Congress was substituted for Legislature, and the word *either* was stricken out.

In the organization of the new Government, but little revenue for a series of years was expected from commerce. The public lands were considered as the principal resource of the country for the payment of the Revolutionary debt. Direct taxation was the means relied on to pay the current expenses of the Government. The short period that occurred between the cession of western lands to the Federal Government by Virginia and other States, and the adoption of the Constitution, was sufficient to show the necessity of a proper land system and a temporary Government. This was clearly seen by propositions and remarks in the Federal Convention, some of which are above cited, by the passage of the Ordinance of 1787, and the adoption of that instrument by Congress, under the Constitution, which gave to it validity.

It will be recollected that the deed of cession of western territory was made to the United States by Virginia in 1784, and that it required the territory ceded to be laid out into States, that the land should be disposed of for the common benefit of the States, and that all right, title, and claim, as well of soil as of jurisdiction, were ceded; and this was the form of cession from other States.

On the 13th of July, the Ordinance of 1787 was passed, "for the government of the United States territory northwest of the river Ohio," with but one dissenting vote. This instrument provided there should be organized in the territory not less than three nor more than five States, designating their boundaries. It was passed while the Federal Convention was in session, about two months before the Constitution was adopted by the Convention. The members of the Convention must therefore have been well acquainted with the provisions of the

Ordinance. It provided for a temporary Government, as initiatory to the formation of State Governments. Slavery was prohibited in the territory.

Can any one suppose that the eminent men of the Federal Convention could have overlooked or neglected a matter so vitally important to the country, in the organization of temporary Governments for the vast territory northwest of the river Ohio? In the 3d section of the 4th article of the Constitution, they did make provision for the admission of new States, the sale of the public lands, and the temporary Government of the territory. Without a temporary Government, new States could not have been formed, nor could the public lands have been sold.

If the third section were before us now for consideration for the first time, under the facts stated, I could not hesitate to say there was adequate legislative power given in it. The power to make all needful rules and regulations is a power to legislate. This no one will controvert, as Congress cannot make "rules and regulations," except by legislation. But it is argued that the word territory is used as synonymous with the word land; and that the rules and regulations of Congress are limited to the disposition of lands and other property belonging to the United States. That this is not the true construction of the section appears from the fact that in the first line of the section "the power to dispose of the public lands" is given expressly, and, in addition, to make all needful rules and regulations. The power to dispose of is complete in itself, and requires nothing more. It authorizes Congress to use the proper means within its discretion, and any further provision for this purpose would be a useless verbiage. As a composition, the Constitution is remarkably free from such a charge.

In the discussion of the power of Congress to govern a Territory, in the case of the Atlantic Insurance Company *v.* Canter, (1 Peters, 511; 7 Curtis, 685,) Chief Justice Marshall, speaking for the court, said, in regard to the people of Florida, "they do not, however, participate in political power; they do not share in the Government till Florida shall become a State; in the mean time, Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.' "

And he adds, "perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result

necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory; whichever may be the source whence the power is derived, the possession of it is unquestioned." And in the close of the opinion, the court say, "in legislating for them [the Territories,] Congress exercises the combined powers of the General and State Governments."

Some consider the opinion to be loose and inconclusive; others, that it is *obiter dicta;* and the last sentence is objected to as recognising absolute power in Congress over Territories. The learned and eloquent Wirt, who, in the argument of a cause before the court, had occasion to cite a few sentences from an opinion of the Chief Justice, observed, "no one can mistake the style, the words so completely match the thought."

I can see no want of precision in the language of the Chief Justice; his meaning cannot be mistaken. He states, first, the third section as giving power to Congress to govern the Territories, and two other grounds from which the power may also be implied. The objection seems to be, that the Chief Justice did not say which of the grounds stated he considered the source of the power. He did not specifically state this, but he did say, "whichever may be the source whence the power is derived, the possession of it is unquestioned." No opinion of the court could have been expressed with a stronger emphasis; the power in Congress is unquestioned. But those who have undertaken to criticise the opinion, consider it without authority, because the Chief Justice did not designate specially the power. This is a singular objection. If the power be unquestioned, it can be a matter of no importance on which ground it is exercised.

The opinion clearly was not *obiter dicta.* The turning point in the case was, whether Congress had power to authorize the Territorial Legislature of Florida to pass the law under which the Territorial court was established, whose decree was brought before this court for revision. The power of Congress, therefore, was the point in issue.

The word "territory," according to Worcester, "means land, country, a district of country under a temporary Government." The words "territory or other property," as used, do imply, from the use of the pronoun other, that territory was used as descriptive of land; but does it follow that it was not used also as descriptive of a district of country? In both of these senses it belonged to the United States—as land, for the purpose of sale; as territory, for the purpose of government.

But, if it be admitted that the word territory as used means land, and nothing but land, the power of Congress to organize a temporary Government is clear. It has power to make all needful regulations respecting the public lands, and the extent of those "needful regulations" depends upon the direction of Congress, where the means are appropriate to the end, and do not conflict with any of the prohibitions of the Constitution. If a temporary Government be deemed needful, necessary, requisite, or is wanted, Congress has power to establish it. This court says, in McCulloch *v.* The State of Maryland, (4 Wheat., 316,) "If a certain means to carry into effect any of the powers expressly given by the Constitution to the Government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance."

The power to establish post offices and post roads gives power to Congress to make contracts for the transportation of the mail, and to punish all who commit depredations upon it in its transit, or at its places of distribution. Congress has power to regulate commerce, and, in the exercise of its discretion, to lay an embargo, which suspends commerce; so, under the same power, harbors, lighthouses, breakwaters, &c., are constructed.

Did Chief Justice Marshall, in saying that Congress governed a Territory, by exercising the combined powers of the Federal and State Governments, refer to unlimited discretion? A Government which can make white men slaves? Surely, such a remark in the argument must have been inadvertently uttered. On the contrary, there is no power in the Constitution by which Congress can make either white or black men slaves. In organizing the Government of a Territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit; so that, whether the object may be the protection of the persons and property of purchasers of the public lands, or of communities who have been annexed to the Union by conquest or purchase, they are initiatory to the establishment of State Governments, and no more power can be claimed or exercised than is necessary to the attainment of the end. This is the limitation of all the Federal powers.

But Congress has no power to regulate the internal concerns of a State, as of a Territory; consequently, in providing for the Government of a Territory, to some extent, the combined powers of the Federal and State Governments are necessarily exercised.

If Congress should deem slaves or free colored persons injurious to the population of a free Territory, as conducing to lessen the value of the public lands, or on any other ground connected with the public interest, they have the power to prohibit them from becoming settlers in it. This can be sustained on the ground of a sound national policy, which is so clearly shown in our history by practical results, that it would seem no considerate individual can question it. And, as regards any unfairness of such a policy to our Southern brethren, as urged in the argument, it is only necessary to say that, with one-fourth of the Federal population of the Union, they have in the slave States a larger extent of fertile territory than is included in the free States; and it is submitted, if masters of slaves be restricted from bringing them into free territory, that the restriction on the free citizens of non-slaveholding States, by bringing slaves into free territory, is four times greater than that complained of by the South. But, not only so; some three or four hundred thousand holders of slaves, by bringing them into free territory, impose a restriction on twenty millions of the free States. The repugnancy to slavery would probably prevent fifty or a hundred freemen from settling in a slave Territory, where one slaveholder would be prevented from settling in a free Territory.

This remark is made in answer to the argument urged, that a prohibition of slavery in the free Territories is inconsistent with the continuance of the Union. Where a Territorial Government is established in a slave Territory, it has uniformly remained in that condition until the people form a State Constitution; the same course where the Territory is free, both parties acting in good faith, would be attended with satisfactory results.

The sovereignty of the Federal Government extends to the entire limits of our territory. Should any foreign power invade our jurisdiction, it would be repelled. There is a law of Congress to punish our citizens for crimes committed in districts of country where there is no organized Government. Criminals are brought to certain Territories or States, designated in the law, for punishment. Death has been inflicted in Arkansas and in Missouri, on individuals, for murders committed beyond the limit of any organized Territory or State; and no one doubts that such a jurisdiction was rightfully exercised. If there be a right to acquire territory, there necessarily must be an implied power to govern it. When the military force of the Union shall conquer a country, may not Congress provide for the government of such country? This would be an implied power essential to the acquisition of new territory.

This power has been exercised, without doubt of its constitutionality, over territory acquired by conquest and purchase.

And when there is a large district of country within the United States, and not within any State Government, if it be necessary to establish a temporary Government to carry out a power expressly vested in Congress—as the disposition of the public lands—may not such Government be instituted by Congress? How do we read the Constitution? Is it not a practical instrument?

In such cases, no implication of a power can arise which is inhibited by the Constitution, or which may be against the theory of its construction. As my opinion rests on the third section, these remarks are made as an intimation that the power to establish a temporary Government may arise, also, on the other two grounds stated in the opinion of the court in the insurance case, without weakening the third section.

I would here simply remark, that the Constitution was formed for our whole country. An expansion or contraction of our territory required no change in the fundamental law. When we consider the men who laid the foundation of our Government and carried it into operation, the men who occupied the bench, who filled the halls of legislation and the Chief Magistracy, it would seem, if any question could be settled clear of all doubt, it was the power of Congress to establish Territorial Governments. Slavery was prohibited in the entire Northwestern Territory, with the approbation of leading men, South and North; but this prohibition was not retained when this ordinance was adopted for the government of Southern Territories, where slavery existed. In a late republication of a letter of Mr. Madison, dated November 27, 1819, speaking of this power of Congress to prohibit slavery in a Territory, he infers there is no such power, from the fact that it has not been exercised. This is not a very satisfactory argument against any power, as there are but few, if any, subjects on which the constitutional powers of Congress are exhausted. It is true, as Mr. Madison states, that Congress, in the act to establish a Government in the Mississippi Territory, prohibited the importation of slaves into it from foreign parts; but it is equally true, that in the act erecting Louisiana into two Territories, Congress declared, "it shall not be lawful for any person to bring into Orleans Territory, from any port or place within the limits of the United States, any slave which shall have been imported since 1798, or which may hereafter be imported, except by a citizen of the United States who settles in the Territory, under the penalty of the freedom of such slave." The inference of Mr. Madison, therefore, against the power of

Congress, is of no force, as it was founded on a fact supposed, which did not exist.

It is refreshing to turn to the early incidents of our history, and learn wisdom from the acts of the great men who have gone to their account. I refer to a report in the House of Representatives, by John Randolph, of Roanoke, as chairman of a committee, in March, 1803—fifty-four years ago. From the Convention held at Vincennes, in Indiana, by their President, and from the people of the Territory, a petition was presented to Congress, praying the suspension of the provision which prohibited slavery in that Territory. The report stated "that the rapid population of the State of Ohio sufficiently evinces, in the opinion of your committee, that the labor of slaves is not necessary to promote the growth and settlement of colonies in that region. That this labor, demonstrably the dearest of any, can only be employed to advantage in the cultivation of products more valuable than any known to that quarter of the United States; that the committee deem it highly dangerous and inexpedient to impair a provision wisely calculated to promote the happiness and prosperity of the Northwestern country, and to give strength and security to that extensive frontier. In the salutary operation of this sagacious and benevolent restraint, it is believed that the inhabitants will, at no very distant day, find ample remuneration for a temporary privation of labor and of emigration." (1 vol. State Papers, Public Lands, 160.)

The judicial mind of this country, State and Federal, has agreed on no subject, within its legitimate action, with equal unanimity, as on the power of Congress to establish Territorial Governments. No court, State or Federal, no judge or statesman, is known to have had any doubts on this question for nearly sixty years after the power was exercised. Such Governments have been established from the sources of the Ohio to the Gulf of Mexico, extending to the Lakes on the north and the Pacific Ocean on the west, and from the lines of Georgia to Texas.

Great interests have grown up under the Territorial laws over a country more than five times greater in extent than the original thirteen States; and these interests, corporate or otherwise, have been cherished and consolidated by a benign policy, without any one supposing the law-making power had united with the Judiciary, under the universal sanction of the whole country, to usurp a jurisdiction which did not belong to them. Such a discovery at this late date is more extraordinary than anything which has occurred in the judicial history of this or any other country. Texas, under a previous organiza-

tion, was admitted as a State; but no State can be admitted into the Union which has not been organized under some form of government. Without temporary Governments, our public lands could not have been sold, nor our wildernesses reduced to cultivation, and the population protected; nor could our flourishing States, West and South, have been formed.

What do the lessons of wisdom and experience teach, under such circumstances, if the new light, which has so suddenly and unexpectedly burst upon us, be true? Acquiescence; acquiescence under a settled construction of the Constitution for sixty years, though it may be erroneous; which has secured to the country an advancement and prosperity beyond the power of computation.

An act of James Madison, when President, forcibly illustrates this policy. He had made up his opinion that Congress had no power under the Constitution to establish a National Bank. In 1815, Congress passed a bill to establish a bank. He vetoed the bill, on objections other than constitutional. In his message, he speaks as a wise statesman and Chief Magistrate, as follows:

"Waiving the question of the constitutional authority of the Legislature to establish an incorporated bank, as being precluded, in my judgment, by the repeated recognitions under varied circumstances of the validity of such an institution, in acts of the Legislative, Executive, and Judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."

Has this impressive lesson of practical wisdom become lost to the present generation?

If the great and fundamental principles of our Government are never to be settled, there can be no lasting prosperity. The Constitution will become a floating waif on the billows of popular excitement.

The prohibition of slavery north of thirty-six degrees thirty minutes, and of the State of Missouri, contained in the act admitting that State into the Union, was passed by a vote of 134, in the House of Representatives, to 42. Before Mr. Monroe signed the act, it was submitted by him to his Cabinet, and they held the restriction of slavery in a Territory to be within the constitutional powers of Congress. It would be singular, if in 1804 Congress had power to prohibit the introdnction of slaves in Orleans Territory from any other part of the Union, under the penalty of freedom to the slave, if the same power, embodied in the Missouri compromise, could not be exercised in 1820.

But this law of Congress, which prohibits slavery north of

Missouri and of thirty-six degrees thirty minutes, is declared to have been null and void by my brethren. And this opinion is founded mainly, as I understand, on the distinction drawn between the ordinance of 1787 and the Missouri compromise line. In what does the distinction consist? The ordinance, it is said, was a compact entered into by the confederated States before the adoption of the Constitution; and that in the cession of territory authority was given to establish a Territorial Government.

It is clear that the ordinance did not go into operation by virtue of the authority of the Confederation, but by reason of its modification and adoption by Congress under the Constitution. It seems to be supposed, in the opinion of the court, that the articles of cession placed it on a different footing from territories subsequently acquired. I am unable to perceive the force of this distinction. That the ordinance was intended for the government of the Northwestern Territory, and was limited to such Territory, is admitted. It was extended to Southern Territories, with modifications, by acts of Congress, and to some Northern Territories. But the ordinance was made valid by the act of Congress, and without such act could have been of no force. It rested for its validity on the act of Congress, the same, in my opinion, as the Missouri compromise line.

If Congress may establish a Territorial Government in the exercise of its discretion, it is a clear principle that a court cannot control that discretion. This being the case, I do not see on what ground the act is held to be void. It did not purport to forfeit property, or take it for public purposes. It only prohibited slavery; in doing which, it followed the ordinance of 1787.

I will now consider the fourth head, which is: "The effect of taking slaves into a State or Territory, and so holding them, where slavery is prohibited."

If the principle laid down in the case of Prigg *v.* The State of Pennsylvania is to be maintained, and it is certainly to be maintained until overruled, as the law of this court, there can be no difficulty on this point. In that case, the court says: "The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws." If this be so, slavery can exist nowhere except under the authority of law, founded on usage having the force of law, or by statutory recognition. And the court further says: "It is manifest, from this consideration, that if the Constitution had not contained the clause requiring the rendition of fugitives from labor, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves

coming within its limits, and to have given them entire immunity and protection against the claims of their masters."

Now, if a slave abscond, he may be reclaimed; but if he accompany his master into a State or Territory where slavery is prohibited, such slave cannot be said to have left the service of his master where his services were legalized. And if slavery be limited to the range of the territorial laws, how can the slave be coerced to serve in a State or Territory, not only without the authority of law, but against its express provisions? What gives the master the right to control the will of his slave? The local law, which exists in some form. But where there is no such law, can the master control the will of the slave by force? Where no slavery exists, the presumption, without regard to color, is in favor of freedom. Under such a jurisdiction, may the colored man be levied on as the property of his master by a creditor? On the decease of the master, does the slave descend to his heirs as property? Can the master sell him? Any one or all of these acts may be done to the slave, where he is legally held to service. But where the law does not confer this power, it cannot be exercised.

Lord Mansfield held that a slave brought into England was free. Lord Stowell agreed with Lord Mansfield in this respect, and that the slave could not be coerced in England; but on her voluntary return to Antigua, the place of her slave domicil, her former status attached. The law of England did not prohibit slavery, but did not authorize it. The jurisdiction which prohibits slavery is much stronger in behalf of the slave within it, than where it only does not authorize it.

By virtue of what law is it, that a master may take his slave into free territory, and exact from him the duties of a slave? The law of the Territory does not sanction it. No authority can be claimed under the Constitution of the United States, or any law of Congress. Will it be said that the slave is taken as property, the same as other property which the master may own? To this I answer, that colored persons are made property by the law of the State, and no such power has been given to Congress. Does the master carry with him the law of the State from which he removes into the Territory? and does that enable him to coerce his slave in the Territory? Let us test this theory. If this may be done by a master from one slave State, it may be done by a master from every other slave State. This right is supposed to be connected with the person of the master, by virtue of the local law. Is it transferable? May it be negotiated, as a promissory note or bill of exchange? If it be assigned to a man from a free State, may he coerce the slave by virtue of it? What shall this thing be

denominated? Is it personal or real property? Or is it an indefinable fragment of sovereignty, which every person carries with him from his late domicil? One thing is certain, that its origin has been very recent, and it is unknown to the laws of any civilized country.

A slave is brought to England from one of its islands, where slavery was introduced and maintained by the mother country. Although there is no law prohibiting slavery in England, yet there is no law authorizing it; and, for near a century, its courts have declared that the slave there is free from the coercion of the master. Lords Mansfield and Stowell agree upon this point, and there is no dissenting authority.

There is no other description of property which was not protected in England, brought from one of its slave islands. Does not this show that property in a human being does not arise from nature or from the common law, but, in the language of this court, "it is a mere municipal regulation, founded upon and limited to the range of the territorial laws?" This decision is not a mere argument, but it is the end of the law, in regard to the extent of slavery. Until it shall be overturned, it is not a point for argument; it is obligatory on myself and my brethren, and on all judicial tribunals over which this court exercises an appellate power.

It is said the Territories are common property of the States, and that every man has a right to go there with his property. This is not controverted. But the court say a slave is not property beyond the operation of the local law which makes him such. Never was a truth more authoritatively and justly uttered by man. Suppose a master of a slave in a British island owned a million of property in England; would that authorize him to take his slaves with him to England? The Constitution, in express terms, recognises the *status* of slavery as founded on the municipal law: "No person held to service or labor in one State, *under the laws thereof*, escaping into another, shall," &c. Now, unless the fugitive escape from a place where, by the municipal law, he is held to labor, this provision affords no remedy to the master. What can be more conclusive than this? Suppose a slave escape from a Territory where slavery is not authorized by law, can he be reclaimed?

In this case, a majority of the court have said that a slave may be taken by his master into a Territory of the United States, the same as a horse, or any other kind of property. It is true, this was said by the court, as also many other things, which are of no authority. Nothing that has been said by them, which has not a direct bearing on the jurisdiction of the court, against which they decided, can be considered as

authority. I shall certainly not regard it as such. The question of jurisdiction, being before the court, was decided by them authoritatively, but nothing beyond that question. A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence.

Under this head I shall chiefly rely on the decisions of the Supreme Courts of the Southern States, and especially of the State of Missouri.

In the first and second sections of the sixth article of the Constitution of Illinois, it is declared that neither slavery nor involuntary servitude shall hereafter be introduced into this State, otherwise than for the punishment of crimes whereof the party shall have been duly convicted; and in the second section it is declared that any violation of this article shall effect the emancipation of such person from his obligation to service. In Illinois, a right of transit through the State is given the master with his slaves. This is a matter which, as I suppose, belongs exclusively to the State.

The Supreme Court of Illinois, in the case of Jarrot *v.* Jarrot, (2 Gilmer, 7,) said:

"After the conquest of this Territory by Virginia, she ceded it to the United States, and stipulated that the titles and possessions, rights and liberties, of the French settlers, should be guarantied to them. This, it has been contended, secured them in the possession of those negroes as slaves which they held before that time, and that neither Congress nor the Convention had power to deprive them of it; or, in other words, that the ordinance and Constitution should not be so interpreted and understood as applying to such slaves, when it is therein declared that there shall be neither slavery nor involuntary servitude in the Northwest Territory, nor in the State of Illinois, otherwise than in the punishment of crimes. But it was held that those rights could not be thus protected, but must yield to the ordinance and Constitution."

The first slave case decided by the Supreme Court of Missouri, contained in the reports, was Winny *v.* Whitesides, (1 Missouri Rep., 473,) at October term, 1824. It appeared that, more than twenty-five years before, the defendant, with her husband, had removed from Carolina to Illinois, and brought with them the plaintiff; that they continued to reside in Illinois three or four years, retaining the plaintiff as a slave; after which, they removed to Missouri, taking her with them.

The court held, that if a slave be detained in Illinois until he be entitled to freedom, the right of the owner does not revive when he finds the negro in a slave State.

That when a slave is taken to Illinois by his owner, who takes up his residence there, the slave is entitled to freedom.

In the case of Lagrange *v.* Chouteau, (2 Missouri Rep., 20, at May term, 1828,) it was decided that the ordinance of 1787 was intended as a fundamental law for those who may choose to live under it, rather than as a penal statute.

That any sort of residence contrived or permitted by the legal owner of the slave, upon the faith of secret trusts or contracts, in order to defeat or evade the ordinance, and thereby introduce slavery *de facto*, would entitle such slave to freedom.

In Julia *v.* McKinney, (3 Missouri Rep., 279,) it was held, where a slave was settled in the State of Illinois, but with an intention on the part of the owner to be removed at some future day, that hiring said slave to a person to labor for one or two days, and receiving the pay for the hire, the slave is entitled to her freedom, under the second section of the sixth article of the Constitution of Illinois.

Rachel *v.* Walker (4 Missouri Rep., 350, June term, 1836) is a case involving, in every particular, the principles of the case before us. Rachel sued for her freedom; and it appeared that she had been bought as a slave in Missouri, by Stockton, an officer of the army, taken to Fort Snelling, where he was stationed, and she was retained there as a slave a year; and then Stockton removed to Prairie du Chien, taking Rachel with him as a slave, where he continued to hold her three years, and then he took her to the State of Missouri, and sold her as a slave.

"Fort Snelling was admitted to be on the west side of the Mississippi river, and north of the State of Missouri, in the territory of the United States. That Prairie du Chien was in the Michigan Territory, on the east side of the Mississippi river. Walker, the defendant, held Rachel under Stockton."

The court said, in this case:

"The officer lived in Missouri Territory, at the time he bought the slave; he sent to a slaveholding country and procured her; this was his voluntary act, done without any other reason than that of his convenience; and he and those claiming under him must be holden to abide the consequences of introducing slavery both in Missouri Territory and Michigan, contrary to law; and on that ground Rachel was declared to be entitled to freedom."

In answer to the argument that, as an officer of the army, the master had a right to take his slave into free territory, the court said no authority of law or the Government compelled him to keep the plaintiff there as a slave.

"Shall it be said, that because an officer of the army owns

slaves in Virginia, that when, as officer and soldier, he is required to take the command of a fort in the non-slaveholding States or Territories, he thereby has a right to take with him as many slaves as will suit his interests or convenience? It surely cannot be law. If this be true, the court say, then it is also true that the convenience or supposed convenience of the officer repeals, as to him and others who have the same character, the ordinance and the act of 1821, admitting Missouri into the Union, and also the prohibition of the several laws and Constitutions of the non-slaveholding States."

In Wilson *v.* Melvin, (4 Missouri R., 592,) it appeared the defendant left Tennessee with an intention of residing in Illinois, taking his negroes with him. After a month's stay in Illinois, he took his negroes to St. Louis, and hired them, then returned to Illinois. On these facts, the inferior court instructed the jury that the defendant was a sojourner in Illinois. This the Supreme Court held was error, and the judgment was reversed.

The case of Dred Scott *v.* Emerson (15 Missouri R., 682, March term, 1852) will now be stated. This case involved the identical question before us, Emerson having, since the hearing, sold the plaintiff to Sandford, the defendant.

Two of the judges ruled the case, the Chief Justice dissenting. It cannot be improper to state the grounds of the opinion of the court, and of the dissent.

The court say: "Cases of this kind are not strangers in our court. Persons have been frequently here adjudged to be entitled to their freedom, on the ground that their masters held them in slavery in Territories or States in which that institution is prohibited. From the first case decided in our court, it might be inferred that this result was brought about by a presumed assent of the master, from the fact of having voluntarily taken his slave to a place where the relation of master and slave did not exist. But subsequent cases base the right to 'exact the forfeiture of emancipation,' as they term it, on the ground, it would seem, that it was the duty of the courts of this State to carry into effect the Constitution and laws of other States and Territories, regardless of the rights, the policy, or the institutions, of the people of this State."

And the court say that the States of the Union, in their municipal concerns, are regarded as foreign to each other; that the courts of one State do not take notice of the laws of other States, unless proved as facts, and that every State has the right to determine how far its comity to other States shall extend; and it is laid down, that when there is no act of manumission decreed to the free State, the courts of the slave States

cannot be called to give effect to the law of the free State. Comity, it alleges, between States, depends upon the discretion of both, which may be varied by circumstances. And it is declared by the court, "that times are not as they were when the former decisions on this subject were made." Since then, not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures whose inevitable consequence must be the overthrow and destruction of our Government. Under such circumstances, it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others.

Chief Justice Gamble dissented from the other two judges. He says:

"In every slaveholding State in the Union, the subject of emancipation is regulated by statute; and the forms are prescribed in which it shall be effected. Whenever the forms required by the laws of the State in which the master and slave are resident are complied with, the emancipation is complete, and the slave is free. If the right of the person thus emancipated is subsequently drawn in question in another State, it will be ascertained and determined by the law of the State in which the slave and his former master resided; and when it appears that such law has been complied with, the right to freedom will be fully sustained in the courts of all the slaveholding States, although the act of emancipation may not be in the form required by law in which the court sits.

"In all such cases, courts continually administer the law of the country where the right was acquired; and when that law becomes known to the court, it is just as much a matter of course to decide the rights of the parties according to its requirements, as it is to settle the title of real estate situated in our State by its own laws."

This appears to me a most satisfactory answer to the argument of the court. Chief Justice continues:

"The perfect equality of the different States lies at the foundation of the Union. As the institution of slavery in the States is one over which the Constitution of the United States gives no power to the General Government, it is left to be adopted or rejected by the several States, as they think best; nor can any one State, or number of States, claim the right to interfere with any other State upon the question of admitting or excluding this institution.

"A citizen of Missouri, who removes with his slave to Illi-

nois, has no right to complain that the fundamental law of that State to which he removes, and in which he makes his residence, dissolves the relation between him and his slave. It is as much his own voluntary act, as if he had executed a deed of emancipation. No one can pretend ignorance of this constitutional provision, and," he says, "the decisions which have heretofore been made in this State, and in many other slaveholding States, give effect to this and other similar provisions, on the ground that the master, by making the free State the residence of his slave, has submitted his right to the operation of the law of such State; and this," he says, "is the same in law as a regular deed of emancipation."

He adds:

"I regard the question as conclusively settled by repeated adjudications of this court, and, if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them, than I would any other series of decisions by which the law of any other question was settled. There is with me," he says, "nothing in the law relating to slavery which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary public excitements which are gathered around it."

"In this State," he says, "it has been recognised from the beginning of the Government as a correct position in law, that a master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave." These decisions, which come down to the year 1837, seemed to have so fully settled the question, that since that time there has been no case bringing it before the court for any reconsideration, until the present. In the case of Winny *v.* Whitesides, the question was made in the argument, "whether one nation would execute the penal laws of another," and the court replied in this language, (Huberus, quoted in 4 Dallas,) which says, "personal rights or disabilities obtained or communicated by the laws of any particular place are of a nature which accompany the person wherever he goes;" and the Chief Justice observed, in the case of Rachel *v.* Walker, the act of Congress called the Missouri compromise was held as operative as the ordinance of 1787.

When Dred Scott, his wife and children, were removed from Fort Snelling to Missouri, in 1838, they were free, as the law was then settled, and continued for fourteen years afterwards, up to 1852, when the above decision was made. Prior to this, for nearly thirty years, as Chief Justice Gamble declares, the residence of a master with his slave in the State of Illinois, or in the Territory north of Missouri, where slavery was prohibited

by the act called the Missouri compromise, would manumit the slave as effectually as if he had executed a deed of emancipation; and that an officer of the army who takes his slave into that State or Territory, and holds him there as a slave, liberates him the same as any other citizen—and down to the above time it was settled by numerous and uniform decisions; and that on the return of the slave to Missouri, his former condition of slavery did not attach. Such was the settled law of Missouri until the decision of Scott and Emerson.

In the case of Sylvia *v.* Kirby, (17 Misso. Rep., 434,) the court followed the above decision, observing it was similar in all respects to the case of Scott and Emerson.

This court follows the established construction of the statutes of a State by its Supreme Court. Such a construction is considered as a part of the statute, and we follow it to avoid two rules of property in the same State. But we do not follow the decisions of the Supreme Court of a State beyond a statutory construction as a rule of decision for this court. State decisions are always viewed with respect and treated as authority; but we follow the settled construction of the statutes, not because it is of binding authority, but in pursuance of a rule of judicial policy.

But there is no pretence that the case of Dred Scott *v.* Emerson turned upon the construction of a Missouri statute; nor was there any established rule of property which could have rightfully influenced the decision. On the contrary, the decision overruled the settled law for near thirty years.

This is said by my brethren to be a Missouri question; but there is nothing which gives it this character, except that it involves the right to persons claimed as slaves who reside in Missouri, and the decision was made by the Supreme Court of that State. It involves a right claimed under an act of Congress and the Constitution of Illinois, and which cannot be decided without the consideration and construction of those laws. But the Supreme Court of Missouri held, in this case, that it will not regard either of those laws, without which there was no case before it; and Dred Scott, having been a slave, remains a slave. In this respect it is admitted this is a Missouri question—a case which has but one side, if the act of Congress and the Constitution of Illinois are not recognised.

And does such a case constitute a rule of decision for this court—a case to be followed by this court? The course of decision so long and so uniformly maintained established a comity or law between Missouri and the free States and Territories where slavery was prohibited, which must be somewhat regarded in this case. Rights sanctioned for twenty-eight years

ought not and cannot be repudiated, with any semblance of justice, by one or two decisions, influenced, as declared, by a determination to counteract the excitement against slavery in the free States.

The courts of Louisiana having held, for a series of years, that where a master took his slave to France, or any free State, he was entitled to freedom, and that on bringing him back the status of slavery did not attach, the Legislature of Louisiana declared by an act that the slave should not be made free under such circumstances. This regulated the rights of the master from the time the act took effect. But the decision of the Missouri court, reversing a former decision, affects all previous decisions, technically, made on the same principles, unless such decisions are protected by the lapse of time or the statute of limitations. Dred Scott and his family, beyond all controversy, were free under the decisions made for twenty-eight years, before the case of Scott *v.* Emerson. This was the undoubted law of Missouri for fourteen years after Scott and his family were brought back to that State. And the grave question arises, whether this law may be so disregarded as to enslave free persons. I am strongly inclined to think that a rule of decision so well settled as not to be questioned, cannot be annulled by a single decision of the court. Such rights may be inoperative under the decision in future; but I cannot well perceive how it can have the same effect in prior cases.

It is admitted, that when a former decision is reversed, the technical effect of the judgment is to make all previous adjudications on the same question erroneous. But the case before us was not that the law had been erroneously construed, but that, under the circumstances which then existed, that law would not be recognised; and the reason for this is declared to be the excitement against the institution of slavery in the free States. While I lament this excitement as much as any one, I cannot assent that it shall be made a basis of judicial action.

In 1816, the common law, by statute, was made a part of the law of Missouri; and that includes the great principles of international law. These principles cannot be abrogated by judicial decisions. It will require the same exercise of power to abolish the common law, as to introduce it. International law is founded in the opinions generally received and acted on by civilized nations, and enforced by moral sanctions. It becomes a more authoritative system when it results from special compacts, founded on modified rules, adapted to the exigencies of human society; it is in fact an international morality, adapted to the best interests of nations. And in regard to the States

of this Union, on the subject of slavery, it is eminently fitted for a rule of action, subject to the Federal Constitution. "The laws of nations are but the natural rights of man applied to nations." (Vattel.)

If the common law have the force of a statutory enactment in Missouri, it is clear, as it seems to me, that a slave who, by a residence in Illinois in the service of his master, becomes entitled to his freedom, cannot again be reduced to slavery by returning to his former domicil in a slave State. It is unnecessary to say what legislative power might do by a general act in such a case, but it would be singular if a freeman could be made a slave by the exercise of a judicial discretion. And it would be still more extraordinary if this could be done, not only in the absence of special legislation, but in a State where the common law is in force.

It is supposed by some, that the third article in the treaty of cession of Louisiana to this country, by France, in 1803, may have some bearing on this question. The article referred to provides, "that the inhabitants of the ceded territory shall be incorporated into the Union, and enjoy all the advantages of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess."

As slavery existed in Louisiana at the time of the cession, it is supposed this is a guaranty that there should be no change in its condition.

The answer to this is, in the first place, that such a subject does not belong to the treaty-making power; and any such arrangement would have been nugatory. And, in the second place, by no admissible construction can the guaranty be carried further than the protection of property in slaves at that time in the ceded territory. And this has been complied with. The organization of the slave States of Louisiana, Missouri, and Arkansas, embraced every slave in Louisiana at the time of the cession. This removes every ground of objection under the treaty. There is therefore no pretence, growing out of the treaty, that any part of the territory of Louisiana, as ceded, beyond the organized States, is slave territory.

Under the fifth head, we were to consider whether the status of slavery attached to the plaintiff and wife, on their return to Missouri.

This doctrine is not asserted in the late opinion of the Supreme Court of Missouri, and up to 1852 the contrary doctrine was uniformly maintained by that court.

In its late decision, the court say that it will not give effect in Missouri to the laws of Illinois, or the law of Congress

called the Missouri compromise. This was the effect of the decision, though its terms were, that the court would not take notice, judicially, of those laws.

In 1851, the Court of Appeals of South Carolina recognised the principle, that a slave, being taken to a free State, became free. (Commonwealth *v.* Pleasants, 10 Leigh Rep., 697.) In Betty *v.* Horton, the Court of Appeals held that the freedom of the slave was acquired by the action of the laws of Massachusetts, by the said slave being taken there. (5 Leigh Rep., 615.)

The slave States have generally adopted the rule, that where the master, by a residence with his slave in a State or Territory where slavery is prohibited, the slave was entitled to his freedom everywhere. This was the settled doctrine of the Supreme Court of Missouri. It has been so held in Mississippi, in Virginia, in Louisiana, formerly in Kentucky, Maryland, and in other States.

The law, where a contract is made and is to be executed, governs it. This does not depend upon comity, but upon the law of the contract. And if, in the language of the Supreme Court of Missouri, the master, by taking his slave to Illinois, and employing him there as a slave, emancipates him as effectually as by a deed of emancipation, is it possible that such an act is not matter for adjudication in any slave State where the master may take him? Does not the master assent to the law, when he places himself under it in a free State?

The States of Missouri and Illinois are bounded by a common line. The one prohibits slavery, the other admits it. This has been done by the exercise of that sovereign power which appertains to each. We are bound to respect the institutions of each, as emanating from the voluntary action of the people. Have the people of either any right to disturb the relations of the other? Each State rests upon the basis of its own sovereignty, protected by the Constitution. Our Union has been the foundation of our prosperity and national glory. Shall we not cherish and maintain it? This can only be done by respecting the legal rights of each State.

If a citizen of a free State shall entice or enable a slave to escape from the service of his master, the law holds him responsible, not only for the loss of the slave, but he is liable to be indicted and fined for the misdemeanor. And I am bound here to say, that I have never found a jury in the four States which constitute my circuit, which have not sustained this law, where the evidence required them to sustain it. And it is proper that I should also say, that more cases have arisen in my circuit, by reason of its extent and locality, than in all

other parts of the Union. This has been done to vindicate the sovereign rights of the Southern States, and protect the legal interests of our brethren of the South.

Let these facts be contrasted with the case now before the court. Illinois has declared in the most solemn and impressive form that there shall be neither slavery nor involuntary servitude in that State, and that any slave brought into it, with a view of becoming a resident, shall be emancipated. And effect has been given to this provision of the Constitution by the decision of the Supreme Court of that State. With a full knowledge of these facts, a slave is brought from Missouri to Rock Island, in the State of Illinois, and is retained there as a slave for two years, and then taken to Fort Snelling, where slavery is prohibited by the Missouri compromise act, and there he is detained two years longer in a state of slavery. Harriet, his wife, was also kept at the same place four years as a slave, having been purchased in Missouri. They were then removed to the State of Missouri, and sold as slaves, and in the action before us they are not only claimed as slaves, but a majority of my brethren have held that on their being returned to Missouri the status of slavery attached to them.

I am not able to reconcile this result with the respect due to the State of Illinois. Having the same rights of sovereignty as the State of Missouri in adopting a Constitution, I can perceive no reason why the institutions of Illinois should not receive the same consideration as those of Missouri. Allowing to my brethren the same right of judgment that I exercise myself, I must be permitted to say that it seems to me the principle laid down will enable the people of a slave State to introduce slavery into a free State, for a longer or shorter time, as may suit their convenience; and by returning the slave to the State whence he was brought, by force or otherwise, the status of slavery attaches, and protects the rights of the master, and defies the sovereignty of the free State. There is no evidence before us that Dred Scott and his family returned to Missouri voluntarily. The contrary is inferable from the agreed case: "In the year 1838, Dr. Emerson removed the plaintiff and said Harriet, and their daughter Eliza, from Fort Snelling to the State of Missouri, where they have ever since resided." This is the agreed case; and can it be inferred from this that Scott and family returned to Missouri voluntarily? He was removed; which shows that he was passive, as a slave, having exercised no volition on the subject. He did not resist the master by absconding or force. But that was not sufficient to bring him within Lord Stowell's decision; he must have acted voluntarily. It would be a

mockery of law and an outrage on his rights to coerce his return, and then claim that it was voluntary, and on that ground that his former status of slavery attached.

If the decision be placed on this ground, it is a fact for a jury to decide, whether the return was voluntary, or else the fact should be distinctly admitted. A presumption against the plaintiff in this respect, I say with confidence, is not authorized from the facts admitted.

In coming to the conclusion that a voluntary return by Grace to her former domicil, slavery attached, Lord Stowell took great pains to show that England forced slavery upon her colonies, and that it was maintained by numerous acts of Parliament and public policy, and, in short, that the system of slavery was not only established by Great Britain in her West Indian colonies, but that it was popular and profitable to many of the wealthy and influential people of England, who were engaged in trade, or owned and cultivated plantations in the colonies. No one can read his elaborate views, and not be struck with the great difference between England and her colonies, and the free and slave States of this Union. While slavery in the colonies of England is subject to the power of the mother country, our States, especially in regard to slavery, are independent, resting upon their own sovereignties, and subject only to international laws, which apply to independent States.

In the case of Williams, who was a slave in Granada, having run away, came to England, Lord Stowell said: "The four judges all concur in this—that he was a slave in Granada, though a free man in England, and he would have continued a free man in all other parts of the world except Granada."

Strader *v.* Graham (10 Howard, 82, and 18 Curtis, 305) has been cited as having a direct bearing in the case before us. In that case the court say: "It was exclusively in the power of Kentucky to determine, for itself, whether the employment of slaves in another State should or should not make them free on their return." No question was before the court in that case, except that of jurisdiction. And any opinion given on any other point is *obiter dictum*, and of no authority. In the conclusion of his opinion, the Chief Justice said: "In every view of the subject, therefore, this court has no jurisdiction of the case, and the writ of error must on that gronnd be dismissed."

In the case of Spencer *v.* Negro Dennis, (8 Gill's Rep., 321,) the court say: "Once free, and always free, is the maxim of Maryland law upon the subject. Freedom having once vested, by no compact between the master and the the liberated slave,

nor by any condition subsequent, attached by the master to the gift of freedom, can a state of slavery be reproduced."

In Hunter *v.* Bulcher, (1 Leigh, 172:)

"By a statute of Maryland of 1796, all slaves brought into that State to reside are declared free; a Virginian-born slave is carried by his master to Maryland; the master settled there, and keeps the slave there in bondage for twelve years, the statute in force all the time; then he brings him as a slave to Virginia, and sells him there. Adjudged, in an action brought by the man against the purchaser, that he is free."

Judge Kerr, in the case, says:

"Agreeing, as I do, with the general view taken in this case by my brother Green, I would not add a word, but to mark the exact extent to which I mean to go. The law of Maryland having enacted that slaves carried into that State for sale or to reside shall be free, and the owner of the slave here having carried him to Maryland, and voluntarily submitting himself and the slave to that law, it governs the case."

In every decision of a slave case prior to that of Dred Scott *v.* Emerson, the Supreme Court of Missouri considered it as turning upon the Constitution of Illinois, the ordinance of 1787, or the Missouri compromise act of 1820. The court treated these acts as in force, and held itself bound to execute them, by declaring the slave to be free who had acquired a domicil under them with the consent of his master.

The late decision reversed this whole line of adjudication, and held that neither the Constitution and laws of the States, nor acts of Congress in relation to Territories, could be judicially noticed by the Supreme Court of Missouri. This is believed to be in conflict with the decisions of all the courts in the Southern States, with some exceptions of recent cases.

In Marie Louise *v.* Morat et al., (9 Louisiana Rep., 475,) it was held, where a slave having been taken to the kingdom of France or other country by the owner, where slavery is not tolerated, operates on the condition of the slave, and produces immediate emancipation; and that, where a slave thus becomes free, the master cannot reduce him again to slavery.

Josephine *v.* Poultney, (Louisiana Annual Rep., 329,) "where the owner removes with a slave into a State in which slavery is prohibited, with the intention of residing there, the slave will be thereby emancipated, and their subsequent return to the State of Louisiana cannot restore the relation of master and slave." To the same import are the cases of Smith *v.* Smith, (13 Louisiana Rep., 441; Thomas *v.* Generis, Louisiana Rep., 483; Harry et al. *v.* Decker and Hopkins, Walker's Mississippi Rep., 36.) It was held that, "slaves within the ju-

risdiction of the Northwestern Territory became freemen by virtue of the ordinance of 1787, and can assert their claim to freedom in the courts of Mississippi." (Griffith *v.* Fanny, 1 Virginia Rep., 143.) It was decided that a negro held in servitude in Ohio, under a deed executed in Virginia, is entitled to freedom by the Constitution of Ohio.

The case of Rhodes *v.* Bell (2 Howard, 307; 15 Curtis, 152) involved the main principle in the case before us. A person residing in Washington city purchased a slave in Alexandria, and brought him to Washington. Washington continued under the law of Maryland, Alexandria under the law of Virginia. The act of Maryland of November, 1796, (2 Maxcy's Laws, 351,) declared any one who shall bring any negro, mulatto, or other slave, into Maryland, such slave should be free. The above slave, by reason of his being brought into Washington city, was declared by this court to be free. This, it appears to me, is a much stronger case against the slave than the facts in the case of Scott.

In Bush *v.* White, (3 Monroe, 104,) the court say:

"That the ordinance was paramount to the Territorial laws, and restrained the legislative power there as effectually as a Constitution in an organized State. It was a public act of the Legislature of the Union, and a part of the supreme law of the land; and, as such, this court is as much bound to take notice of it as it can be of any other law."

In the case of Rankin *v.* Lydia, before cited, Judge Mills, speaking for the Court of Appeals of Kentucky, says:

"If, by the positive provision in our code, we can and must hold our slaves in the one case, and statutory provisions equally positive decide against that right in the other, and liberate the slave, he must, by an authority equally imperious, be declared free. Every argument which supports the right of the master on one side, based upon the force of written law, must be equally conclusive in favor of the slave, when he can point out in the statute the clause which secures his freedom."

And he further said:

"Free people of color in all the States are, it is believed, quasi citizens, or, at least, denizens. Although none of the States may allow them the privilege of office and suffrage, yet all other civil and conventional rights are secured to them; at least, such rights were evidently secured to them by the ordinance in question for the government of Indiana. If these rights are vested in that or any other portion of the United States, can it be compatible with the spirit of our confederated Government to deny their existence in any other part? Is there less comity existing between State and State, or State

and Territory, than exists between the despotic Governments of Europe?"

These are the words of a learned and great judge, born and educated in a slave State.

I now come to inquire, under the sixth and last head, "whether the decisions of the Supreme Court of Missouri, on the question before us, are binding on this court."

While we respect the learning and high intelligence of the State courts, and consider their decisions, with others, as authority, we follow them only where they give a construction to the State statutes. On this head, I consider myself fortunate in being able to turn to the decision of this court, given by Mr. Justice Grier, in Pease *v.* Peck, a case from the State of Michigan, (18 Howard, 589,) decided in December term, 1855. Speaking for the court, Judge Grier said:

"We entertain the highest respect for that learned court, (the Supreme Court of Michigan,) and in any question affecting the construction of their own laws, where we entertain any doubt, would be glad to be relieved from doubt and responsibility by reposing on their decision. There are, it is true, many dicta to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the State courts on the construction of their own laws. But although this may be correct, yet a rather strong expression of a general rule, it cannot be received as the annunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of a State, by its highest judicature established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it, without criticism or further inquiry. When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions; and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines subversive of former safe precedent."

These words, it appears to me, have a stronger application to the case before us than they had to the cause in which they were spoken as the opinion of this court; and I regret that they do not seem to be as fresh in the recollection of some of my brethren as in my own. For twenty-eight years, the decisions of the Supreme Court of Missouri were consistent on all the points made in this case. But this consistent course was suddenly terminated, whether by some new light suddenly springing up, or an excited public opinion, or both, it is not

necessary to say. In the case of Scott *v.* Emerson, in 1852, they were overturned and repudiated.

This, then, is the very case in which seven of my brethren declared they would not follow the last decision. On this authority I may well repose. I can desire no other or better basis.

But there is another ground which I deem conclusive, and which I will re-state.

The Supreme Court of Missouri refused to notice the act of Congress or the Constitution of Illinois, under which Dred Scott, his wife and children, claimed that they are entitled to freedom.

This being rejected by the Missouri court, there was no case before it, or least it was a case with only one side. And this is the case which, in the opinion of this court, we are bound to follow. The Missouri court disregards the express provisions of an act of Congress and the Constitution of a sovereign State, both of which laws for twenty-eight years it had not only regarded, but carried into effect.

If a State court may do this, on a question involving the liberty of a human being, what protection do the laws afford? So far from this being a Missouri question, it is a question, as it would seem, within the twenty-fifth section of the judiciary act, where a right to freedom being set up under the act of Congress, and the decision being against such right, it may be brought for revision before this court, from the Supreme Court of Missouri.

I think the judgment of the court below should be reversed.

Mr. Justice CURTIS dissenting.

I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case. The plaintiff alleged, in his declaration, that he was a citizen of the State of Missouri, and that the defendant was a citizen of the State of New York. It is not doubted that it was necessary to make each of these allegations, to sustain the jurisdiction of the Circuit Court. The defendant denied, by a plea to the jurisdiction, either sufficient or insufficient, that the plaintiff was a citizen of the State of Missouri. The plaintiff demurred to that plea. The Circuit Court adjudged the plea insufficient, and the first question for our consideration is, whether the sufficiency of that plea is before this court for judgment, upon this writ of error. The part of the judicial power of the United States, conferred by Congress on the Circuit Courts, being limited to certain described cases and controversies, the question whether a partic-

ular case is within the cognizance of a Circuit Court, may be raised by a plea to the jurisdiction of such court. When that question has been raised, the Circuit Court must, in the first instance, pass upon and determine it. Whether its determination be final, or subject to review by this appellate court, must depend upon the will of Congress; upon which body the Constitution has conferred the power, with certain restrictions, to establish inferior courts, to determine their jurisdiction, and to regulate the appellate power of this court. The twenty-second section of the judiciary act of 1789, which allows a writ of error from final judgments of Circuit Courts, provides that there shall be no reversal in this court, on such writ of error, for error in ruling any plea in abatement, *other than a plea to the jurisdiction of the court.* Accordingly it has been held, from the origin of the court to the present day, that Circuit Courts have not been made by Congress the final judges of their own jurisdiction in civil cases. And that when a record comes here upon a writ of error or appeal, and, on its inspection, it appears to this court that the Circuit Court had not jurisdiction, its judgment must be reversed, and the cause remanded, to be dismissed for want of jurisdiction.

It is alleged by the defendant in error, in this case, that the plea to the jurisdiction was a sufficient plea; that it shows, on inspection of its allegations, confessed by the demurrer, that the plaintiff was not a citizen of the State of Missouri; that upon this record, it must appear to this court that the case was not within the judicial power of the United States, as defined and granted by the Constitution, because it was not a suit by a citizen of one State against a citizen of another State.

To this it is answered, first, that the defendant, by pleading over, after the plea to the jurisdiction was adjudged insufficient, finally waived all benefit of that plea.

When that plea was adjudged insufficient, the defendant was obliged to answer over. He held no alternative. He could not stop the further progress of the case in the Circuit Court by a writ of error, on which the sufficiency of his plea to the jurisdiction could be tried in this court, because the judgment on that plea was not final, and no writ of error would lie. He was forced to plead to the merits. It cannot be true, then, that he waived the benefit of his plea to the jurisdiction by answering over. Waiver includes consent. Here, there was no consent. And if the benefit of the plea was finally lost, it must be, not by any waiver, but because the laws of the United States have not provided any mode of reviewing the decision of the Circuit Court on such a plea, when that decision is against the defendant. This is not the

law. Whether the decision of the Circuit Court on a plea to the jurisdiction be against the plaintiff, or against the defendant, the losing party may have any alleged error in law, in ruling such a plea, examined in this court on a writ of error, when the matter in controversy exceeds the sum or value of two thousand dollars. If the decision be against the plaintiff, and his suit dismissed for want of jurisdiction, the judgment is technically final, and he may at once sue out his writ of error. (Mollan *v.* Torrance, 9 Wheat., 537.) If the decision be against the defendant, though he must answer over, and wait for a final judgment in the cause, he may then have his writ of error, and upon it obtain the judgment of this court on any question of law apparent on the record, touching the jurisdiction. The fact that he pleaded over to the merits, under compulsion, can have no effect on his right to object to the jurisdiction. If this were not so, the condition of the two parties would be grossly unequal. For if a plea to the jurisdiction were ruled against the plaintiff, he could at once take his writ of error, and have the ruling reviewed here; while, if the same plea were ruled against the defendant, he must not only wait for a final judgment, but could in no event have the ruling of the Circuit Court upon the plea reviewed by this court. I know of no ground for saying that the laws of the United States have thus discriminated between the parties to a suit in its courts.

It is further objected, that as the judgment of the Circuit Court was in favor of the defendant, and the writ of error in this cause was sued out by the plaintiff, the defendant is not in a condition to assign any error in the record, and therefore this court is precluded from considering the question whether the Circuit Court had jurisdiction.

The practice of this court does not require a technical assignment of errors. (See the rule.) Upon a writ of error, the whole record is open for inspection; and if any error be found in it, the judgment is reversed. (Bank of U. S. *v.* Smith, 11 Wheat., 171.)

It is true, as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage. In this, we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts, that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage, if it were a departure by the court itself from its settled course of procedure. The cases on this subject are collected in Bac. Ab., Error H. 4. And this court followed this practice in Capron *v.* Van Noor-

den, (2 Cranch, 126,) where the plaintiff below procured the reversal of a judgment for the defendant, on the ground that the plaintiff's allegations of citizenship had not shown jurisdiction.

But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is, not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case to which the judicial power of the United States does not extend. The course of the court is, where no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown, negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even where it does not appear, affirmatively, that it does exist. (Pequignot *v.* The Pennsylvania R. R. Co., 16 How., 104.) It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. (Cutler *v.* Rae, 7 How., 729.) I consider, therefore, that when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this court is, *sua sponte*, if not moved to it by either party, to examine the sufficiency of that plea; and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power.

I proceed, therefore, to examine the plea to the jurisdiction.

I do not perceive any sound reason why it is not to be judged by the rules of the common law applicable to such pleas. It is true, where the jurisdiction of the Circuit Court depends on the citizenship of the parties, it is incumbent on the plaintiff to allege on the record the necessary citizenship; but when he has done so, the defendant must interpose a plea in abatement, the allegations whereof show that the court has not jurisdiction; and it is incumbent on him to prove the truth of his plea.

In Sheppard *v.* Graves, (14 How., 27,) the rules on this subject are thus stated in the opinion of the court: "That although in the courts of the United States, it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken, *prima facie*, as existing; and it is incumbent

on him who would impeach that jurisdiction for causes dehors the pleading, to allege and prove such causes; that the necessity for the allegation, and the burden of sustaining it by proof, both rest upon the party taking the exception." These positions are sustained by the authorities there cited, as well as by Wickliffe *v.* Owings, (17 How., 47.)

When, therefore, as in this case, the necessary averments as to citizenship are made on the record, and jurisdiction is assumed to exist, and the defendant comes by a plea to the jurisdiction to displace that presumption, he occupies, in my judgment, precisely the position described in Bacon Ab., Abatement: "Abatement, in the general acceptation of the word, signifies a plea, put in by the defendant, in which he shows cause to the court why he should not be impleaded; or, if at all, not in the manner and form he now is."

This being, then, a plea in abatement, to the jurisdiction of the court, I must judge of its sufficiency by those rules of the common law applicable to such pleas.

The plea was as follows: "And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action, and each and every of them, (if any such have accrued to the said Dred Scott,) accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri; for that, to wit, the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid."

The plaintiff demurred, and the judgment of the Circuit Court was, that the plea was insufficient.

I cannot treat this plea as a general traverse of the citizenship alleged by the plaintiff. Indeed, if it were so treated, the plea was clearly bad, for it concludes with a verification, and not to the country, as a general traverse should. And though this defect in a plea in bar must be pointed out by a special demurrer, it is never necessary to demur specially to a plea in abatement; all matters, though of form only, may be taken advantage of upon a general demurrer to such a plea. (Chitty on Pl., 465.)

The truth is, that though not drawn with the utmost technical accuracy, it is a special traverse of the plaintiff's allegation

of citizenship, and was a suitable and proper mode of traverse under the circumstances. By reference to Mr. Stephen's description of the uses of such a traverse, contained in his excellent analysis of pleadings, (Steph. on Pl., 176,) it will be seen how precisely this plea meets one of his descriptions. No doubt the defendant might have traversed, by a common or general traverse, the plaintiff's allegation that he was a citizen of the State of Missouri, concluding to the country. The issue thus presented being joined, would have involved matter of law, on which the jury must have passed, under the direction of the court. But by traversing the plaintiff's citizenship specially—that is, averring those facts on which the defendant relied to show that in point of law the plaintiff was not a citizen, and basing the traverse on those facts as a deduction therefrom—opportunity was given to do, what was done; that is, to present directly to the court, by a demurrer, the sufficiency of those facts to negative, in point of law, the plaintiff's allegation of citizenship. This, then, being a special, and not a general or common traverse, the rule is settled, that the facts thus set out in the plea, as the reason or ground of the traverse, must of themselves constitute, in point of law, a negative of the allegation thus traversed. (Stephen on Pl., 183; Ch. on Pl., 620.) And upon a demurrer to this plea, the question which arises is, whether the facts, that the plaintiff is a negro, of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as negro slaves, *may all be true, and yet* the plaintiff be a citizen of the State of Missouri, within the meaning of the Constitution and laws of the United States, which confer on citizens of one State the right to sue citizens of another State in the Circuit Courts. Undoubtedly, if these facts, taken together, amount to an allegation that, at the time of action brought, the plaintiff was himself a slave, the plea is sufficient. It has been suggested that the plea, in legal effect, does so aver, because, if his ancestors were sold as slaves, the presumption is they continued slaves; and if so, the presumption is, the plaintiff was born a slave; and if so, the presumption is, he continued to be a slave to the time of action brought.

I cannot think such presumptions can be resorted to, to help out defective averments in pleading; especially, in pleading in abatement, where the utmost certainty and precision are required. (Chitty on Pl., 457.) That the plaintiff himself was a slave at the time of action brought, is a substantive fact, having no necessary connection with the fact that his parents were sold as slaves. For they might have been sold after he was born; or the plaintiff himself, if once a slave, might have

became a freeman before action brought. To aver that his ancestors were sold as slaves, is not equivalent, in point of law, to an averment that he was a slave. If it were, he could not even confess and avoid the averment of the slavery of his ancestors, which would be monstrous; and if it be not equivalent in point of law, it cannot be treated as amounting thereto when demurred to; for a demurrer confesses only those substantive facts which are well pleaded, and not other distinct substantive facts which might be inferred therefrom by a jury. To treat an averment that the plaintiff's ancestors were Africans, brought to this country and sold as slaves, as amounting to an averment on the record that he was a slave, because it may lay some foundation for presuming so, is to hold that the facts actually alleged may be treated as intended as evidence of another distinct fact not alleged. But it is a cardinal rule of pleading, laid down in Dowman's case, (9 Rep., 9 b,) and in even earlier authorities therein referred to, "that evidence shall never be pleaded, for it only tends to prove matter of fact; and therefore the matter of fact shall be pleaded." Or, as the rule is sometimes stated, pleadings must not be argumentative. (Stephen on Pleading, 384, and authorities cited by him.) In Com. Dig., Pleader E. 3, and Bac. Abridgement, Pleas I, 5, and Stephen on Pl., many decisions under this rule are collected. In trover, for an indenture whereby A granted a manor, it is no plea that A did not grant the manor, for it does not answer the declaration except by argument. (Yelv., 223.)

So in trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods. The court said, "this is an infallible argument that the defendant is not guilty, but it is no plea." (Dyer, a 43.)

In ejectment, the defendant pleaded a surrender of a copyhold by the hand of Fosset, the steward. The plaintiff replied, that Fosset was not steward. The court held this no issue, for it traversed the surrender only argumentatively. (Cro. Elis., 260.)

In these cases, and many others reported in the books, the inferences from the facts stated were irresistible. But the court held they did not, when demurred to, amount to such inferable facts. In the case at bar, the inference that the defendant was a slave at the time of action brought, even if it can be made at all, from the fact that his parents were slaves, is certainly not a necessary inference. This case, therefore, is like that of Digby *v.* Alexander, (8 Bing., 116.) In that case, the defendant pleaded many facts strongly tending to show that he was once Earl of Stirling; but as there was no positive alle-

gation that he was so at the time of action brought, and as every fact averred might be true, and yet the defendant not have been Earl of Stirling at the time of action brought, the plea was held to be insufficient.

A lawful seizin of land is presumed to continue. But if, in an action of trespass *quare clausum*, the defendant were to plead that he was lawfully seized of the *locus in quo*, one month before the time of the alleged trespass, I should have no doubt it would be a bad plea. (See Mollan *v.* Torrance, 9 Wheat., 537.) So if a plea to the jurisdiction, instead of alleging that the plaintiff was a citizen of the same State as the defendant, were to allege that the plaintiff's ancestors were citizens of that State, I think the plea could not be supported. My judgment would be, as it is in this case, that if the defendant meant to aver a particular substantive fact, as existing at the time of action brought, he must do it directly and explicitly, and not by way of inference from certain other averments, which are quite consistent with the contrary hypothesis. I cannot, therefore, treat this plea as containing an averment that the plaintiff himself was a slave at the time of action brought; and the inquiry recurs, whether the facts, that he is of African descent, and that his parents were once slaves, are necessarily inconsistent with his own citizenship in the State of Missouri, within the meaning of the Constitution and laws of the United States.

In Gassies *v.* Ballon, (6 Pet., 761,) the defendant was described on the record as a naturalized citizen of the United States, residing in Louisiana. The court held this equivalent to an averment that the defendant was a citizen of Louisiana; because a citizen of the United States, residing in any State of the Union, is, for purposes of jurisdiction, a citizen of that State. Now, the plea to the jurisdiction in this case does not controvert the fact that the plaintiff resided in Missouri at the date of the writ. If he did then reside there, and was also a citizen of the United States, no provisions contained in the Constitution or laws of Missouri can deprive the plaintiff of his right to sue citizens of States other than Missouri, in the courts of the United States.

So that, under the allegations contained in this plea, and admitted by the demurrer, the question is, whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States. If any such person can be a citizen, this plaintiff has the right to the judgment of the court that he is so; for no cause is shown by the plea why he is not so, except his descent and the slavery of his ancestors.

The first section of the second article of the Constitution

uses the language, "a citizen of the United States at the time of the adoption of the Constitution." One mode of approaching this question is, to inquire who were citizens of the United States at the time of the adoption of the Constitution.

Citizens of the United States at the time of the adoption of the Constitution can have been no other than citizens of the United States under the Confederation. By the Articles of Confederation, a Government was organized, the style whereof was, "The United States of America." This Government was in existence when the Constitution was framed and proposed for adoption, and was to be superseded by the new Government of the United States of America, organized under the Constitution. When, therefore, the Constitution speaks of citizenship of the United States, existing at the time of the adoption of the Constitution, it must necessarily refer to citizenship under the Government which existed prior to and at the time of such adoption.

Without going into any question concerning the powers of the Confederation to govern the territory of the United States out of the limits of the States, and consequently to sustain the relation of Government and citizen in respect to the inhabitants of such territory, it may safely be said that the citizens of the several States were citizens of the United States under the Confederation.

That Government was simply a confederacy of the several States, possessing a few defined powers over subjects of general concern, each State retaining every power, jurisdiction, and right, not expressly delegated to the United States in Congress assembled. And no power was thus delegated to the Government of the Confederation, to act on any question of citizenship, or to make any rules in respect thereto. The whole matter was left to stand upon the action of the several States, and to the natural consequence of such action, that the citizens of each State should be citizens of that Confederacy into which that State had entered, the style whereof was, "The United States of America."

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New

York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

The Supreme Court of North Carolina, in the case of the State *v.* Manuel, (4 Dev. and Bat., 20,) has declared the law of that State on this subject, in terms which I believe to be as sound law in the other States I have enumerated, as it was in North Carolina.

"According to the laws of this State," says Judge Gaston, in delivering the opinion of the court, "all human beings within it, who are not slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman laws between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects—those born out of his allegiance were aliens. Slavery did not exist in England, but it did in the British colonies. Slaves were not in legal parlance persons, but property. The moment the incapacity, the disqualification of slavery, was removed, they became persons, and were then either British subjects, or not British subjects, according as they were or were not born within the allegiance of the British King. Upon the Revolution, no other change took place in the laws of North Carolina than was consequent on the transition from a colony dependent on a European King, to a free and sovereign State. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, remained aliens. Slaves, manumitted here, became freemen, and therefore, if born within North Carolina, are citizens of North Carolina, and all free persons born within the State are born citizens of the State. The Constitution extended the elective franchise to every freeman who had arrived at the age of twenty-one, and paid a public tax; and it is a matter of universal notoriety, that, under it, free persons, without regard to color, claimed and exercised the franchise, until it was taken from free men of color a few years since by our amended Constitution."

In the State *v.* Newcomb, (5 Iredell's R., 253,) decided in 1844, the same court referred to this case of the State *v.* Manuel, and said: "That case underwent a very laborious investigation, both by the bar and the bench. The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a control-

ling influence and authority on all questions of a similar character."

An argument from speculative premises, however well chosen, that the then state of opinion in the Commonwealth of Massachusetts was not consistent with the natural rights of people of color who were born on that soil, and that they were not, by the Constitution of 1780 of that State, admitted to the condition of citizens, would be received with surprise by the people of that State, who know their own political history. It is true, beyond all controversy, that persons of color, descended from African slaves, were by that Constitution made citizens of the State; and such of them as have had the necessary qualifications, have held and exercised the elective franchise, as citizens, from that time to the present. (See Com. *v.* Aves, 18 Pick. R., 210.)

The Constitution of New Hampshire conferred the elective franchise upon "every inhabitant of the State having the necessary qualifications," of which color or descent was not one.

The Constitution of New York gave the right to vote to "every male inhabitant, who shall have resided," &c.; making no discrimination between free colored persons and others. (See Con. of N. Y., Art. 2, Rev. Stats. of N. Y., vol. 1, p. 126.)

That of New Jersey, to "all inhabitants of this colony, of full age, who are worth £50 proclamation money, clear estate."

New York, by its Constitution of 1820, required colored persons to have some qualifications as prerequisites for voting, which white persons need not possess. And New Jersey, by its present Constitution, restricts the right to vote to white male citizens. But these changes can have no other effect upon the present inquiry, except to show, that before they were made, no such restrictions existed; and colored in common with white persons, were not only citizens of those States, but entitled to the elective franchise on the same qualifications as white persons, as they now are in New Hampshire and Massachusetts. I shall not enter into an examination of the existing opinions of that period respecting the African race, nor into any discussion concerning the meaning of those who asserted, in the Declaration of Independence, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. My own opinion is, that a calm comparison of these assertions of universal abstract truths, and of their own individual opinions and acts, would not leave

these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts. But this is not the place to vindicate their memory. As I conceive, we should deal here, not with such disputes, if there can be a dispute concerning this subject, but with those substantial facts evinced by the written Constitutions of States, and by the notorious practice under them. And they show, in a manner which no argument can obscure, that in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States.

The fourth of the fundamental articles of the Confederation was as follows: "The free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be entitled to all the privileges and immunities of free citizens in the several States."

The fact that free persons of color were citizens of some of the several States, and the consequence, that this fourth article of the Confederation would have the effect to confer on such persons the privileges and immunities of general citizenship, were not only known to those who framed and adopted those articles, but the evidence is decisive, that the fourth article was intended to have that effect, and that more restricted language, which would have excluded such persons, was deliberately and purposely rejected.

On the 25th of June, 1778, the Articles of Confederation being under consideration by the Congress, the delegates from South Carolina moved to amend this fourth article, by inserting after the word "free," and before the word "inhabitants," the word "white," so that the privileges and immunities of general citizenship would be secured only to white persons. Two States voted for the amendment, eight States against it, and the vote of one State was divided. The language of the article stood unchanged, and both by its terms of inclusion, "free inhabitants," and the strong implication from its terms of exclusion, "paupers, vagabonds, and fugitives from justice," who alone were excepted, it is clear, that under the Confederation, and at the time of the adoption of the Constitution, free colored persons of African descent might be, and, by reason of their citizenship in certain States, were entitled to the

privileges and immunities of general citizenship of the United States.

Did the Constitution of the United States deprive them or their descendants of citizenship?

That Constitution was ordained and established by the people of the United States, through the action, in each State, of those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of "the people of the United States," by whom the Constitution was ordained and established, but in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

I can find nothing in the Constitution which, *proprio vigore*, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its Constitution and laws. And my opinion is, that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.

I will proceed to state the grounds of that opinion.

The first section of the second article of the Constitution uses the language, "a natural-born citizen." It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth. At the Declaration of Independence, and ever since, the received general doctrine has been, in conformity with the common law, that free persons born within either of the colonies were subjects of the King; that by the Declaration of Independence, and the consequent acquisition of sovereignty by the several States, all such persons ceased to be subjects, and became citizens of the several States, except so far as some of them were disfranchised by the legislative power of the States, or availed themselves, seasonably, of the right to adhere to the British Crown in the civil contest,

and thus to continue British subjects. (McIlvain *v.* Coxe's Lessee, 4 Cranch, 209; Inglis *v.* Sailors' Snug Harbor, 3 Peters, p. 99; Shanks *v.* Dupont, Ibid, p. 242.)

The Constitution having recognised the rule that persons born within the several States are citizens of the United States, one of four things must be true:

First. That the Constitution itself has described what native-born persons shall or shall not be citizens of the United States; or,

Second. That it has empowered Congress to do so; or,

Third. That all free persons, born within the several States, are citizens of the United States; or,

Fourth. That it is left to each State to determine what free persons, born within its limits, shall be citizens of such State, and *thereby* be citizens of the United States.

If there be such a thing as citizenship of the United States acquired by birth within the States, which the Constitution expressly recognises, and no one denies, then these four alternatives embrace the entire subject, and it only remains to select that one which is true.

That the Constitution itself has defined citizenship of the United States by declaring what persons, born within the several States, shall or shall not be citizens of the United States, will not be pretended. It contains no such declaration. We may dismiss the first alternative, as without doubt unfounded.

Has it empowered Congress to enact what free persons, born within the several States, shall or shall not be citizens of the United States?

Before examining the various provisions of the Constitution which may relate to this question, it is important to consider for a moment the substantial nature of this inquiry. It is, in effect, whether the Constitution has empowered Congress to create privileged classes within the States, who alone can be entitled to the franchises and powers of citizenship of the United States. If it be admitted that the Constitution has enabled Congress to declare what free persons, born within the several States, shall be citizens of the United States, it must at the same time be admitted that it is an unlimited power. If this subject is within the control of Congress, it must depend wholly on its discretion. For, certainly, no limits of that discretion can be found in the Constitution, which is wholly silent concerning it; and the necessary consequence is, that the Federal Government may select classes of persons within the several States who alone can be entitled to the political privileges of citizenship of the United States. If this power exists, what persons born within the States may be President or Vice Pres-

ident of the United States, or members of either House of Congress, or hold any office or enjoy any privilege whereof citizenship of the United States is a necessary qualification, must depend solely on the will of Congress. By virtue of it, though Congress can grant no title of nobility, they may create an oligarchy, in whose hands would be concentrated the entire power of the Federal Government.

It is a substantive power, distinct in its nature from all others; capable of affecting not only the relations of the States to the General Government, but of controlling the political condition of the people of the United States. Certainly we ought to find this power granted by the Constitution, at least by some necessary inference, before we can say it does not remain to the States or the people. I proceed therefore to examine all the provisions of the Constitution which may have some bearing on this subject.

Among the powers expressly granted to Congress is "the power to establish a uniform rule of naturalization." It is not doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on foreign birth. To hold that it extends further than this, would do violence to the meaning of the term naturalization, fixed in the common law, (Co. Lit., 8 a, 129 a; 2 Ves., sen., 286; 2 Bl. Com., 293,) and in the minds of those who concurred in framing and adopting the Constitution. It was in this sense of conferring on an alien and his issue the rights and powers of a native-born citizen, that it was employed in the Declaration of Independence. It was in this sense it was expounded in the Federalist, (No. 42,) has been understood by Congress, by the Judiciary, (2 Wheat., 259, 269; 3 Wash. R., 313, 322; 12 Wheat., 277,) and by commentators on the Constitution. (3 Story's Com. on Con., 1—3; 1 Rawle on Con., 84—88; 1 Tucker's Bl. Com. App., 255—259.)

It appears, then, that the only power expressly granted to Congress to legislate concerning citizenship, is confined to the removal of the disabilities of foreign birth.

Whether there be anything in the Constitution from which a broader power may be implied, will best be seen when we come to examine the two other alternatives, which are, whether all free persons, born on the soil of the several States, or only such of them as may be citizens of each State, respectively, are thereby citizens of the United States. The last of these alternatives, in my judgment, contains the truth.

Undoubtedly, as has already been said, it is a principle of public law, recognised by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship. But it must be remembered, that though

the Constitution was to form a Government, and under it the United States of America were to be one united sovereign nation, to which loyalty and obedience on the one side, and from which protection and privileges on the other, would be due, yet the several sovereign States, whose people were then citizens, were not only to continue in existence, but with powers unimpaired, except so far as they were granted by the people to the National Government.

Among the powers unquestionably possessed by the several States, was that of determining what persons should and what persons should not be citizens. It was practicable to confer on the Government of the Union this entire power. It embraced what may, well enough for the purpose now in view, be divided into three parts. *First:* The power to remove the disabilities of alienage, either by special acts in reference to each individual case, or by establishing a rule of naturalization to be administered and applied by the courts. *Second:* Determining what persons should enjoy the privileges of citizenship, in respect to the internal affairs of the several States. *Third:* What native-born persons should be citizens of the United States.

The first-named power, that of establishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped. Construing a Constitution containing only limited and defined powers of government, the argument derived from this definite and restricted power to establish a rule of naturalization, must be admitted to be exceedingly strong. I do not say it is necessarily decisive. It might be controlled by other parts of the Constitution. But when this particular subject of citizenship was under consideration, and, in the clause specially intended to define the extent of power concerning it, we find a particular part of this entire power separated from the residue, and conferred on the General Government, there arises a strong presumption that this is all which is granted, and that the residue is left to the States and to the people. And this presumption is, in my opinion, converted into a certainty, by an examination of all such other clauses of the Constitution as touch this subject.

I will examine each which can have any possible bearing on this question.

The first clause of the second section of the third article of the Constitution is, "The judicial power shall extend to controversies between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States; and between States, or the citizens thereof, and foreign States,

citizens, or subjects." I do not think this clause has any considerable bearing upon the particular inquiry now under consideration. Its purpose was, to extend the judicial power to those controversies into which local feelings or interests might so enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill will between different States, or a particular State and a foreign nation. At the same time, I would remark, in passing, that it has never been held, I do not know that it has ever been supposed, that any citizen of a State could bring himself under this clause and the eleventh and twelfth sections of the judiciary act of 1789, passed in pursuance of it, who was not a citizen of the United States. But I have referred to the clause, only because it is one of the places where citizenship is mentioned by the Constitution. Whether it is entitled to any weight in this inquiry or not, it refers only to citizenship of the several States; it recognises that; but it does not recognise citizenship of the United States as something distinct therefrom.

As has been said, the purpose of this clause did not necessarily connect it with citizenship of the United States, even if that were something distinct from citizenship of the several States, in the contemplation of the Constitution. This cannot be said of other clauses of the Constitution, which I now proceed to refer to.

"The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." Nowhere else in the Constitution is there anything concerning a general citizenship; but here, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship, how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States, and, as such, the privileges and immunities of general citizenship, derived from and guarantied by the Constitution, are to be enjoyed by them. It would seem that if it had been intended to constitute a class of native-born persons within the States, who should derive their citizenship of the United States from the action of the Federal Government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States.

And if it was intended to secure these rights only to citizens of the United States, how has the Constitution here described such persons? Simply as citizens of each State.

But, further: though, as I shall presently more fully state, I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship under the American Constitutions; and the just and constitutional possession of this right is decisive evidence of citizenship. The provisions made by a Constitution on this subject must therefore be looked to as bearing directly on the question what persons are citizens under that Constitution; and as being decisive, to this extent, that all such persons as are allowed by the Constitution to exercise the elective franchise, and thus to participate in the Government of the United States, must be deemed citizens of the United States.

Here, again, the consideration presses itself upon us, that if there was designed to be a particular class of native-born persons within the States, deriving their citizenship from the Constitution and laws of the United States, they should at least have been referred to as those by whom the President and House of Representatives were to be elected, and to whom they should be responsible.

Instead of that, we again find this subject referred to the laws of the several States. The electors of President are to be appointed in such manner as the Legislature of each State may direct, and the qualifications of electors of members of the House of Representatives shall be the same as for electors of the most numerous branch of the State Legislature.

Laying aside, then, the case of aliens, concerning which the Constitution of the United States has provided, and confining our view to free persons born within the several States, we find that the Constitution has recognised the general principle of public law, that allegiance and citizenship depend on the place of birth; that it has not attempted practically to apply this principle by designating the particular classes of persons who should or should not come under it; that when we turn to the Constitution for an answer to the question, what free persons, born within the several States, are citizens of the United States, the only answer we can receive from any of its express provisions is, the citizens of the several States are to enjoy the privileges and immunities of citizens in every State, and their franchise as electors under the Constitution depends on their citizenship in the several States. Add to this, that the Constitution was ordained by the citizens of the several States; that they were "the people of the United States," for whom

and whose posterity the Government was declared in the preamble of the Constitution to be made; that each of them was "a citizen of the United States at the time of the adoption of the Constitution," within the meaning of those words in that instrument; that by them the Government was to be and was in fact organized; and that no power is conferred on the Government of the Union to discriminate between them, or to disfranchise any of them—the necessary conclusion is, that those persons born within the several States, who, by force of their respective Constitutions and laws, are citizens of the State, are thereby citizens of the United States.

It may be proper here to notice some supposed objections to this view of the subject.

It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.

Again, it has been objected, that if the Constitution has left to the several States the rightful power to determine who of their inhabitants shall be citizens of the United States, the States may make aliens citizens.

The answer is obvious. The Constitution has left to the States the determination what persons, born within their respective limits, shall acquire by birth citizenship of the United States; it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress.

It has been further objected, that if free colored persons, born within a particular State, and made citizens of that State by its Constitution and laws, are thereby made citizens of the United States, then, under the second section of the fourth article of the Constitution, such persons would be entitled to all the privileges and immunities of citizens in the several States; and if so, then colored persons could vote, and be

eligible to not only Federal offices, but offices even in those States whose Constitutions and laws disqualify colored persons from voting or being elected to office.

But this position rests upon an assumption which I deem untenable. Its basis is, that no one can be deemed a citizen of the United States who is not entitled to enjoy all the privileges and franchises which are conferred on any citizen. (See 1 Lit. Kentucky R., 326.) That this is not true, under the Constitution of the United States, seems to me clear.

A naturalized citizen cannot be President of the United States, nor a Senator till after the lapse of nine years, nor a Representative till after the lapse of seven years, from his naturalization. Yet, as soon as naturalized, he is certainly a citizen of the United States. Nor is any inhabitant of the District of Columbia, or of either of the Territories, eligible to the office of Senator or Representative in Congress, though they may be citizens of the United States. So, in all the States, numerous persons, though citizens, cannot vote, or cannot hold office, either on account of their age, or sex, or the want of the necessary legal qualifications. The truth is, that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided, is a question to be determined by each State, in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way.

One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States. Besides, this clause of the Constitution does not confer on the citizens of one State, in all other States, specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not to such as belong to particular citizens attended by other qualifications. Privileges and immunities which belong to certain citizens of a State, by reason of the operation of causes other than mere citizenship, are not conferred. Thus, if the laws of a State require, in addition to

citizenship of the State, some qualification for office, or the exercise of the elective franchise, citizens of all other States, coming thither to reside, and not possessing those qualifications, cannot enjoy those privileges, not because they are not to be deemed entitled to the privileges of citizens of the State in which they reside, but because they, in common with the native-born citizens of that State, must have the qualifications prescribed by law for the enjoyment of such privileges, under its Constitution and laws. It rests with the States themselves so to frame their Constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship. If one of the States will not deny to any of its own citizens a particular privilege or immunity, if it confer it on all of them by reason of mere naked citizenship, then it may be claimed by every citizen of each State by force of the Constitution; and it must be borne in mind, that the difficulties which attend the allowance of the claims of colored persons to be citizens of the United States are not avoided by saying that, though each State may make them its citizens, they are not thereby made citizens of the United States, because the privileges of general citizenship are secured to the citizens of each State. The language of the Constitution is, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." If each State may make such persons its citizens, they become, as such, entitled to the benefits of this article, if there be a native-born citizenship of the United States distinct from a native-born citizenship of the several States.

There is one view of this article entitled to consideration in this connection. It is manifestly copied from the fourth of the Articles of Confederation, with only slight changes of phraseology, which render its meaning more precise, and dropping the clause which excluded paupers, vagabonds, and fugitives from justice, probably because these cases could be dealt with under the police powers of the States, and a special provision therefor was not necessary. It has been suggested, that in adopting it into the Constitution, the words "free inhabitants" were changed for the word "citizens." An examination of the forms of expression commonly used in the State papers of that day, and an attention to the substance of this article of the Confederation, will show that the words "free inhabitants," as then used, were synonymous with citizens. When the Articles of Confederation were adopted, we were in the midst of the war of the Revolution, and there were very few persons then embraced in the words "free inhabitants," who were not born on our soil. It was not a time when many, save the

children of the soil, were willing to embark their fortunes in our cause; and though there might be an inaccuracy in the uses of words to call free inhabitants citizens, it was then a technical rather than a substantial difference. If we look into the Constitutions and State papers of that period, we find the inhabitants or people of these colonies, or the inhabitants of this State, or Commonwealth, employed to designate those whom we should now denominate citizens. The substance and purpose of the article prove it was in this sense it used these words: it secures to the free inhabitants of each State the privileges and immunities of free citizens in every State. It is not conceivable that the States should have agreed to extend the privileges of citizenship to persons not entitled to enjoy the privileges of citizens in the States where they dwelt; that under this article there was a class of persons in some of the States, not citizens, to whom were secured all the privileges and immunities of citizens when they went into other States; and the just conclusion is, that though the Constitution cured an inaccuracy of language, it left the substance of this article in the National Constitution the same as it was in the Articles of Confederation.

The history of this fourth article, respecting the attempt to exclude free persons of color from its operation, has been already stated. It is reasonable to conclude that this history was known to those who framed and adopted the Constitution. That under this fourth article of the Confederation, free persons of color might be entitled to the privileges of general citizenship, if otherwise entitled thereto, is clear. When this article was, in substance, placed in and made part of the Constitution of the United States, with no change in its language calculated to exclude free colored persons from the benefit of its provisions, the presumption is, to say the least, strong, that the practical effect which it was designed to have, and did have, under the former Government, it was designed to have, and should have, under the new Government.

It may be further objected, that if free colored persons may be citizens of the United States, it depends only on the will of a master whether he will emancipate his slave, and thereby make him a citizen. Not so. The master is subject to the will of the State. Whether he shall be allowed to emancipate his slave at all; if so, on what conditions; and what is to be the political *status* of the freed man, depend, not on the will of the master, but on the will of the State, upon which the political *status* of all its native-born inhabitants depends. Under the Constitution of the United States, each State has retained this power of determining the political *status* of its na-

tive-born inhabitants, and no exception thereto can be found in the Constitution. And if a master in a slaveholding State should carry his slave into a free State, and there emancipate him, he would not thereby make him a native-born citizen of that State, and consequently no privileges could be claimed by such emancipated slave as a citizen of the United States. For, whatever powers the States may exercise to confer privileges of citizenship on persons not born on their soil, the Constitution of the United States does not recognise such citizens. As has already been said, it recognises the great principle of public law, that allegiance and citizenship spring from the place of birth. It leaves to the States the application of that principle to individual cases. It secured to the citizens of each State the privileges and immunities of citizens in every other State. But it does not allow to the States the power to make aliens citizens, or permit one State to take persons born on the soil of another State, and, contrary to the laws and policy of the State where they were born, make them its citizens, and so citizens of the United States. No such deviation from the great rule of public law was contemplated by the Constitution; and when any such attempt shall be actually made, it is to be met by applying to it those rules of law and those principles of good faith which will be sufficient to decide it, and not, in my judgment, by denying that all the free native-born inhabitants of a State, who are its citizens under its Constitution and laws, are also citizens of the United States.

It has sometimes been urged that colored persons are shown not to be citizens of the United States by the fact that the naturalization laws apply only to white persons. But whether a person born in the United States be or be not a citizen, cannot depend on laws which refer only to aliens, and do not affect the *status* of persons born in the United States. The utmost effect which can be attributed to them is, to show that Congress has not deemed it expedient generally to apply the rule to colored aliens. That they might do so, if thought fit, is clear. The Constitution has not excluded them. And since that has conferred the power on Congress to naturalize colored aliens, it certainly shows color is not a necessary qualification for citizenship under the Constitution of the United States. It may be added, that the power to make colored persons citizens of the United States, under the Constitution, has been actually exercised in repeated and important instances. (See the Treaties with the Choctaws, of September 27, 1830, art. 14; with the Cherokees, of May 23, 1836, art. 12; Treaty of Guadalupe Hidalgo, February 2, 1848, art. 8.)

I do not deem it necessary to review at length the legisla-

tion of Congress having more or less bearing on the citizenship of colored persons. It does not seem to me to have any considerable tendency to prove that it has been considered by the legislative department of the Government, that no such persons are citizens of the United States. Undoubtedly they have been debarred from the exercise of particular rights or privileges extended to white persons, but, I believe, always in terms which, by implication, admit they may be citizens. Thus the act of May 17, 1792, for the organization of the militia, directs the enrolment of "every free, able-bodied, white male citizen." An assumption that none but white persons are citzens, would be as inconsistent with the just import of this language, as that all citizens are able-bodied, or males.

So the act of February 28, 1803, (2 Stat. at Large, 205,) to prevent the importation of certain persons into States, when by the laws thereof their admission is prohibited, in its first section forbids all masters of vessels to import or bring "any negro, mulatto, or other person of color, not being a native, *a citizen*, or registered seaman of the United States," &c.

The acts of March 3, 1813, section 1, (2 Stat. at Large, 809,) and March 1, 1817, section 3, (3 Stat. at Large, 351,) concerning seamen, certainly imply there may be persons of color, natives of the United States, who are not citizens of the United States. This implication is undoubtedly in accordance with the fact. For not only slaves, but free persons of color, born in some of the States, are not citizens. But there is nothing in these laws inconsistent with the citizenship of persons of color in others of the States, nor with their being citizens of the United States.

Whether much or little weight should be attached to the particular phraseology of these and other laws, which were not passed with any direct reference to this subject, I consider their tendency to be, as already indicated, to show that, in the apprehension of their framers, color was not a necessary qualification of citizenship. It would be strange, if laws were found on our statute book to that effect, when, by solemn treaties, large bodies of Mexican and North American Indians as well as free colored inhabitants of Louisiana have been admitted to citizenship of the United States.

In the legislative debates which preceded the admission of the State of Missouri into the Union, this question was agitated. Its result is found in the resolution of Congress, of March 5, 1821, for the admission of that State into the Union. The Constitution of Missouri, under which that State applied for admission into the Union, provided, that it should be the duty

of the Legislature "to pass laws to prevent free negroes and mulattoes from coming to and settling in the State, under any pretext whatever." One ground of objection to the admission of the State under this Constitution was, that it would require the Legislature to exclude free persons of color, who would be entitled, under the second section of the fourth article of the Constitution, not only to come within the State, but to enjoy there the privileges and immunities of citizens. The resolution of Congress admitting the State was upon the fundamental condition, "that the Constitution of Missouri shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen of either of the States of this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States." It is true, that neither this legislative declaration, nor anything in the Constitution or laws of Missouri, could confer or take away any privilege or immunity granted by the Constitution. But it is also true, that it expresses the then conviction of the legislative power of the United States, that free negroes, as citizens of some of the States, might be entitled to the privileges and immunities of citizens in all the States.

The conclusions at which I have arrived on this part of the case are:

First. That the free native-born citizens of each State are citizens of the United States.

Second. That as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States.

Third. That every such citizen, residing in any State, has the right to sue and is liable to be sued in the Federal courts, as a citizen of that State in which he resides.

Fourth. That as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States, and his residence in the State of Missouri, the plea to the jurisdiction was bad, and the judgment of the Circuit Court overruling it was correct.

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri compro-

mise act, and the grounds and conclusions announced in their opinion.

Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the Circuit Court, and having decided that this plea showed that the Circuit Court had not jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appeared on the trial before the court and jury, on the issues joined on the pleas in bar, and so have reached the question of the power of Congress to pass the act of 1820. On so grave a subject as this, I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the court, as described by its repeated decisions, and, as I understand, acknowledged in this opinion of the majority of the court.

In the course of that opinion, it became necessary to comment on the case of Legrand *v.* Darnall, (reported in 2 Peters's R., 664.) In that case, a bill was filed, by one alleged to be a citizen of Maryland, against one alleged to be a citizen of Pennsylvania. The bill stated that the defendant was the son of a white man by one of his slaves; and that the defendant's father devised to him certain lands, the title to which was put in controversy by the bill. These facts were admitted in the answer, and upon these and other facts the court made its decree, founded on the principle that a devise of land by a master to a slave was by implication also a bequest of his freedom. The facts that the defendant was of African descent, and was born a slave, were not only before the court, but entered into the entire substance of its inquiries. The opinion of the majority of my brethren in this case disposes of the case of Legrand *v.* Darnall, by saying, among other things, that as the fact that the defendant was born a slave only came before this court on the bill and answer, it was then too late to raise the question of the personal disability of the party, and therefore that decision is altogether inapplicable in this case.

In this I concur. Since the decision of this court in Livingston *v.* Story, (11 Pet., 351,) the law has been settled, that when the declaration or bill contains the necessary averments of citizenship, this court cannot look at the record, to see whether those averments are true, except so far as they are put in issue by a plea to the jurisdiction. In that case, the defendant denied by his answer that Mr. Livingston was a citizen of New York, as he had alleged in the bill. Both parties went into proofs. The court refused to examine those proofs, with reference to the personal disability of the plaintiff. This is the

settled law of the court, affirmed so lately as Shepherd *v.* Graves, (14 How., 27,) and Wickliff *v.* Owings, (17 How., 51.) (See also De Wolf *v.* Rabaud, 1 Pet., 476.) But I do not understand this to be a rule which the court may depart from at its pleasure. If it be a rule, it is as binding on the court as on the suitors. If it removes from the latter the power to take any objection to the personal disability of a party alleged by the record to be competent, which is not shown by a plea to the jurisdiction, it is because the court are forbidden by law to consider and decide on objections so taken. I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri, save that raised by the plea to the jurisdiction; and I do not hold any opinion of this court, or any court, binding, when expressed on a question not legitimately before it. (Carroll *v.* Carroll, 16 How., 275.) The judgment of this court is, that the case is to be dismissed for want of jurisdiction, because the plaintiff was not a citizen of Missouri, as he alleged in his declaration. Into that judgment, according to the settled course of this court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.

But as, in my opinion, the Circuit Court had jurisdiction, I am obliged to consider the question whether its judgment on the merits of the case should stand or be reversed.

The residence of the plaintiff in the State of Illinois, and the residence of himself and his wife in the territory acquired from France lying north of latitude thirty-six degrees thirty minutes, and north of the State of Missouri, are each relied on by the plaintiff in error. As the residence in the terrirory affects the plaintiff's wife and children as well as himself, I must inquire what was its effect.

The general question may be stated to be, whether the plaintiff's *status*, as a slave, was so changed by his residence within that territory, that he was not a slave in the State of Missouri, at the time this action was brought.

In such cases, two inquiries arise, which may be confounded, but should be kept distinct.

The first is, what was the law of the Territory into which the master and slave went, respecting the relation between them?

The second is, whether the State of Missouri recognises and allows the effect of that law of the Territory, on the *status* of the slave, on his return within its jurisdiction.

As to the first of these questions, the will of States and na-

tions, by whose municipal law slavery is not recognised, has been manifested in three different ways.

One is, absolutely to dissolve the relation, and terminate the rights of the master existing under the law of the country whence the parties came. This is said by Lord Stowell, in the case of the slave Grace, (2 Hag. Ad. R., 94,) and by the Supreme Court of Louisiana in the case of Maria Louise *v.* Marot, (9 Louis. R., 473,) to be the law of France; and it has been the law of several States of this Union, in respect to slaves introduced under certain conditions. (Wilson *v.* Isabel, 5 Call's R., 430; Hunter *v.* Hulcher, 1 Leigh, 172; Stewart *v.* Oaks, 5 Har. and John., 107.)

The second is, where the municipal law of a country not recognising slavery, it is the will of the State to refuse the master all aid to exercise any control over his slave; and if he attempt to do so, in a manner justifiable only by that relation, to prevent the exercise of that control. But no law exists, designed to operate directly on the relation of master and slave, and put an end to that relation. This is said by Lord Stowell, in the case above mentioned, to be the law of England, and by Mr. Chief Justice Shaw, in the case of the Commonwealth *v.* Aves, (18 Pick., 193,) to be the law of Massachusetts.

The third is, to make a distinction between the case of a master and his slave only temporarily in the country, *animo non manendi*, and those who are there to reside for permanent or indefinite purposes. This is said by Mr. Wheaton to be the law of Prussia, and was formerly the statute law of several States of our Union. It is necessary in this case to keep in view this distinction between those countries whose laws are designed to act directly on the *status* of a slave, and make him a freeman, and those where his master can obtain no aid from the laws to enforce his rights.

It is to the last case only that the authorities, out of Missouri, relied on by defendant, apply, when the residence in the non-slaveholding Territory was permanent. In the Commonwealth *v.* Aves, (18 Pick., 218,) Mr. Chief Justice Shaw said: "From the principle above stated, on which a slave brought here becomes free, to wit: that he becomes entitled to the protection of our laws, it would seem to follow, as a necessary conclusion, that if the slave waives the protection of those laws, and returns to the State where he is held as a slave, his condition is not changed." It was upon this ground, as is apparent from his whole reasoning, that Sir William Scott rests his opinion in the case of the slave Grace. To use one of his expressions, the effect of the law of England was to put the liberty of the slave into a parenthesis. If there had been an

act of Parliament declaring that a slave coming to England with his master should thereby be deemed no longer to be a slave, it is easy to see that the learned judge could not have arrived at the same conclusion. This distinction is very clearly stated and shown by President Tucker, in his opinion in the case of Betty *v.* Horton, (5 Leigh's Virginia R., 615.) (See also Hunter *v.* Fletcher, 1 Leigh's Va. R., 172; Maria Louise *v.* Marot, 9 Louisiana R.; Smith *v.* Smith, 13 Ib., 441; Thomas *v.* Genevieve, 16 Ib., 483; Rankin *v.* Lydia, 2 A. K. Marshall, 467; Davies *v.* Tingle, 8 B. Munroe, 539; Griffeth *v.* Fanny, Gilm. Va. R., 143; Lumford *v.* Coquillon, 14 Martin's La. R., 405; Josephine *v.* Poultney, 1 Louis. Ann. R., 329.)

But if the acts of Congress on this subject are valid, the law of the Territory of Wisconsin, within whose limits the residence of the plaintiff and his wife, and their marriage and the birth of one or both of their children, took place, falls under the first category, and is a law operating directly on the *status* of the slave. By the eighth section of the act of March 6, 1820, (3 Stat. at Large, 548,) it was enacted that, within this Territory, "slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited: *Provided, always*, that any person escaping into the same, from whom labor or service is lawfully claimed in any State or Territory of the United States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service, as aforesaid."

By the act of April 20, 1836, (4 Stat. at Large, 10,) passed in the same month and year of the removal of the plaintiff to Fort Snelling, this part of the territory ceded by France, where Fort Snelling is, together with so much of the territory of the United States east of the Mississippi as now constitutes the State of Wisconsin, was brought under a Territorial Government, under the name of the Territory of Wisconsin. By the eighteenth section of this act, it was enacted, "That the inhabitants of this Territory shall be entitled to and enjoy all and singular the rights, privileges, and advantages, granted and secured to the people of the Territory of the United States northwest of the river Ohio, by the articles of compact contained in the ordinance for the government of said Territory, passed on the 13th day of July, 1787; and shall be subject to all the restrictions and prohibitions in said articles of compact imposed upon the people of the said Territory." The sixth article of that compact is, "there shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in

the punishment of crimes, whereof the party shall have been duly convicted. *Provided, always*, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service, as aforesaid." By other provisions of this act establishing the Territory of Wisconsin, the laws of the United States, and the then existing laws of the State of Michigan, are extended over the Territory; the latter being subject to alteration and repeal by the legislative power of the Territory created by the act.

Fort Snelling was within the Territory of Wisconsin, and these laws were extended over it. The Indian title to that site for a military post had been acquired from the Sioux nation as early as September 23, 1805, (Am. State Papers, Indian Affairs, vol. 1, p. 744,) and until the erection of the Territorial Government, the persons at that post were governed by the rules and articles of war, and such laws of the United States, including the eighth section of the act of March 6, 1820, prohibiting slavery, as were applicable to their condition; but after the erection of the Territory, and the extension of the laws of the United States and the laws of Michigan over the whole of the Territory, including this military post, the persons residing there were under the dominion of those laws in all particulars to which the rules and articles of war did not apply.

It thus appears that, by these acts of Congress, not only was a general system of municipal law borrowed from the State of Michigan, which did not tolerate slavery, but it was positively enacted that slavery and involuntary servitude, with only one exception, specifically described, should not exist there. It is not simply that slavery is not recognised and cannot be aided by the municipal law. It is recognised for the purpose of being absolutely prohibited, and declared incapable of existing within the Territory, save in the instance of a fugitive slave.

It would not be easy for the Legislature to employ more explicit language to signify its will that the *status* of slavery should not exist within the Territory, than the words found in the act of 1820, and in the ordinance of 1787; and if any doubt could exist concerning their application to cases of masters coming into the Territory with their slaves to reside, that doubt must yield to the inference required by the words of exception. That exception is, of cases of fugitive slaves. An exception from a prohibition marks the extent of the prohibition; for it would be absurd, as well as useless, to except from a prohibi-

tion a case not contained within it. (9 Wheat., 200.) I must conclude, therefore, that it was the will of Congress that the state of involuntary servitude of a slave, coming into the Territory with his master, should cease to exist. The Supreme Court of Missouri so held in Rachel *v.* Walker, (4 Misso. R., 350,) which was the case of a military officer going into the Territory with two slaves.

But it is a distinct question, whether the law of Missouri recognised and allowed effect to the change wrought in the *status* of the plaintiff, by force of the laws of the Territory of Wisconsin.

I say the law of Missouri, because a judicial tribunal, in one State or nation, can recognise personal rights acquired by force of the law of any other State or nation, only so far as it is the law of the former State that those rights should be recognised. But, in the absence of positive law to the contrary, the will of every civilized State must be presumed to be to allow such effect to foreign laws as is in accordance with the settled rules of international law. And legal tribunals are bound to act on this presumption. It may be assumed that the motive of the State in allowing such operation to foreign laws is what has been termed comity. But, as has justly been said, (per Chief Justice Taney, 13 Pet., 589,) it is the comity of the State, not of the court. The judges have nothing to do with the motive of the State. Their duty is simply to ascertain and give effect to its will. And when it is found by them that its will to depart from a rule of international law has not been mainfested by the State, they are bound to assume that its will is to give effect to it. Undoubtedly, every sovereign State may refuse to recognise a change, wrought by the law of a foreign State, on the *status* of a person, while within such foreign State, even in cases where the rules of international law require that recognition. Its will to refuse such recognition may be manifested by what we term statute law, or by the customary law of the State. It is within the province of its judicial tribunals to inquire and adjudge whether it appears, from the statute or customary law of the State, to be the will of the State to refuse to recognise such changes of *status* by force of foreign law, as the rules of the law of nations require to be recognised. But, in my opinion, it is not within the province of any judicial tribunal to refuse such recognition from any political considerations, or any view it may take of the exterior political relations between the State and one or more foreign States, or any impressions it may have that a change of foreign opinion and action on the subject of slavery may afford a reason why the State should change its own action. To understand and give

just effect to such considerations, and to change the action of the State in consequence of them, are functions of diplomatists and legislators, not of judges.

The inquiry to be made on this part of the case is, therefore, whether the State of Missouri has, by its statute, or its customary law, manifested its will to displace any rule of international law, applicable to a change of the *status* of a slave, by foreign law.

I have not heard it suggested that there was any statute of the State of Missouri bearing on this question. The customary law of Missouri is the common law, introduced by statute in 1816. (1 Ter. Laws, 436.) And the common law, as Blackstone says, (4 Com., 67,) adopts, in its full extent, the law of nations, and holds it to be a part of the law of the land.

I know of no sufficient warrant for declaring that any rule of international law, concerning the recognition, in that State, of a change of *status*, wrought by an extra-territorial law, has been displaced or varied by the will of the State of Missouri.

I proceed then to inquire what the rules of international law prescribe concerning the change of *status* of the plaintiff wrought by the law of the Territory of Wisconsin.

It is generally agreed by writers upon international law, and the rule has been judicially applied in a great number of cases, that wherever any question may arise concerning the *status* of a person, it must be determined according to that law which has next previously rightfully operated on and fixed that *status*. And, further, that the laws of a country do not rightfully operate upon and fix the *status* of persons who are within its limits *in itinere*, or who are abiding there for definite temporary purposes, as for health, curiosity, or occasional business; that these laws, known to writers on public and private international law as personal statutes, operate only on the inhabitants of the country. Not that it is or can be denied that each independent nation may, if it thinks fit, apply them to all persons within their limits. But when this is done, not in conformity with the principles of international law, other States are not understood to be willing to recognise or allow effect to such applications of personal statutes.

It becomes necessary, therefore, to inquire whether the operation of the laws of the Territory of Wisconsin upon the *status* of the plaintiff was or was not such an operation as these principles of international law require other States to recognise and allow effect to.

And this renders it needful to attend to the particular facts and circumstances of this case.

It appears that this case came on for trial before the Circuit Court and a jury, upon an issue, in substance, whether the plaintiff, together with his wife and children, were the slaves of the defendant.

The court instructed the jury that, "upon the facts in this case, the law is with the defendant." This withdrew from the jury the consideration and decision of every matter of fact. The evidence in the case consisted of written admissions, signed by the counsel of the parties. If the case had been submitted to the judgment of the court, upon an agreed statement of facts, entered of record, in place of a special verdict, it would have been necessary for the court below, and for this court, to pronounce its judgment solely on those facts, thus agreed, without inferring any other facts therefrom. By the rules of the common law applicable to such a case, and by force of the seventh article of the amendments of the Constitution, this court is precluded from finding any fact not agreed to by the parties on the record. No submission to the court on a statement of facts was made. It was a trial by jury, in which certain admissions, made by the parties, were the evidence. The jury were not only competent, but were bound to draw from that evidence every inference which, in their judgment, exercised according to the rules of law, it would warrant. The Circuit Court took from the jury the power to draw any inferences from the admissions made by the parties, and decided the case for the defendant. This course can be justified here, if at all, only by its appearing that upon the facts agreed, and all such inferences of fact favorable to the plaintiff's case, as the jury might have been warranted in drawing from those admissions, the law was with the defendant. Otherwise, the plaintiff would be deprived of the benefit of his trial by jury, by whom, for aught we can know, those inferences favorable to his case would have been drawn.

The material facts agreed, bearing on this part of the case, are, that Dr. Emerson, the plaintiff's master, resided about two years at the military post of Fort Snelling, being a surgeon in the army of the United States, his domicil of origin being unknown; and what, if anything, he had done, to preserve or change his domicil prior to his residence at Rock Island, being also unknown.

Now, it is true, that under some circumstances the residence of a military officer at a particular place, in the discharge of his official duties, does not amount to the acquisition of a technical domicil. But it cannot be affirmed, with correctness, that it never does. There being actual residence, and this being presumptive evidence of domicil, all the circumstances

of the case must be considered, before a legal conclusion can be reached, that his place of residence is not his domicil. If a military officer stationed at a particular post should entertain an expectation that his residence there would be indefinitely protracted, and in consequence should remove his family to the place where his duties were to be discharged, form a permanent domestic establishment there, exercise there the civil rights and discharge the civil duties of an inhabitant, while he did no act and manifested no intent to have a domicil elsewhere, I think no one would say that the mere fact that he was himself liable to be called away by the orders of the Goverment would prevent his acquisition of a technical domicil at the place of the residence of himself and his family. In other words, I do not think a military officer incapable of acquiring a domicil. (Bruce *v.* Bruce, 2 Bos. and Pul., 230; Munroe *v.* Douglass, 5 Mad. Ch. R., 232.) This being so, this case stands thus: there was evidence before the jury that Emerson resided about two years at Fort Snelling, in the Territory of Wisconsin. This may or may not have been with such intent as to make it his technical domicil. The presumption is that it was. It is so laid down by this court, in Ennis *v.* Smith, (14 How.,) and the authorities in support of the position are there referred to. His intent was a question of fact for the jury. (Fitchburg *v.* Winchendon, 4 Cush., 190.)

The case was taken from the jury. If they had power to find that the presumption of the necessary intent had not been rebutted, we cannot say, on this record, that Emerson had not his technical domicil at Fort Snelling. But, for reasons which I shall now proceed to give, I do not deem it necessary in this case to determine the question of the technical domicil of Dr. Emerson.

It must be admitted that the inquiry whether the law of a particular country has rightfully fixed the *status* of a person, so that in accordance with the principles of international law that *status* should be recognised in other jurisdictions, ordinarily depends on the question whether the person was domiciled in the country whose laws are asserted to have fixed his *status.* But, in the United States, questions of this kind may arise, where an attempt to decide solely with reference to technical domicil, tested by the rules which are applicable to changes of places of abode from one country to another, would not be consistent with sound principles. And, in my judgment, this is one of those cases.

The residence of the plaintiff, who was taken by his master, Dr. Emerson, as a slave, from Missouri to the State of Illinois, and thence to the Territory of Wisconsin, must be deemed to

have been for the time being, and until he asserted his own separate intention, the same as the residence of his master; and the inquiry, whether the personal statutes of the Territory were rightfully extended over the plaintiff, and ought, in accordance with the rules of international law, to be allowed to fix his *status*, must depend upon the circumstances under which Dr. Emerson went into that Territory, and remained there; and upon the further question, whether anything was there rightfully done by the plaintiff to cause those personal statutes to operate on him.

Dr. Emerson was an officer in the army of the United States. He went into the Territory to discharge his duty to the United States. The place was out of the jurisdiction of any particular State, and within the exclusive jurisdiction of the United States. It does not appear where the domicil of origin of Dr. Emerson was, nor whether or not he had lost it, and gained another domicil, nor of what particular State, if any, he was a citizen.

On what ground can it be denied that all valid laws of the United States, constitutionally enacted by Congress for the government of the Territory, rightfully extended over an officer of the United States and his servant who went into the Territory to remain there for an indefinite length of time, to take part in its civil or military affairs? They were not foreigners, coming from abroad. Dr. Emerson was a citizen of the country which had exclusive jurisdiction over the Territory; and not only a citizen, but he went there in a public capacity, in the service of the same sovereignty which made the laws. Whatever those laws might be, whether of the kind denominated personal statutes, or not, so far as they were intended by the legislative will, constitutionally expressed, to operate on him and his servant, and on the relations between them, they had a rightful operation, and no other State or country can refuse to allow that those laws might rightfully operate on the plaintiff and his servant, because such a refusal would be a denial that the United States could, by laws constitutionally enacted, govern their own servants, residing on their own Territory, over which the United States had the exclusive control, and in respect to which they are an independent sovereign power. Whether the laws now in question were constitutionally enacted, I repeat once more, is a separate question. But, assuming that they were, and that they operated directly on the *status* of the plaintiff, I consider that no other State or country could question the rightful power of the United States so to legislate, or, consistently with the settled rules of international law, could refuse to recognise the effects

of such legislation upon the *status* of their officers and servants, as valid everywhere.

This alone would, in my apprehension, be sufficient to decide this question.

But there are other facts stated on the record which should not be passed over. It is agreed that, in the year 1836, the plaintiff, while residing in the Territory, was married, with the consent of Dr. Emerson, to Harriet, named in the declaration as his wife, and that Eliza and Lizzie were the children of that marriage, the first named having been born on the Mississippi river, north of the line of Missouri, and the other having been born after their return to Missouri. And the inquiry is, whether, after the marriage of the plaintiff in the Territory, with the consent of Dr. Emerson, any other State or country can, consistently with the settled rules of international law, refuse to recognise and treat him as a free man, when suing for the liberty of himself, his wife, and the children of that marriage. It is in reference to his *status*, as viewed in other States and countries, that the contract of marriage and the birth of children becomes strictly material. At the same time, it is proper to observe that the female to whom he was married having been taken to the same military post of Fort Snelling as a slave, and Dr. Emerson claiming also to be her master at the time of her marriage, her *status*, and that of the children of the marriage, are also affected by the same considerations.

If the laws of Congress governing the Territory of Wisconsin were constitutional and valid laws, there can be no doubt these parties were capable of contracting a lawful marriage, attended with all the usual civil rights and obligations of that condition. In that Territory they were absolutely free persons, having full capacity to enter into the civil contract of marriage.

It is a principle of international law, settled beyond controversy in England and America, that a marriage, valid by the law of the place where it was contracted, and not in fraud of the law of any other place, is valid everywhere; and that no technical domicil at the place of the contract is necessary to make it so. (See Bishop on Mar. and Div., 125—129, where the cases are collected.)

If, in Missouri, the plaintiff were held to be a slave, the validity and operation of his contract of marriage must be denied. He can have no legal rights; of course, not those of a husband and father. And the same is true of his wife and children. The denial of his rights is the denial of theirs. So that, though lawfully married in the Territory, when they came out of it, into the State of Missouri, they were no longer

husband and wife; and a child of that lawful marriage, though born under the same dominion where its parents contracted a lawful marriage, is not the fruit of that marriage, nor the child of its father, but subject to the maxim, *partus sequitur ventrem.*

It must be borne in mind that in this case there is no ground for the inquiry, whether it be the will of the State of Missouri not to recognise the validity of the marriage of a fugitive slave, who escapes into a State or country where slavery is not allowed, and there contracts a marriage; or the validity of such a marriage, where the master, being a citizen of the State of Missouri, voluntarily goes with his slave, *in itinere*, into a State or country which does not permit slavery to exist, and the slave there contracts marriage without the consent of his master; for in this case, it is agreed, Dr. Emerson did consent; and no further question can arise concerning his rights, so far as their assertion is inconsistent with the validity of the marriage. Nor do I know of any ground for the assertion that this marriage was in fraud of any law of Missouri. It has been held by this court, that a bequest of property by a master to his slave, by necessary implication entitles the slave to his freedom; because, only as a freeman could he take and hold the bequest. (Legrand *v.* Darnall, 2 Pet. R., 664.) It has also been held, that when a master goes with his slave to reside for an indefinite period in a State where slavery is not tolerated, this operates as an act of manumission; because it is sufficiently expressive of the consent of the master that the slave should be free. (2 Marshall's Ken. R., 470; 14 Martin's Louis. R., 401.)

What, then, shall we say of the consent of the master, that the slave may contract a lawful marriage, attended with all the civil rights and duties which belong to that relation; that he may enter into a relation which none but a free man can assume—a relation which involves not only the rights and duties of the slave, but those of the other party to the contract, and of their descendants to the remotest generation? In my judgment, there can be no more effectual abandonment of the legal rights of a master over his slave, than by the consent of the master that the slave should enter into a contract of marriage, in a free State, attended by all the civil rights and obligations which belong to that condition.

And any claim by Dr. Emerson, or any one claiming under him, the effect of which is to deny the validity of this marriage, and the lawful paternity of the children born from it, wherever asserted, is, in my judgment, a claim inconsistent with good faith and sound reason, as well as with the rules of international law. And I go further: in my opinion, a law of the State

of Missouri, which should thus annul a marriage, lawfully contracted by these parties while resident in Wisconsin, not in fraud of any law of Missouri, or of any right of Dr. Emerson, who consented thereto, would be a law impairing the obligation of a contract, and within the prohibition of the Constitution of the United States. (See 4 Wheat., 629, 695, 696.)

To avoid misapprehension on this important and difficult subject, I will state, distinctly, the conclusions at which I have arrived. They are:

First. The rules of international law respecting the emancipation of slaves, by the rightful operation of the laws of another State or country upon the *status* of the slave, while resident in such foreign State or country, are part of the common law of Missouri, and have not been abrogated by any statute law of that State.

Second. The laws of the United States, constitutionally enacted, which operated directly on and changed the *status* of a slave coming into the Territory of Wisconsin with his master, who went thither to reside for an indefinite length of time, in the performance of his duties as an officer of the United States, had a rightful operation on the *status* of the slave, and it is in conformity with the rules of international law that this change of *status* should be recognised everywhere.

Third. The laws of the United States, in operation in the Territory of Wisconsin at the time of the plaintiff's residence there, did act directly on the *status* of the plaintiff, and change his *status* to that of a free man.

Fourth. The plaintiff and his wife were capable of contracting, and, with the consent of Dr. Emerson, did contract a marriage in that Territory, valid under its laws; and the validity of this marriage cannot be questioned in Missouri, save by showing that it was in fraud of the laws of that State, or of some right derived from them; which cannot be shown in this case, because the master consented to it.

Fifth. That the consent of the master that his slave, residing in a country which does not tolerate slavery, may enter into a lawful contract of marriage, attended with the civil rights and duties which belong to that condition, is an effectual act of emancipation. And the law does not enable Dr. Emerson, or any one claiming under him, to assert a title to the married persons as slaves, and thus destroy the obligation of the contract of marriage, and bastardize their issue, and reduce them to slavery.

But it is insisted that the Supreme Court of Missouri has settled this case by its decision in Scott *v.* Emerson, (15 Missouri Reports, 576;) and that this decision is in conformity

with the weight of authority elsewhere, and with sound principles. If the Supreme Court of Missouri had placed its decision on the ground that it appeared Dr. Emerson never became domiciled in the Territory, and so its laws could not rightfully operate on him and his slave; and the facts that he went there to reside indefinitely, as an officer of the United States, and that the plaintiff was lawfully married there, with Dr. Emerson's consent, were left out of view, the decision would find support in other cases, and I might not be prepared to deny its correctness. But the decision is not rested on this ground. The domicil of Dr. Emerson in that Territory is not questioned in that decision; and it is placed on a broad denial of the operation, in Missouri, of the law of any foreign State or country upon the *status* of a slave, going with his master from Missouri into such foreign State or country, even though they went thither to become, and actually became, permanent inhabitants of such foreign State or country, the laws whereof acted directly on the *status* of the slave, and changed his *status* to that of a freeman.

To the correctness of such a decision I cannot assent. In my judgment, the opinion of the majority of the court in that case is in conflict with its previous decisions, with a great weight of judicial authority in other slaveholding States, and with fundamental principles of private international law. Mr. Chief Justice Gamble, in his dissenting opinion in that case, said:

"I regard the question as conclusively settled by repeated adjudications of this court; and if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them, than I would any other series of decisions by which the law upon any other question had been settled. There is with me nothing in the law of slavery which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary excitements which have gathered around it. * * * * * * But in the midst of all such excitement, it is proper that the judicial mind, calm and self-balanced, should adhere to principles established when there was no feeling to disturb the view of the legal questions upon which the rights of parties depend."

"In this State, it has been recognised from the beginning of the Government as a correct position in law, that the master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave." (Winney *v.* Whitesides, 1 Mo., 473; Le Grange *v.* Chouteau, 2 Mo., 20; Milley *v.* Smith, Ib., 36; Ralph *v.* Duncan, 3 Mo., 194; Julia *v.* McKinney, Ib., 270; Nat *v.* Ruddle, Ib., 400; Rachel *v.* Walker, 4 Mo., 350; Wilson *v.* Melvin, 592.)

Chief Justice Gamble has also examined the decisions of the courts of other States in which slavery is established, and finds them in accordance with these preceding decisions of the Supreme Court of Missouri to which he refers.

It would be a useless parade of learning for me to go over the ground which he has so fully and ably occupied.

But it is further insisted we are bound to follow this decision. I do not think so. In this case, it is to be determined what laws of the United States were in operation in the Territory of Wisconsin, and what was their effect on the *status* of the plaintiff. Could the plaintiff contract a lawful marriage there? Does any law of the State of Missouri impair the obligation of that contract of marriage, destroy his rights as a husband, bastardize the issue of the marriage, and reduce them to a state of slavery?

These questions, which arise exclusively under the Constitution and laws of the United States, this court, under the Constitution and laws of the United States, has the rightful authority finally to decide. And if we look beyond these questions, we come to the consideration whether the rules of international law, which are part of the laws of Missouri until displaced by some statute not alleged to exist, do or do not require the *status* of the plaintiff, as fixed by the laws of the Territory of Wisconsin, to be recognised in Missouri. Upon such a question, not depending on any statute or local usage, but on principles of universal jurisprudence, this court has repeatedly asserted it could not hold itself bound by the decisions of State courts, however great respect might be felt for their learning, ability, and impartiality. (See Swift *v.* Tyson, 16 Peters's R., 1; Carpenter *v.* The Providence Ins. Co., Ib., 495; Foxcroft *v.* Mallet, 4 How., 353; Rowan *v.* Runnels, 5 How., 134.)

Some reliance has been placed on the fact that the decision in the Supreme Court of Missouri was between these parties, and the suit there was abandoned to obtain another trial in the courts of the United States.

In Homer *v.* Brown, (16 How., 354,) this court made a decision upon the construction of a devise of lands, in direct opposition to the unanimous opinion of the Supreme Court of Massachusetts, between the same parties, respecting the same subject-matter—the claimant having become nonsuit in the State court, in order to bring his action in the Circuit Court of the United States. I did not sit in that case, having been of counsel for one of the parties while at the bar; but, on examining the report of the argument of the counsel for the plaintiff in error, I find they made the point, that this court ought to give effect to the construction put upon the will by the State

court, to the end that rights respecting lands may be governed by one law, and that the law of the place where the lands are situated; that they referred to the State decision of the case, reported in 3 Cushing, 390, and to many decisions of this court. But this court does not seem to have considered the point of sufficient importance to notice it in their opinions. In Millar *v.* Austin, (13 How., 218,) an action was brought by the endorsee of a written promise. The question was, whether it was negotiable under a statute of Ohio. The Supreme Court of that State having decided it was not negotiable, the plaintiff became nonsuit, and brought his action in the Circuit Court of the United States. The decision of the Supreme Court of the State, reported in 4 Ves., L. J., 527, was relied on. This court unanimously held the paper to be negotiable.

When the decisions of the highest court of a State are directly in conflict with each other, it has been repeatedly held, here, that the last decision is not necessarily to be taken as the rule. (State Bank *v.* Knoop, 16 How., 369; Pease *v.* Peck, 18 How., 599.)

To these considerations I desire to add, that it was not made known to the Supreme Court of Missouri, so far as appears, that the plaintiff was married in Wisconsin with the consent of Dr. Emerson, and it is not made known to us that Dr. Emerson was a citizen of Missouri, a fact to which that court seem to have attached much importance.

Sitting here to administer the law between these parties, I do not feel at liberty to surrender my own convictions of what the law requires, to the authority of the decision in 15 Missouri Reports.

I have thus far assumed, merely for the purpose of the argument, that the laws of the United States, respecting slavery in this Territory, were constitutionally enacted by Congress. It remains to inquire whether they are constitutional and binding laws.

In the argument of this part of the case at bar, it was justly considered by all the counsel to be necessary to ascertain the source of the power of Congress over the territory belonging to the United States. Until this is ascertained, it is not possible to determine the extent of that power. On the one side it was maintained that the Constitution contains no express grant of power to organize and govern what is now known to the laws of the United States as a Territory. That whatever power of this kind exists, is derived by implication from the capacity of the United States to hold and acquire territory out of the limits of any State, and the necessity for its having some government.

On the other side, it was insisted that the Constitution has not failed to make an express provision for this end, and that it is found in the third section of the fourth article of the Constitution.

To determine which of these is the correct view, it is needful to advert to some facts respecting this subject, which existed when the Constitution was framed and adopted. It will be found that these facts not only shed much light on the question, whether the framers of the Constitution omitted to make a provision concerning the power of Congress to organize and govern Territories, but they will also aid in the construction of any provision which may have been made respecting this subject.

Under the Confederation, the unsettled territory within the limits of the United States had been a subject of deep interest. Some of the States insisted that these lands were within their chartered boundaries, and that they had succeeded to the title of the Crown to the soil. On the other hand, it was argued that the vacant lands had been acquired by the United States, by the war carried on by them under a common Government and for the common interest.

This dispute was further complicated by unsettled questions of boundary among several States. It not only delayed the accession of Maryland to the Confederation, but at one time seriously threatened its existence. (5 Jour. of Cong., 208, 442.) Under the pressure of these circumstances, Congress earnestly recommended to the several States a cession of their claims and rights to the United States. (5 Jour. of Cong., 442.) And before the Constitution was framed, it had been begun. That by New York had been made on the 1st day of March, 1781; that of Virginia on the 1st day of March, 1784; that of Massachusetts on the 19th day of April, 1785; that of Connecticut on the 14th day of September, 1786; that of South Carolina on the 8th day of August, 1787, while the Convention for framing the Constitution was in session.

It is very material to observe, in this connection, that each of these acts cedes, in terms, to the United States, as well the jurisdiction as the soil.

It is also equally important to note that, when the Constitution was framed and adopted, this plan of vesting in the United States, for the common good, the great tracts of ungranted lands claimed by the several States, in which so deep an interest was felt, was yet incomplete. It remained for North Carolina and Georgia to cede their extensive and valuable claims. These were made, by North Carolina on the 25th day of February, 1790, and by Georgia on the 24th day of April,

1802. The terms of these last-mentioned cessions will hereafter be noticed in another connection; but I observe here that each of them distinctly shows, upon its face, that they were not only in execution of the general plan proposed by the Congress of the Confederation, but of a formed purpose of each of these States, existing when the assent of their respective people was given to the Constitution of the United States.

It appears, then, that when the Federal Constitution was framed, and presented to the people of the several States for their consideration, the unsettled territory was viewed as justly applicable to the common benefit, so far as it then had or might attain thereafter a pecuniary value; and so far as it might become the seat of new States, to be admitted into the Union upon an equal footing with the original States. And also that the relations of the United States to that unsettled territory were of different kinds. The titles of the States of New York, Virginia, Massachusetts, Connecticut, and South Carolina, as well of soil as of jurisdiction, had been transferred to the United States. North Carolina and Georgia had not actually made transfers, but a confident expectation, founded on their appreciation of the justice of the general claim, and fully justified by the results, was entertained, that these cessions would be made. The ordinance of 1787 had made provision for the temporary government of so much of the territory actually ceded as lay northwest of the river Ohio.

But it must have been apparent, both to the framers of the Constitution and the people of the several States who were to act upon it, that the Government thus provided for could not continue, unless the Constitution should confer on the United States the necessary powers to continue it. That temporary Government, under the ordinance, was to consist of certain officers, to be appointed by and responsible to the Congress of the Confederation; their powers had been conferred and defined by the ordinance. So far as it provided for the temporary government of the Territory, it was an ordinary act of legislation, deriving its force from the legislative power of Congress, and depending for its vitality upon the continuance of that legislative power. But the officers to be appointed for the Northwestern Territory, after the adoption of the Constitution, must necessarily be officers of the United States, and not of the Congress of the Confederation; appointed and commissioned by the President, and exercising powers derived from the United States under the Constitution.

Such was the relation between the United States and the Northwestern Territory, which all reflecting men must have foreseen would exist, when the Government created by the

Constitution should supersede that of the Confederation. That if the new Government should be without power to govern this Territory, it could not appoint and commission officers, and send them into the Territory, to exercise there legislative, judicial, and executive power; and that this Territory, which was even then foreseen to be so important, both politically and financially, to all the existing States, must be left not only without the control of the General Government, in respect to its future political relations to the rest of the States, but absolutely without any Government, save what its inhabitants, acting in their primary capacity, might from time to time create for themselves.

But this Northwestern Territory was not the only territory, the soil and jurisdiction whereof were then understood to have been ceded to the United States. The cession by South Carolina, made in August, 1787, was of "all the territory included within the river Mississippi, and a line beginning at that part of the said river which is intersected by the southern boundary 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 the Tugaloo river, to the said mountains; and thence to run a due west course to the river Mississippi."

It is true that by subsequent explorations it was ascertained that the source of the Tugaloo river, upon which the title of South Carolina depended, was so far to the northward, that the transfer conveyed only a narrow slip of land, about twelve miles wide, lying on the top of the ridge of mountains, and extending from the northern boundary of Georgia to the southern boundary of North Carolina. But this was a discovery made long after the cession, and there can be no doubt that the State of South Carolina, in making the cession, and the Congress in accepting it, viewed it as a transfer to the United States of the soil and jurisdiction of an extensive and important part of the unsettled territory ceded by the Crown of Great Britain by the treaty of peace, though its quantity or extent then remained to be ascertained.*

It must be remembered also, as has been already stated, that not only was there a confident expectation entertained by the

* *Note by Mr. Justice Curtis.* This statement that *some* territory did actually pass by this cession, is taken from the opinion of the court, delivered by Mr. Justice Wayne, in the case of Howard *v.* Ingersoll, reported in 13 How., 405. It is an obscure matter, and, on some examination of it, I have been led to doubt whether any territory actually passed by this cession. But as the fact is not important to the argument, I have not thought it necessary further to investigate it.

other States, that North Carolina and Georgia would complete the plan already so far executed by New York, Virginia, Massachusetts, Connecticut, and South Carolina, but that the opinion was in no small degree prevalent, that the just title to this "back country," as it was termed, had vested in the United States by the treaty of peace, and could not rightfully be claimed by any individual State.

There is another consideration applicable to this part of the subject, and entitled, in my judgment, to great weight.

The Congress of the Confederation had assumed the power not only to dispose of the lands ceded, but to institute Governments and make laws for their inhabitants. In other words, they had proceeded to act under the cession, which, as we have seen, was as well of the jurisdiction as of the soil. This ordinance was passed on the 13th of July, 1787. The Convention for framing the Constitution was then in session at Philadelphia. The proof is direct and decisive, that it was known to the Convention.* It is equally clear that it was admitted and understood not to be within the legitimate powers of the Confederation to pass this ordinance. (Jefferson's Works, vol. 9, pp. 251, 276; Federalist, Nos. 38, 43.)

The importance of conferring on the new Government regular powers commensurate with the objects to be attained, and thus avoiding the alternative of a failure to execute the trust assumed by the acceptance of the cessions made and expected, or its execution by usurpation, could scarcely fail to be perceived. That it was in fact perceived, is clearly shown by the Federalist, (No. 38,) where this very argument is made use of in commendation of the Constitution.

Keeping these facts in view, it may confidently be asserted that there is very strong reason to believe, before we examine the Constitution itself, that the necessity for a competent grant of power to hold, dispose of, and govern territory, ceded and expected to be ceded, could not have escaped the attention of those who framed or adopted the Constitution; and that if it did not escape their attention, it could not fail to be adequately provided for.

Any other conclusion would involve the assumption that a subject of the gravest national concern, respecting which the small States felt so much jealousy that it had been almost an insurmountable obstacle to the formation of the Confederation, and as to which all the States had deep pecuniary and political interests, and which had been so recently and constantly agita-

* It was published in a newspaper at Philadelphia, in May, and a copy of it was sent by R. H. Lee to Gen. Washington, on the 15th of July. (See p. 261, Cor. of Am. Rev., vol. 4, and Writings of Washington, vol. 9, p. 174.)

ted, was nevertheless overlooked; or that such a subject was not overlooked, but designedly left unprovided for, though it was manifestly a subject of common concern, which belonged to the care of the General Government, and adequate provision for which could not fail to be deemed necessary and proper.

The admission of new States, to be framed out of the ceded territory, early attracted the attention of the Convention. Among the resolutions introduced by Mr. Randolph, on the 29th of May, was one on this subject, (Res. No. 10, 5 Elliot, 128,) which, having been affirmed in Committee of the Whole, on the 5th of June, (5 Elliot, 156,) and reported to the Convention on the 13th of June, (5 Elliot, 190,) was referred to the Committee of Detail, to prepare the Constitution, on the 26th of July, (5 Elliot, 376.) This committee reported an article for the admission of new States "lawfully constituted or established." Nothing was said concerning the power of Congress to prepare or form such States. This omission struck Mr. Madison, who, on the 18th of August, (5 Elliot, 439,) moved for the insertion of power to dispose of the unappropriated lands of the United States, and to institute temporary Governments for new States arising therein.

On the 29th of August, (5 Elliot, 492,) the report of the committee was taken up, and after debate, which exhibited great diversity of views concerning the proper mode of providing for the subject, arising out of the supposed diversity of interests of the large and small States, and between those which had and those which had not unsettled territory, but no difference of opinion respecting the propriety and necessity of some adequate provision for the subject, Gouverneur Morris moved the clause as it stands in the Constitution. This met with general approbation, and was at once adopted. The whole section is as follows:

"New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of Congress.

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State."

That Congress has some power to institute temporary Governments over the territory, I believe all agree; and, if it be admitted that the necessity of some power to govern the terri-

tory of the United States could not and did not escape the attention of the Convention and the people, and that the necessity is so great, that, in the absence of any express grant, it is strong enough to raise an implication of the existence of that power, it would seem to follow that it is also strong enough to afford material aid in construing an express grant of power respecting that territory; and that they who maintain the existence of the power, without finding any words at all in which it is conveyed, should be willing to receive a reasonable interpretation of language of the Constitution, manifestly intended to relate to the territory, and to convey to Congress some authority concerning it.

It would seem, also, that when we find the subject-matter of the growth and formation and admission of new States, and the disposal of the territory for these ends, were under consideration, and that some provision therefor was expressly made, it is improbable that it would be, in its terms, a grossly inadequate provision; and that an indispensably necessary power to institute temporary Governments, and to legislate for the inhabitants of the territory, was passed silently by, and left to be deduced from the necessity of the case.

In the argument at the bar, great attention has been paid to the meaning of the word "territory."

Ordinarily, when the territory of a sovereign power is spoken of, it refers to that tract of country which is under the political jurisdistion of that sovereign power. Thus Chief Justice Marshall (in United States *v.* Bevans, 3 Wheat., 386) says: "What, then, is the extent of jurisdiction which a State possesses? We answer, without hesitation, the jurisdiction of a State is coextensive with its territory." Examples might easily be multiplied of this use of the word, but they are unnecessary, because it is familiar. But the word "territory" is not used in this broad and general sense in this clause of the Constitution.

At the time of the adoption of the Constitution, the United States held a great tract of country northwest of the Ohio; another tract, then of unknown extent, ceded by South Carolina; and a confident expectation was then entertained, and afterwards realized, that they then were or would become the owners of other great tracts, claimed by North Carolina and Georgia. These ceded tracts lay within the limits of the United States, and out of the limits of any particular State; and the cessions embraced the civil and political jurisdiction, and so much of the soil as had not previously been granted to individuals.

These words, "territory belonging to the United States,"

were not used in the Constitution to describe an abstraction, but to identify and apply to these actual subjects matter then existing and belonging to the United States, and other similar subjects which might afterwards be acquired; and this being so, all the essential qualities and incidents attending such actual subjects are embraced within the words "territory belonging to the United States," as fully as if each of those essential qualities and incidents had been specifically described.

I say, the essential qualities and incidents. But in determining what were the essential qualities and incidents of the subject with which they were dealing, we must take into consideration not only all the particular facts which were immediately before them, but the great consideration, ever present to the minds of those who framed and adopted the Constitution, that they were making a frame of government for the people of the United States and their posterity, under which they hoped the United States might be, what they have now become, a great and powerful nation, possessing the power to make war and to conclude treaties, and thus to acquire territory. (See Cerré *v.* Pitot, 6 Cr., 336; Am. Ins. Co. *v.* Canter, 1 Pet., 542.) With these in view, I turn to examine the clause of the article now in question.

It is said this provision has no application to any territory save that then belonging to the United States. I have already shown that, when the Constitution was framed, a confident expectation was entertained, which was speedily realized, that North Carolina and Georgia would cede their claims to that great territory which lay west of those States. No doubt has been suggested that the first clause of this same article, which enabled Congress to admit new States, refers to and includes new States to be formed out of this territory, expected to be thereafter ceded by North Carolina and Georgia, as well as new States to be formed out of territory northwest of the Ohio, which then had been ceded by Virginia. It must have been seen, therefore, that the same necessity would exist for an authority to dispose of and make all needful regulations respecting this territory, when ceded, as existed for a like authority respecting territory which had been ceded.

No reason has been suggested why any reluctance should have been felt, by the framers of the Constitution, to apply this provision to all the territory which might belong to the United States, or why any distinction should have been made, founded on the accidental circumstance of the dates of the cessions; a circumstance in no way material as respects the necessity for rules and regulations, or the propriety of conferring

on the Congress power to make them. And if we look at the course of the debates in the Convention on this article, we shall find that the then unceded lands, so far from having been left out of view in adopting this article, constituted, in the minds of members, a subject of even paramount importance.

Again, in what an extraordinary position would the limitation of this clause to territory then belonging to the United States, place the territory which lay within the chartered limits of North Carolina and Georgia. The title to that territory was then claimed by those States, and by the United States; their respective claims are purposely left unsettled by the express words of this clause; and when cessions were made by those States, they were merely of their claims to this territory, the United States neither admitting nor denying the validity of those claims; so that it was impossible then, and has ever since remained impossible, to know whether this territory did or did not then belong to the United States; and, consequently, to know whether it was within or without the authority conferred by this clause, to dispose of and make rules and regulations respecting the territory of the United States. This attributes to the eminent men who acted on this subject a want of ability and forecast, or a want of attention to the known facts upon which they were acting, in which I cannot concur.

There is not, in my judgment, anything in the language, the history, or the subject-matter of this article, which restricts its operation to territory owned by the United States when the Constitution was adopted.

But it is also insisted that provisions of the Constitution respecting territory belonging to the United States do not apply to territory acquired by treaty from a foreign nation. This objection must rest upon the position that the Constitution did not authorize the Federal Government to acquire foreign territory, and consequently has made no provision for its government when acquired; or, that though the acquisition of foreign territory was contemplated by the Constitution, its provisions concerning the admission of new States, and the making of all needful rules and regulations respecting territory belonging to the United States, were not designed to be applicable to territory acquired from foreign nations.

It is undoubtedly true, that at the date of the treaty of 1803, between the United States and France, for the cession of Louisiana, it was made a question, whether the Constitution had conferred on the executive department of the Government of the United States power to acquire foreign territory by a treaty.

There is evidence that very grave doubts were then entertained concerning the existence of this power. But that there was then a settled opinion in the executive and legislative branches of the Government, that this power did not exist, cannot be admitted, without at the same time imputing to those who negotiated and ratified the treaty, and passed the laws necessary to carry it into execution, a deliberate and known violation of their oaths to support the Constitution; and whatever doubts may then have existed, the question must now be taken to have been settled. Four distinct acquisitions of foreign territory have been made by as many different treaties, under as many different Administrations. Six States, formed on such territory, are now in the Union. Every branch of this Government, during a period of more than fifty years, has participated in these transactions. To question their validity now, is vain. As was said by Mr. Chief Justice Marshall, in the American Insurance Company *v.* Canter, (1 Peters, 542,) "the Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently, that Government possesses the power of acquiring territory, either by conquest or treaty." (See Cerré *v.* Pitot, 6 Cr., 336.) And I add, it also possesses the power of governing it, when acquired, not by resorting to supposititious powers, nowhere found described in the Constitution, but expressly granted in the authority to make all needful rules and regulations respecting the territory of the United States.

There was to be established by the Constitution a frame of government, under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the Government, and embrace all territory belonging to the United States throughout all time, and the purposes and objects of which apply to all territory of the United States, and narrow it down to territory belonging to the United States when the Constitution was framed, while at the same time it is admitted that the Constitution contemplated and authorized the acquisition, from time to time, of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purposes of the instrument, as it is with its language, and I can have no hesitation in rejecting it.

I construe this clause, therefore, as if it had read, Congress shall have power to make all needful rules and regulations respecting those tracts of country, out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the

soil, so far as the soil may be the property of the party making the cession, at the time of making it.

It has been urged that the words "rules and regulations" are not appropriate terms in which to convey authority to make laws for the government of the territory.

But it must be remembered that this is a grant of power to the Congress—that it is therefore necessarily a grant of power to legislate—and, certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. Power granted to a Legislature to make all needful rules and regulations respecting the territory, is a power to pass all needful laws respecting it.

The word regulate, or regulation, is several times used in the Constitution. It is used in the fourth section of the first article to describe those laws of the States which prescribe the times, places, and manner, of choosing Senators and Representatives; in the second section of the fourth article, to designate the legislative action of a State on the subject of fugitives from service, having a very close relation to the matter of our present inquiry; in the second section of the third article, to empower Congress to fix the extent of the appellate jurisdiction of this court; and, finally, in the eighth section of the first article are the words, "Congress shall have power to regulate commerce."

It is unnecessary to describe the body of legislation which has been enacted under this grant of power; its variety and extent are well known. But it may be mentioned, in passing, that under this power to regulate commerce, Congress has enacted a great system of municipal laws, and extended it over the vessels and crews of the United States on the high seas and in foreign ports, and even over citizens of the United States resident in China; and has established judicatures, with power to inflict even capital punishment within that country.

If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

To this I answer, that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.

Besides this, the rules and regulations must be needful. But undoubtedly the question whether a particular rule or regulation be needful, must be finally determined by Congress itself. Whether a law be needful, is a legislative or political,

not a judicial, question. Whatever Congress deems needful is so, under the grant of power.

Nor am I aware that it has ever been questioned that laws providing for the temporary government of the settlers on the public lands are needful, not only to prepare them for admission to the Union as States, but even to enable the United States to dispose of the lands.

Without government and social order, there can be no property; for without law, its ownership, its use, and the power of disposing of it, cease to exist, in the sense in which those words are used and understood in all civilized States.

Since, then, this power was manifestly conferred to enable the United States to dispose of its public lands to settlers, and to admit them into the Union as States, when in the judgment of Congress they should be fitted therefor, since these were the needs provided for, since it is confessed that Government is indispensable to provide for those needs, and the power is, to make *all needful* rules and regulations respecting the territory, I cannot doubt that this is a power to govern the inhabitants of the territory, by such laws as Congress deems needful, until they obtain admission as States.

Whether they should be thus governed solely by laws enacted by Congress, or partly by laws enacted by legislative power conferred by Congress, is one of those questions which depend on the judgment of Congress—a question which of these is needful.

But it is insisted, that whatever other powers Congress may have respecting the territory of the United States, the subject of negro slavery forms an exception.

The Constitution declares that Congress shall have power to make "*all* needful rules and regulations" respecting the territory belonging to the United States.

The assertion is, though the Constitution says all, it does not mean all—though it says all, without qualification, it means all except such as allow or prohibit slavery. It cannot be doubted that it is incumbent on those who would thus introduce an exception not found in the language of the instrument, to exhibit some solid and satisfactory reason, drawn from the subject-matter or the purposes and objects of the clause, the context, or from other provisions of the Constitution, showing that the words employed in this clause are not to be understood according to their clear, plain, and natural signification.

The subject-matter is the territory of the United States out of the limits of every State, and consequently under the exclusive power of the people of the United States. Their

will respecting it, manifested in the Constitution, can be subject to no restriction. The purposes and objects of the clause were the enactment of laws concerning the disposal of the public lands, and the temporary government of the settlers thereon until new States should be formed. It will not be questioned that, when the Constitution of the United States was framed and adopted, the allowance and the prohibition of negro slavery were recognised subjects of municipal legislation; every State had in some measure acted thereon; and the only legislative act concerning the territory—the ordinance of 1787, which had then so recently been passed—contained a prohibition of slavery. The purpose and object of the clause being to enable Congress to provide a body of municipal law for the government of the settlers, the allowance or the prohibition of slavery comes within the known and recognised scope of that purpose and object.

There is nothing in the context which qualifies the grant of power. The regulations must be "respecting the territory." An enactment that slavery may or may not exist there, is a regulation respecting the territory. Regulations must be needful; but it is necessarily left to the legislative discretion to determine whether a law be needful. No other clause of the Constitution has been referred to at the bar, or has been seen by me, which imposes any restriction or makes any exception concerning the power of Congress to allow or prohibit slavery in the territory belonging to the United States.

A practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind, on a question of the interpretation of the Constitution. (Stuart *v.* Laird, 1 Cranch, 269; Martin *v.* Hunter, 1 Wheat., 304; Cohens *v.* Virginia, 6 Wheat., 264; Prigg *v.* Pennsylvania, 16 Pet., 621; Cooley *v.* Port Wardens, 12 How., 315.)

In this view, I proceed briefly to examine the practical construction placed on the clause now in question, so far as it respects the inclusion therein of power to permit or prohibit slavery in the Territories.

It has already been stated, that after the Government of the United States was organized under the Constitution, the temporary Government of the Territory northwest of the river Ohio could no longer exist, save under the powers conferred on Congress by the Constitution. Whatever legislative, judicial, or executive authority should be exercised therein could be derived only from the people of the United States under the Constitution. And, accordingly, an act was passed on the

7th day of August, 1789, (1 Stat. at Large, 50,) which recites: "Whereas, in order that the ordinance of the United States in Congress assembled, for the government of the territory northwest of the river Ohio, *may continue to have full effect*, it is required that certain provisions should be made, so as to adapt the same to the present Constitution of the United States." It then provides for the appointment by the President of all officers, who, by force of the ordinance, were to have been appointed by the Congress of the Confederation, and their commission in the manner required by the Constitution; and empowers the Secretary of the Territory to exercise the powers of the Governor in case of the death or necessary absence of the latter.

Here is an explicit declaration of the will of the first Congress, of which fourteen members, including Mr. Madison, had been members of the Convention which framed the Constitution, that the ordinance, one article of which prohibited slavery, "should continue to have full effect." Gen. Washington, who signed this bill, as President, was the President of that Convention.

It does not appear to me to be important, in this connection, that that clause in the ordinance which prohibited slavery was one of a series of articles of what is therein termed a compact. The Congress of the Confederation had no power to make such a compact, nor to act at all on the subject; and after what had been so recently said by Mr. Madison on this subject, in the thirty-eighth number of the *Federalist*, I cannot suppose that he, or any others who voted for this bill, attributed any intrinsic effect to what was denominated in the ordinance a compact between "the original States and the people and States in the new territory;" there being no new States then in existence in the territory, with whom a compact could be made, and the few scattered inhabitants, unorganized into a political body, not being capable of becoming a party to a treaty, even if the Congress of the Confederation had had power to make one touching the government of that territory.

I consider the passage of this law to have been an assertion by the first Congress of the power of the United States to prohibit slavery within this part of the territory of the United States; for it clearly shows that slavery was thereafter to be prohibited there, and it could be prohibited only by an exertion of the power of the United States, under the Constitution; no other power being capable of operating within that territory after the Constitution took effect.

On the 2d of April, 1790, (1 Stat. at Large, 106,) the first Congress passed an act accepting a deed of cession by North

Carolina of that territory afterwards erected into the State of Tennessee. The fourth express condition contained in this deed of cession, after providing that the inhabitants of the Territory shall be temporarily governed in the same manner as those beyond the Ohio, is followed by these words: "*Provided, always*, that no regulations made or to be made by Congress shall tend to emancipate slaves."

This provision shows that it was then understood Congress might make a regulation prohibiting slavery, and that Congress might also allow it to continue to exist in the Territory; and accordingly, when, a few days later, Congress passed the act of May 20th, 1790, (1 Stat. at Large, 123,) for the government of the Territory south of the river Ohio, it provided, "and the Government of the Territory south of the Ohio shall be similar to that now exercised in the Territory northwest of the Ohio, except so far as is otherwise provided in the conditions expressed in an act of Congress of the present session, entitled, 'An act to accept a cession of the claims of the State of North Carolina to a certain district of western territory.'" Under the Government thus established, slavery existed until the Territory became the State of Tennessee.

On the 7th of April, 1798, (1 Stat. at Large, 649,) an act was passed to establish a Government in the Mississippi Territory in all respects like that exercised in the Territory northwest of the Ohio, "excepting and excluding the last article of the ordinance made for the government thereof by the late Congress, on the 13th day of July, 1787." When the limits of this Territory had been amicably settled with Georgia, and the latter ceded all its claim thereto, it was one stipulation in the compact of cession, that the ordinance of July 13th, 1787, "shall in all its parts extend to the Territory contained in the present act of cession, that article only excepted which forbids slavery." The Government of this Territory was subsequently established and organized under the act of May 10th, 1800; but so much of the ordinance as prohibited slavery was not put in operation there.

Without going minutely into the details of each case, I will now give reference to two classes of acts, in one of which Congress has extended the ordinance of 1787, including the article prohibiting slavery, over different Territories, and thus exerted its power to prohibit it; in the other, Congress has erected Governments over Territories acquired from France and Spain, in which slavery already existed, but refused to apply to them that part of the Government under the ordinance which excluded slavery.

Of the first class are the act of May 7th, 1800, (2 Stat. at

Large, 58,) for the government of the Indiana Territory; the act of January 11th, 1805, (2 Stat. at Large, 309,) for the government of Michigan Territory; the act of May 3d, 1809, (2 Stat. at Large, 514,) for the government of the Illinois Territory; the act of April 20th, 1836, (5 Stat. at Large, 10,) for the government of the Territory of Wisconsin; the act of June 12th, 1838, for the government of the Territory of Iowa; the act of August 14th, 1848, for the government of the Territory of Oregon. To these instances should be added the act of March 6th, 1820, (3 Stat. at Large, 548,) prohibiting slavery in the territory acquired from France, being northwest of Missouri, and north of thirty-six degrees thirty minutes north latitude.

Of the second class, in which Congress refused to interfere with slavery already existing under the municipal law of France or Spain, and established Governments by which slavery was recognised and allowed, are: the act of March 26th, 1804, (2 Stat. at Large, 283,) for the government of Louisiana; the act of March 2d, 1805, (2 Stat. at Large, 322,) for the government of the Territory of Orleans; the act of June 4th, 1812, (2 Stat. at Large, 743,) for the government of the Missouri Territory; the act of March 30th, 1822, (3 Stat. at Large, 654,) for the government of the Territory of Florida. Here are eight distinct instances, beginning with the first Congress, and coming down to the year 1848, in which Congress has excluded slavery from the territory of the United States; and six distinct instances in which Congress organized Governments of Territories by which slavery was recognised and continued, beginning also with the first Congress, and coming down to the year 1822. These acts were severally signed by seven Presidents of the United States, beginning with General Washington, and coming regularly down as far as Mr. John Quincy Adams, thus including all who were in public life when the Constitution was adopted.

If the practical construction of the Constitution contemporaneously with its going into effect, by men intimately acquainted with its history from their personal participation in framing and adopting it, and continued by them through a long series of acts of the gravest importance, be entitled to weight in the judicial mind on a question of construction, it would seem to be difficult to resist the force of the acts above adverted to.

It appears, however, from what has taken place at the bar, that notwithstanding the language of the Constitution, and the long line of legislative and executive precedents under it, three different and opposite views are taken of the power of Congress respecting slavery in the Territories.

One is, that though Congress can make a regulation prohibiting slavery in a Territory, they cannot make a regulation allowing it; another is, that it can neither be established nor prohibited by Congress, but that the people of a Territory, when organized by Congress, can establish or prohibit slavery; while the third is, that the Constitution itself secures to every citizen who holds slaves, under the laws of any State, the indefeasible right to carry them into any Territory, and there hold them as property.

No particular clause of the Constitution has been referred to at the bar in support of either of these views. The first seems to be rested upon general considerations concerning the social and moral evils of slavery, its relations to republican Governments, its inconsistency with the Declaration of Independence and with natural right.

The second is drawn from considerations equally general, concerning the right of self-government, and the nature of the political institutions which have been established by the people of the United States.

While the third is said to rest upon the equal right of all citizens to go with their property upon the public domain, and the inequality of a regulation which would admit the property of some and exclude the property of other citizens; and, inasmuch as slaves are chiefly held by citizens of those particular States where slavery is established, it is insisted that a regulation excluding slavery from a Territory operates, practically, to make an unjust discrimination between citizens of different States, in respect to their use and enjoyment of the territory of the United States.

With the weight of either of these considerations, when presented to Congress to influence its action, this court has no concern. One or the other may be justly entitled to guide or control the legislative judgment upon what is a needful regulation. The question here is, whether they are sufficient to authorize this court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument. To engraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of ju-

ridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

If it can be shown, by anything in the Constitution itself, that when it confers on Congress the power to make *all* needful rules and regulations respecting the territory belonging to the United States, the exclusion or the allowance of slavery was excepted; or if anything in the history of this provision tends to show that such an exception was intended by those who framed and adopted the Constitution to be introduced into it, I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text of the Constitution. But where the Constitution has said *all* needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all.

There have been eminent instances in this court closely analogous to this one, in which such an attempt to introduce an exception, not found in the Constitution itself, has failed of success.

By the eighth section of the first article, Congress has the power of exclusive legislation in all cases whatsoever within this District.

In the case of Loughborough *v.* Blake, (5 Whea., 324,) the question arose, whether Congress has power to impose direct taxes on persons and property in this District. It was insisted, that though the grant of power was in its terms broad enough to include direct taxation, it must be limited by the principle, that taxation and representation are inseparable. It would not be easy to fix on any political truth, better established or more fully admitted in our country, than that taxation and representation must exist together. We went into the war of the Revolution to assert it, and it is incorporated as fundamental into all American Governments. But however true and im-

portant this maxim may be, it is not necessarily of universal application. It was for the people of the United States, who ordained the Constitution, to decide whether it should or should not be permitted to operate within this District. Their decision was embodied in the words of the Constitution; and as that contained no such exception as would permit the maxim to operate in this District, this court, interpreting that language, held that the exception did not exist.

Again, the Constitution confers on Congress power to regulate commerce with foreign nations. Under this, Congress passed an act on the 22d of December, 1807, unlimited in duration, laying an embargo on all ships and vessels in the ports or within the limits and jurisdiction of the United States. No law of the United States ever pressed so severely upon particular States. Though the constitutionality of the law was contested with an earnestness and zeal proportioned to the ruinous effects which were felt from it, and though, as Mr. Chief Justice Marshall has said, (9 Wheat., 192,) "a want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this," I am not aware that the fact that it prohibited the use of a particular species of property, belonging almost exclusively to citizens of a few States, and this indefinitely, was ever supposed to show that it was unconstitutional. Something much more stringent, as a ground of legal judgment, was relied on—that the power to regulate commerce did not include the power to annihilate commerce.

But the decision was, that under the power to regulate commerce, the power of Congress over the subject was restricted only by those exceptions and limitations contained in the Constitution; and as neither the clause in question, which was a general grant of power to regulate commerce, nor any other clause of the Constitution, imposed any restrictions as to the duration of an embargo, an unlimited prohibition of the use of the shipping of the country was within the power of Congress. On this subject, Mr. Justice Daniel, speaking for the court in the case of United States *v.* Marigold, (9 How., 560,) says: "Congress are, by the Constitution, vested with the power to regulate commerce with foreign nations; and however, at periods of high excitement, an application of the terms 'to regulate commerce,' such as would embrace absolute prohibition, may have been questioned, yet, since the passage of the embargo and non-intercourse laws, and the repeated judicial sanctions these statutes have received, it can scarcely at this day be open to doubt, that every subject falling legitimately

within the sphere of commercial regulation may be partially or wholly excluded, when either measure shall be demanded by the safety or the important interests of the entire nation. The power once conceded, it may operate on any and every subject of commerce to which the legislative discretion may apply it."

If power to regulate commerce extends to an indefinite prohibition of the use of all vessels belonging to citizens of the several States, and may operate, without exception, upon every subject of commerce to which the legislative discretion may apply it, upon what grounds can I say that power to make all needful rules and regulations respecting the territory of the United States is subject to an exception of the allowance or prohibition of slavery therein?

While the regulation is one "respecting the territory," while it is, in the judgment of Congress, "a needful regulation," and is thus completely within the words of the grant, while no other clause of the Constitution can be shown, which requires the insertion of an exception respecting slavery, and while the practical construction for a period of upwards of fifty years forbids such an exception, it would, in my opinion, violate every sound rule of interpretation to force that exception into the Constitution upon the strength of abstract political reasoning, which we are bound to believe the people of the United States thought insufficient to induce them to limit the power of Congress, because what they have said contains no such limitation.

Before I proceed further to notice some other grounds of supposed objection to this power of Congress, I desire to say, that if it were not for my anxiety to insist upon what I deem a correct exposition of the Constitution, if I looked only to the purposes of the argument, the source of the power of Congress asserted in the opinion of the majority of the court would answer those purposes equally well. For they admit that Congress has power to organize and govern the Territories until they arrive at a suitable condition for admission to the Union; they admit, also, that the kind of Government which shall thus exist should be regulated by the condition and wants of each Territory, and that it is necessarily committed to the discretion of Congress to enact such laws for that purpose as that discretion may dictate; and no limit to that discretion has been shown, or even suggested, save those positive prohibitions to legislate, which are found in the Constitution.

I confess myself unable to perceive any difference whatever between my own opinion of the general extent of the power of Congress and the opinion of the majority of the court, save

that I consider it derivable from the express language of the Constitution, while they hold it to be silently implied from the power to acquire territory. Looking at the power of Congress over the Territories as of the extent just described, what positive prohibition exists in the Constitution, which restrained Congress from enacting a law in 1820 to prohibit slavery north of thirty-six degrees thirty minutes north latitude?

The only one suggested is that clause in the fifth article of the amendments of the Constitution which declares that no person shall be deprived of his life, liberty, or property, without due process of law. I will now proceed to examine the question, whether this clause is entitled to the effect thus attributed to it. It is necessary, first, to have a clear view of the nature and incidents of that particular species of property which is now in question.

Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution, and has been explicitly declared by this court. The Constitution refers to slaves as "persons held to service in one State, under the laws thereof." Nothing can more clearly describe a *status* created by municipal law. In Prigg *v.* Pennsylvania, (10 Pet., 611,) this court said: "The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws." In Rankin *v.* Lydia, (2 Marsh., 12, 470,) the Supreme Court of Appeals of Kentucky said: "Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law." I am not acquainted with any case or writer questioning the correctness of this doctrine. (See also 1 Burge, Col. and For. Laws, 738—741, where the authorities are collected.)

The *status* of slavery is not necessarily always attended with the same powers on the part of the master. The master is subject to the supreme power of the State, whose will controls his action towards his slave, and this control must be defined and regulated by the municipal law. In one State, as at one period of the Roman law, it may put the life of the slave into the hand of the master; others, as those of the United States, which tolerate slavery, may treat the slave as a person, when the master takes his life; while in others, the law may recognise a right of the slave to be protected from cruel treatment. In other words, the *status* of slavery embraces every condition, from that in which the slave is known to the law simply as a

chattel, with no civil rights, to that in which he is recognised as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor. Which of these conditions shall attend the *status* of slavery, must depend on the municipal law which creates and upholds it.

And not only must the *status* of slavery be created and measured by municipal law, but the rights, powers, and obligations, which grow out of that *status*, must be defined, protected, and enforced, by such laws. The liability of the master for the torts and crimes of his slave, and of third persons for assaulting or injuring or harboring or kidnapping him, the forms and modes of emancipation and sale, their subjection to the debts of the master, succession by death of the master, suits for freedom, the capacity of the slave to be party to a suit, or to be a witness, with such police regulations as have existed in all civilized States where slavery has been tolerated, are among the subjects upon which municipal legislation becomes necessary when slavery is introduced.

Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery?

Is it not more rational to conclude that they who framed and adopted the Constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist; and that, being aware of these principles, and having said nothing to interfere with or displace them, or to compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein? Moreover, if the right exists, what are its limits, and what are its conditions? If citizens of the United States have the right to take their slaves to a Territory, and hold them there as slaves, without regard to the laws of the Territory, I suppose this right is not to be restricted to the citizens of slaveholding States. A citizen of a State which does not tolerate slavery can hardly be denied the power of doing the same thing. And what law of slavery does either take with him to the Territory? If it be said to be those laws respecting

slavery which existed in the particular State from which each slave last came, what an anomaly is this? Where else can we find, under the law of any civilized country, the power to introduce and permanently continue diverse systems of foreign municipal law, for holding persons in slavery? I say, not merely to introduce, but permanently to continue, these anomalies. For the offspring of the female must be governed by the foreign municipal laws to which the mother was subject; and when any slave is sold or passes by succession on the death of the owner, there must pass with him, by a species of subrogation, and as a kind of unknown *jus in re*, the foreign municipal laws which constituted, regulated, and preserved, the *status* of the slave before his exportation. Whatever theoretical importance may be now supposed to belong to the maintenance of such a right, I feel a perfect conviction that it would, if ever tried, prove to be as impracticable in fact, as it is, in my judgment, monstrous in theory.

I consider the assumption which lies at the basis of this theory to be unsound; not in its just sense, and when properly understood, but in the sense which has been attached to it. That assumption is, that the territory ceded by France was acquired for the equal benefit of all the citizens of the United States. I agree to the position. But it was acquired for their benefit in their collective, not their individual, capacities. It was acquired for their benefit, as an organized political society, subsisting as "the people of the United States," under the Constitution of the United States; to be administered justly and impartially, and as nearly as possible for the equal benefit of every individual citizen, according to the best judgment and discretion of the Congress; to whose power, as the Legislature of the nation which acquired it, the people of the United States have committed its administration. Whatever individual claims may be founded on local circumstances, or sectional differences of condition, cannot, in my opinion, be recognised in this court, without arrogating to the judicial branch of the Government powers not committed to it; and which, with all the unaffected respect I feel for it, when acting in its proper sphere, I do not think it fitted to wield.

Nor, in my judgment, will the position, that a prohibition to bring slaves into a Territory deprives any one of his property without due process of law, bear examination.

It must be remembered that this restriction on the legislative power is not peculiar to the Constitution of the United States; it was borrowed from *Magna Charta;* was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the States, usually in the very words of

the great charter. It existed in every political community in America in 1787, when the ordinance prohibiting slavery north and west of the Ohio was passed.

And if a prohibition of slavery in a Territory in 1820 violated this principle of *Magna Charta*, the ordinance of 1787 also violated it; and what power had, I do not say the Congress of the Confederation alone, but the Legislature of Virginia, or the Legislature of any or all the States of the Confederacy, to consent to such a violation? The people of the States had conferred no such power. I think I may at least say, if the Congress did then violate *Magna Charta* by the ordinance, no one discovered that violation. Besides, if the prohibition upon all persons, citizens as well as others, to bring slaves into a Territory, and a declaration that if brought they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slaveholding States which have enacted the same prohibition? As early as October, 1778, a law was passed in Virginia, that thereafter no slave should be imported into that Commonwealth by sea or by land, and that every slave who should be imported should become free. A citizen of Virginia purchased in Maryland a slave who belonged to another citizen of Virginia, and removed with the slave to Virginia. The slave sued for her freedom, and recovered it; as may be seen in Wilson *v.* Isabel, (5 Call's R., 425.) See also Hunter *v.* Hulsher, (1 Leigh, 172;) and a similar law has been recognised as valid in Maryland, in Stewart *v.* Oaks, (5 Har. and John., 107.) I am not aware that such laws, though they exist in many States, were ever supposed to be in conflict with the principle of *Magna Charta* incorporated into the State Constitutions. It was certainly understood by the Convention which framed the Constitution, and has been so understood ever since, that, under the power to regulate commerce, Congress could prohibit the importation of slaves; and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can a similar regulation respecting a Territory violate the fifth amendment of the Constitution?

Some reliance was placed by the defendant's counsel upon the fact that the prohibition of slavery in this territory was in the words, "that slavery, &c., shall be and is hereby *forever* prohibited." But the insertion of the word *forever* can have no legal effect. Every enactment not expressly limited in its

duration continues in force until repealed or abrogated by some competent power, and the use of the word "forever" can give to the law no more durable operation. The argument is, that Congress cannot so legislate as to bind the future States formed out of the territory, and that in this instance it has attempted to do so. Of the political reasons which may have induced the Congress to use these words, and which caused them to expect that subsequent Legislatures would conform their action to the then general opinion of the country that it ought to be permanent, this court can take no cognizance.

However fit such considerations are to control the action of Congress, and however reluctant a statesman may be to disturb what has been settled, every law made by Congress may be repealed, and, saving private rights, and public rights gained by States, its repeal is subject to the absolute will of the same power which enacted it. If Congress had enacted that the crime of murder, committed in this Indian Territory, north of thirty-six degrees thirty minutes, by or on any white man, should *forever* be punishable with death, it would seem to me an insufficient objection to an indictment, found while it was a Territory, that at some future day States might exist there, and so the law was invalid, because, by its terms, it was to continue in force forever. Such an objection rests upon a misapprehension of the province and power of courts respecting the constitutionality of laws enacted by the Legislature.

If the Constitution prescribe one rule, and the law another and different rule, it is the duty of courts to declare that the Constitution, and not the law, governs the case before them for judgment. If the law include no case save those for which the Constitution has furnished a different rule, or no case which the Legislature has the power to govern, then the law can have no operation. If it includes cases which the Legislature has power to govern, and concerning which the Constitution does not prescribe a different rule, the law governs those cases, though it may, in its terms, attempt to include others, on which it cannot operate. In other words, this court cannot declare void an act of Congress which constitutionally embraces some cases, though other cases, within its terms, are beyond the control of Congress, or beyond the reach of that particular law. If, therefore, Congress had power to make a law excluding slavery from this territory while under the exclusive power of the United States, the use of the word "forever" does not invalidate the law, so long as Congress has the exclusive legislative power in the territory.

But it is further insisted that the treaty of 1803, between the United States and France, by which this territory was acquired, has so restrained the constitutional powers of Congress, that it cannot, by law, prohibit the introduction of slavery into that part of this territory north and west of Missouri, and north of thirty-six degrees thirty minutes north latitude.

By a treaty with a foreign nation, the United States may rightfully stipulate that the Congress will or will not exercise its legislative power in some particular manner, on some particular subject. Such promises, when made, should be voluntarily kept, with the most scrupulous good faith. But that a treaty with a foreign nation can deprive the Congress of any part of the legislative power conferred by the people, so that it no longer can legislate as it was empowered by the Constitution to do, I more than doubt.

The powers of the Government do and must remain unimpaired. The responsibility of the Government to a foreign nation, for the exercise of those powers, is quite another matter. That responsibility is to be met, and justified to the foreign nation, according to the requirements of the rules of public law; but never upon the assumption that the United States had parted with or restricted any power of acting according to its own free will, governed solely by its own appreciation of its duty.

The second section of the fourth article is, "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." This has made treaties part of our municipal law; but it has not assigned to them any particular degree of authority, nor declared that laws so enacted shall be irrepealable. No supremacy is assigned to treaties over acts of Congress. That they are not perpetual, and must be in some way repealable, all will agree.

If the President and the Senate alone possess the power to repeal or modify a law found in a treaty, inasmuch as they can change or abrogate one treaty only by making another inconsistent with the first, the Government of the United States could not act at all, to that effect, without the consent of some foreign Government. I do not consider, I am not aware it has ever been considered, that the Constitution has placed our country in this helpless condition. The action of Congress in repealing the treaties with France by the act of July 7th, 1798, (1 Stat. at Large, 578,) was in conformity with these views. In the case of Taylor et al. *v.* Morton, (2 Curtis's Cir. Ct. R.,

454,) I had occasion to consider this subject, and I adhere to the views there expressed.

If, therefore, it were admitted that the treaty between the United States and France did contain an express stipulation that the United States would not exclude slavery from so much of the ceded territory as is now in question, this court could not declare that an act of Congress excluding it was void by force of the treaty. Whether or no a case existed sufficient to justify a refusal to execute such a stipulation, would not be a judicial, but a political and legislative question, wholly beyond the authority of this court to try and determine. It would belong to diplomacy and legislation, and not to the administration of existing laws. Such a stipulation in a treaty, to legislate or not to legislate in a particular way, has been repeatedly held in this court to address itself to the political or the legislative power, by whose action thereon this court is bound. (Foster *v.* Nicolson, 2 Peters, 314; Garcia *v.* Lee, 12 Peters, 519.)

But, in my judgment, this treaty contains no stipulation in any manner affecting the action of the United States respecting the territory in question. Before examining the language of the treaty, it is material to bear in mind that the part of the ceded territory lying north of thirty-six degrees thirty minutes, and west and north of the present State of Missouri, was then a wilderness, uninhabited save by savages, whose possessory title had not then been extinguished.

It is impossible for me to conceive on what ground France could have advanced a claim, or could have desired to advance a claim, to restrain the United States from making any rules and regulations respecting this territory, which the United States might think fit to make; and still less can I conceive of any reason which would have induced the United States to yield to such a claim. It was to be expected that France would desire to make the change of sovereignty and jurisdiction as little burdensome as possible to the then inhabitants of Louisiana, and might well exhibit even an anxious solicitude to protect their property and persons, and secure to them and their posterity their religious and political rights; and the United States, as a just Government, might readily accede to all proper stipulations respecting those who were about to have their allegiance transferred. But what interest France could have in uninhabited territory, which, in the language of the treaty, was to be transferred "forever, and in full sovereignty," to the United States, or how the United States could consent to allow a foreign nation to interfere in its purely internal affairs, in which that foreign nation had no concern

whatever, is difficult for me to conjecture. In my judgment, this treaty contains nothing of the kind.

The third article is supposed to have a bearing on the question. It is as follows: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States; and in the mean time they shall be maintained and protected in the enjoyment of their liberty, property, and the religion they profess."

There are two views of this article, each of which, I think, decisively shows that it was not intended to restrain the Congress from excluding slavery from that part of the ceded territory then uninhabited. The first is, that, manifestly, its sole object was to protect individual rights of the then inhabitants of the territory. They are to be "maintained and protected in the free enjoyment of their liberty, property, and the religion they profess." But this article does not secure to them the right to go upon the public domain ceded by the treaty, either with or without their slaves. The right or power of doing this did not exist before or at the time the treaty was made. The French and Spanish Governments while they held the country, as well as the United States when they acquired it, always exercised the undoubted right of excluding inhabitants from the Indian country, and of determining when and on what conditions it should be opened to settlers. And a stipulation, that the then inhabitants of Louisiana should be protected in their property, can have no reference to their use of that property, where they had no right, under the treaty, to go with it, save at the will of the United States. If one who was an inhabitant of Louisiana at the time of the treaty had afterwards taken property then owned by him, consisting of fire-arms, ammunition, and spirits, and had gone into the Indian country north of thirty-six degrees thirty minutes, to sell them to the Indians, all must agree the third article of the treaty would not have protected him from indictment under the act of Congress of March 30, 1802, (2 Stat. at Large, 139,) adopted and extended to this territory by the act of March 26, 1804, (2 Stat. at Large, 283.)

Besides, whatever rights were secured were individual rights. If Congress should pass any law which violated such rights of any individual, and those rights were of such a character as not to be within the lawful control of Congress under the Constitution, that individual could complain, and the act of Congress, as to such rights of his, would be inoperative; but it

would be valid and operative as to all other persons, whose individual rights did not come under the protection of the treaty. And inasmuch as it does not appear that any inhabitant of Louisiana, whose rights were secured by treaty, had been injured, it would be wholly inadmissible for this court to assume, first, that one or more such cases may have existed; and, second, that if any did exist, the entire law was void—not only as to those cases, if any, in which it could not rightfully operate, but as to all others, wholly unconnected with the treaty, in which such law could rightfully operate.

But it is quite unnecessary, in my opinion, to pursue this inquiry further, because it clearly appears from the language of the article, and it has been decided by this court, that the stipulation was temporary, and ceased to have any effect when the then inhabitants of the Territory of Louisiana, in whose behalf the stipulation was made, were incorporated into the Union.

In the cases of New Orleans *v.* De Armas et al., (9 Peters, 223,) the question was, whether a title to property, which existed at the date of the treaty, continued to be protected by the treaty after the State of Louisiana was admitted to the Union. The third article of the treaty was relied on. Mr. Chief Justice Marshall said: "This article obviously contemplates two objects. One, that Louisiana shall be admitted into the Union as soon as possible, on an equal footing with the other States; and the other, that, till such admission, the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty, property, and religion. Had any one of these rights been violated while these stipulations continued in force, the individual supposing himself to be injured might have brought his case into this court, under the twenty-fifth section of the judicial act. But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were "admitted to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States."

The cases of Chouteau *v.* Marguerita, (12 Peters, 507,) and Permoli *v.* New Orleans, (3 How., 589,) are in conformity with this view of the treaty.

To convert this temporary stipulation of the treaty, in behalf of French subjects who then inhabited a small portion of Louisiana, into a permanent restriction upon the power of Congress to regulate territory then uninhabited, and to assert that it not only restrains Congress from affecting the rights of property of the then inhabitants, but enabled them and all other citizens of the United States to go into any part of the

ceded territory with their slaves, and hold them there, is a construction of this treaty so opposed to its natural meaning, and so far beyond its subject-matter and the evident design of the parties, that I cannot assent to it. In my opinion, this treaty has no bearing on the present question.

For these reasons, I am of opinion that so much of the several acts of Congress as prohibited slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude, and west of the river Mississippi, were constitutional and valid laws.

I have expressed my opinion, and the reasons therefor, at far greater length than I could have wished, upon the different questions on which I have found it necessary to pass, to arrive at a judgment on the case at bar. These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion. I have touched no question which, in the view I have taken, it was not absolutely necessary for me to pass upon, to ascertain whether the judgment of the Circuit Court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less, would have been inconsistent with my views of my duty.

In my opinion, the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial.

INDEX

OF THE

PRINCIPAL MATTERS.
