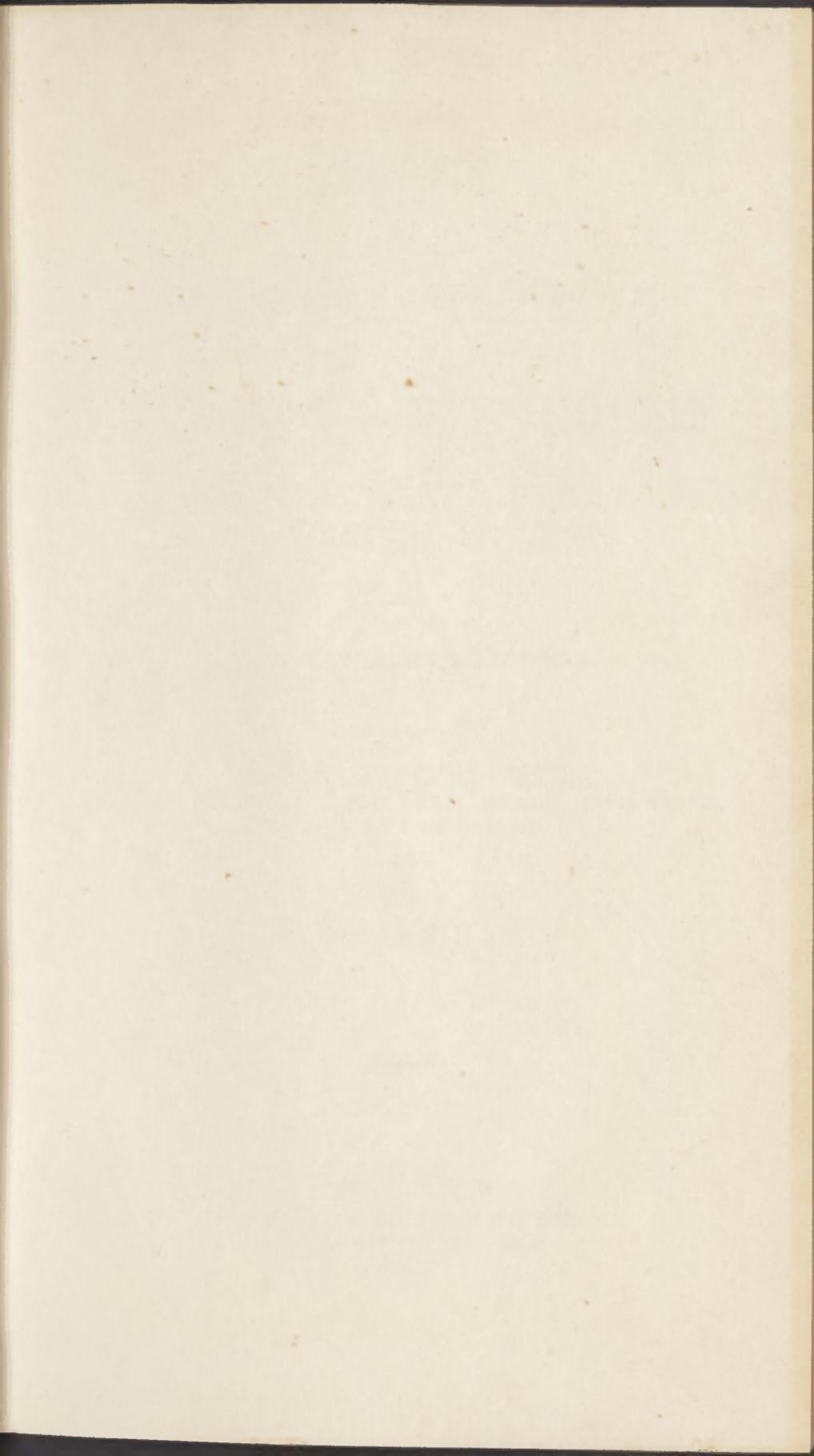
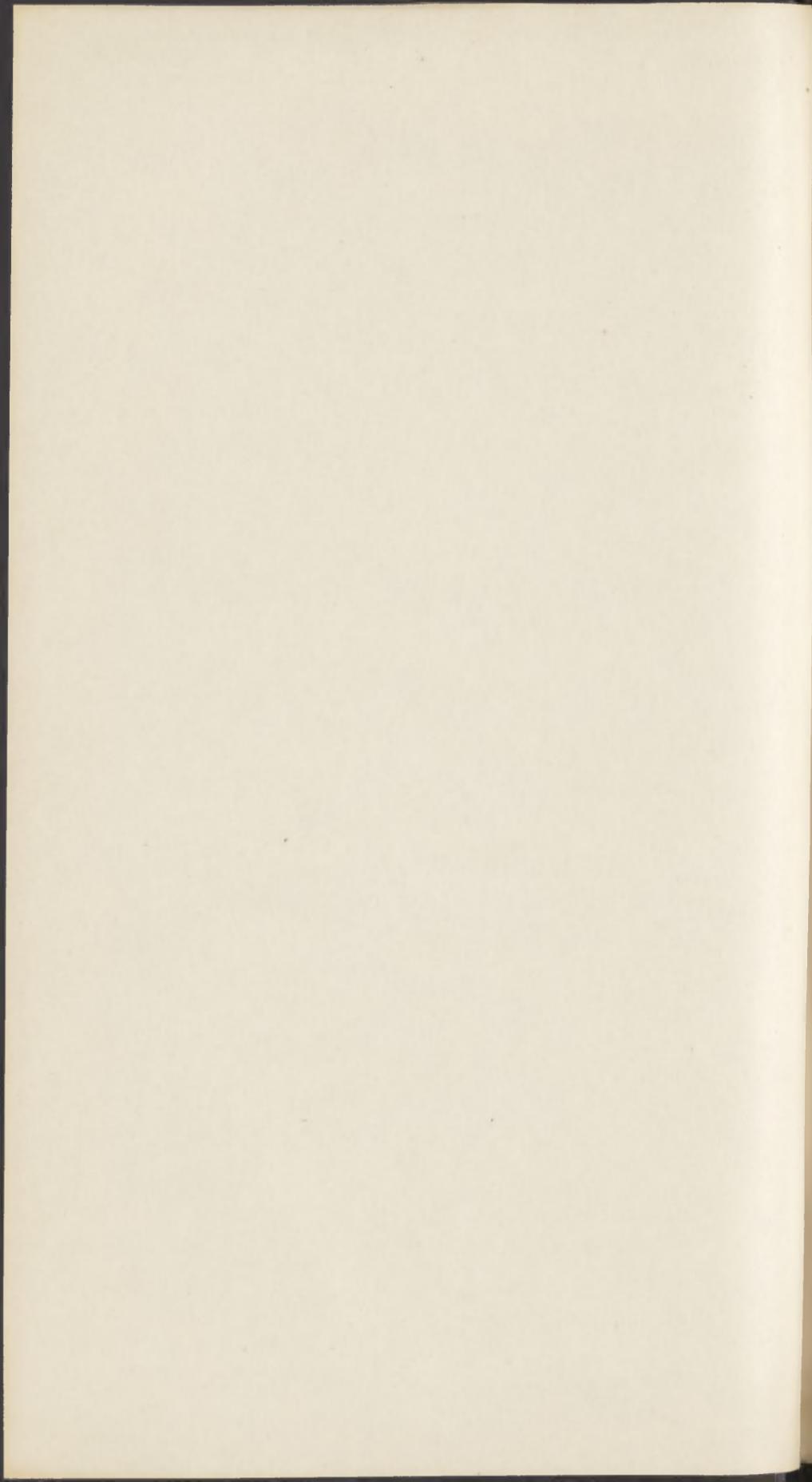


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REPORTS
OF
CASES ARGUED AND ADJUDGED
IN
THE SUPREME COURT
OF
THE UNITED STATES.

DECEMBER TERM, 1859.

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

VOL. XXIII.

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SUPREME COURT OF THE UNITED STATES.

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HON. JOHN CATRON, Associate Justice.
HON. PETER V. DANIEL, Associate Justice.
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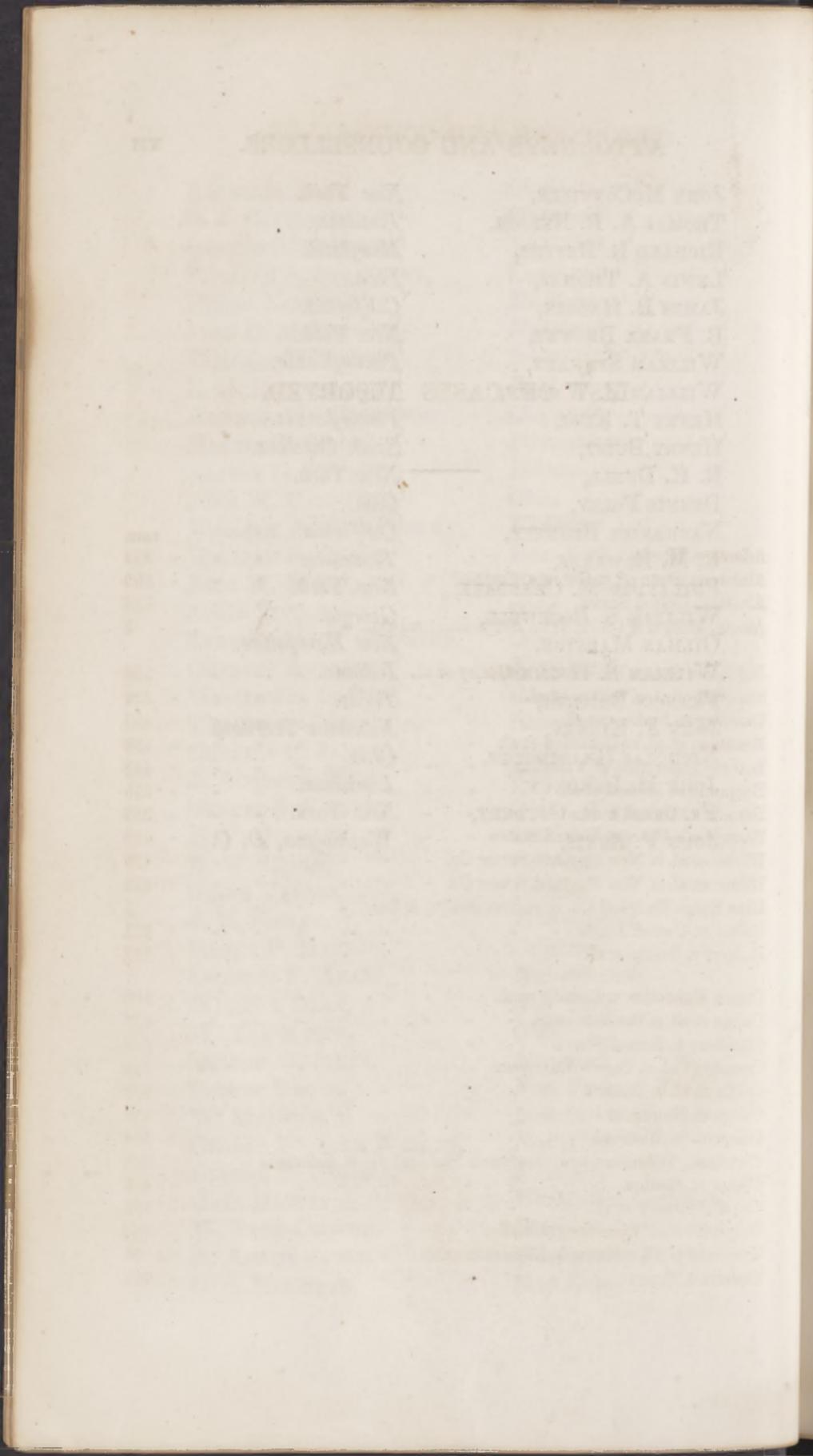
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THE DECISIONS
OF THE
SUPREME COURT OF THE UNITED STATES,
AT
DECEMBER TERM, 1859.

ANSON, BANGS, & Co., *v.* THE BLUE RIDGE RAILROAD COMPANY.

Where a motion was made to dismiss an appeal, upon the ground that no appeal bond had been given, time was allowed the appellants within which to file the bond. If they complied with the order, the appeal was to stand; otherwise, to be dismissed.

The appeal bond must be taken and approved by any judge or justice authorized to allow the appeal or writ of error.

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

A motion was made by *Mr. Phillips*, on behalf of the appellees, to dismiss the appeal, upon the ground that no appeal bond was given at the time of granting the appeal, as required by the statute, either as a security for costs or supersedeas of execution.

Mr. Johnson opposed the motion and offered to give a bond for costs, and thus prevent the dismissal, if consistent with the practice of the court.

After argument by these two counsel, Mr. Justice NELSON delivered the opinion of the court.

This is a motion to dismiss the appeal, on the part of the appellee, upon the ground that no appeal bond was given at the

Teese et al. v. Huntingdon et al.

time of granting the appeal, as required by the statute, either as a security for costs or supersedeas of execution. 1 Stat. at Large, pages 84, 85, secs. 22, 23, p. 404.

It is admitted that no bond was given, but the counsel resisting the motion proposes to give one for the costs, and thus prevent the dismissal, if consistent with the practice of the court. The practice has been allowed in several cases, as will be seen by reference to 10 Wh. R., 311, 16 How., 148, and 9 Wh., 555. In the last case, time was granted within which to give the bond, or the case be dismissed. The bond may be taken and approved before any judge or justice authorized to allow the appeal or writ of error.

Let the appellant have sixty days to give the bond, and file it with the clerk, upon complying with which order the motion be dismissed; otherwise, granted.

LEWIS TEESE AND LEWIS TEESE, JUN., PLAINTIFFS IN ERROR, v.
C. P. HUNTINGDON AND MARK HOPKINS.

Counsel fees are not a proper element for the consideration of the jury in the estimation of damages in actions for the infringement of a patent right. This point has been directly ruled by this court, and is no longer an open question. By the fifteenth section of the patent act of the fourth of July, 1836, the defendant is permitted to plead the general issue and give any special matter in evidence, provided notice in writing may have been given to the plaintiff or his attorney thirty days before the trial.

It is not necessary that this should be served and filed by an order of the court; and it is sufficient if it was served and filed subsequently to the time when the depositions were taken and filed in court.

For the purpose of impeaching a witness, a question was asked of another witness, "What is the reputation of the (first) witness for moral character?" This question was objected to, and properly not allowed to be put by the court below.

The elementary writers and cases upon this point examined.

Another witness was asked what was the reputation of the first witness for truth and veracity, who replied that he had no means of knowing, not having had any transactions with him for five years. This question was excluded by the court, which must judge according to its discretion whether or not it applies to a time too remote.

Teese et al. v. Huntingdon et al.

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

The history of the trial in the court below is fully set forth in the opinion of this court.

It was argued by *Mr. Phillips* for the plaintiffs in error, and by *Mr. Gifford* for the defendants. The arguments of the counsel upon many of the points which occurred are omitted, and only the two following will be noticed.

With respect to impeaching the character of a witness, *Mr. Phillips* said:

Evidence was offered to impeach the character of one of defendants' witnesses, by showing his "general reputation for moral character." It was objected, that "the inquiry should be limited to his general reputation for truth and veracity;" and the objection was sustained.

The authorities on this point are to be found carefully collated in 21 American Law Journal, N. S., p. 145, where it is said, that so far as the decisions in England are concerned, "they are unanimous to the point that the true criterion of the credit of a witness is his general character and conduct, and not his general character for truth and veracity. The English books will be examined in vain for a single authoritative case which in any respect limits the examination upon this point to the character for truth and veracity."

Upon examination, it will be found that this rule obtains in most of our States.

Other evidence was then offered to prove the reputation of the witness from 1850 to 1853 for truth and veracity. To which it was objected, that "the dates named were too remote, and that the reputation of the witness at a period less remote from the time of trial could be alone put in issue." This objection also was sustained.

The judgment was rendered on the 26th October, 1857, and the time covered by the inquiry was from 1850 to 1853, so that the intermediate period was less than four years.

Teese et al. v. Huntingdon et al.

This is certainly a short statute of limitations in favor of reputation. Whatever influence the question of time was entitled to, was for the jury to consider. The judge could not exclude the evidence as incompetent, for there is neither common-law rule nor statute to justify it.

The view which *Mr. Gifford* took of these points was the following:

The objection to the inquiry as to Jesse Morrill's reputation for "moral character" was properly sustained.

1. It is not in any case proper to seek to impeach a witness, by proving what was his reputation for moral character. The inquiry should be as to his reputation for truth and veracity.

U. States v. Van Sickle, 2 McLean, 219.

Goss v. Stimpson, 2 Sumner, 610.

Gilbert v. Sheldon, 13 Barb., 623.

The People v. Rector, 19 Wend., 569.

Jackson v. Lewis, 13 John. R., 504.

The State v. Bruce, 24 Maine, 71, 72.

Phillips v. Ringfield, 1 Appl., 375.

Commonwealth v. Morse, 3 Pick., 194, 196.

Morse v. Pine, 4 Vermont R., 281.

State v. Smith, 7 Vermont R., 141.

State v. Forrest, 15 Vermont R., 435.

State v. Randolph, 24 Conn. Rep., 363.

State v. Howard, 9 N. Hampshire, 485.

Gilchrist v. McKee, 4 Watts, 380.

Chess v. Chess, 1 Penn. R., 32.

Uhl v. Commonwealth, 6 Grattan, 706.

Ward v. the State, 28 Alabama R., 53—court divided.

Ford v. Ford, 7 Humphrey, 92.

Jones v. the State, 13 Texas, 168.

Perkins v. Noble, 4 Warden's Ohio State Rep., 668.

Taylor on Evidence, sec. 1083.

The testimony was properly excluded as to what was the reputation of Jesse Morrill in 1852 or 1853—about five years before the trial.

Teese et al. v. Huntingdon et al.

1. Because it does not appear that said Morrill was a witness called by the defendants. He is not named in the notices of special matter of defence as one of the defendants' witnesses, and he is not named in the lists of witnesses examined by the defendants.

It must appear by the record that he was called by the defendants, or this objection for that reason must fall.

The law requires that an authenticated transcript of the record and an assignment of errors shall be returned with the writ; and there can be no error cognizable by this court, unless it appear from the record.

The mere assertion of facts in the assignment of errors to show error, cannot be substituted for the record.

Judiciary Act of 1789, sec. 22.

Conkling's Treatise, 3d ed., 689.

Stevens *v.* Gladding & Proud, 19 How., 64.

Parsons *v.* Beddford et al., 3 Peters, 433, 445.

All the information the record gives is, that this Morrill "had, as a witness in said case, given material evidence for the defence on said trial."

There is nothing more common than for a witness called by one party to give "material evidence" for the other party. This is constantly done on cross-examinations, and often by the party opposed to the one calling the witness, making him his own witness as to certain facts.

A party cannot impeach a witness called by himself, by proving him unworthy of belief.

Graham and Waterman on New Trials, page 953.

The court below ruled out the evidence offered to impeach Morrill, and, except in so far as the record shows, this court has no means of knowing why. All presumptions are in favor of the correctness of the ruling. This court is bound to consider the determination of the court below to have been correct, on the common presumption that the judge exercised his jurisdiction soundly, until the facts are presented showing the contrary.

2 Graham and Waterman on New Trials, page 596 to 599, and cases.

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2. Said testimony was properly excluded, because, if it had appeared that this Morrill was a witness in behalf of the defendants, an attempt to impeach him by proving what his reputation was four or five years before the trial, was not admissible.

There must be a limit of time, back of which a party cannot go to prove the reputation of a witness to impeach him; else to impeach a man on a trial to-day, it might be proved what his reputation was for truth and veracity fifty years ago.

There is no specific time fixed by law, and it must be left to the discretion of the judge at the trial.

There was no offer or suggestion in the present case, on the part of the plaintiffs, to add anything to the proof proposed.

They called one witness who, as appears from the record, did then know Morrill, and proposed to prove by him what Morrill's reputation was for moral character. This being ruled out as an improper form of question, they dropped that witness, and called another, who did not know Morrill, and had not known him for four or five years, and then varied the question, and put it as to his reputation for truth and veracity.

Why did they not put the question in that form to the first witness who had the information? Obviously for the reason that they dared not properly interrogate a witness having the requisite knowledge, but preferred rather to weave snares to suspend the case and bill of exceptions.

Mr. Justice CLIFFORD 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 California. According to the transcript, the declaration in this case was filed on the eighteenth day of March, 1856. It was an action of trespass on the case for an alleged infringement of certain letters patent purporting to have been duly issued to the plaintiffs for a new and useful improvement in a certain machine or implement called a sluice-fork, used for the purpose of removing stones from sluices and sluice-boxes in washing gold. As the foundation of the suit, the plaintiffs in their declaration set up the letters patent, alleging that they were the original and first

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inventors of the improvement therein described, and charged that the defendants, on the second day of July, 1855, and on divers other days and times between that day and the day of the commencement of the suit, unlawfully and without license vended and sold a large number of the improved forks made in imitation of their invention. To this charge the defendants pleaded the general issue, and in addition thereto, set up in their answer to the declaration two other grounds of defence. In the first place, they denied that the plaintiffs were the original and first inventors of the improvement described in the letters patent, averring that the supposed improvement was known and used by divers other persons in the United States long before the pretended invention of the plaintiffs. They also alleged that the improvement claimed by the plaintiffs, as their invention, was not the proper subject of a patent within the true intent and meaning of the patent law of the United States.

By the fifteenth section of the patent act of the fourth of July, 1836, the defendant, in actions claiming damages for making, using, or selling, the thing patented, is permitted to plead the general issue, and for certain defences, therein specified, to give that act and any special matter in evidence which is pertinent to the issue, and of which notice in writing may have been given to the plaintiff or his attorney thirty days before the trial. Within that provision, and subject to that condition, he may, under the general issue, give any special matter in evidence tending to prove that the patentee was not the original and first inventor or discoverer of the thing patented, or a substantial and material part thereof claimed as new, or that it had been described in some public work anterior to the supposed discovery by the patentee, or had been in public use, or on sale, with the consent and allowance of the patentee, before his application for a patent. But whenever the defendant relies in his defence on the fact of a previous invention or knowledge or use of the thing patented, he is required to "state in his notice of special matter the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used."

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Two written notices were accordingly given by the defendants of special matter to be offered in evidence by them at the trial, in support of the first ground of defence set up in the answer to the declaration. One was dated on the twenty-eighth day of August, 1856, and the other on the nineteenth day of September of the succeeding year, but they were both duly served and filed in court more than thirty days before the trial. Upon this state of the pleadings the parties on the twentieth day of October, 1857, went to trial, and the jury, under the rulings and instructions of the presiding justice, returned their verdict for the defendants. After the plaintiffs had introduced evidence tending to prove the alleged infringement of their patent, they claimed that counsel fees were recoverable as damages in this action, and offered proof accordingly, in order to show what would be a reasonable charge in that behalf.

That evidence was objected to by the defendants, upon the ground that counsel fees were not recoverable as damages in actions of that description, and the court sustained the objection, and excluded the evidence. To which ruling the plaintiffs excepted. Little or no reliance was placed upon this exception by the counsel of the plaintiffs, and in view of the circumstances one or two remarks upon the subject will be sufficient. Suppose it could be admitted that counsel fees constituted a proper element for the consideration of the jury, in the estimation of damages in cases of this description; still the error of the court in excluding the evidence would furnish no ground to reverse the judgment, for the reason that the verdict was for the defendants. For all purposes connected with this investigation, it must be assumed, under the finding of the jury, that the plaintiffs were not entitled to any damages whatever; and if not, then the evidence excluded by the ruling of the court was entirely immaterial. But the evidence was properly rejected on the ground assumed by the presiding justice.

Counsel fees are not a proper element for the consideration of the jury in the estimation of damages in actions for the infringement of a patent right. That point has been directly

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ruled by this court, and is no longer an open question. Jurors are required to find the actual damages incurred by the plaintiff at the time his suit was brought; and if, in the opinion of the court, the defendant has not acted in good faith, or has caused unnecessary expense and injury to the plaintiff, the court may render judgment for a larger sum, not exceeding three times the amount of the verdict. 5 Stat. at Large, page 123. *Day v. Woodworth*, 13 How., 372. To maintain the issue on their part, the defendants offered three depositions, each tending to prove that the plaintiffs were not the original and first inventors of the improvement described in their letters patent.

Objection was seasonably made by the plaintiffs to the introduction of each of these depositions on two grounds: 1. Because the first notice of special matter to be introduced at the trial did not accord with the proof offered, as contained in these depositions. 2. Because the second notice of special matter to be thus introduced was served and filed without any order from the court, and therefore should be disregarded.

Exceptions were duly taken to the respective rulings of the court, in admitting each of these depositions; but as they all depend upon the same general considerations, they will be considered together.

It is conceded by the defendants that the first notice was, to some extent, insufficient. On the other hand, it is admitted by the plaintiffs that the terms of the second notice were sufficiently comprehensive and specific to justify the rulings of the court, in allowing the depositions to be read to the jury. They, however, insist upon the objection, taken at the trial, that it was served and filed without any order of the court, and that it was insufficient, because it was served and filed subsequently to the time when the depositions were taken and filed in court.

But neither of these objections can be sustained. All that the act of Congress requires is, that notice of the special matter to be offered in evidence at the trial shall be in writing, and be given to the plaintiff, or his attorney, more than thirty days before the trial. By the plain terms of the law, it is a

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right conferred upon the defendant; and of course he may exercise it in the manner and upon the conditions therein pointed out, without any leave or order from the court. When the notice is properly drawn, and duly and seasonably served and filed in court as a part of the pleadings, nothing further is required to give the defendant the full and unrestricted benefit of the provision.

Such notice is required, in order to guard patentees from being surprised at the trial by evidence of a nature which they could not be presumed to know or be prepared to meet, and thereby subject them either to delay or a loss of their cause. To prevent such consequences, the defendant is required to specify the names and places of residence of the persons on whose prior knowledge of the alleged improvement he relies to disprove the novelty of the invention, and the place or places where the same had been used. *Wilton v. Railroads*, 1 Wall, jun., 195.

Compliance with this provision, on the part of the defendant, being a condition precedent to his right to introduce such special matter under the general issue, it necessarily follows that he may give the requisite notice without any leave or order from the court; and for the same reason, if he afterwards discovers that the first notice served is defective, or not sufficiently comprehensive to admit his defence, he may give another, to remedy the defect or supply the deficiency, subject to the same condition that it must be in writing, and be served more than thirty days before the trial.

Having given the notice as required by the act of Congress, the defendant at the trial may proceed to prove the facts therein set forth by any legal and competent testimony. For that purpose, he may call and examine witnesses upon the stand, or he may introduce any deposition which has been legally taken in the cause. Under those circumstances, depositions taken before the notice was served, as well as those taken afterward, are equally admissible, provided the statements of the deponents are applicable to the matters thus put in issue between the parties.

After the defence was closed, the plaintiffs offered evidence

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to impeach one of the witnesses, who had given material testimony for the defendants. When called, the impeaching witness stated that he knew the witness sought to be impeached, and knew other persons who were acquainted with the witness, and that they both resided in the city of Sacramento; whereupon, the counsel of the plaintiffs put the question, "What is the reputation of the witness for moral character?" To that question, the counsel of the defendants objected, on the ground that the inquiry should be limited to the general reputation of the witness for truth and veracity, with the right to put the further inquiry whether the witness testifying would believe the other on his oath; and the court sustained the objection, and rejected the testimony.

No reasons were assigned by the court for the ruling; and of course the only point presented is, whether the particular question propounded was properly excluded.

Courts of justice differ very widely, whether the general reputation of the witness for truth and veracity is the true and sole criterion of his credit, or whether the inquiry may not properly be extended to his entire moral character and estimation in society. They also differ as to the right to inquire of the impeaching witness whether he would believe the other on his oath. All agree, however, that the first inquiry must be restricted either to the general reputation of the witness for truth and veracity, or to his general character; and that it cannot be extended to particular facts or transactions, for the reason that, while every man is supposed to be fully prepared to meet those general inquiries, it is not likely he would be equally so without notice to answer as to particular acts.

According to the views of Mr. Greenleaf, the inquiry in all cases should be restricted to the general reputation of the witness for truth and veracity; and he also expresses the opinion that the weight of authority in the American courts is against allowing the question to be put to the impeaching witness whether he would believe the other on his oath. In the last edition of his work on the law of evidence, he refers to several decided cases, which appear to support these posi-

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tions; and it must be admitted that some of these decisions, as well as others that have since been made to the same effect, are enforced by reasons drawn from the analogies of the law, to which it would be difficult to give any satisfactory answer. 1 Greenl. Ev., sec. 461; *Phillips v. Kingfield*, 19 Me., 375, per Shepley, J.; *Goss v. Stimpson*, 2 Sum., 610; *Wood v. Mann*, 2 Sum., 321; *Craig v. the State*, 5 Ohio N. S., 605; *Gilbert v. Sheldon*, 13 Barb., 623; *Jackson v. Lewis*, 13 Johns. R., 504; *United States v. Van Sickle*, 2 McLean, 219; *State v. Bruce*, 24 Me., 72; *Com. v. Morse*, 3 Pick., 196; *Gilchrist v. McKee*, 4 Watts, 380; *State v. Smith*, 7 Vt. R., 141; *Frye v. Bank of Illinois*, 11 Ill. R., 367; *Jones v. the State*, 13 Texas R., 168; *State v. Randolph*, 24 Conn. R., 363; *Uhl v. Com.*, 6 Gratt., 706; *Wike v. Lightner*, 11 S. and R., 338; *Kemmel v. Kemmel*, 3 S. and R., 338; *State v. Howard*, 9 N. H., 485; *Buckner v. the State*, 20 Ohio, 18; *Ford v. Ford*, 7 Humphr., 92; *Thurman v. Virgin*, 18 B. Munroe, 792; *Perkins v. Nobley*, 4 Ohio N. S., 668; *Bates v. Barber*, 4 Cush., 107.

On the other hand, a recent English writer on the law of evidence, of great repute, maintains that the inquiry in such cases properly involves the entire moral character of the witness whose credit is thus impeached, and his estimation in society; and that the opinion of the impeaching witness, as to whether he is entitled to be believed on his oath, is also admissible to the jury. 2 Taylor Ev., secs. 1082, 1083.

That learned writer insists that the regular mode of examining into the character of the witness sought to be impeached is to ask the witness testifying whether he knows his general reputation; and if so, what that reputation is, and whether, from such knowledge, he would believe him upon his oath. In support of this mode of conducting the examination, he refers to several decided cases, both English and American, which appear to sustain the views of the writer. *Rees v. Watson*, 32 How. St. Tr., 496; *Mawson v. Hartsink*, 4 Esp. R., 104; *Rex v. Rockwood*, 13 How. St. Tr., 211; *Carpenter v. Wall*, 11 Ad. and El., 803; *Anonymous*, 1 Hill, (S. C.) 259; *Hume v. Scott*, 3 A. K. Marshall, 262; *Day v. the State*, 13 Mis., 422; 3 Am. Law Jour., N. S., 145.

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Both Mr. Greenleaf and Mr. Taylor agree, however, that the impeaching witness must be able to state what is generally said of the other witness by those among whom he resides, and with whom he is chiefly conversant, and in effect admit, that unless he can so speak, he is not qualified to testify upon the subject, for the reason that it is only what is generally said of the witness by his neighbors that constitutes his general reputation. To that extent they concur, and so, as a general remark, do the authorities which on the one side and the other support these respective theories; but beyond that, the views of these commentators, as well as the authorities, appear to be irreconcilable.

In referring to this conflict of opinion among text writers, and judicial decisions, we have not done so because there is anything presented in this record that makes it necessary to choose between them, or even renders it proper that we should attempt at the present time to lay down any general rule upon the subject. On the contrary, our main purpose in doing so is to bring the particular question exhibited in the bill of exceptions to the test of both theories, in order to ascertain whether under either rule of practice it ought to have been allowed. Under the first mode of conducting the examination, it is admitted that it was properly rejected, and we think it was equally improper, supposing the other rule of practice to be correct. Whenever a witness is called to impeach the credit of another, he must know what is generally said of the witness whose credit is impeached by those among whom the last-named witness resides, in order that he may be able to answer the inquiry either as to his general character in the broader sense, or as to his general reputation for truth and veracity. He is not required to speak from his own knowledge of the acts and transactions from which the character or reputation of the witness has been derived, nor indeed is he allowed to do so, but he must speak from his own knowledge of what is generally said of him by those among whom he resides, and with whom he is chiefly conversant; and any question that does not call for such knowledge is an improper one, and ought to be rejected. No case has been cited

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authorizing such a question, or even furnishing an example where it was put, and our researches in that direction have not been attended with any better success. For these reasons, we think the question was properly excluded. Some further attempts were made by the plaintiffs to impeach this witness, and with that view they called another witness, who testified that he knew the one sought to be impeached, and had had business transactions with him during the years 1852-'53 in the city where they resided. On being asked by the counsel of the plaintiffs what was the reputation of the witness for truth and veracity, he replied that he had no means of knowing what it was, not having had any dealings with him since those transactions; thereupon the same counsel repeated the question, limiting it to that period.

Objection was made to that question by the counsel of the defendants on the ground that the period named in the question was too remote, and the court sustained the objection and excluded the question. To this ruling the plaintiffs excepted. Such testimony undoubtedly may properly be excluded by the court when it applies to a period of time so remote from the transaction involved in the controversy, as thereby to become entirely unsatisfactory and immaterial; and as the law cannot fix that period of limitation, it must necessarily be left to the discretion of the court. Considering that the witness had already stated that he was not able to answer the question, we do not think that the discretion of the court in this case was unreasonably exercised. None of the exceptions can be sustained, and the judgment of the Circuit Court is therefore affirmed with costs.

ANDREW LAWRENCE, COMPLAINANT AND APPELLANT, v. HIRAM A. TUCKER.

Where a mortgage was given to secure the payment of a note for \$5,500, and such advances as there had been or might be made within two years, not to exceed in all an indebtedness of six thousand dollars, and advances were made, the mortgage was good to cover the advances and the note for \$5,500.

The parties to the transaction so understood it, and acted upon it accordingly.

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In respect to the validity of mortgages for existing debts and future advances, there can be no doubt. This court has made three decisions directly and inferentially in support of them.

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

The nature of the mortgage and the circumstances under which it was given are set forth in the opinion of the court, and need not be repeated.

The cause was submitted on printed argument by *Mr. B. R. Curtis* for the appellant, and argued by *Mr. Vinton*, upon a brief filed by himself and *Mr. Hayne*, for the appellee.

Mr. Curtis, after giving a narrative of the facts in the case, and contending that the answer did not allege nor was there any evidence tending to prove that the complainant, who was thus admitted to be a bona fide purchaser for a valuable consideration, had any notice of any lien upon this property save what he gathered from the record of the mortgage to the respondent, made the following points :

1. H. A. Tucker, individually, cannot set up this note against a subsequent encumbrance, as intended to cover future advances.

It is true that a mortgage may be taken to secure future advances ; and perhaps, where no fraud is intended, a note for a sum of money may be given in consideration of such expected advances ; though the policy of allowing such departures from strict truth on the public registries of the country is extremely questionable. But this mortgage, in effect, asserts that the note is not to stand for future advances. For it makes a specific and distinct provision for future advances, and expressly, and clearly distinguishes between them and the note, which is, in so many words, declared not to have been given for future advances, but for that amount of money already due.

If H. A. Tucker, individually, had actually made advances subsequent to the mortgage, he could not have a lien by virtue of it, to secure advances, by himself and his firm, beyond the

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amount of \$6,000, without being allowed to contradict the express and clear terms of the deed, which limits the future advances to that sum.

But he has advanced nothing. And the question is, whether a mortgage to one partner, purporting to secure a debt due to him individually, can, as against a bona fide purchaser, without notice of any parol understanding between mortgagor and mortgagee, be set up as a security for advances made by the firm of which he is a member.

2. The mortgage expressly declaring that it was to stand as security for future advances only to the extent of six thousand dollars, it cannot stand as security for any greater amount of such advances, as against a junior encumbrancer, who has no notice of any parol agreement between the mortgagor and mortgagee, that it shall stand as security for a greater sum.

The public registry informed the complainant that future advances were not to exceed \$6,000; that the note was not given for future advances to be made by any one, but for money then due; that the note had reference to dealings between H. A. Tucker, individually, and the mortgagors, and not between the mortgagors and the firm of H. A. Tucker & Co.

A decree allowing H. A. Tucker to set up the mortgage as security for \$9,689.56 of advances made by his firm, contradicts each of these material representations, on which the complainant had a right to rely when he purchased the property.

3. Upon the face of the mortgage and the whole evidence, it is not made out with the requisite certainty that there was an original agreement between the mortgagors and the mortgagees, that the \$5,500 note should stand as a continuing security for all future advances; and when advances to that amount had been made and repaid, that part of the security, if ever applicable to advances, was extinguished.

Truscott et al. v. King, 2 Seld., 147.

4. This mortgage to H. A. Tucker, to secure future advances by the firm of H. A. Tucker & Co., cannot stand as

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security for advances made after the admission of new partners into the firm. As against the mortgagors, their conduct and understanding may prevent them from taking this objection. But a junior encumbrancer is affected only by the precise terms of the mortgage itself, which provides only for advances to be made by the then firm of H. A. Tucker & Co. Either the admission or retirement of a partner puts an end to the right to make further advances upon the credit of the security, as against the junior encumbrancer, and, if the amount due at the time of such change of the firm is afterwards balanced by payments on account, nothing remains due on the mortgage.

Bank of Scotland v. Christie, 8 Cl. and Fin., 214.

Spiers v. Houston, 4 Bligh. N. S., 515.

Pemberton v. Oaks, 4 Russell's R., 154.

Cremer v. Higginson, 1 Mason, 323.

Simpson v. Cook, 1 Bing., 452, 441.

There are cases in which it has been held that the security continues, though new partners are introduced into the firm. But this was only as against the debtor, or his assignees in bankruptcy, who have only his rights, and by force of an agreement by the mortgagors to extend the operation of the security to the new firm.

Without such agreement, which binds only the debtor and his representatives, there is believed to be no case which holds that the right to make advances on the credit of the security continues after a change in the members of the firm.

See *Ex parte, Oakes*, 2 M. D. and De G., 234.

Ex parte, Marsh, 2 Rose, 239.

If there was such an agreement in this case, the complainant had no notice of it, and is not bound by it.

The firm of H. A. Tucker & Co. was changed by the admission of new partners, January 1, 1857, and all advances made previous to that date have been repaid.

Mr. Vinton replied to these points as follows:

Question 1. The first question that arises in this case is, what was the mortgage to Tucker intended to secure?

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We claim that it was intended to secure any indebtedness that might arise in the manner specified therein, to an amount not exceeding, at any one time, the sum of eleven thousand five hundred dollars; and that the actual knowledge of defendant's claim by the subsequent encumbrancers, and by Lawrence, the purchaser, made them chargeable with what was in fact due on the mortgage, not exceeding that sum, as the only condition on which they or any of them would be allowed to redeem the property. In other words, they can only redeem subject to the satisfaction of Tucker's prior equity, whatever that may be.

Question 2. May a mortgage be taken as a security for future advances, and be a lien on the property to the extent of the sum or sums provided for in it?

The cases which affirm the doctrine that a mortgage may be given to secure future advances, or future liabilities, are very numerous.

Shirras v. Caig, 7 Cranch, 34; *Leeds v. Cameron*, 3 Sumner, 492; *Lyle v. Ducomb*, 5 Binney, 590; *Collins v. Carlisle*, 13 Illinois, 256—are some of the leading American cases on this head.

In *Leeds v. Cameron*, Judge Story said: "Nothing can be more clear, both upon principle and authority, than that, at the common law, a mortgage bona fide made may be for future advances and liabilities for the mortgagor by the mortgagee, as well as for present debts and liabilities." He cites 3 Cranch, 73; 1 Pet. Rep., 448.

There are cases which question the prior lien of the first mortgage for future advances made after a second mortgage has been given; but in this case no such question arises, as all the advances were made before the execution of either of the subsequent mortgages.

The advances covered by the first mortgage having been made prior to a subsequent lien, and prior to complainant's purchase, it could make no difference, nor work any injury to the subsequent encumbrancers, nor to the complainant as purchaser, that at times during the continuance of the dealing under the first mortgage there was actually due less than the

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whole amount secured by it, or, if such were the fact, that there was no indebtedness or balance due; and they cannot avail themselves of that objection, because, during the continuance of the dealing, the mortgage and note for \$5,500 were treated as and understood by the parties to be a continuing security for whatever advances might be made during the two years the contract was to last. And neither subsequent encumbrancers nor purchasers could suffer any prejudice, if due inquiry were made, from a mortgage, the record of which was notice to all persons of an encumbrance to the extent of eleven thousand five hundred dollars. They were interested in knowing what was in fact due when the subsequent encumbrance was taken, and when the subsequent purchase was made, and they were interested no further.

The note for \$5,500 states on its face that it was given for an actual loan of money, and consequently the mortgage, to the extent of that note, appears to have been given to secure a debt then due, and this presents the question:

Question 3. Whether parol evidence can be given to show that the note and mortgage were taken as a collateral security for advances thereafter to be made, and that in fact such advances were subsequently made, on the faith of that security?

As between the parties to the mortgage, there can be no question but such proof would be let in. Indeed, it is one of the most ancient principles of a court of equity, that if a deed be absolute on its face, it may be proved by parol, in a court of equity, that it was a conditional conveyance given to secure a loan of money.

Whether such proof will be let in against third persons will depend upon the fact whether the mis-statement or misrepresentation in the deed was made for a dishonest purpose, and whether such third person has been deceived or injured by it. This objection was made in the case of *Shirras v. Caig*, (2 Pet. Cond. Rep., 410.) Judge Marshall said: "It is true the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of thirty thousand pounds sterling, due to all the mortgagees. It was really intended to secure different sums due at the time to particular mortgagees,

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advances afterwards to be made, and liabilities to be incurred to an uncertain amount."

After remarking that misrepresentations of a transaction are liable to suspicion, he says: "But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation. That cannot have happened in the present case."

The same may be said of the case now in hand; the misrepresentation in Tucker's mortgage, if it may be called such, has neither injured nor deceived the subsequent encumbrancers nor the purchaser under them, nor was it made for an unfair or dishonest purpose. If the complainant could prove any of these facts, he had the right and an opportunity to do it. And they are not to be presumed in the absence of proof.

Question 4. Judge Curtis, in his brief, has raised the question, whether the mortgage can stand as a security for advances made by the firm of H. A. Tucker & Co., after the admission of new partners into that concern.

The complainant comes into court asking for equity, and praying that the defendant's legal title to the property mortgaged may be taken from him by a decree of the court. That being his attitude, he will not be likely to meet with much encouragement in setting up technicalities to deprive the defendant of his honest rights.

It ought here to be borne in mind, that all the securities claimed to be now due, with one exception, are notes of hand given by Floyd & French, payable to the order of H. A. Tucker alone, and consequently within the precise letter of the mortgage. The demand note of the 18th of December, 1857, for \$2,000, is made payable to H. A. Tucker & Co.

If H. A. Tucker raised money through the firm of H. A. Tucker & Co., for Floyd & French, and took their notes for it, payable to himself personally, thus bringing the transaction within the precise letter of the mortgage, who, it may be

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asked, has a right to complain of that? Was this dishonest or unfair?

This fact would seem to dispose of this objection to all the claims except the \$2,000 note. And what, it may well be asked, is the equity or justice of the objection to that note?

In January, 1857, two new partners were brought into the firm of H. A. Tucker & Co. But the stipulation respecting this fact, at page 34 of the record, shows that no new capital was brought into the concern. No change was made in the name of the firm; all the old accounts, and that of Floyd & French among the rest, were carried forward without any change. Tucker retained in his own hands the exclusive right to manage and control the affairs of the concern, and to sign the partnership name; it was in fact his concern. Floyd & French continued to get advances as before, with the understanding by both parties that they were made on the faith of the mortgage.

This understanding and this course of dealing could work no injury to subsequent encumbrancers, because they then had no mortgage or claim on the property, nor is it pretended they were misled or deceived by it to their injury.

Lyle v. Ducomb (5 Binney, 590) was a case where defendant Ducomb gave a bond for \$18,000, conditioned to pay \$9,000, with a mortgage on real estate. By an endorsement on the mortgage, it was stated that it was made to secure the plaintiff for notes drawn and to be drawn by him, and by Lyle and Newman, for Ducomb's accommodation.

Objection was made, that a mortgage intended as an indemnity against acts to be performed at a subsequent time, ought not to have any effect against third persons.

Tilghman (Justice) said: "This point was very properly abandoned. There cannot be a more fair, *bona fide*, and valuable consideration, than the drawing and endorsing of notes at a future period, for the benefit and at the request of the mortgagor, and nothing is more reasonable than the providing a sufficient indemnity beforehand."

In that case, six months after the making of the mortgage, and after a builder's lien had attached to the property, the

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mortgagor and mortgagee entered into an agreement, that a description of notes not before embraced by the mortgage, and made by a different drawer than the drawers named in the mortgage, should be embraced therein. Held, that the parties had a right to make such agreement, as between themselves, and that it was also good as to third parties, who were intervening encumbrancers, if the amount of the mortgage encumbrance were not thereby increased beyond the amount which the mortgage was intended to secure.

5 Binney, 589.

This doctrine would seem to dispose of the objection we are now considering. In the case of the Commercial Bank *v.* Cunningham, (24 Pick., 270,) the mortgagors, who were a firm under the name of Edgerton, Whitecomb, & Co., made a mortgage to secure their existing debts, and also future debts they might owe mortgagees; and afterwards mortgagors admitted a new partner into the firm, which assumed a new name. Held, that notes given by the new firm were covered and secured by the mortgage.

In conclusion, we think it may be safely affirmed, that upon no known principle of equity can the defendant be deprived of his legal and equitable lien upon the property mortgaged to him, until he is paid the full amount equitably covered by the mortgage, and due to him and to the other parties named in the deed. In other words, the complainant himself must do what is equitable, as the sole condition on which he can claim to redeem and obtain possession of the property discharged of the defendant's lien.

Mr. Justice WAYNE delivered the opinion of the court.

We have been unable to find anything in this record to authorize us to change or modify the decree made by the Circuit Court in this case.

Andrew Lawrence filed his bill in that court, for the northern district of Illinois, against Hiram A. Tucker, to redeem the furniture of a hotel in the city of Chicago, called the Briggs House, upon which Tucker has a mortgage.

On the 1st of September, 1856, John J. Floyd and George

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H. French, who then were the keepers of that hotel, wishing to have a current business credit with Tucker and the firm of H. A. Tucker & Co., and the bank named in the mortgage, executed, under the name and firm of Floyd & French, to Hiram A. Tucker, a mortgage of the furniture of the hotel, to secure a note of Floyd & French, made to Tucker, for \$5,500, and such advances of money as there had been or might be made within two years, by H. A. Tucker, H. A. Tucker & Co., or the Exchange Bank of H. A. Tucker & Co., not to exceed in all an indebtedness of six thousand dollars in addition to the sum for which their note was given. The note was dated on the 1st of September, the day on which the mortgage was made, payable one day after date, with interest at the rate of ten per cent. per annum. The note was to be held by Tucker, as a collateral security for such advances as have just been stated, and the amount of the note also. Under this arrangement, successive advances were made to Floyd & French, on their checks or by discount of their notes, until some time in October, 1857, when they ceased.

Tucker, during this time, continued to hold the note for \$5,500. He also held several other promissory notes of Floyd & French, as appears by the exhibits, C, D, E, G, H, annexed to Tucker's answer to the complainant's bill. All of these notes, except that for \$2,000, are drawn payable to H. A. Tucker; all of them are prior in dates to other mortgages upon the same furniture, except the note just mentioned for \$2,000, and that was a renewal of a note for a loan made on the 26th September, 1857, prior to the date of the mortgages made to Briggs & Atkins. The mortgage to Briggs was made on the 19th November, 1857, by Floyd & French, and one Ames, who had been taken into their firm. It was given to secure debts due to Briggs, and liabilities he had assumed for them, and also for such advances of money as Briggs might thereafter make to them, with a power of sale on default. When Briggs took this mortgage, he knew that Tucker had a prior mortgage on the same furniture, and he states in his evidence that he knew advances of money had been made upon it by Tucker, for which he knew it stood as a security.

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On the 12th of January, 1858, Floyd & French and Ames made a third mortgage of the same property to Henry Atkyns, as trustee, with a like power of sale, to secure debts mentioned in it. Both of these mortgages refer to Tucker's mortgage as an existing encumbrance upon the furniture, &c., &c. Briggs and Atkyns had then, of course, notice of Tucker's mortgage.

Atkyns sold the furniture under his power of sale on the 27th February, 1858; Briggs sold under his power of sale on the 12th March following. Lawrence became the purchaser at both sales. Briggs sold to him expressly subject to the mortgage of French & Floyd to H. A. Tucker; and Lawrence admits, by a stipulation in the record, that when he purchased the property under the mortgages, he had notice that either the defendant Hiram A. Tucker or H. A. Tucker & Co. held the notes against Floyd & French, as they are set forth in the defendant's answer, and that the amount was claimed to be due upon them, as it is set out in the answer.

Upon referring to that answer, and its exhibits, C, D, E, G, H, we find that the only securities now claimed to be due are, with one exception, notes of hand given by Floyd & French, payable to the order of H. A. Tucker alone, precisely within the mortgage, and that the note of December 18th, 1857, payable to H. A. Tucker & Co., for the sum of two thousand dollars, payable at the counting-house of H. A. Tucker & Co., in Chicago, was for an actual loan of money, and that it was the renewal of a former note for the same sum, dated the 26th September, 1857.

We have, then, the admission of the complainant, that when he purchased under the mortgages of Briggs & Atkyns, he knew the particular items constituting the outstanding unpaid debt of Floyd & French to Hiram A. Tucker and H. A. Tucker & Co. for advances. One of these notes, dated the 14th October, 1857, was for \$1,000, exhibit C; another, dated 22d October, 1857, exhibit D, was for \$3,000; the third, exhibit E, dated July 11, was for \$450; exhibit G, of the same date, was a note for the sum of \$5,000; and exhibit H, dated the 18th December, 1857, was for \$2,000.

Floyd, who did the financial business of the firm of Floyd

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& French, testifies that the notes just mentioned were given for advances; but he claims a credit of \$1,500 on the note, exhibit D; and states that the note for \$450, exhibit E, had not been given for money advanced, but that it and another note for the same amount were given for the interest for one year on the note for \$5,500. Floyd also states that the note marked exhibit I, for \$5,500, was signed by himself when he signed the mortgage, and that he personally made the negotiation with H. A. Tucker & Co.

It is further stated by him, that the aggregate amount of all the advances which had been made by the defendant to his firm upon the faith of the note and the mortgage, since the first of September, 1856, amounted to "from fifty to a hundred thousand dollars," and that the sum now remaining due was "somewhere in the vicinity of ten thousand dollars." He verifies the notes named in the exhibits, C, D, E, G, H, with the originals; confirms the statement in exhibit A of the discounts which his firm had received under the note and mortgage; and adds, that when the note and mortgage were given, his firm then owed to H. A. Tucker & Co. twenty-five hundred dollars, which was paid on the 7th September, 1856; and repeats in his cross-examination what he had said in his examination in chief, concerning the amount of the discounts and cash received from H. A. Tucker & Co. under the note and mortgage.

It must have been upon the testimony of this witness that the court below gave its decree.

But we have not referred to it with the view of testing the correctness of the sum allowed to the defendant, as the condition upon which the complainant might redeem the mortgage—though, having made the computation, we find it to be correct, with a small mistake. Our object has been to show that the parties to the original transaction understood it alike, and acted upon it accordingly; that there never was a difference between them, as to the character of the mortgage and its purpose; and that it was intended to be a security for and a lien upon the property mortgaged for future advances, to the extent of the sum provided for in it. So also Floyd &

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French represented it to be in their transactions with others, when they found it convenient to their business to give other mortgages upon the same property for the security of other creditors.

We consider it to be a mortgage for future advances, that they were subsequently made in conformity with its provisions, and that the proofs that they were so, were rightly received by the court below to substantiate them. There is neither indirectness nor uncertainty in the terms used in the mortgage, to make it doubtful that it was intended to cover the note for \$5,500 and for future advances. It is stated in terms that it was intended for that purpose. The note, though expressed to be an existing indebtedness at the date of the mortgage, secured to be paid by a promissory note, payable one day after date, is associated with the advances to be made to Floyd & French to the amount of \$6,000; but it is proved that the note and mortgage were in fact taken as a security for advances thereafter to be made, and that it was done without any other purpose than to get a credit extended to them of eleven thousand five hundred dollars, instead of advances only to the amount of \$6,000. It is objected that the difference makes the transaction subsidiary.

An objection of this kind was made in the case of *Shirras v. Caig*, 7 Cranch, 34; but this court then said, it is true the real transaction does not appear on the face of the mortgage; the deed purports to have been a debt of thirty thousand pounds sterling, *due to all of the mortgagees*. It was really intended to have different sums due at the time to particular mortgagees, advances afterwards to be made, and liabilities to be encountered to an uncertain amount. After remarking that such misrepresentations of a transaction are liable to suspicion, Chief Justice Marshall adds: "But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation." In this case, the complainant has not been

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deceived, and the variance between the alleged indebtedness and that advances were to be made afterwards gives to his suit no additional force or equity.

No proof was given by the complainant that he had been injured or deceived by it into making his purchase under the mortgages of Briggs and Atkyns, and that cannot be presumed in his behalf. In fact, there is not an averment in the complainant's bill in favor of the equity of his demand, which is not met and denied in the defendant's answer, and which has not been disproved by competent testimony. We do not think there is anything in the objection that the mortgage to H. A. Tucker to secure future advances by the firm of H. A. Tucker & Co. cannot stand as security for advances made after the admission of new partners into that firm. The cases cited in support of this objection do not sustain it, and we have not been able to find any one that does. They relate exclusively to stipulations for an advancement of money to a copartnership after a new member has been taken into the firm.

In respect to the validity of mortgages for existing debts and future advancees, there can be no doubt, if any principle in the law can be considered as settled by the decisions of courts. This court has made three decisions directly and inferentially in support of them: *United States v. Hooe*, 3 Cranch, 73; *Conrad v. Atlantic Insurance Company*, 1 Peters, 448; *Shirras v. Caig*, 7 Cranch, 34. Tilghman, C. J., says, in 5 Binney, 590, *Lyle v. Ducomb*, "there cannot be a more fair, bona fide, and valuable consideration than the drawing or endorsing of notes at a future period, for the benefit and at the request of the mortgagors; and nothing is more reasonable than the providing a sufficient indemnity beforehand." Mr. Justice Story declared, in *Leeds v. Cameron*, 3 Sumner, 492, that nothing can be more clear, both upon principle and authority, than that at the common law a mortgage, bona fide made, may be for future advances by the mortgagee as well as for present debts and liabilities. I need not do more upon such a subject than to refer to the cases of the *United States v. Hooe*, 3 Cranch, 73, and *Conrad v. the Atlantic Insurance Company*, 1 Peters, 448.

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We affirm the decree of the Circuit Court in this case, and shall remand it there for execution.

**CHARLES RICHARDSON AND OTHERS, CLAIMANTS OF THE BARQUE
TANGIER, APPELLANTS, v. DAVID GODDARD AND OTHERS.**

The general rules which regulate the delivery of goods by a carrier, by land or water, explained.

Where the master of a vessel delivered the goods at the place chosen by the consignees, at which they agreed to receive them, and did receive a large portion of them after full and fair notice, and the master deposited them for the consignees in proper order and condition at mid-day, on a week day, in good weather, it was a good delivery according to the general usages of the commercial and maritime law.

The fact that the Governor of the State had appointed a day as a general fast day, did not abrogate the right of the master to continue the delivery of the goods on that day. Holiday is a privilege, not a duty.

There was neither a law of the State forbidding the transaction of business on that day; nor a general usage engraven into the commercial and maritime law, forbidding the unlading of vessels on the day set apart for a church festival, fast, or holiday; nor a special custom in the port, forbidding a carrier from unloading his vessel on such a day.

In the absence of these legal restrictions, the master had a right to continue the delivery of the goods on the wharf on a fast day.

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

It was the case of a libel filed in the District Court by Goddard & Pritchard, against the barque Tangier, for the non-delivery of certain bales of cotton shipped at the port of Apalachicola. The barque arrived at Boston, and the cotton was lost under the circumstances mentioned in the opinion of the court. The District Court dismissed the libel, but this decree was reversed by the Circuit Court, and the vessel ordered to pay the amount reported by the assessor. The claimants of the vessel appealed to this court.

The case was argued by *Mr. Shepley* for the appellants, and by *Mr. Cushing* for the appellees.

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Mr. Shepley said that the question involved might be presented under two aspects.

First. Assuming Thursday, April 10, to have been an ordinary working day, can the libel be maintained?

Second. If not, then does the fact that Thursday was a fast day maintain it?

I. Upon the first assumption, that Thursday is to be deemed an ordinary working day, the respondents establish a full defence upon this proposition—that before the destruction of the cotton by accidental fire, and before one o'clock, on Thursday, April 10, they had unladed it upon a suitable wharf, and one selected by the libellants, and made it ready for delivery under a full and reasonable notice to the libellants, thus legally tendering a delivery.

Upon the first of these two propositions, *Mr. Shepley* contended that the unlading which was shown to have taken place in this case was such a delivery as terminated the liability of the carrier as carrier, and cited the following authorities:

Story on Bailments, sec. 545.

2 Kent's Com., (6th ed.,) 604, and cases in note.

1 Gray's Rep. 271, *Norway Plains Company v. Boston and Maine R. R. Co.*

Cope v. Cordova, 1 Rawle Rep., 203.

Goold v. Chapin, 10 Barb. Supreme Court, 612.

Garside v. Trent and Mersey Navigation Company, 4 Term Rep., 389.

10 Met., 472.

Fisk v. Newton, 1 Denio.

Powell v. Myers, 26 Wend., 591.

Angell on Carriers, sec. 313.

With respect to the nature of the delivery, *Mr. Shepley* laid down the following propositions, each of which was sustained by references to the evidence.

I. the place of delivery was a proper one. It was on a wharf usual, and selected by the libellants.

II. The notices given were sufficient for all, and for unlading on Thursday as well as on previous days.

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III. Before the fire, the cotton was all unladen, and that of the libellants was separated and so accessibly placed as to make it the duty of the consignee to take charge of it.

The next question is, whether the fact that Thursday was fast day, rendered the act of unlading under notice ineffectual to terminate the carrier's liability.

To show this, it must be made to appear, upon the whole evidence—that is, upon the evidence which the court judicially possesses or notices, and upon the evidence given at the trial—that it is the universal usage in the port of Boston not to unlade goods, not liable to injury by weather, upon the forenoon of fast day, from a vessel whose unlading had begun and been interrupted by the neglect of consignees.

The argument upon which this position is maintained is this—

1. Thursday, April 10, 1856, was *prima fronte* a day proper for the discharge of cargo. The fact that the Governor of Massachusetts recommends it to be observed as a day of fasting, humiliation, and prayer, cannot be judicially known to this court to render it *per se* a day improper for the unlading of a half-discharged vessel.

Prima fronte that is a mere recommendation addressed to each man's free will, and which the respondents were legally at liberty to disregard; and as they did disregard it, all their rights remain unaffected under the general law.

The fact that it has been usual for the Governors to make a similar recommendation on other days, for many years, or for two hundred, on or about the same time in the year, does not advance or change the case. Each and all were mere recommendations addressed to each man's free will, which he was at liberty to disregard, and disregarding which, his rights would all remain under the general law.

2. It must appear then to the court, upon the whole evidence, that there is a usage to do no work like this under circumstances like these, to wit, the discharging of a half-discharged cargo under such circumstances as these, so universal as to bind the respondents.

The sources of this evidence are said to be—

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1. The judicial knowledge of the court.

2. The proofs in the cause.

(Upon each of these points, *Mr. Shepley* adduced various illustrations, and contended that they had a legal right to unlade on a fast day, as no law prohibited it. To strike from the week one of its working days, and compel us to a fast or a rest, to which law does not, a universal usage is demanded.

1 Duer on Ins., 258, 261, 262, 265.

The Paragon, Ware's Rep., 322.)

The proof, so far from establishing such a usage not to unlade, establishes the universal usage to unlade.

The following points of fact are established by numerous witnesses (to whom *Mr. Shepley* referred.)

1. That the discharge of vessels begun to be unladen before fast day continues on that day.

2. Cargoes are moved on that day from the wharf.

3. Labor is generally done on that day by all to whom it is necessary or highly convenient to do it.

4. Expresses, freight and passenger trains, go on that day.

5. It is a working day in all charter-parties.

6. Public worship is not observed.

The proof of the usage respecting fast day is not sufficiently broad to deprive the master, who has before commenced unlading, of the right to continue it with all the rights he would have had if it had not been fast day. To that extent the unsuitableness of the day fails to be established by the usage, and the master's rights cannot be destroyed by simple proof that it is not usual to receive goods on that day. That usage not to receive does not affect both parties, does not act upon both, and does not deprive the master of the right, under such circumstances, to regard the day as a suitable day for discharging. The master cannot be affected by any usage prevailing among others, which does not reach and control his conduct. Fast day is a suitable day to unlade, unless there be full proof of a usage to prevent it. That usage must be broad enough to affect the conduct of both parties. The established usage, to complete on fast day an unlading commenced before, breaks in upon the usage attempted to be established so far

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as to leave the ship-master in the full possession of his rights on that day to act precisely as on any other day.

The practice to unlade on that day, and the custom not to receive, are inconsistent with each other to this extent—that the custom not to receive must fail to be established, so far as it is inconsistent with the right to complete an unlading on fast day, or else such right of unlading is of no effect.

If such a usage as is contended for by libellants be established, it is one which may be waived. It was waived by Solis, the clerk, who had full power to represent the consignees respecting the unlading and delivery as their agent, and he waived all objection to a delivery on fast day.

It is the duty of consignees to remove goods from the place where landed so soon as not to occasion delay, and this they engaged to do in this case, by Solis, their clerk. They neglected to do so, and thereby made it necessary to complete unlading on fast day. They cannot have damages occasioned by fire which would not have injured their property if they had not been guilty of neglect which subjected it to that injury.

Mr. Cushing commenced his argument by stating the following general law points:

1. The bills of lading in this case import one full and complete obligation to deliver as well as to carry.

Such is the general law of carriers by sea or land.

Angell on Carriers, sec. 322.

And such is the special law of carriage by sea.

Flanders on Shipping, secs. 507, 513.

See, also, Stevens *v.* Boston and Maine Railroad, 1 Gray, 277.

Parsons on Merc. Law, 202, 207.

Miller *v.* Steam Navigation Co., 13 Bar., 361.

2. The only exception to this rule, in marine carriage, is of perils of the sea.

Fire on the wharf after landing is not within the exception.

Oliver *v.* Memphis Ins. Co., 18 How., 312.

Airey *v.* Merril, 2 Curtis C. C. R. S.

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3. Delivery is either actual or constructive.

Actual delivery is to the consignee, or his authorized agent, the deliverer receiving the goods in fact.

Constructive delivery consists of notice, tender, readiness, and present ability to deliver according to the contract, all such conditions being reasonable as to time and place, and so constituting duty to receive.

Addison on Contracts, 798.

Flanders on Shipping, sec. 811.

Angell on Carriers, sec. 323.

4. Unlading and delivery are, or may be, distinct facts, as well in constructive as in actual delivery.

Thus, the fact of landing on a wharf is not necessarily the fact of delivery.

Addison on Contracts, 811, 812.

Flanders on Shipping, 279.

Logs of Mahogany, 2 Sumner, 589.

Ostrander v. Brown, 15 Johnson, 39.

Gibson v. Culver, 17 Wendell, 305.

Fisk v. Newton, 1 Denio, 45.

Angell on Carriers, sec. 300.

5. Separation of the goods to be delivered from others is of the essence of the question of the readiness to deliver, and the duty to receive, so as to establish constructive delivery.

Brittan v. Barnaby, 21 How., 532.

6. Tender of delivery in such quantities, relatively to time, as may make reception and removal for storage practicable, is of the essence of constructive delivery.

Angell on Carriers, secs. 287, 313.

Brittan v. Barnaby, 21 How., 532.

Parsons Merc. Law, 208.

Price v. Powell, 3 Coms. App., 322.

Benson v. Blunt, 1 A. and Ellis, N. S., 270.

7. Due relation of notice of delivery to the time or times of delivery, so as to impose on the consignees no unreasonable consumption of time in the reception of the goods, is of the essence of constructive delivery.

Gatliff v. Bourne, 4 Bing. N. C., 321.

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8. Proffer of delivery on and for a lawful day is of the essence of constructive delivery.

Ex. gr. The Lord's day is a statute holiday, on which unnecessary labor is forbidden in most of the countries of Christendom.

So, notice on the Lord's day and landing next morning are bad.

Bourne v. Gatliff, 11 Cl. and F., 49.

Generally, *dies festi* (corrupted into *feast* or *fast*, according to taste or occasion)—holidays (days of amusement, or days of sanctity, as the case may be, for the term covers both)—are not days for the execution of contracts.

Chitty on Contracts, (7th Am. ed.,) 721, note.

As to such feast, fast, holy, or holi, days, the following things are to be noted, viz :

(a.) In common contracts not negotiable, if day of performance falls due on a holiday, it is performable the next day.

Chitty on Contracts, *ut supra*.

Chitty on Bills, (11th Am. ed.,) 277, note.

Sutton v. Burt, 20 Wendell, 205.

Staples v. Franklin, 1 Met., 47.

(b.) In negotiable contracts, or with grace, the day before.

Story on Prom. Notes, sec. 219.

Chitty on Bills, (11th Am. ed.,) 377 a, note.

(c.) National or local usages as to holidays have the same effect as statutes.

Story's Prom. Notes, sec. 222.

Chitty on Bills, (11th Am. ed.,) 378 a, note.

City Bank v. Cutler, 3 Pick., 414.

9. In constructive delivery, the conditions of reasonableness are affected, and sometimes determined, by the usage of business, which usage is a question of fact, regulated, however, by legal doctrines.

10. Until such delivery, actual or constructive, the ship's liability under the bill of lading continues.

Story on Bailments, sec. 538.

3 Kent's Com., 163—167.

Price v. Powell, 3 Com. App., 322.

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- Miller *v.* Steam Nav. Co., 13 Bar., 361.
Hill *v.* Humphreys, 5 Watts and S., 123.
Harmon *v.* Clark, 4 Camp., 159.
Goold *v.* Chapin, 10 Bar., 612.
Gatliff *v.* Bourne, 4 Bingham's N. C., 314.
S. C., 3 Man. and Gr., 643.
S. C., 11 Clark and F., 45.
Fisk *v.* Newton, 1 Denio, 45.
Thomas *v.* Bos. and Prov. R., 10 Mit., 432.
Lewis *v.* Western Railroad, 11 Mit., 314.
Norway Plains *v.* Bos. and Maine R., 1 Gray, 263.

III. *Particular Points.*—1. It appears proved in the present case, that, so far as any usage exists, to supply the elements of reasonableness in the evidence of constructive delivery, it is, to haul up to some suitable wharf, and land the goods to be received there.

That is conceded to be a lawful usage.

Gatliff *v.* Bourne, 4 Bing. N. C., 314.

In all other respects the general rules remain, as to notice and other circumstances, as already hereinbefore argued, *ex-emp. gratia.*

- (a.) Due notice to the consignee or his authorized agent.
- (b.) Separation of the goods.
- (c.) Practicability of reception and removal.
- (d.) Due relation of notice and time or times of delivery.
- (e.) A lawful day.

2. It appears in the present case conclusively that the libellants used all due diligence to take away their goods as soon as the landing commenced, and so long as it continued prior to Thursday.

- (a.) Libellants' agents and servants worked on Monday, and on Tuesday so long as they could find any cotton.
- (b.) So far as regards men and teams, and storage, they could have removed all their cotton on Wednesday.

(Three witnesses.)

- (c.) But the parcels were not separated or set apart by the ship on being landed, and were not according to law made by the master ready for delivery, and so there could be no con-

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structive delivery, beyond the actual amount received in part and receipted for by libellants' agent.

See the testimony of the same witnesses.

This consideration applies to so much of the cotton burned, if any, as was landed before Wednesday.

3. Fast day by proclamation is a lawful holiday in Massachusetts, on which libellants were not bound to receive, and therefore all goods landed that day remained at the risk of the ship.

(a.) Statutes of Massachusetts, act of 1838, ch. 182, make bills of exchange falling due on fast day payable the day before, with notice of protest the day after.

Act of 1856, ch. 113, (April 15, 1856,) forbids courts and public offices to be open on fast day.

(b.) It is a *dies non* by immemorial usage in Massachusetts.
(Six witnesses.)

It is a much stronger case of *dies non* by usage than that in *City Bank v. Cutler*, 3 Pick., 414, which was of commencement day at Harvard College.

(c.) The custom-house is closed.
(One witness.)

(d.) To make out a case of constructive delivery on fast day, there must have been specific notice of intention to tender delivery that day, and special agreement to receive on that day. None of which appears, but the contrary is in proof.

(e.) There was no waiver by libellants of their right of holiday on fast day.

Solis, reception clerk of libellants, gave notice to the officers of the *Tangier* that he should not receive on fast day.

(Four witnesses.)

If it had been otherwise, he would have exceeded his authority, and his acts would not have bound his principal.

4. The limitation, by act of Congress, of the liability of ships, does not apply here.

Limitation is only in case of fire on board the ship.

Compare act of Parliament, 26 Geo. III, c. 86, with act of Congress of March 3, 1851, 9 Stat. at Large, 635.

And see *Morewood v. Pollok*, 18 Eng. L. and Eq., 341.

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- IV. Conclusion. 1. There was no actual delivery in this case.
2. The goods were destroyed before the time of lawful reception arrived, and there was no constructive delivery.
3. The ship is therefore liable for the goods.
4. And to the full value.

And the decree of the Circuit Court must be affirmed.

Mr. Justice GRIER delivered the opinion of the court.

The barque "Tangier, a foreign vessel in the port of Boston," is charged in the libel with a failure to deliver certain bales of cotton, according to her contract of affreightment. The answer admits the contract, and alleges a full compliance with it, by a delivery of the cargo on the wharf; and that after such delivery, a part of the cargo was consumed by fire, before it was removed by the consignees.

The libellants amended their libel, admitting the receipt of 163 bales, and setting forth, as a reason for not receiving and taking away from the wharf that portion of the cargo which was unladen on Thursday, "that, by the appointment of the Governor of Massachusetts, that day was kept and regarded by the citizens as 'a day of fasting, humiliation, and prayer,' and that from time immemorial it has been the usage and custom to abstain from all secular work on that day;" and consequently, that the libellants were not bound to receive the cargo on that day; and that such a delivery, without their consent or agreement, is not a delivery or offer to deliver in compliance with the terms of the bill of lading.

Three questions of law were raised on the trial of this case below:

1. Whether the master is exempted from liability for a loss occasioned by accidental fire, after the goods are deposited on the wharf, by the act of Congress of March 3d, 1851.
2. Whether the master is liable, under the circumstances of this case, for the loss of the cotton, on the general principles of the maritime law, excluding the fact of fast day.
3. If not, whether the right of the carrier to continue the discharge of his cargo is affected by the fact that the Governor had appointed that day as a general fast day.

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As our decision of the second and third of these points will dispose of this case, we do not think it necessary to express any opinion on the first.

We will first inquire whether there was such a delivery of cargo in this case as should discharge the carrier under this contract of affreightment, irrespective of the peculiar character of the day.

The facts in evidence, so far as they are material to the correct decision of this point, are briefly as follows :

The barque *Tangier* arrived in the port of Boston on the 8th of April, with a cargo of cotton, intending to discharge at Battery wharf; but at the request of the consignees, and for their convenience, she "hauled up" at Lewis's wharf. She commenced the discharge of her cargo on Monday, the seventh, and on the same day the master gave notice to the consignees of his readiness to deliver the goods. The unlading was commenced in the afternoon, and was continued through the forenoon of Tuesday, when, the cotton not being removed, the wharf became so full that the work was suspended. Notice was again given to the consignees; and they still neglecting to remove their cotton, a third notice was added on Wednesday morning. On the afternoon of that day, all the cotton which had been unladen on Monday and Tuesday was removed, excepting 325 bales, which remained on the wharf over night. On Thursday morning, the wharf was so far cleared that the unlading was completed by one o'clock P. M. On that day, the libellants took away about five bales, and postponed taking the rest till the next day, giving as a reason that it was fast day. About three o'clock of this day, the cotton remaining on the wharf was consumed or damaged by an accidental fire.

The contract of the carrier, in this case, is "to deliver, in like good order and condition, at the port of Boston, unto Goddard & Pritchard."

What constitutes a good delivery, to satisfy the exigency of such a contract, will depend on the known and established usages of the particular trade, and the well-known usages of the port in which the delivery is to be made.

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A carrier by wagon may be bound to deliver his freight at the warehouse of the consignee; carriers by railroad and canal usually deliver at warehouses belonging to themselves or others. Where the contract is to carry by sea, from port to port, an actual or manual tradition of the goods into the possession of the consignee, or at his warehouse, is not required in order to discharge the carrier from his liability as such.

There is no allegation of a particular custom as to the mode and place of delivery, peculiar to the city of Boston, which the carrier has not complied with. The general usages of the commercial and maritime law, as settled by judicial decisions, must therefore be applied to the case. By these, it is well settled that the carrier by water shall carry from port to port, or from wharf to wharf. He is not bound to deliver at the warehouse of the consignee; it is the duty of the consignee to receive the goods out of the ship or on the wharf. But to constitute a valid delivery on the wharf, the carrier should give due and reasonable notice to the consignee, so as to afford him a fair opportunity of providing suitable means to remove the goods, or put them under proper care and custody.

Such a delivery, to be effectual, should not only be at the proper place, which is usually the wharf, but at a proper time. A carrier who would deposit goods on a wharf at night or on Sunday, and abandon them without a proper custodian, before the consignee had proper time and opportunity to take them into his possession and care, would not fulfil the obligation of his contract. When goods are not accepted by the consignee, the carrier should put them in a place of safety; and when he has so done, he is no longer liable on his contract of affreightment.

Applying these principles to the facts of this case, it is clear that (saving the question as to the day) the respondents are not liable on their contract of affreightment for the loss of the goods in question. They delivered the goods at the place chosen by the consignees, and where they agreed to receive them, and did receive a large portion of them, after full and fair notice.

The goods were deposited for the consignees in proper order

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and condition, at mid-day, on a week day, in good weather. This undoubtedly constituted a good delivery; and the carriers are clearly not liable on their contract of affreightment, unless, by reason of the fact next to be noticed, they were restrained from unlading their vessel and tendering delivery on that day.

II. This inquiry involves the right of the carrier to labor on that day, and discharge cargo, and not the right of the consignee to keep a voluntary holiday, and to postpone the removal of the goods to his warehouse to a more convenient season. The policy of the law holds the carrier to a rigorous liability; and in the discharge of it, he is not bound to await the convenience or accommodate himself to the caprice or conscientious scruples of the consignee. The master of a ship usually has a certain number of lay-days. He is bound to expedite the unlading of his vessel, in order to relieve the owners from the expense of demurrage, and to liberate the ship from the onerous liability of the contract of affreightment as soon as possible. He has six days of the week in which to perform this task, and has a right to demand the acceptance of his freight by the consignee. The consignee may think it proper to keep Saturday as his Sabbath, and to observe Friday as a fast day, or other church festival, or he may postpone the removal of the goods because his warehouse is not in order to receive them; but he cannot exercise his rights at the expense of others, and compel the carrier to stand as insurer of his property, to suit his convenience or his conscience.

Let us inquire, then, first, whether there is any law of the State of Massachusetts which forbids the transaction of business on the day in question; 2dly. If not, is there any general custom or usage engrafted into the commercial or maritime law, and making a part thereof, which forbids the unlading of vessels and a tender of freight to the consignee on the day set apart for a church festival, fast, or holiday; and 3dly. If not, is there any special custom in the port of Boston which prohibits the carrier from unlading his vessel on such a day, and compels him to observe it as a holiday.

1. There is no statute of Massachusetts which forbids the

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citizen to labor and pursue his worldly business on any day of the week, except on the Lord's day, usually called Sunday. In the case of *Farnum v. Fowle*, (12 Mass. Rep., 94,) it is said by Chief Justice Parker: "There are no fixed and established holidays in Massachusetts, in which all business is suspended," except Sunday.

2. The observance of Sunday as a Sabbath or day of ceremonial rest was first enjoined by the Emperor Constantine as a civil regulation, in conformity with the practice of the Christian church. Hence it is a maxim of the civil law, "*Diebus dominicis mercari, judicari vel jurari non debet.*" This day, with others soon after added by ecclesiastical authority, (such as "*Dies natalis*," or Christmas, and "*Pascha*," or Easter, were called "*Dies festi*," or "*Feriae*," which we call festivals, saints' days, holy days, or holidays. In the thirteenth century, the number of these festivals enjoined by the church was so increased that they exceeded the number of Sundays in the year. The multiplication of them by the church had its origin in a spirit of kindness and Christian philanthropy. Their policy was to alleviate the hardships and misery of predial slaves and the poor laborers on the soil who were compelled to labor for their feudal lords. But afterwards, when these vassals were enfranchised and tilled the earth for themselves, they complained that "they were ruined" by the number of church festivals or compulsory holidays. In 1695, the French King forbid the establishment of any *new* holidays, unless by royal authority; and the church went further, and suppressed a large number of them, or transferred their observance to the next Sunday. (See *Dalloz*, vol. 29, Tit. "*Jour ferie*," and 2d *Campeaux droit civil*, page 168.)

The same observance of these festivals was required by the ecclesiastical authorities as that which was due to Sunday. Men were forbidden to labor or to follow their usual business or employments. But to this rule there were many exceptions of persons and trades, who were not subjected to such observance.

Without enumerating all the exceptions, we may mention that, by the canon law, the observance of these days did not

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extend “to those who sold provisions; to posts or public conveyances; to travellers; to carriers by land or water; *to the lading and unlading of ships engaged in maritime commerce.*”

Thus we see that in those countries where these holidays had their origin, and the sanction both of Church and State, they were not allowed to interfere with the necessities of commerce, or to extend to ships, or those who navigate them. And it would certainly present a strange anomaly, if this country, in the nineteenth century, should be found re-establishing the superstitious observances of the dark ages with *increased rigor*, which both priest and sovereign in the seventeenth have been compelled to abolish as nuisances.

In England and other Protestant countries, while a more strict observance of the Lord’s day is enforced by statute, the other fasts and festivals enjoined by the church have never been treated as coming within the category of compulsory holidays. Every man is left free to follow the dictates of his conscience in regard to them. Formerly their courts sat even on Sunday; nor were contracts made on that day considered illegal or void till the statute of 29 Charles 2d, c. 27, was enacted, whereby “no person whatever is allowed to do or exercise any worldly labor or work of their callings on the Lord’s day.” But this prohibition was never extended, either by statute or usage, to other church fasts, festivals, or holidays. It is true that there are three days in the year, to wit, “Candlemas, Ascension, and St. John the Baptist,” in which the courts do not sit, and the officers are allowed a holiday. But there is no trace of any decision by their courts that worldly labor was prohibited on those days, or any usage that ships should not be unladen and freight delivered and received on such days. These saints’ days and church fasts or festivals are treated as voluntary holidays, not as Sabbaths of compulsory rest.

In the case of *Figgins v. Willie*, (3 Blackstone, 1186,) where a public officer claimed a right of holiday on the feast day of St. Barnabas, Chief Justice De Grey says: “I by no means approve of these self-made holidays; the offices ought to be open.” And in *Sparrow v. Cooper*, (2 Blackstone, 1315,) the

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same judge observes, in reference to the same day: "There is no prescriptive right to keep this as holiday. It is not established by any act of Parliament. The boards of revenue, custom-house, and excise, may act as they please, and pay such compliment to their officers and servants as they shall judge expedient by remitting more frequently the hard labor of their clerks, but they are no examples for the court." And the Justices Gould and Blackstone severally observe: "My objection extends to all holidays, as well as St. Barnabas day."

It may be observed, in passing, that there, as well as here, the class of persons most anxious to multiply holidays were the public officers, apprentices, clerks, and others receiving yearly salaries.

It is matter of history that the State of Massachusetts was colonized by men who fled from ecclesiastical oppression, that they might enjoy liberty of conscience, and that while they enforced the most rigid observance of the Lord's day as a Sabbath, or day of ceremonial rest, they repudiated with abhorrence all saints' days and festivals observed by the churches of Rome or of England. They "did not desire to be again brought in bondage, to observe days and months, and times and years." And while they piously named a day in every year which they recommended that Christians should spend in fasting and prayer, they imposed it on no man's conscience to abstain from his worldly occupations on such day, much less did they anticipate that it would be perverted into an idle holiday. The proclamation of the Governor is but a recommendation. It has not the force of law, nor was it so intended. The duties of fasting and prayer are voluntary, and not of compulsion, *and holiday is a privilege, not a duty.* In almost every State in the Union a day of thanksgiving is appointed in the fall of the year by the Governor, because there is no ecclesiastical authority which would be acknowledged by the various denominations. It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor. Nor is it necessary to a literal compliance with the recommended fast day that all labor should cease, and the day be observed

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as a Sabbath, or as a holiday. It is not so treated by those who conscientiously observe every Friday as a fast day.

III. Does the testimony in this case show that from time immemorial there has been a well-known usage, having the force and effect of law in Boston, which requires all men to cease from labor, and compels vessels engaged in foreign commerce to cease from discharging their cargoes, and hinders consignees from receiving them?

We do not know this fact judicially, for (except in this case) there is no judicial decision, or course of decisions, in Massachusetts, which establishes the doctrine that carriers must cease to discharge cargo on this day in the port of Boston, but rather the contrary. And after a careful examination of the testimony, we are compelled to say that we find no sufficient evidence of such a peculiar custom in Boston, differing from that of all other commercial cities in the world.

The testimony shows this, and no more: That some persons go to church on that day; some close the windows of their warehouses and shops, and either abstain from work or do it privately; some work half the day, and some not at all. Public officers, school-boys, apprentices, clerks, and others who live on salaries, or prefer pleasure to business, claim the privilege of holiday, while those who depend on their daily labor for their daily bread, and cannot afford to be idle, pursue their occupations as usual. The libellants appear to have had no conscientious scruples on the subject, as they received goods from other ships, and some from this. But the testimony is clear, that however great the number may be who choose to convert the day into a voluntary holiday for idleness or amusement, it never has been the custom that vessels discharging cargo on the wharves of Boston ceased on that day; that like the canon law regarding church festivals and holidays of other countries and former ages, the custom of Boston (if it amount to anything more than that every man might do as he pleased on that day) did not extend to vessels engaged in foreign commerce, or forbid the carrier to continue the delivery of freight on that day.

On the whole, we are of opinion that the barque *Tangier*

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has made good delivery of her cargo to the consignees according to the exigency of her bill of lading, and that the decree of the Circuit Court should be reversed, and the libel dismissed with costs.

REUBEN MIDDLETON, PLAINTIFF IN ERROR, v. WILLIAM McGREW.

The alien heirs of a colonist in Texas, who died intestate in 1835, cannot inherit his landed property there. The courts of Texas have so decided, and this court adopts their decisions.

THIS case was brought up by writ of error from the District Court of the United States for the eastern district of Texas.

It was an action of trespass to try title brought by Middleton, a citizen and resident of the State of Missouri, to recover a tract of land in the county of Refugio, in the southern and western margins of the San Antonio and Guadalupe rivers, being the same land which was granted to a certain Joshua Davis, by the proper authorities of the State of Coahuila and Texas, in the colony of Power and Hewetson, and bounded as follows, to wit: on the north by the rivers San Antonio and Guadalupe, on the south by vacant lands, on the east by the league of land granted to P. Hines, and on the west by the league granted to Doña Josefa Galan, widow of —— Hernandez, deceased, having a front, when reduced to a straight line, on said river, of about eight thousand eight hundred and eighty-seven varas, and running back about fourteen thousand and sixty varas, and containing five and one-fourth leagues.

The amended answer of the defendant, McGrew, said that the plaintiff ought not to have and maintain his action herein, because he says that the said Joshua Davis, in the petition named, under whom the plaintiff claimed, died in the year 1835. That his next of kin and pretended heirs, under whom the plaintiff claims, were, at the date of his death, aliens to the Republic of Mexico, being citizens of the United States of America, residing in the State of Missouri, and thencefor-

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ward continued and remained aliens as aforesaid, and aliens from the Republic of Texas, being citizens of the United States, resident in the State of Missouri as aforesaid. And that the said next of kin and pretended heirs did not at any time prior to the annexation of Texas, or ever after, take possession of the land sued for, and did not, prior to said annexation, make sale of the same, but the said land remained, from the time of the death of said Davis, continuously until the present time, in the adverse peaceable possession of this defendant and those under whom he claims, holding and claiming the same adversely to the pretended right and title of the said next of kin, which is the title under which plaintiff claims in this suit, and this he is ready to verify. Wherefore he prays judgment, &c.

After much evidence was given upon the trial, which it is not necessary to recite, the court charged the jury, that if they found by the evidence that Joshua Davis, the grantee under whom the plaintiff claimed, departed this life in the year 1835, having no other kindred than three brothers, citizens and residents of the United States, and aliens to Mexico, such brothers, by reason of alienage, could not take real estate by descent from him in Mexico. To the opinion of the court in thus charging the jury, the said plaintiff excepted. Whereupon, the jury found a verdict for the defendant, and the plaintiff brought the case up to this court.

It was argued by *Mr. Hughes* for the plaintiff in error, and submitted on a printed argument by *Mr. Ballinger* for the defendant.

Mr. Hughes laid down the following propositions:

1. That, by the laws of Spain and of the Indies, a foreigner domiciliated in a foreign country, in all times past, at least from the time of Alonso el Sabeo, in the thirteenth century, during whose reign the Siete Partidas was compiled, could take as an heir to a person dying in Spain.

2. That this rule is not limited or changed by reason of anything in the colonization laws of Coahuila and Texas, or in

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the judgments of the courts of Texas; whence it follows, that—

3. The plaintiff ought to have recovered in the court below, having derived his right from the brothers and heirs of the grantee, Joshua Davis.

As the arguments of the counsel upon these points, and especially upon the construction of the judgments of the courts of Texas, would be interesting only to the profession in that State, they are omitted.

Mr. Justice CAMPBELL delivered the opinion of the court.

This action was instituted for the recovery of land in the colony of Power and Hewetson, in Texas, in the possession of the defendant, and claimed by the plaintiff through a conveyance by the brothers of Joshua Davis, deceased, a colonist, who died in June, 1835, intestate, and without issue. These brothers were citizens of the United States, and assumed to be the heirs-at-law of the decedent. The only question presented for the examination of this court is, whether the brothers were capable of taking by inheritance real property within the limits of Mexico, or were they disabled by their condition as aliens? The solution of this question must be found in the jurisprudence of Mexico, as it is understood and applied to cases as they have arisen within the State of Texas. If there is found in the decisions of the Supreme Court of that State clear and consistent testimony to the existence of a rule of descent, under such circumstances, the duty of this court will be performed in ascertaining and enforcing that rule in this case.

The defendant has referred the court to a series of decisions as containing such testimony.

The case of *Hollomon v. Peebles*, 1 Texas R., 673, was that of heirs claiming the land of a colonist in the settlement of Austin, who after his location had returned to the United States and died, leaving heirs who were citizens of them. The court intimate, that by the laws of Spain, as adopted in Mexico, these heirs had no heritable blood, and proceed to say: "Whatever may be the true construction of the laws of Spain or of colonization on the subject matter, there can be

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no doubt that the capacity of aliens to hold lands in the Republic of Mexico, if it ever existed under the laws of Spain, was extinguished by the decree of the 12th March, 1828." (4 vol. *Ordenes y Decretos*, p. 155.) The sixth article of this decree is expressed in the following terms, viz:

"Foreigners introduced and established in conformity with the regulations now prescribed, or which shall be hereafter prescribed, are under the protection of the laws, and enjoy the civil rights conferred by them upon Mexicans, with the exception of acquiring landed rural property, which, by the existing laws, those not naturalized cannot obtain. * * * This provision covers all acquisitions of real property, whether by purchase or inheritance, and is so understood by the Mexican editor of *Murillos de Testamentos*."

The case of *Yates v. Iams*, 10 Tex. R., 168, was that of a citizen of the United States claiming through an ancestor who had died in 1827 in Texas, holding land by a head-right acquired in 1824. The court announce their conclusion, "that, upon general principles pervading the law of 1823, under which this grant was made, and upon the general policy of the Government in relation to the right of property in lands (granted for the purpose of colonization) at the time of the death of the intestate, an heir domiciliated out of the Republic of Mexico could acquire no right by inheritance to lands of persons dying in the province of Texas."

The case of *Hornsby v. Bacon*, 20 Texas R., 556, was that of citizens of the United States claiming to share as heirs in real property of a citizen of Texas, who died in 1835, with other relations of the same degree, who were citizens of Texas. The court say: "The right of the plaintiff's vendors (the alien heirs) to claim this land by inheritance must be tested by laws anterior to the Constitution of the Republic; and by them, as appears from our previous decisions, such right cannot be sustained. The plaintiff can claim nothing through them by his conveyance."

The case of *Blythe v. Easterling*, 20 Texas R., 565, is that of heirs claiming the landed estate of an immigrant to Texas, who died in November, 1833, they being aliens and non-resi-

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dents. The court decide, "that it is too well settled by repeated decisions of this court to be longer regarded as an open question, that at the period of the death of the decedent, his heirs, being aliens, could not inherit his estate."

We understand these decisions to declare a law of descent applicable to the landed property of Texas generally, and not to lands in a particular colony, or settled under a particular act of colonization. The case before the court falls within the control of these decisions.

The judgment of the District Court is affirmed.

HENRY OELRICKS AND GUSTAV W. LURMAN, PLAINTIFFS IN ERROR, v. BENJAMIN FORD.

Where there was a written contract for the delivery of a certain number of barrels of flour at a given price, to be delivered within a named time at the seller's option, and evidence was offered by the purchaser of an usage existing, that a margin should be put up, the court below was right in refusing to allow this evidence to go to the jury, because it was too indefinite and uncertain to establish an usage.

And, moreover, if the usage existed, the proof would have been inadmissible to affect the construction of the contract, in which there was no ambiguity or doubt on the face of the instrument.

Any parol evidence of conversations or of an understanding of the parties that the contract was made subject to such an usage, was inadmissible, as these were merged in the written instrument.

The contract was made in Baltimore, between the purchasers and an agent of the seller, the seller residing in New York. The latter, and not the agent, was bound to bring the suit, as the character of the agent was disclosed on the face of the contract. There is no distinction in the principle governing agencies of this description between the cases of a home or foreign principal.

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

It was an action of assumpsit brought by Ford, a citizen of New York, against Oelricks & Lurman, merchants of Baltimore, upon a contract in writing, made by the defendants, who agreed to purchase from Bell, agent for Ford, ten thousand barrels of flour, deliverable at seller's option at the prices

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and upon the terms stated in the contract, which is fully set forth in the opinion of the court, and need not be repeated. Ballard was the broker who made the contract on behalf of Oelricks & Lurman.

The evidence given upon the trial by the plaintiff and defendants was very voluminous, and was both oral and written.

The points of law which arose in the case will be manifest from the prayers to the court offered by the counsel for the plaintiff, and from the instructions to the jury given by the court, which were as follows:

1. That the evidence in this case is insufficient to authorize the jury to find that there is an usage in the city of Baltimore, with regard to contracts for the sale of merchandise to be delivered at a future time, by which the defendants were authorized to annul the contract bearing date the 7th November, 1855, given in evidence, upon the failure of the plaintiff to put up a margin in money, as security for its performance, in compliance with the demand contained in the letter of the witness, Ballard, to J. W. Bell, of the 21st December, given in evidence.

2. That such an usage, if found by them to exist, is invalid, and not binding, because it is unreasonable.

3. That evidence of such an usage, if it should be established by competent evidence, and be held reasonable by the court, is inadmissible in this case, because it contradicts or waives the written contract dated the 7th November, 1855, given in evidence.

4. That if the jury find, that before the 21st day of December, 1855, J. W. Bell had left the city of Baltimore without authorizing any person to represent him in his absence, and have never since returned, the letters of the witness, Ballard, of the 21st and 24th December, 1855, left at the former place of business of said Bell, as proved by the said Ballard, did not affect the plaintiff with notice of the demand for a margin mentioned in said letters, even if, under any usage or contract, the defendants were authorized to make such demand.

5. That if the jury find that the witness, Ballard, reduced the said contract, dated the 7th November, and given in evi-

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dence, to writing, at the request of the defendant, Lurman, and that said Ballard signed two copies of the same, and procured the approval of the defendants, and of Bell, as agent of the plaintiff, to the same, by their signatures thereto, and delivered one of the said contracts to the defendants, and the other, which has been given in evidence by the plaintiff, to said Bell, and shall further find all this was done on the 23d November, 1855, after the interview at the Exchange between the defendant, Lurman, and the said Bell, spoken of by the witness, Ballard; and shall also find that, at said interview, the defendant, Lurman, declined to have the clause inserted in said contract having reference to putting up a margin; and if the jury find that said Bell, upon the 12th and 15th December, delivered 2,000 barrels of flour under said contract, which were received by the defendants, and paid for by them; and if the jury shall further find that the plaintiff offered to deliver, and was prepared and willing to deliver, the balance of the 8,000 barrels contracted to be delivered under said contract, at the times and at the prices testified to by the witnesses of the plaintiff, and that the defendants refused to receive the same, then the plaintiff is entitled to recover in this suit the difference between the price of flour mentioned in said contract (\$9.25) and the market value of the parcels of flour tendered by the plaintiff on the days on which they were respectively tendered, with interest thereon from such periods, respectively. But the court rejected the prayers of the plaintiff, and each of them, and, in lieu of them, granted the following instructions to the jury:

1. If the jury shall find, from the evidence in this case, that the defendants entered into the written contract dated the 7th of November, 1855, which has been offered in evidence, and that the plaintiff offered to deliver to the defendants in the months of January and February, 1856, eight thousand barrels of flour, in pursuance of the stipulations of said contract, and in the mode therein pointed out; and that, when said offers were made by the said plaintiff, he had the requisite amount of flour to comply in good faith with said offers, and could have delivered the same, if the defendants had been

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willing to receive the same, and shall further find that the defendants wholly refused to receive and pay for said flour according to the terms of said contract, then the plaintiff is entitled to recover such damages as the jury may find from the evidence he has suffered from said refusal of defendants to execute the said contract on their part.

2. The rule of damages in this case is the difference between the contract price of the flour and the market value in the city of Baltimore of the same on the several days on which the plaintiff offered to deliver the same in accordance with the provisions of said contract, with interest on such sum in the discretion of the jury. To the granting of which instructions the defendants prayed leave to except, and upon this exception the case came up to this court.

It was argued by *Mr. Frick* and *Mr. Benjamin* for the plaintiffs in error, and by *Mr. Brown*, upon a brief filed by himself and *Mr. Brune*, for the defendant.

The reader will perceive, from the prayers and instructions, that the two principal points in the case were: 1. Whether the evidence to support an usage was sufficient to authorize the jury to infer an usage; and 2. Whether Ford could maintain the action.

The decision of the first point necessarily involved an examination of the evidence, which, as before remarked, was very voluminous, and a summary of which is given in the opinion of the court. It would require a prolonged statement to follow the counsel through this examination, but the points can be given as follows:

I. That all the evidence in the cause ought properly to have been submitted to the jury, and was sufficient, if they believed it, to establish the existence of an usage, among a certain class of flour dealers in the city of Baltimore accustomed to deal in "time contracts," under which, either the buyer or seller might demand security, by way of a margin to be put up by both, whenever the faithful performance of such a contract should be considered doubtful by either party. The amount

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of such margin to be reasonable, according to the judgment of other merchants in the same business, and the contract to be cancelled, upon a failure to put it up.

II. That there was evidence in the cause, which ought properly to have been submitted to the jury, tending to show, that both the agent of the plaintiff below, and the defendants, made all their "time contracts" for flour, with reference and subject to such an usage; and that each party knew such to be the special custom of the other's business, when the "time contract" in evidence was entered into; and that the contract was specially made with reference and subject to such an usage.

III. That the usage, as proved, was a reasonable and lawful usage.

IV. That the effect of the usage was not to vary and contradict the contract, but to add to it something incidental and not inconsistent with it; and that, on this ground, proof of the usage was admissible, although the contract was in writing. And further, that the agreement for a "time" sale of flour on certain terms and for a margin, if required by either party, to secure it, being one and simultaneous, and a part only of the contract having been reduced to writing, on that ground, parol evidence of the residue was properly admissible.

V. That the agent of the plaintiff below had a right to contract in reference to the usage, so as to bind his principal; that the demand made for a margin, upon the agent, as proved, affected the principal with constructive notice of it; and that moreover there was evidence, proper for the jury, tending to show that the principal had actual notice of the demand, and in fact put his refusal to comply with it only upon the ground that there was no agreement for a "margin" in the written contract.

VI. That not only by the rules of legal presumption, but by necessary inference from the facts, the credit in this case was given exclusively to the agent, and the principal had no right of action on the contract; and that, even if this were otherwise, the rule of damages, as applied to the case, was erroneous.

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Upon the last point, the following authorities were cited:

There is still another view of the case, showing error in the instruction given by the court below. This instruction announced the whole law of the case in the court's own language, and proceeded upon the ground that all the evidence offered to incorporate the usage into the contract was inadmissible. But it had the effect of withdrawing also from the jury all the evidence showing that the credit given in the transaction was to the agent, Bell, exclusively; and if that fact had been found, the defendants could not have charged the plaintiff upon the contract, and the plaintiff had therefore no right of action against them.

The rule laid down by Story as a presumption of law is, that "a foreign factor, buying or selling goods, is ordinarily treated, as between himself and the other party, as the sole contracting party; and the real principal cannot sue or be sued on the contract."

Story on Agency, sec., 423.

See also more specially sections 268, 290, and 400.

This is the established English doctrine.

Russell on Factors and Brokers, 288.

Livermore on Agency, vol. ii., p. 249.

Patterson *v.* Gandasequi, 15 East., 62.

Addison *v.* Gandasequi, 4 Taunt., 574.

Thompson *v.* Davenport, 9 Barn. and Cress., 78.

Smyth *v.* Anderson, 7 Mann. Grang. and Scott, 21, (62 E. C. L. R.)

The rule as stated by Story, in the four sections above quoted, has never been directly questioned in this country, except in one case, (*Kirkpatrick v. Steiner*, 22 Wendell, 244,) and then by a divided court.

It is reaffirmed by him (and that case examined) in note 1 to sec. 268, 5th edition of 1857, Story on Agency, and has been adopted in *McKenzie v. Nevins*, 22 Maine, (9 Shepley,) 143; *Alcock v. Hopkins*, 6 Cushing, 490; *Merrick's Estate*, 5 Watts and Serg., p. 14.

It is however an open question, whether the rule extends to the different States of the Union, as jurisdictions foreign to

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each other. There are *dicta* in 22 Wendell, above referred to, to the effect that it does not. But the point has never been expressly made and decided that way.

On the contrary, in *Newcastle M. Co. v. Red River R. R.*, 1 Rob. Louisiana R., p. 145, it was directly held that it did apply to the different States, as a reasonable rule of presumption; and this would seem to be the true doctrine.

The term used in the books is principals "beyond seas;" and in construing those words in acts of limitation, they are held to refer to other States of this Union.

And so, bills of exchange are foreign bills when drawn by a party in one State, upon one in another State.

Story on Bills of Exchange, secs. 22 and 23.

Buckner v. Finley, 2 Peters R., 586.

So, both Scotland and Ireland are foreign to England for the purposes of this rule; and the reasons for the decision given in Story, 22, 23, and 2 Peters, in regard to bills of exchange, are similar to those in sec. 290 (Story on Agency) for the distinction made between domestic and foreign principals.

This rule, in the absence of any evidence on the question "to whom credit was given," creates a conclusive presumption of exclusive credit to the agent. It is of course liable to be rebutted. But the onus is on the principal. In this case, there is nothing to remove the weight of the presumption. On the contrary, the proof is all the other way.

(Evidence referred to.)

The counsel for the defendant in error made the following points:

I. The evidence is not sufficient to establish a general usage in Baltimore, by which either party to a contract to deliver flour at a future time is entitled to demand a margin or security of the other.

II. Such an usage, if proved, would not be valid and binding, because—

1. It is not ancient, reasonable, and certain. It opens the door to fraud and deception, and offers facilities to parties to escape from contracts which appear likely to occasion loss.

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The cause for which a margin may be demanded, the amount of the margin and its character, whether money or anything else, the notice to be given, the place of deposit, and the manner in which the deposit is to be made, are not established with reasonable certainty.

2. Because the usage is not generally known in Baltimore.
3. Because an usage may explain the meaning of terms, but cannot avail to contradict or vary a written contract, as in this case is attempted to be done. To permit it to do so would be in violation of a settled rule of evidence and of the statute of frauds.

According to the testimony of Ballard, a witness for the defendants, and the only one who details the circumstances connected with the making of the contract, Bell and Lurman both said that they made their contracts with reference to the usage. Ballard then asked Lurman if he should insert about the margin in the contract. Lurman said, no; he was satisfied with Mr. Bell. Whereupon, the contract was drawn without referring to the usage. The previous conversation in reference to the usage is inadmissible in evidence, because it contradicts or varies the written contract in an important particular.

III. If the conversation with reference to the usage is of any avail at all, it can only bind Bell personally, and was intended only to do so, for Lurman expressly excluded it from the contract, and declared that "he was satisfied with Mr. Bell."

IV. The testimony of Ballard would be inadmissible to show the usage of Bell in reference to his own contracts, in a case like this, where it would vary or contradict a written contract, but it certainly cannot bind the plaintiff, who does not appear to have had any notice or knowledge thereof. Bell's clerk, (Manro,) who was well acquainted with his business, never heard of such a usage.

V. Even if the usage be proved, and be good in law and binding on the plaintiff, the defendants cannot avail themselves of it; because, in the letter of Ballard, the broker, in which the margin is demanded, it is expressly claimed on the

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ground of contract, and not of usage. And in the conversation on the 29th of December, 1856, which took place between Brown and Frick, the attorneys of the respective parties, the attorney of the defendants did not claim a right to security on the ground of usage, or make any reference to usage, but referred to the notice given by Ballard, for defendants, and took the ground that the contract had been rescinded by defendants, because the plaintiff had not given security, as demanded by the notice. The plaintiff's attorney denied the right of the defendants to demand any security, but said that the plaintiff was prepared to do anything required by the contract. Nothing is said of usage until the letter of the 16th of January, 1856, of the defendants, which mentions the usage to the plaintiff for the first time.

VI. Because the notice was not addressed by Ballard to the plaintiff, in New York, but was directed to Bell, in Baltimore, and sent to his counting-room after he had disappeared. The notice is dated 21st December, and required the money to be put up on the 22d, and the plaintiff never saw the notice until Christmas day following.

VII. Bell was not the plaintiff's agent for the purpose of receiving any such notice; and even if he were, a notice addressed to an absconding agent, and sent to his counting-room, and so sent, in fact, because the agent was known to have disappeared, is not sufficient to bind the principal. Bell's absconding put an end to his agency; and his disappearance, which was known to the defendants, was a sufficient notice to them of the fact. Good faith and fair dealing required that the notice should have been sent to the plaintiff in New York.

VIII. But the notice did not give the plaintiff reasonable time to comply, even if it had been communicated to him by telegraph, which it was not. It was left at Bell's counting-room before 12 M. on the 21st, and gave notice to deposit \$5,000 in the Merchants' Bank of Baltimore on the following day. Flour had then fallen in price. The object of the defendants, undoubtedly, was to get rid of a losing contract, by giving a notice with which the plaintiff had neither time nor opportunity to comply.

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IX. The defendants did not comply with their own notice—they state that on the 22d they would deposit \$5,000 in the Merchants' Bank, and required Bell to do the same; but, in fact, they made no such deposit, and therefore under no circumstances could the plaintiff be required to do so.

X. The defendants had no right to require the arbitrary sum of \$5,000 in cash to be put up on a contract, on which, at the time of the demand, they were, in fact, losers; and, therefore, no security at all was necessary.

XI. Nor had the defendants the right to select the Merchants' Bank of Baltimore as the place of deposit for the plaintiff, under the penalty of a cancellation of the contract.

XII. Nor had Ballard, the broker, who made the contract, any right to give a notice to put up a margin. The notice, which required immediate action and the deposit of a large sum of money, should have come from the defendants themselves.

XIII. The instructions of the court are correct, and cover the whole case. The rule of damages, as laid down, is sustained both by reason and authority.

XIV. Ford is principal, and has right to sue.

Green v. Kopke, 36 Eng. L. and Eq., 396.

Mahoney v. Kekule, 25 ib., 278.

Kirkpatrick v. Steiner, 22 Wend., 244.

Taintor v. Prendergrast, 3 Hill, 72.

3 Robinson Pr., 57.

2 Kent's Com. 8th ed., 630.

May, 818.

The following authorities are relied on to establish the propositions that the written contract cannot be varied or contradicted by the proof of usage; that the alleged usage is not properly proved, and if proved, is not valid.

United States v. Buchanan, 8 How., 83, 102.

Adams v. Otterback, 15 How., 545.

Brittan v. Barnaby, 21 How., 538.

Foley v. Mason, 6 Md., 50.

1 *Greenleaf's Evidence*, secs. 275, 278, 281, 284, 288, 292, 293, 294.

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- Coxe *v.* Heisley, 19 Penn. State, 247.
Maury *v.* Insurance Co., 9 Met., 363.
Brown *v.* Stoddart, 10 Met., 381.
Adams *v.* Wordley, 1 Mees. and Wels., 374.
Magee *v.* Atkinson, 2 Mees. and Wels., 442.
Trueman *v.* Loder, 11 A. and E., 596.
Allen *v.* Dykes, 3 Hill N. Y., 597.
Hinton *v.* Locke, 5 Hill N. Y., 437.
Gross *v.* Criss, 3 Gratt., 262.
Macomber *v.* Parker, 13 Pick., 182.
Howe *v.* Mutual Ins. Co., 1 Sandf. Sup. C., 137.
Barlow *v.* Lambert, 28 Ala., 710.
1 Smith's Leading Cas., 307, 308, 309, margin; and see
note of H. B. W. to p. 309.
Browne *v.* Gatliffe, 11 Cl. and Fin., 45, 70.
Ford *v.* Yates, 2 M. and Gran., 549.
Browne on St. of Frauds, p. 116, secs. 118, 448, 451.
2 Parsons on Contracts, 59.
3 Cranch, 31.
1 Met., 199.
4 M. and W., 140.

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 by Ford against the defendants in the
court below upon the following contract:

BALTIMORE, November 7, 1855.

For and in consideration of one dollar, the receipt whereof
is hereby acknowledged, I have this day purchased from J.
W. Bell, agent for Benjamin Ford, New York, for account of
Oelricks & Lurman, Baltimore, ten thousand barrels superfine
Howard Street or Ohio flour, deliverable, at seller's option, in
lots of five hundred barrels, each lot subject to three days'
notice of delivery, and payable on delivery, at the rate of nine
dollars and twenty-five cents per barrel, viz:

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2,000 barrels, seller's option, all December, 1855.					
4,000	"	"	"	January, 1856.	
4,000	"	"	"	February, 1856.	

10,000

L. E. BALLARD, Broker.

Approved:

OELRICKS & LURMAN.

The 2,000 barrels deliverable in December were delivered, accepted, and paid for, as per contract. The 4,000 barrels to be delivered in each of the months of January and February were duly tendered to the defendants, and payments demanded, and which were refused.

The only objection to the acceptance of the flour at the time tendered was the refusal of Ford to a demand made upon his agent to deposit \$5,000 in one of the banks in Baltimore to secure the punctual delivery of the flour at the time mentioned. This demand for a deposit of money was denied by the plaintiff, on the ground that the contract contained no such stipulation.

After much testimony given by both parties on the trial, on the subject of a usage among the dealers in flour in the city of Baltimore to demand on time contracts a deposit of money, (or margin, as it is called,) and the right to rescind the contract if refused, the court charged the jury, that if they shall find, from the evidence, the defendants entered into the contract given in evidence, and that the plaintiff offered to deliver the flour therein mentioned according to its terms, and that when the offer was made he had the requisite quantity of flour to comply with the contract, and could have delivered it if the defendants had been willing to receive it, and that they had refused, then the plaintiff was entitled to recover. The court further instructed the jury, that the rule of damages was the difference between the contract price of the flour and the market value in the city of Baltimore on the several days of the tenders, with interest on this sum, in the discretion of the jury. The jury found for the plaintiff.

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One of the principal grounds of objection to the ruling of the court is, its refusal to submit the question of usage, which was the subject of evidence on the trial, to the jury.

The witnesses introduced by the defendants to prove the usage speak in a very qualified manner as to its existence, as well as to the instances in which they have known it to have been adopted or acquiesced in; and all of them admit they have no knowledge that it was general among the dealers. Some of them state that they recognised and had acted upon a custom in their own business, under which either party to the contract might require a margin to a reasonable amount, to be put up to secure the performance, and that the contract might be rescinded, if the party refused; that they could not say such was the general custom; that different persons have different customs; some consider there is such a usage, and some do not. One witness states that he had at all times in his business considered it to be a right which might be exercised by either party to a time contract, whenever he apprehended a risk; that if the party was solvent, he supposed there was no right to demand it; another, that in his business he had always considered such contracts to be subject to the right of either party to demand the margin; that the occasion of exercising it was rare, as contracts made by his house were made with responsible persons; that he did not know that this was a general usage in Baltimore. The broker who negotiated the contract for the defendants states that he considered it a clearly understood right of both parties to such contracts to demand a margin to a reasonable amount; that he entertained the belief, from conversations with various merchants on the subject; that he recollects but one instance where, when the demand was made, the margin was put up, which was a margin of twenty-five cents on the barrel in a contract for 500 barrels.

There were ten witnesses, flour merchants for many years in the city, who state that they knew of no such usage.

It will thus be seen, from a careful analysis of the evidence, that the defendants wholly failed to prove any general or established usage or custom of the trade in Baltimore, as claimed in the defence. Every witness called on their behalf fails to

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prove facts essential to make out the custom in the sense of the law; on the contrary, most of them expressly disprove it. They express opinions upon the subject of a margin as a right to be exercised in their own business, but admit that it is not founded upon any general usage; and none of them speak of its having been claimed or exercised in his own business but in one or two instances. Whether a usage or custom of the kind set up existed in the trade in Baltimore, was a question of fact to be proved by persons who had a knowledge of it from dealing in the article of flour. Opinions of persons as to what rights they might exercise in their own business in respect to time contracts fall far short of any legal proof of the fact, especially when they admit that there was no general usage of the kind known to them.

Then, as to the precise limit or character of the custom claimed, the opinions of the witnesses are various and indefinite. The margin, they say, must be reasonable, but the pretended usage contains no rule by which a reasonable margin may be determined. It is said the amount may be referred to merchants. But there is no evidence that this is a part of the custom, or that any such mode of adjusting it ever occurred in the trade. Some of the witnesses state, that the margin must be a sum of money sufficient to make the party safe according to the state of the market. One states, that at the time the demand was made in this case for a margin, flour had fallen, and the price lower than the price in the contract; yet this, in his judgment, did not affect the right to make the demand, as the general opinion among dealers was, that the price would advance; that there were great fluctuations in the price, and that, in such a condition of things, a reasonable margin would depend upon the extent and character of the fluctuations, and upon the speculative ideas of the future value of flour.

The broker of the defendants, who purchased this flour, states his view of the reasonableness of the margin, which is the difference between the intrinsic value of the flour and its speculative value; by intrinsic value, he says he means the cost of the production; and by speculative value, the price at

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which it was rating above its intrinsic value ; and to a question what, in his opinion, would be a reasonable margin under the custom, when flour in the market was lower than the contract price, he answered, that he considered the demand reasonable in this case, because he believed flour was going up to twelve dollars per barrel. It would be difficult to describe a custom more indefinite and unsettled.

But, independently of the total insufficiency of the evidence to establish the usage, we are satisfied, if it existed, the proof would have been inadmissible to affect the construction of the contract. This proof is admissible in the absence of express stipulations, or where the meaning of the parties is uncertain upon the language used, and where the usage of the trade to which the contract relates, or with reference to which it was made, may afford explanation, and supply deficiencies in the instrument. Technical, local, or doubtful words may be thus explained. So where stipulations in the contract refer to matters outside of the instrument, parol proof of extraneous facts may be necessary to interpret their meaning. As a general rule, there must be ambiguity or uncertainty upon the face of the written instrument, arising out of the terms used by the parties, in order to justify the extraneous evidence, and, when admissible, it must be limited in its effect to the clearing up of the obscurity. It is not admissible to add to or engraff upon the contract new stipulations, nor to contradict those which are plain. (2 Kent Com., p. 556; 3 ib., p. 260, and note; 1 Greenl. Ev., sec. 295; 2 Cr. and J., 249, 250; 14 How., 445.)

Applying these principles to the contract before us, it is quite clear that the proof of the usage attempted to be established was inadmissible, and should have been rejected. There is no ambiguity or uncertainty in its terms or stipulations, and the condition sought to be annexed was not by way of explanation or interpretation, but in addition to the contract. The plaintiff agrees to deliver a given number of barrels of flour on certain days, at the price of \$9.25 per barrel, in consideration of which the defendants agree to receive the flour, and pay the price. This is the substance of the written contract. But the

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defendants insist, that besides the obligations arising out of the written instrument, the plaintiff is under an additional obligation to give security, whenever called upon, for the faithful performance; and this, by the deposit in bank of the sum of \$5,000. The written instrument bound only the personal responsibility of the plaintiff; the parol evidence seeks to super-add, not a responsible name, as a surety, but in effect the same thing, a given sum of money. The parol proof not only adds to the written instrument, but is repugnant to the legal effect of it.

It was also urged on the argument that this contract was entered into between the defendants and the agent of the plaintiff, with the understanding at the time that it should be subject to the usage; but the answer to this is, that no such usage existed; and if it did, the terms of the contract exclude it. Any conversations and verbal understanding between the parties at the time were merged in the contract, and parol evidence inadmissible to engrraft them upon it.

We are satisfied the court below was right in excluding the consideration of the evidence of the usage from the jury: 1, because the usage was not proved; and 2, if it had been, it was incompetent to vary the clear and positive terms of the instrument.

An objection has been taken on the argument, which was not presented to the court below, but which, it is insisted, is involved in the exception to the charge; and that is, inasmuch as it appears upon the evidence that the plaintiff was a resident of New York, and the contract made at Baltimore, in the State of Maryland, by an agent, the presumption of law is, that the credit was given exclusively to the agent, the principal being the resident of a foreign State; and hence, that the contract, in legal effect, was made with the agent, and not with the principal, and the former should have brought the suit.

This doctrine is laid down by Judge Story in his work on agency, and which was supposed to be the doctrine of the English courts at the time, and founded upon adjudged cases. (Story on Agency, sec. 268 and note; secs. 290, 423.) It did

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not, however, at the time receive the assent of some of the courts and jurists of this country. (2 Kent's Com., pp. 630, 631, and note; 22 Wend., p. 224; 3 Hill., 72.) And the doctrine has recently been explained, and Judge Story's rule rejected, by the English courts. In the case of *Green v. Kope*, (36 Eng. L. and Eq. R., pp. 396, 399, 1856,) the court denied that there was any distinction, as it respected the personal liability of the agent, whether the principal was English or a foreigner. The Chief Justice observed: "It is in all cases a question of intention from the contract, explained by the surrounding circumstances, such as the custom or usage of the trade when such exists. No usage," he observes, "was proved in the present case, and I believe none could have been proved." Again, he observed: "It would be ridiculous to suppose that an agent, for a commission of one-half per cent., is to guaranty the performance of a contract for the shipment of 1,000 barrels of tar." The case was finally put upon the intent of the parties, as derived from the construction of the contract, and which was, that the defendant contracted only as agent, and not to make himself personally liable. Willes, J., doubted if evidence of custom was admissible to qualify the express words of the contract, so as to make the agent liable.

(See also 14 Com. B. R., p. 390; *Mahoney v. Kekule*, 5 Ellis and Black, pp. 125, 130.)

In the present case, the broker's note, and which is approved by the defendants, affixing the firm name, is too clear upon the face of it to admit of doubt as to the person with whom the contract was made. The purchase is from "J. W. Bell, agent for Benjamin Ford, of New York," and the case shows that Bell had full authority. The name of the principal is disclosed in the contract, and the place of his residence, as the person making the sale of the flour, through his agent. This fixes the duty of performance upon him, and exonerates the agent.

The judgment of the court below affirmed.

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**THE DUBUQUE AND PACIFIC RAILROAD COMPANY, PLAINTIFFS IN
ERROR, v. EDWIN C. LITCHFIELD.**

On the 8th of August, 1846, a grant of land was made to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river, from its mouth to the Raccoon fork, in said Territory, one equal moiety, in alternate sections, of the public lands (remaining unsold and not otherwise disposed of, encumbered, or appropriated) in a strip five miles in width on each side of said river, to be selected within said Territory by an agent to be appointed by the Governor thereof, subject to the approval of the Secretary of the Treasury of the United States.

On the 15th of May, 1856, Congress passed an act granting to the State of Iowa, for the purpose of aiding in the construction of a railroad from Dubuque to a point on the Missouri near Sioux city, every alternate section of land, designated by odd numbers, for six sections in width on each side of said road. The State of Iowa regranted the lands to the Dubuque and Pacific Railroad Company.

The land in question is claimed under these two acts by the parties respectively. The title held under the act of 1846 must prevail, provided the grant extended to lands above the Raccoon fork.

This court has jurisdiction to construe this act in the case now before it, the proceedings before the Executive department, extending through more than ten years, not being sufficient either to conclude the title or to control the construction of the act.

Those proceedings stated.

The grant was confined to lands between the mouth of Des Moines river and Raccoon fork; that was the river to be improved, on each side of which the strip of land granted was to lie. The historical circumstances connected with the grant sustain this view.

All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied.

The claimant, under the act of 1846, cannot be considered as an innocent purchaser. The act of Congress was a grant to Iowa of an undivided moiety of the lands below Raccoon fork, and the officers of the Executive department had no further authority than to make partition of those lands. Having extended their acts to lands lying outside of the boundaries, their attempts to make partition were merely nugatory.

The court is satisfied, from evidence before it, that this is not merely a fictitious action.

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THIS case was brought up by writ of error from the District Court of the United States for the district of Iowa.

In order that the reader may the more readily understand the question involved, he is requested to make a quasi map for himself according to the following directions: Take a page of paper, upon the eastern and western sides of which draw two lines from north to south, the former representing the Mississippi and the latter the Missouri rivers. Then draw four parallel lines, equi-distant from each other, from east to west, calling the southern the State line, the next above it the "first correction line," the third the "second correction line," and the fourth the "north boundary of Iowa." Then draw a diagonal line from the northwest to the southeast corner, which may be supposed to represent the Des Moines river. From the southeast corner, make a dotted line on each side of, and at a small distance from, the diagonal line, as far as the intersection with the first correctional line, at which is the Raccoon fork. The space included within these dotted lines is conceded to have been granted by the act of 1846. Continue these dotted lines to the second correctional line, and the space thus included will cover lands which have been conditionally certified by the United States, and which are also claimed under the construction of the grant of 1846, as contended for by the counsel of Litchfield, the defendant in error. Continuing still further the dotted lines to the boundary, they will include the land which the same construction would give to the claimants under the act of 1846, who contended for the right of running up the river from its mouth upon both sides of it.

Now draw two dotted lines from east to west on each side of the second correctional line, which will include the grant to the Dubuque and Pacific Railroad Company; and within the space where these dotted lines clash, was the land in dispute, viz: section one, in township eighty-eight north, range twenty-nine west of the fifth principal meridian. It was conceded, in the argument, that Litchfield, who brought the suit, was entitled to recover, if the grant of 1846 ran up the river above the Raccoon fork. The claim of the railroad company was,

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that the grant did not extend above that point; in which case, their title to the section in controversy was undoubted. There was an agreed statement of facts in the court below, which covered upwards of forty pages of the record. The court decided that the right to the land claimed was in the plaintiff; from which decision the railroad company brought the case up to this court.

It was submitted on printed arguments by *Mr. Platt Smith* for the plaintiff in error, and by *Mr. Charles Mason* for the defendant. The Attorney General (*Mr. Black*) intervened on behalf of the United States, upon the ground that if the grant stopped at the Raccoon fork, it would give away 321,000 acres; whereas, if it were extended up the river, it would take 800,000 acres more, nearly all of which belonged to the United States.

The Attorney General also made the following points, viz:

1. This is a fictitious suit brought here, not to determine the rights of the nominal parties, nor to settle any real dispute between them, but to get an opinion which will throw the moral influence of this court against the Government in a matter already decided by the Executive. Therefore, the case ought to be dismissed.

2. Assuming that an actual dispute exists between the parties, they have agreed upon a statement of facts, which is, in some respects, palpably erroneous and unjust, and in others so defective that no judgment can safely be pronounced upon it.

3. If the court feel bound in such a case to give an opinion, it will be neither necessary nor proper to pronounce upon the construction of the Des Moines river grant. The rights of the parties to the section in suit depend on the conveyances which were made to them by the State of Iowa.

4. The true interpretation of the Des Moines river grant confines it to that part of the river which lies below the Raccoon fork, as the proper department of the Government has decided.

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Each one of these points was elaborately argued by the Attorney General. Upon the three first of them, *Mr. Platt Smith*, who was counsel for the defendants below, felt himself called upon to reply, which he did as follows:

These charges are embraced in a great number of insinuations and innuendoes in different parts of the Attorney General's argument. He charges that the agreed statement is "entirely one-sided;" that the defendant's side of the case occupies only the fourth of a page, while the plaintiff's side covers forty-two pages. He says, "It is impossible to understand how such a statement could have been assented to, unless both parties were at least willing that the plaintiff's side should prevail." Again, "It is inexcusable to stuff it with *ex parte* affidavits and unauthorized certificates of outsiders, which no court can lawfully listen to or suffer to be intruded on its notice. When matter thus grossly inadmissible is put in, and all of it is manifestly for the benefit of one side, it is easy to see that the party on the other side is not making opposition in good faith." The court will please recollect that this is an action of right to try title to real estate; that it is the business of the plaintiff to make out his case; that he must depend on the strength of his own title; and therefore that the introduction of forty-two pages of stuff "which no court can lawfully listen to" may, in that sense of the term, be considered one-sided, as charged by the Attorney General. Although "all of it is manifestly for the benefit of one side," yet I am entirely willing that that side may make the most of it, and neither the Attorney General nor any one else has the right to impugn my motives or faith for not claiming an interest in the stuff, or stuffing the record with an equal amount of the same sort for my own benefit. The court will presume that I knew, as well as the Attorney General, that the court could discriminate between the solid matter and the stuff, and that, if no court could listen to it, there was no danger of losing the case by it; in fact, the Attorney General is not much frightened about this point himself. In speaking of this kind of evidence, farther along in his argument, he says, "I cannot say for myself that I fear the effect upon your minds of such

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affidavits as those of Mr. Sample or Mr. Belknap, or the certificate of Mr. Guy Wells; but when a court receives and reads such things, those who know not what manner of men judges are, might readily suppose the decision to be affected by them more or less." Now, I suppose that the Attorney General imagined that I was one of those persons who did not know what manner of men judges are, and therefore that I supposed they would listen to and be influenced by this stuff. I claim to know, as well as the Attorney General, that the court will only be governed by facts which are really pertinent to the case. The plaintiff's counsel in the action in the District Court, I believe, in good faith supposed that what the Attorney General calls stuff had something to do with the case; I must confess that I thought otherwise at the time, and only admitted such facts for what they are worth, and in doing this I only did what is quite common. I think that a majority of the facts contained in the records of the cases tried in the Supreme Court of the United States are irrelevant, and might by strict rules have been excluded as stuff. The Attorney General says, "It is impossible not to believe that the minds of the counsel on both sides were directed by their clients exclusively to the one subject of the claim against the United States;" and again, "It is impossible to understand how such a statement could have been assented to, unless both parties were at least willing that the plaintiff's side should prevail;" and again, "It is impossible that such a judgment could have been entered under such circumstances, unless both parties had expressed a wish that it should be done." He therefore concludes that if these two parties did that thing, it is conclusive evidence that the suit is fictitious; and he might have added, that both attorneys are guilty of conspiring to defraud the Government out of two million dollars worth of land, and ought to have their names stricken from the rolls, and be sent to the penitentiary. But I say, on the contrary, that it is impossible for the court to presume, without any shadow of proof, that the inferences and charges of the Attorney General are true; but the court will presume that the great mass of stuff and irrelevant matter which has been admitted into the record

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was admitted as the same kind of stuff usually is, that it was insisted on by one party who was sanguine and hard pushed for evidence, and admitted by the other for the supposed reason that the court would not listen to it or be influenced by it. This, I think, is the only fair inference which the court can draw from these facts. As to the judge of the District Court examining the case and deciding it in one day, I will say that if such appears to be the fact, it is an error. The case was submitted to the district judge, who had it under advisement for several days, though the judgment may have been entered as on the day on which it was submitted. All judgments, I believe, are in contemplation of law presumed to have been entered on the first day of the term, though in fact they may have been decided on several days; yet I am not aware any inference of fraud or conspiracy can be raised from the fact that the case was submitted and judgment rendered the same day.

Upon the fourth point made by the Attorney General, viz: the construction of the grant, which was, in effect, the principal point in the case, the Attorney General argued as follows:

IV. While I confess to some anxiety that this court, for the sake of example, should dismiss the case without giving any opinion about the construction of the Des Moines grant, it shall not be said that I am unwilling to meet the point if you shall think that it fairly and necessarily arises. I have no fears that your opinion will be opposed to that of the department. I will not argue it upon affidavits, nor waste words in reply to what has been said about the desire of parties interested in the claim to get more land than the Government thought them entitled to. I am very willing to admit that they want a great deal more than they got. But the question to be settled is, how much they have a right to receive.

The simple and naked question presented to the Interior Department was on the construction of the first section of the act of 1846, "that there be, and hereby is, granted to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river from its mouth to the Raccoon fork, (so called,) in said Territory, one equal

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moiety, in alternate sections, of the public lands, (remaining unsold and not otherwise disposed of, encumbered, or appropriated,) in a strip five miles in width on each side of said river, to be selected within said Territory by an agent or agents to be appointed by the Governor thereof, subject to the approval of the Secretary of the Treasury of the United States."

Does this give to the Territory one moiety of all the lands on both sides of the river up to its source, or is the grant confined to the lands which lie between the fork and the mouth? What is the extent of this grant? How is the strip described within which the alternate sections of land are to be taken? It is described as a strip five miles in width on each side of said river. What river? The said river—the river before mentioned and described—that is, the Des Moines river from its mouth to the Raccoon fork.

There was nothing in the report of the committee, nor in the bill itself, which could have directed the attention of Congress to any lands above the fork, or created a suspicion in the mind of any member that the land above the fork was meant to be included. Indeed, there was nothing in the bill or the report to indicate that there was any river above that fork which was called by the name of the Des Moines. Nor was it true as a geographical fact, that the river above the fork was so called. A map published in 1844, only two years before the date of the law, marks the river as Keosagua or Des Moines only to a point just above the Raccoon fork, beyond which it is called the river of the Sioux. If the phraseology of the statute would make the extent of the grant doubtful under other circumstances, the fact that the river above the fork was not called by the name of Des Moines would show very clearly what must have been the legislative intent when such words were used. It seems, however, that the persons engaged in the improvement of the Des Moines river have changed the name of a part of it; but the alteration of their geography will hardly carry with it a change in an act of Congress.

I admit that this, like every other statute, must be interpret-

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ed *ex visceribus suis*, with the aid of such lights as may be shed upon it by known historical and geographical facts, together with the authority of those officers whose duty it has been to interpret it heretofore. Where Congress has said one thing plainly and distinctly in a law passed and enrolled, it cannot be modified or in any manner changed by proof, however clear, that the committee which reported the bill, or any other member of the body, or even all of them together, meant to say a different thing. But when an obscurely worded law has received a construction at the hands of those who passed it, that construction will not be lightly set aside by any court. So, when an officer, whose duty it is to administer and execute the law, gives an official construction of it, his opinion is entitled to equal respect; and when the persons interested in a different construction have acquiesced in that which the law received from the officers, the conclusion is still more strong and clear against any opposing view. All this has occurred in the present case.

(Then followed an examination of the acts of the executive officer of the Government.)

If the court shall reach this part of the case, and be of opinion that the words of the grant are sufficiently ambiguous to leave the intent of the Legislature in doubt, it will then become necessary to determine what rule of interpretation shall be applied to it. Shall the Government or the grantee have the benefit of the doubt? A more important question to the public treasury and the morals of the people has never been determined in this court. If it be once settled that acts of this kind are to be construed largely in favor of the parties who get them passed, it will take millions every year, in land and money, to satisfy claimants to whom Congress never intended to give thousands. It is not necessary to show our respect for Congress by affecting to be ignorant that legislation like this is generally procured upon the solicitation of parties interested. The public and well-known history of the country proves that land grants have been sometimes carried by means much worse than solicitation. Will you put it into the power of parties to possess themselves of the public domain or the

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public money under grants which they themselves have shaped so as to make them unintelligible? That would be throwing the door wide open to the most dangerous and most demoralizing species of fraud. It would be an offer of the most enormous premium to every man whose ingenuity is great enough to practice deception upon Congress. I have no fears that this court will make itself responsible for the consequences which would follow from such a rule.

I do not ask your honors to say that a strained construction in favor of the public right should be put on any statute. Let every grantee have what Congress gives him in words which are tolerably plain to the apprehension of intelligent men. But do not give, by construction, what the grant itself was not understood to convey. There is no hardship in this. When a legislative body means to give anything, the words can easily be found to express that meaning. It does not happen once in a thousand times that the language of a grant construed strictly carries less than the Legislature is willing to bestow.

The general rule is so well established, that to cite the authorities would look like an affectation of case hunting. Public grants must be construed strictly against the grantee. All Governments are obliged to make this a maxim of their jurisprudence; otherwise, they could not protect themselves against the impostures which would be continually practiced on their officers and agents. Is there anything in a land grant made by Congress for the benefit of a local improvement which should take it out of the rule? No. Of all public grants, these should be looked after with the greatest caution. I trust the court will at least leave them within the principle which governs other grants of a like nature.

But even if you were disposed to repudiate the general rule, or change it so as to give a public grantee the benefit of a reasonable doubt, what could he take by such a doubt as this?—a doubt which has no countenance in the law itself—a doubt which the authors of the grant never dreamed of—a doubt which did not enter the heads of the grantees themselves until it was suggested by a loosely-written and ill-considered letter from the Land Office—a doubt so dim that it was not seen by

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the State of Iowa, nor any of her agents, while they were accepting the law with a construction which confined them to its words—a doubt which was steadily repelled by nearly all the officers of this Goverment, and never entertained by any long enough to be acted on. Doubts may do good service sometimes, but not such doubts as this.

The reporter can only make room for *Mr. Mason's* argument upon the construction of the grant, which was as follows:

We hold that the plain language of the act itself is sufficient to settle this question conclusively in his favor. It grants "one equal moiety in alternate sections of the public lands, (remaining unsold and not otherwise disposed of, encumbered, or appropriated,) in a strip five miles in width on each side of said river."

It is true that, in defining the object of the grant, the law declares it to be for the purpose of aiding to improve the Des Moines river, from its mouth to the Raccoon fork; and the conclusion is thence drawn by some, that the grant itself was intended to extend no higher than the latter point. But I submit whether such a conclusion can be reached by any sound rule for the interpretation of statutes.

When we speak in general terms of the Des Moines river, we mean the whole river, and not a portion of it. In defining the *purpose* of the grant, a limited portion of the river is expressly mentioned. But in fixing the *limit* of the grant, the river itself is named, without restriction or qualification. How shall it then be said that a part, and not the whole of the river, was intended?

The Des Moines river was, in 1846, a well-known stream. Several years previous to that time, a thorough exploration of the country which includes the valley of that river had been made by Mr. Nicollet, under the direction of the Topographical Bureau. The report and map made by him were published by the authority of Congress in 1843, and contained the latest and most authentic information which was in the possession of Congress at the time that this act was passed. In that report, Mr. Nicollet says:

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"The Des Moines empties into the Mississippi in $40^{\circ} 22'$ latitude N., and its sources, heretofore supposed to be in 43° , are extended on my map to $44^{\circ} 3' N.$ "

See Senate Document No. 237, of the 2d session 26th Congress, page 23.

The map which accompanied this report represents the river as taking its rise far above the north line of the present State of Iowa, (which is the parallel of $43^{\circ} 30' N.$,) and corresponds with the report.

The report of Mr. McClelland shows that the committee which reported this bill had the report and map of Mr. Nicollet before it, and that their report was made in accordance therewith.

Here, then, we have the source and the mouth of this river definitely fixed. Its whole course is distinctly shown in a report and map prepared by a public officer, and published by the authority of Congress only three years previous to the passage of this act; and with all this information before them, they declare that the grant shall embrace the alternate sections in a strip five miles in width on each side of the river. Is there the least ambiguity or doubt as to their meaning?

In 1856, in an act of Congress granting lands to the State of Iowa, to aid in the construction of certain railroads, the following language is used:

"*Be it enacted, &c.*, That there be, and is hereby, granted to the State of Iowa, for the purpose of aiding in the construction of railroads from Burlington, &c., [specifying four different roads,] every alternate section of land designated by odd numbers, for six sections in width, on each side of said roads."

Statutes at Large, vol. 11, page 9.

Now, it has never been doubted that the land granted by this act extended throughout the whole length of each road, respectively. And yet, the language employed in limiting these grants is substantially the same as that used in fixing the extent of the Des Moines river grant. The alternate sections, for six miles in width on each side of said roads, are granted without declaring that this grant should extend throughout the entire length of each of those roads. The

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same rule of construction which has been applied to the railroad grants would render this grant coextensive with the entire river. In fact, there is even a stronger reason for such a construction in this case than in that. The river was a fixed object in nature, mapped out and described before the grant was made. Congress knew, with much more precision, what they were granting, than though they had been appropriating lands for the construction of railroads then unlocated, and the precise length and direction of which they could not foresee.

In such circumstances, when lands within five miles of the Des Moines river are mentioned, who is authorized to say that only those below the Raccoon fork are meant? The Legislature has fixed no such limit. Can the courts prescribe one?

But, by way of heaping measure, and as if to place the matter beyond all reasonable doubt, Congress has fixed another restriction upon the extent of this grant. The land must be selected within the then Territory of Iowa. The first restriction prevented us from taking lands more than five miles from the river; the second confines us within the Territory. On the principle involved in the maxim, "*expressio unius est exclusio alterius*," each of these restrictions adds strength to the conclusion that there are no other restrictions unexpressed. "As exception strengthens the force of a law in cases not excepted, so, according to Lord Bacon, enumeration weakens it in cases not enumerated."

Dwarris on Statutes, page 605.

In fact, a prohibition of one thing often involves an actual permission to do what is not thus prohibited. Thus, the constitutional provision which prevents Congress from interfering with the slave trade *prior* to 1808 has always been regarded as giving authority to prohibit it *after* that period. In like manner, the limitation which restricts us to the Territory of Iowa, in the selection of lands, is, in effect, an authority to select the alternate sections within five miles of the whole length of the river, wherever such land can be found within any portion of that Territory.

In the construction of a statute, we must endeavor to give a definite meaning to every word and expression found there-

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in. The fair and natural import of the terms employed is to govern in construing the law, and where a clear intelligible meaning can be gathered from those terms, we are not to look beyond them to fancy some unexpressed intent.

In *Denn v. Reid*, (11 Peters, 524,) the question turned upon the validity of a deed given for lands to which the Indian title was not extinguished. By an act of the Legislature, deeds of this description were declared valid, provided they were proved by one or more subscribing witnesses thereto, before any one of certain officers mentioned in the act. This deed had not been so proved, but it was acknowledged by the grantor himself before one of these very officers. It was contended that, as an acknowledgment was more conclusive and satisfactory than any proof by subscribing witnesses could possibly be, this deed came within the spirit and intent of the law.

The court admitted that the intention of the Legislature was probably such as was thus contended for, but the language of the statute did not justify such a construction. They say :

“ Where the language of an act is not clear, or is of doubtful construction, a court may well look at every part of the statute, as its title, and the mischief intended to be remedied in carrying it into effect. But it is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.”

Such is the doctrine adopted by this court, and by a like rule we wish the present case to be determined. We need (as we think) only read this statute, with an unprejudiced wish to arrive at its meaning from the natural import of the language alone, to be satisfied that, for the purpose of aiding to improve the Des Moines river as high up as the Raccoon fork, it was the evident intention of Congress to grant the alternate sections, in a strip five miles in width, on each side of said river, from its mouth to its source, so far as such land could be found within the limits of the then Territory of Iowa.

But it is said that all grants of this nature are obtained upon

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the plausible plea that the reserved sections will be doubled in value, which can only be done when the grant is coextensive with the improvement. If that were even generally true, there is reason to believe that the present case was an intended exception. In other cases, where alternate sections are granted to aid in making an improvement, the minimum price of the reserved sections has been doubled. That was not done in the present instance. The natural inference is, that Congress was satisfied that the reserved sections in this case would not be doubled in value, as they lay mostly along the river, far above the improvement.

But it seems to be thought that there is, at least, an impropriety in granting lands for public improvements, except where the property of the Government is to be benefited thereby—that in such cases the lands granted should be along or adjacent to the improvements to be made, or should be coextensive therewith, and that such a practice is so proper, and has become so far the settled policy of the Government, that it will in a great degree control the meaning of the statute. There may be a fitness in such a rule, but has it become a settled policy? Can it change the plain meaning of the statute? Can it make the law?

It is true, that such a rule has in various instances been applied to canal and railroad grants, but I know of no instance in which it has been applied to river improvements, unless the present grant is one.

On the very day upon which this Des Moines river grant was passed, a similar grant was made to Wisconsin, "to aid in the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal." For this purpose there was granted by that law the one-half of three sections in width, "on each side of the said Fox river and the lakes through which it passes from its mouth to the point where the Portage canal shall enter the same, and on each side of said canal from one stream to the other—reserving the alternate sections to the United States—to be selected under the direction of the Governor of said State, and such selection to be approved by the President of the United States."

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Statutes at Large, vol. 9, p. 83.

Now, here was a case in which Congress only intended to grant the land along the Fox river just as far as the improvement was to be made, and not to its source. With what precision have they expressed that intent? How different from the language of the Iowa grant, made on the same day!

But it was a grant made for the improvement of the Fox and Wisconsin rivers, and for connecting them by a canal; and still the grant extends only along one of those rivers and the canal which is to connect them, but not along the other river. The supposed policy of the Government in such cases is as much disregarded by making the grant less in extent than the improvement as by making it greater. The same argument that would limit our grant to the Raccoon fork would extend theirs along the whole length of the Wisconsin river, from the point where the Portage canal shall enter it to its mouth. Would such a construction of that law meet with any favor from the Government or from this court? If an idea of fitness or policy is not permitted to enlarge a grant, will it be allowed to diminish one? Should not the rule be reciprocal?

Again, in 1852, Congress granted seven hundred and fifty thousand acres of land to the State of Michigan for the improvement of the St. Mary's river, by constructing a canal around the rapids therein. These lands were "to be selected in subdivisions, agreeably to the United States surveys, by an agent or agents to be appointed by the Governor of said State, subject to the approval of the Secretary of the Interior, from any lands within said State subject to private entry."

Statutes at Large, vol. 10, p. 35.

Here, also, there was no correspondence in extent between the improvement and the grant. These are the only cases of grants of land for river improvements (except our own) that have fallen under my observation. At all events, they are sufficient to do away with the idea of the supposed established policy as connected with such grants.

It may be said that a departure from this rule was absolutely necessary in the case of the Michigan grant, as the cost was

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so great, in proportion to the length of the improvement, that a sufficient amount of land could not otherwise be obtained. The same necessity, though not so great in degree, existed in relation to the Iowa grant, as is proved by the fact shown in the record, that, after having expended all the land below the Raccoon fork, and a still larger amount lying above that point, the work is yet far from being completed.

But, if the circumstances of the case did not amount to a necessity, they at least showed a manifest propriety, of not following the rule suggested. The river was navigable, for a portion of the year, far above the Raccoon fork.

The land along the river would therefore be enhanced in value, by the contemplated improvement, far above its upper terminus. The completion of the improvement to the Raccoon fork would have added greatly to the value of all the land for an indefinite distance above that point; and the Government was acting like a prudent and just proprietor in contributing to that improvement by granting the alternate sections through a limited portion of the region thus benefited.

Again, the land, for thirty or forty miles above the mouth of the Des Moines, was not to contribute an acre to the improvement, though much money was to be expended on that very portion of the river. On the one side of that part of the stream was the State of Missouri, and the land was therefore excluded from being taken by the very terms of the grant; and on the other side was the half-breed tract, in the State of Iowa, and was private property, as will appear from the treaty of 1824 and the act of Congress of June 30, 1834.

See *Statutes at Large*, vol. 7, p. 229, and vol. 4, p. 470.

Besides, a considerable portion of the land between the half-breed tract and the Raccoon fork had been sold by the United States prior to 1846; so that, at the date of the passage of this law, there was but little more than one-half the amount of land below the Raccoon fork to be affected by the grant, which it would have embraced had the alternate sections throughout this portion of the river been subject to the terms of the grant. There was only three hundred and twenty-one thousand acres left to be transferred to the State,

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under this grant below the Raccoon fork; whereas the amount of six sections to the mile, for the whole of that distance, would have composed an aggregate of more than five hundred and eighty-seven thousand acres.

This deficiency of two hundred and sixty-six thousand acres, situated below the Raccoon fork, would probably at that time have been of more value than the whole nine hundred thousand acres, which were, as we contend, granted above that point, and which were to be received in lieu thereof. In railroad grants, it is the custom to allow the alternate sections to be taken for fifteen miles on each side of the road, to make up for any deficiency like the present. Instead of increasing the breadth of the grant for that purpose in this instance, a suitable addition has been made to its length.

Now it might be, from a sense of fitness, that those lands higher up and along the river were taken in place of those which were wanting below, or it might be only an arbitrary way of fixing upon what was deemed a suitable quantity of land, or it might be from some other motive on the part of Congress, that this rule was adopted. Whatever the reason might have been, is wholly immaterial. It is enough that the grant was made in those terms.

What we have been contending for is, that in the construction of this statute the court should confine itself to the language of the law. The principle which has been sanctioned by this court justifies us in insisting upon such a rule. In the case of the *Paulina's Cargo v. the United States*, 7 Cranch, 60, Chief Justice Marshall says:

“In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the Legislature. But this intention is to be searched for in the words which the Legislature has employed to convey it.”

And again, in the *United States v. Fisher*, 2 Cranch, 390:

“Where rights are infringed, where fundamental principles are overthrown, where the general principle of the law is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects. But where only a political regu-

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lation is made, which is inconvenient, if the intention of the Legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind where the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them to avoid an inconvenience which ought to have been contemplated in the Legislature when the act was passed, and which, in their opinion, was probably overbalanced in the particular advantages it was calculated to produce."

We respectfully submit whether the present is a case which justifies a strained construction of the statute. Must not something more than a mere inconvenience or a departure from a supposed rule of fitness be necessary to justify a disregard of the ordinary rule of construction in accordance with the fair import of the language used?

Mr. Justice CATRON delivered the opinion of the court.

The land in controversy lies within five miles of the Des Moines river, and within the limits of what was the Iowa Territory when the act of Congress of 1846 was passed, making the grant to improve the navigation of the Des Moines river from its mouth to the Raccoon fork; but the land sued for lies nearly sixty miles above the mouth of that fork.

Litchfield, the plaintiff below, claims by virtue of a title derived from the State of Iowa, acting as trustee of the Des Moines river fund.

The Dubuque and Pacific Railroad Company is in possession of the section of land, under a grant from Congress for the purpose of constructing a railroad from Dubuque, on the Mississippi river, to a point on the Missouri river near Sioux city. This grant was made to the State of Iowa in 1856, and is for every alternate section, (designated by odd numbers,) for six sections in width on each side of the road. The road was located, the lands designated by the United States, and accepted by Iowa; and then they were transferred to the railroad company by the Legislature of that State. The section in dispute is one of those vested in the railroad company. This is the younger and inferior title, if the first grant for im-

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proving the river extends along its whole length; and the material question in this case is, whether the grant made by the act of Congress of August 8th, 1846, for the river improvement, is limited to lands lying next the river, and *below* the Raccoon Fork. And although this depends on a true construction of the act, still it becomes necessary to give a brief *historical* statement of the proceedings before the Executive department respecting this claim, extending through more than ten years; these proceedings being relied on, either to conclude the title, or to control the construction of the act of Congress.

They are as follows: By the act of Congress approved August 8th, 1846, a grant of land was made to the Territory of Iowa "for the purpose of aiding said Territory to improve the navigation of the Des Moines river from its mouth to the Raccoon fork, in said Territory, one equal moiety, in alternate sections, of the public lands (remaining unsold and not otherwise disposed of, encumbered, or appropriated) in a strip five miles in width on each side of said river, to be selected *within* said Territory, by an agent to be appointed by the Governor thereof, subject to the approval of the Secretary of the Treasury of the United States."

The 4th section of that act provides that the lands shall become the property of the State of Iowa on her admission into the Union, which was very soon expected to occur. The Governor of Iowa was notified by the Commissioner of the General Land Office of this act, soon after its passage, viz: October 17, 1846, by letter, in which it is stated that, "under the grant, the Territory is entitled to the vacant lands, in alternate sections, within five miles on each side of the Des Moines river, from the northern boundary of Missouri to the Raccoon fork."

No objection to this construction was then made by the State authorities, and the agent of the State proceeded to make the selections within the limits above stated.

No question as to the extent of this grant arose until nearly two years after. It appears, however, that a letter dated February 23d, 1848, from Commissioner Young, did not adhere

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to the restrictions mentioned in the first letter, but its terms seemed to concede to it a greater extent. And in 1849 this question was brought to the attention of the Secretary of the Treasury, by the delegation of the State in Congress; they claiming that the State was entitled to land along the whole course of the river to its source. In reply, (March 2d, 1849,) the Secretary, Mr. Walker, expresses an opinion that the "grant extends on both sides of the river from its source to its mouth, but not into lands on the river in the State of Missouri." This opinion conceded that *nine hundred thousand acres* above the Raccoon fork was within the grant.

In conformity with this view of Mr. Walker, selections of lands above the fork were reported by the Commissioner of the General Land Office, for confirmation, to the Secretary of the Interior, Mr. Ewing; the supervision of the public lands having passed from the Treasury to the Interior Department. Mr. Ewing, upon the ground that the opinion of Mr. Walker had not been carried into effect, held that the same was open for revision; and not concurring therein, refused to approve the selections. But, as Congress was then in session, and might "extend the grant," ordered a suspension of action in the matter.

From this decision of Mr. Ewing an appeal was taken in 1850 to the President, by whom the matter was referred to the Attorney General, Mr. Johnson, who, in his opinion of July 19, 1850, construed the grant as extending above the Raccoon fork.

No action appears to have been taken under this opinion of Mr. Johnson; and the question remained open at the accession of the next President, Mr. Fillmore, when it was submitted to the Attorney General, Mr. Crittenden, who, on the 30th June, 1851, replied that the letter of Mr. Walker had no binding effect on his successor, being but an opinion expressed, not an act done; that the opinions of Attorney Generals are merely advisory; and that the grant, in his opinion, was limited to the lands below the fork. In this opinion it appears that Mr. Stuart (then Secretary of the Interior) concurred; but afterwards, on the 29th October, 1851, he addressed the Commis-

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sioner of the General Land Office on the subject, and directed the selections above the Raccoon fork to be reported for his approval, for the reasons and upon the conditions therein stated, viz: "that the question involved partakes more of a judicial than of an executive character, which must ultimately be determined by the judicial tribunals of the country." In conformity with this decision, lists of lands above the fork were submitted by the Commissioner in October, 1851, and March, 1852, and approved by Mr. Stuart in accordance with the views expressed in his letter of the 29th October, 1851. Acting under this authority, the Commissioner, in 1853, submitted lists to Secretary McClelland also, which were approved. The subject was again brought before the Secretary of the Interior in 1856, and by him referred to Attorney General Cushing. Mr. Cushing, in his reply of 29th May, 1856, advised that a proposition set forth by him be submitted to the State for a final adjustment of the matter. This proposition was not accepted by the State; and in 1858 the subject was laid before Attorney General Black, whose opinion clearly restricted the grant to the river below the Raccoon fork; that being in accordance with the construction originally given to it at the General Land Office. On mature consideration, we are of opinion that the title of neither party has been affected by the proceedings in the Land Office, or by the opinions of the officers of the Executive department, but that the claims of the parties under the two acts of Congress must be determined by the construction to be given to those acts. This we are required to do in deciding this cause.

The caption of the act of 1846 informs us that the donation was made to aid in the improvement of the navigation "of the Des Moines river;" and the body of it grants to the Territory (and State) alternate sections, to improve the navigation "of the Des Moines river, from its mouth to the Raccoon fork," in a strip five miles in width on each side of "said river." And we are further told, (section 3d,) that "the said river Des Moines shall forever remain a public highway for the use of the Government of the United States, free from any toll or other charge whatever for any property of the United States,

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or persons in their service, passing through or along the same."

What *navigable river* was to be improved, and was in the contemplation of Congress in 1846, when the northern portion of Iowa was a wilderness? Surely not the small streams and brooks reaching into Minnesota Territory, as is here claimed.

Congress recognised the Des Moines river, over which a free passage was secured, to be a stream emptying into the Mississippi; and from its mouth to the Raccoon fork was the "said river," on each side of which the strip of land granted was to lie.

As proof of which, we refer to the following facts: The bill was introduced into the House of Representatives by Mr. Dodge, the Delegate from Iowa Territory, and was the subject of a report by the Committee on Public Lands, which report is a document in the case agreed, and the facts therein stated are admitted. Among these facts, it appears (by a previous report of Captain Fremont, who had officially explored the Des Moines river) that from its mouth to the Raccoon fork was two hundred and three miles; that it presented no obstacles to navigation that could not be overcome, at a slight expense, by the removal of loose stones at some points, and the construction of artificial banks at some few others, so as to destroy the abrupt bends, and that this was all that would be required to render it navigable; that the variable nature of the bed and the velocity of the current would keep the channel constantly clear.

The committee's report states that the country is occupied and cultivated as high up as the Raccoon fork; and that a clear and uninterrupted navigation could be secured at an expenditure not great when compared with the object; that the land appropriated by the bill is similar in its character and object to many grants already made by Congress for other Western Territories and States, and at the same time less in quantity; but it is believed that it will be sufficient to accomplish the desired improvement; and as evidence of this, Captain Fremont's statement is relied on. The committee was, however, of the opinion, that locks and dams might be required at some of the ripples.

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Accompanying this report, and as a part of it, is a letter from the Commissioner of the General Land Office, obtained by Mr. Dodge, (dated May 5th, 1846,) in which it is officially stated, "That the amount of unsold land within five miles on each side of the Des Moines river, from its mouth to the Raccoon fork, *proposed* to be granted to the Territory of Iowa by House bill No. 106, is estimated at 261,000 acres." The bill No. 106, as reported, was passed into the law before us. When we carry with us the fact that the 261,000 acres of land were surveyed, and the plats recorded in the General Land Office, to which surveys the Commissioner's letter referred, it is plain that the river, from its mouth to the Raccoon fork, was, in the view of Congress, as manifestly as if the outlines of the tract (or strip) had been given by a plan in connection with the river. Of this we have no doubt; but if we had doubts from any obscurity of the act of Congress, a settled rule of construction would determine the controversy. All grants of this description are strictly construed *against* the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied. *Charles River Bridge v. Warren Bridge*, 11 Peters, 420.

We concur with the following citation and reasoning of the plaintiff's counsel, to wit: Lord Ellenborough, in his judgment in *Gildart v. Gladstone*, 1 East., 675, (an action for Liverpool dock dues,) says: "If the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interest of the public, and against that of the company, because the company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it be clear that it was so intended."

"The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and

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clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms."

The second ground relied on in support of Litchfield's title is, that he is an innocent purchaser from the State of Iowa of land conceded to belong to the improvement fund by the officers and agents of the United States; and having been certified as part of the grant, and as being one of the odd sections belonging to Iowa, the principal is bound by the acts of his agents, and that these binding acts cannot be revoked at the pleasure of the Secretary of the Interior, as is here assumed to be done.

We have set forth the proceedings on this claim, and have already expressed the opinion, that the courts of justice are not concluded by them. The principal reason, however, why the conveyance to Litchfield, under the river improvement grant, cannot be upheld, is this: The act of Congress was a direct grant to Iowa in fee of an undivided moiety of the whole tract lying on each side of the river from the Raccoon fork to the Missouri line. Congress had the undoubted power to make the grant and vest the fee.

No authority was conferred on the Executive officers administering the public lands to do more than make *partition* between the tenants in common, Iowa and the United States, in the manner prescribed by the act of Congress.

The premises in dispute lie sixty miles beyond the limits of the tract granted; it was therefore impossible to make partition, under this grant, of lands lying outside of its boundaries; and all attempts to do so were merely nugatory. It follows that the plaintiff below has no title, and his action must fail.

The Attorney General has intervened, and insists that this action is a mere fiction, and was intended to draw from this court an opinion, affecting the rights of the United States and others, the parties to this suit having nothing at stake, and that the case should be dismissed.

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To meet this imputation of contrivance, the parties and their counsel have filed affidavits and statements, from which it satisfactorily appears that the action was brought by a bona fide claimant under the grantee of the river improvement fund against the railroad company; and although the case agreed was made up in a friendly spirit, nevertheless the object was to try the title, and this was done at the instance of some of the Executive officers.

If the judgment of the District Court were affirmed, the defendant below would lose the land; and it being reversed, the plaintiff below loses it. The action was obviously brought to carry out Secretary Stuart's suggestion, when he said, "That the question involved partakes more of a judicial than an executive character, and must ultimately be determined by the judicial tribunals of the country."

We have therefore felt bound to hear and decide the cause on its merits; and finding that the plaintiff below has no title, we direct that the judgment of the District Court be reversed, and the cause remanded; and that court is ordered to enter judgment for the defendant below.

DANIEL GREEN'S ADMINISTRATRIX v. FLETCHER CREIGHTON, IN HIS OWN RIGHT, AND AS EXECUTOR OF JONATHAN MCCALEB DECEASED.

The courts of the United States, as courts of equity, have jurisdiction over executors and administrators, where the parties to the suit are citizens of different States, and this jurisdiction is not barred by subsequent proceedings in insolvency in the Probate Court of a State.

In such a case, the courts may interpose in favor of a foreign creditor, to arrest the distribution of any surplus of the estate of a decedent among the heirs. Although at law a creditor cannot sue the surety upon an administration bond until he has obtained a judgment against the administrator, yet it is not so in equity; and in the present case, where the original debtor and his surety are both dead, insolvent, and a portion of the assets of the estate of the latter can be traced to the possession of his administrator and his surety, the power of a court of equity is required to call for a discovery of the amount and nature of the assets in hand.

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

The bill was originally filed by Daniel Green, a citizen of the State of Arkansas, against Fletcher Creighton and Jonathan McCaleb. Whilst the proceedings were pending, McCaleb died, and a bill of revivor was filed against Fletcher Creighton, his executor.

In 1836, Wheeler C. Green died in Mississippi intestate and without issue. His personal representatives were Daniel Green, Reuben Green, and Sally Smith. In 1837, the latter two conveyed their interest in the estate to Daniel Green, who thus became the sole claimant.

In October, 1836, letters of administration were granted to Albert Tunstall, who gave as sureties upon his bond, Amos Whiting, George W. Summers, and Eli West.

In 1837, Whiting died, and letters of administration upon his estate were granted to his widow, Maria L. Whiting, and George Lake. In 1839, Maria intermarried with J. M. Rhodes, who thereupon became administrator of said Whiting in right of his wife.

In March, 1839, Green instituted proceedings against Tunstall, as administrator, in the Probate Court of Claiborne county, and at June term, 1841, obtained a decree for \$61,194.76; and it was further ordered, that the administration bond should be put in suit in any court having cognizance of the matter.

So far, Green's remedy was against Tunstall personally, and those who represented Whiting, the surety upon his bond.

In October, 1841, Lake and Rhodes and wife were removed from the administration by the Probate Court; and Fletcher Creighton was appointed administrator *de bonis non* of Whiting, who gave bond in the penalty of \$100,000, with Jonathan McCaleb as surety.

Green had therefore to look to Tunstall personally, and Creighton as the administrator of Whiting, and McCaleb as the surety of Creighton. The bill alleged that a large amount of assets of the estate of Whiting came into the hands of Creighton.

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In August, 1843, Tunstall died insolvent, without having paid any part of the money which he had been decreed to pay by the Probate Court.

The bill stated that a large amount of the assets in the hands of Creighton were at interest with McCaleb, his surety.

In 1844, Creighton, on citation for that purpose, made another and further administration bond, with Jonathan McCaleb as his surety, in the penalty of one hundred thousand dollars.

In 1848, Green filed his bill against Creighton and McCaleb. The prayer of the bill was, that the claim of the complainant against the estate of Amos Whiting, as surety of Tunstall, who administered on the estate of Wheeler C. Green, may be established by decree of this court, and against said Creighton, in his capacity as administrator *de bonis non* of said estate, to the amount of the liability of said Amos, for and on account of said Albert Tunstall, as administrator of W. C. Green. Also, that said Creighton and Jonathan McCaleb may admit assets in the possession of Creighton sufficient to pay the claim of complainant, or set forth in his answer a full account of all the assets, &c., of the estate of said Amos Whiting, which have come to the hands or knowledge of said Creighton, or of any other person within his knowledge.

That said Creighton may be decreed to pay to complainant such sums of money as may be decreed against the estate of Amos Whiting, or against said Creighton in his character as administrator *de bonis non*, if sufficient assets shall be found in his hands for that purpose; and if not, then for such amount as said Creighton shall be found liable for; and in case said Creighton shall not be able to pay such sum or sums on account of said insolvency, then that said Jonathan McCaleb may be decreed, as his surety, to pay it for him. The bill concludes with the general prayer for relief.

The defendants demurred to this bill, but the demurrer was overruled, and they were required to answer. Answers were accordingly put in, which entered into the merits of the case; but as the opinion of this court did not touch upon that branch of the subject, it is unnecessary to do so in this report.

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One part of the answer must be inserted, because it raises one of the questions decided by this court, viz: the pendency of the proceedings in insolvency.

Further answering, these defendants aver that the estate of the said Amos Whiting was reported to be insolvent to the March term, A. D. 1841, of the Probate Court of Claiborne county, and was then so declared by said court, and commissioners appointed to receive and audit claims against the said estate; and that, by reason of various delays in relation thereto, the same still remains open for the proof of claims; and these defendants insist that the complainant is bound to make out his claim in the Probate Court in the manner required by the laws of the State of Mississippi, and has no right to maintain this suit to establish said claim against the estate of Whiting; and they pray that they may be allowed to rely on the same as a plea in bar to said bill; and they further insist that, in any event, the complainants can only be entitled to such a dividend upon his claim as the estate of said Whiting may pay.

This cause having come on to be heard at the May term, 1855, of said court, and the same having been argued and submitted, on the nineteenth day of May, 1855, on final hearing on bill, bill of revivor, answers to original bill and bill of revivor, exhibits, and proofs, and the same having been taken under advisement by his honor S. J. Gholson, the judge presiding on said final hearing, and the court, being now sufficiently advised in the premises, doth see fit to order, adjudge, and decree, and it is accordingly so ordered, adjudged, and decreed, that said bill and bill of revivor be and the same is hereby dismissed, and that the complainant pay the costs to be taxed, ordered, adjudged, and decreed, on this, the twenty-sixth day of January, 1856.

The complainant appealed to this court, his administratrix, Eveline C. Green, having become the party on the record.

It was submitted on printed arguments by *Mr. Freeman* for the appellant, and *Mr. Yerger* and *Mr. Wharton* for the appellee. Only those parts of the arguments will be noticed which

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relate to the jurisdiction of the courts of the United States in the present aspect of the case.

The counsel for the appellant stated the case with more particularity than the above summary, and then continued:

Tunstall died insolvent; the money could not be made out of him. Amos Whiting, his surety, had died in 1837, and the only way to establish his liability, as surety for Tunstall, to pay the amount of Tunstall's defalcation to the estate of Green, was to proceed against the administrator of Whiting. But it is said that Whiting's administrator is not liable in equity to account until judgment had been first obtained against him at law. To this I reply, that it was the duty of Whiting, as surety of Tunstall, to see that he administered the estate of Green according to law. He neglected this duty; the Court of Probate had full jurisdiction to ascertain and decree the amount of Tunstall's indebtedness to the estate of W. C. Green, as administrator of the same; this decree was had in accordance with law, as shown by the pleadings and proofs, and the amount of this decree could have been forced out of Tunstall by attachment and imprisonment, if he had been possessed of the means to pay it. The decree of the Probate Court was therefore a lawful and final assessment of the damages against Whiting's principal in the administration bond, by the only tribunal in the State of Mississippi having jurisdiction of that subject, and must therefore be regarded as conclusive evidence of the amount of Whiting's liability for Tunstall, and with which his estate is chargeable.

1 Phillips's Ev., 246.

7 Howard's U. S. Rep., 220.

2 Lomax, 458, 459.

2 J. J. Marshall, 195.

But if this were not so, the answers of defendants admit that Tunstall inventoried the estate of W. C. Green at upwards of \$20,000, no portion of which was ever accounted for in the Probate Court. The inventory at eight per cent. would now amount to \$52,000, and, in any event, he would be liable for this amount, or the increase of the sixteen slaves and the

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value of the bricks made on the brick yard of the estate of Green. There is no other claim established against the estate of W. C. Green. If, then, the amount of the damages have been so decreed as to be binding on Tunstall, why is not the same conclusive as to the amount of damages against his surety? Because, say they, the administration bond affords a remedy at law. If true, that does not reach the question. Bonds of administrators are the bonds of trustees in equity, and the surety is liable for the amount, in whatever tribunal the principal is liable. The jurisdiction of this court over executors and administrators is not affected by the Constitution and laws of Mississippi—its jurisdiction is not derived therefrom nor limited thereby, but only by the Constitution and laws of the United States; and these confer upon this court the same jurisdiction over administrators as that of the chancery courts of England.

9 Peters, 632, 658.

3 Wheat., 212, 4 do., 108.

5 Mason, 105.

3 Mason, 165.

3 Leigh, 407.

2 Blackford, 377.

1 Har. and J., 232.

Mumf., 368; 5 Rand, 319.

Stewart and Porter, 133; 1 Sto. Eq. Ju., 515, secs. 542, 543, 544, 545, 546, 547, 548, and 552.

Jeremy's Eq. Ju., 537, 538.

4 Johns. Ch. Rep., 619.

3 Johns. Ch. Rep., 56, 190.

Taylor and Benham, 5 How. U. S., 233.

Rule 51 of this Court.

From these authorities, it is evident that this court has full jurisdiction over the subject matter of the bill, the objects of which are to obtain a discovery of assets in the hands of the administrator, not inventoried, and to reach equitable assets of the estate in the hands of his surety, Jonathan McCaleb, and others, and to marshall the assets of the estate of Whiting, if the administrator does not admit sufficient assets to pay com-

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plainant's demand. 1 Story, Eq. Ju., 601, 602, sec. 543, "a creditor may file his bill for the payment of his own debt, and seek a discovery of assets for this purpose only." If he does so, and the bill is sustained, and an account is decreed to be taken, the court will, upon the footing of such an account, proceed to make a final decree in favor of the creditor, without sending him back to law for the recovery of his debt, for this is one of the cases in which a court of equity, being once in rightful possession of a case for discovery and account, will proceed to a final decree on all the merits.

1 Story, Eq. Ju., pp. 603, 604, sec. 546.

The defendant, Jonathan McCaleb, is not only a surety on the bond of Creighton, but is charged with having in his hands equitable assets of the estate of Whiting, which a judgment against Creighton would not reach, and this fact is admitted by the answer of defendants. Creighton is alleged to be insolvent, and the charge is not denied. McCaleb, his surety, has money of the estate which Creighton refuses to collect; he is therefore a proper party, for all these reasons.

Story Eq. Pl., p. 212, sec. 178.

5 Gill. J., 432, 453.

10 Gill. J., 65, 100.

2 Rand., 398, 399.

In the case of the *Ordinary v. Snooks*, it was held that the Probate Court was the proper tribunal to assess damages on an administration bond—5 Halstead, N. J., 65; 1 do., cited as above. But a court of equity has jurisdiction of a bill, by a distributee or legatee against an administrator and his sureties, or either of them alone, on their bond, without any previous suit at law.

6 Calls. Va. Rep., p. 21.

2 Rand., 483.

2 J. J. Marshall, 198.

3 Monroe, 354.

4 Munford, 296, 457; 2 Bibb., 276.

2 Hen'g and Mumf., 8; and Rule 51 of this Court.

These cases are conclusive on the points of jurisdiction alike upon principle and as precedents.

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The counsel for the appellee stated their argument in support of the decree of the court below, dismissing the bill, as follows:

We hope to be able to make it very clear to your honors that the purpose of the complainant in filing this bill was to relieve himself from the necessity of pursuing the only course which, under the operation of the Constitution and laws of Mississippi, it was competent for him to pursue, as well as to evade the force and effect of decisions of the High Court of Errors and Appeals, made in this very cause, and between the same parties.

First, then, what has been adjudicated by said High Court of Errors and Appeals in this very cause and between the parties to this record?

It will be borne in mind that this suit is an attempt to enforce the decree of the Probate Court of Claiborne county, Mississippi, which was rendered in the plenary proceedings instituted in that court by the complainant herein against Tunstall, the administrator appointed by that court, of Wheeler C. Green. The case is first brought to the attention of the said High Court of Errors and Appeals, in Green, administrator, appellant *v.* Tunstall et al. 5 How. (Miss.) R., 638.

It was then and there held, that "the Probate Court has not jurisdiction which will enable it to proceed against the sureties in an administrator's bond, on a plenary proceeding by bill. The sureties in the administrator's bond must be sued at law, after proceedings to fix the liability of the administrator." It will be seen, from an examination of the report of the case, that a bill was filed in 1839, in the Probate Court aforesaid, against said Tunstall, administrator, and his securities on his bond, (it is the same thing denominated a plenary proceeding in this record,) for discovery of assets, an account, and distribution. The defendants failing to appear and answer, *pro confesso* was taken against them, and afterwards a final decree for \$44,403.35—execution was sued out, which was superseded on Tunstall's petition. At May term, 1840, Tunstall filed a petition or bill of review to revise the decree of 1839, for

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several reasons; the only one needful to be stated being, that the court had not jurisdiction of said original bill, and that its decree was void. Green, complainant in this bill, demurred to the said petition or bill of review. Said decree was reversed as to the sureties, and the cause reopened as to Tunstall, and from that order an appeal was prosecuted. It is very true that one of the questions decided by the court had reference more particularly to the question, whether the sureties of an administrator could be called to account in the Probate Court, or whether they should not be sued after a final settlement by the administrator, and a decree to pay what might be found to be due, or to make distribution. Reference is made to the statute of Mississippi, authorizing the institution of plenary proceedings—Hutch. Code, 547, sec. 7—which provides, that whenever either of the parties, having a contest in the Orphans' Court, shall require, the said court may direct a plenary proceeding, by bill or petition, to which there shall be an answer on oath, (or affirmation;) and if the party refuse to answer on oath to any matter alleged in the bill or petition, and proper for the court to decide upon, the said party may be attached, fined, and committed, at the discretion of the court, and the matters set forth in said bill or petition shall be taken *pro confesso*, and decreed accordingly. Being liable only on the administration bond, not being officers of the Probate Court, the only recourse against the sureties is by action at law against them, after the liability of the administrator has been ascertained by proper proceedings in that behalf, and after a final settlement by him, and a decree of the court fixing the amount of his liability, and directing him to pay it. The same rule is held in Alabama and South Carolina, as may be seen by reference to the cases cited by the High Court, viz:

1 Porter, 70.

3 Stew and Port., 263, 348.

2 Bai., (S. C.,) 60.

1 Bai., (S. C.,) 27.

1 Nott and McCord, 587.

4 Nott and McCord, 113, 120.

It will be recollected that Whiting was only a security of

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Tunstall in his administration bond, and survived the grant of letters to Tunstall only about ten months. The defendant, Creighton, is administrator of Whiting and executor of defendant, McCaleb, who was a security on the bond of defendant, Creighton as administrator of Whiting. The case cited from 5th Howard, apart from being an adjudication between the same parties of the same subject matter, would be an authority upon general principles for the appellees.

The same arguments are offered, the same authorities, and some others, are cited by appellant's counsel in his printed brief in this case, which were urged by the learned counsel who argued the case from 5th Howard already cited, as may be seen from page 644 of the report of said case. Yet the High Court of Mississippi declare that they were authorities which did not apply to the case then before them, but related entirely to proceedings in the court of chancery, and jurisdiction was entertained on the peculiar grounds of the respective cases decided, and that the rule laid down in the cases from Alabama and South Carolina is not changed by the statute of Mississippi authorizing a joint action on the bond against an administrator and his securities for a *devastavit*; and they accordingly decided that the original decree of the Probate Court was unauthorized by law, and that the second decree was proper, and that the decree appealed from should be affirmed.

The next that we hear of these parties and of this litigation in Mississippi is in 7 Smedes and Marshall, 197.

From the report of the case there, it seems that appellant's counsel presented a claim to the commissioners of insolvency appointed upon the estate of said Whiting, which had been declared insolvent, amounting to \$60,000, which was rejected by said commissioners, because unsupported by proof; that appellant thereupon filed his petition in the Probate Court, reciting the action of said court upon the plenary proceedings aforesaid, the decree thereon, and the order that suit be brought on the bond of said Tunstall, as administrator, against him and Whiting as his surety, for the payment of said decree, in any court having competent jurisdiction thereof—a

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copy of said bond and decree being all the evidence submitted to said commissioners in support of said claim—which was for the full amount of said bond, and that said evidence was sufficient, and prays that referees be appointed to audit said claim. They were appointed accordingly, and reported in favor of the allowance of said claim, embracing a copy of said bond in their report, as the evidence on which they based their said allowance. The administrator, Creighton, filed exceptions to the sufficiency and competency of the evidence. The exceptions were sustained, and said report set aside, to which said appellant filed a bill of exceptions, which brought the case before the High Court on an appeal from the decree vacating the allowance of said commissioners. The bill of exceptions recites that appellant relied on a copy of the bond of the administrator, and on the decree of the Probate Court rendered in the plenary proceedings aforesaid. The High Court decide, "that in an action at law on the bond of an administrator, the bond is but inducement to the action, and no recovery can be had on it without proof of damages. It is only security for such damages as the parties interested in the estate sustained. To make it a valid claim against an insolvent estate, or against any one, it must be accompanied by proof of damages; if not so accompanied, it is not a claim. There must be proof that the condition has been broken, for it is only on such a contingency that a right of action accrues." And again, "instead of allowing the penalty of the bond as a claim, the referees should have allowed the amount of damages sustained by a breach of the condition." Accordingly, they affirmed the judgment of the court below.

We again meet with this same claim in *Green v. Creighton*, (10 Smedes and Marshall, 159.) Now, however, the *forum* is changed, and, instead of proceedings in the Probate Court of Claiborne county, it is a bill filed in the Superior Court of Chancery of Mississippi: and we ask attention to the striking similarity of the prayer as set out in the report of the case, and the prayer of the present bill. The objects of the bill are very clearly specified in the opinion of the court, and are the same precisely, in legal intendment and effect, with the objects

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of this bill. An injunction had been granted to restrain defendant, Creighton, from paying a certain other claim against the estate of Whiting. The chancellor dissolved the injunction, and from that order an appeal was taken to the High Court of Errors and Appeals.

The following is the emphatic language of the court in affirming the decree of the chancellor:

"Nothing, certainly, is better settled in this court, than that the Court of Chancery does not possess the jurisdiction which it is here asked to exercise. The administration of estates, and the settlement of the accounts of the administrators, falls peculiarly and exclusively under the cognizance of the Probate Court. * * * Suits upon the bonds of administrators pertain to the Circuit Court."

In that bill, it was alleged that the administrators had practiced fraud in their settlements with the Probate Court—of which, however, no proof was offered or attempted; and the High Court held that, if the charge were established, a court of equity would have jurisdiction of a bill to set aside the settlements, and order new ones to be made in the Probate Court; but it could only entertain it for that purpose, and to that extent, and, having removed that obstacle out of the complainant's path, he would be remitted to the Probate Court, there to pursue his remedy against the administrator, as if no such fraudulent settlement had been made. They affirm that there was no evidence in the case before them to support the fraud charged. They also notice the objection taken by the appellant's counsel, "that there was no demurrer to the jurisdiction of the court below, and that it was too late to raise the objection in the High Court, and decide that that rule is only applicable in cases of concurrent jurisdiction, not where there is an entire want of jurisdiction of the subject matter."

We omitted to state, in its proper place, that in this case a demurrer was filed to the jurisdiction of the court, and that it was overruled, and the defendants required to answer.

The foregoing summary will serve to show that this is no new case in the courts of Mississippi, either in name or principle, and will also serve to show a reason for the change of forum.

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Precisely similar, in all its features, is the case of *Buckingham et al. v. Owen*.

6 Smedes and Marshall, 502.

In that case, the appellee, Owen, filed his bill in the Superior Court of Chancery, reciting that on 28th February, 1840, he recovered a judgment in the Circuit Court against G. W. and B. Sims, administrators of M. Sims; that they resigned their letters of administration 2d July, 1839, and one J. R. Greer was appointed administrator *de bonis non*, who gave bond, with certain persons as securities, and took possession of the unadministered effects of said M. Sims, deceased; that he collected and appropriated to his own use a large amount of assets, and committed, in his said administration, a *devastavit*, for which he and his securities on his bond were liable to answer; that said Greer died in September, 1840, intestate and insolvent; that no one had administered on his estate; that in December, 1840, one R. Davis was appointed administrator *de bonis non* of said Sims, and reported the estate insolvent; that the debt to said Owen was still due. The bill prayed that the sureties on Greer's bond might be decreed to pay the judgment and costs. The defendants demurred, for want of jurisdiction. Their demurrer was overruled, and they appealed.

It will be seen, from the foregoing statement, the said original administrators, G. W. and B. Sims, had resigned some six or seven months prior to the rendition of the judgment. The judgment was, in point of fact, as it is indeed held by the court, a nullity. But the High Court proceed to remark, that even if it had been a judgment against Greer, the administrator *de bonis non*, "we do not see upon what principle the jurisdiction of a court of chancery could be sustained in this State over the subject matter, after reviewing the authorities cited for the appellee, some of the very same cited by appellants in this case, particularly *Spottswood v. Dandridge*, 4 Munford R., 289.

They wholly deny the principle attempted to be established by them. They admit that, in some of the States of the Union, in suits against executors and administrators, courts of equity

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have concurrent jurisdiction with courts of law, and that it is upon that principle a court of chancery in Virginia exercises it; but they quote with approbation the language in 2 Rob. Pr., 38, showing the strong inclination of the Court of Appeals in that State to restrict parties to their remedy at law, when it is full and adequate, and referring to the case before cited by us, *Green v. Tunstall*, 5 Howard, 638.

They say that was "a bill filed against the administrator and his sureties for a discovery and account of assets, and for distribution. The object was similar to that in view in this case, (*Buckingham v. Owen*.) The very authorities cited to sustain this bill were cited in the argument of that cause. The court decided that the remedy upon the bond was exclusively in a court of law." So they held that the chancellor erred in overruling the demurrer; they reversed his decree, and dismissed the bill for want of jurisdiction in the Chancery Court to entertain it.

The 4th article, sec. 18, of the Constitution of the State of Mississippi, provides for the establishment of the Probate Court. Its language is, "that a Probate Court shall be established in each county of this State, with jurisdiction in all matters testamentary and of administration, of orphans' business and the allotment of dower, in cases of idiocy and lunacy, and of persons *non compos mentis*." In construing the powers of that court, derived from that clause of the Constitution, the High Court of Errors and Appeals of Mississippi have repeatedly held that its jurisdiction was exclusive in reference to the matters committed to it. And thus the Superior Court of Chancery of said State has no jurisdiction whatever of the subjects confided to the Probate Court. Accordingly, on a bill filed in said Chancery Court to review, in a matter of administration, the proceedings of the Probate Court, it was held that the Chancery Court had no jurisdiction of the case, that it belonged exclusively to the Probate Court, and the bill was therefore dismissed.

Blanton v. King, 2 How. Miss. R., 856.

Carmichael v. Bronder, 3 ib., 252.

Again. When the Probate Court has full jurisdiction of a

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matter, its judgment is final, and cannot be disturbed, unless fraud is charged and proved.

Stubblefield v. McRaven, 5 S. and M., 130.

Jones v. Coon, ib., 751.

The utmost that a court of chancery can do is, where fraud is charged against a settlement of an administrator in the Probate Court, to set aside the settlement made in the Probate Court, and direct a new settlement there. Its jurisdiction does not extend beyond that, as was held between the parties to this record in 10 S. and M., 159.

Mr. Justice CAMPBELL delivered the opinion of the court.

The intestate of the plaintiff, as an heir of Wheeler Green, deceased, and claiming, by assignment of the remaining heirs, the entire estate, filed this bill against the defendant, in his capacity of administrator of Amos Whiting, deceased, and of executor of the will of Jonathan McCaleb. He states, that Albert Tunstall became the administrator of the estate of Wheeler Green by the appointment of the Court of Probate of Claiborne county, Mississippi, in 1836; that he gave bond for the faithful performance of his duties, with Amos Whiting as his surety; that Tunstall received a large amount of property belonging to the estate, and committed a devastavit; that in the year 1841, his intestate summoned Tunstall before the Probate Court to make an account, and upon that accounting he was found to be indebted to him, as heir, sixty-one thousand one hundred and ninety-four 76-100 dollars; which sum he was required to pay by the decree of the court, and authority was given to prosecute a suit on the administration bond. The bill avers that Tunstall and Whiting, his surety, are both dead, and that all of his other sureties are insolvent. It charges that the defendant, Creighton, as administrator of Whiting, has assets in his hands for administration, and that a portion of the assets is in the hands of McCaleb, who is the surety of Creighton on his bond to the Probate Court, as administrator of Whiting.

The object of the bill is to establish the claim of the intestate and his representative, arising from the judgment against

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Tunstall and the breach of his administration bond, on which Whiting is a surety, against the administrator of Whiting and his surety, and to obtain satisfaction from them to the extent of the assets in their hands belonging to that estate, and for this purpose they seek a discovery of the assets, and account and payment.

The defendants appeared to the bill, and allege that the estate of Whiting has been regularly administered, and that returns have been made to the Probate Court of Claiborne county, Mississippi, of whatever property came to the hands of the administrator, Creighton, whose character as administrator is admitted, and that he was then engaged in administering the estate under the laws of Mississippi; that the estate had been reported to the Probate Court as insolvent several years before this suit was instituted, and that commissioners had been appointed by that court to receive and credit the claims; which commission was still open for the proof of claims. They contest the validity of the judgment recovered against Tunstall, and the truth of the account preferred against them, and deny the jurisdiction of the Circuit Court to entertain this bill. The connection of McCaleb with the bond of Creighton is admitted, and also that a portion of the money of the estate of Whiting had been deposited with or lent to him. Upon the hearing of the cause on the pleadings and proofs, the bill was dismissed for want of jurisdiction, and by the agreement of the parties the record has been made up so as to present that question only. None other will, therefore, be considered. In the organization of the courts of the United States, the remedies at common law and in equity have been distinguished, and the jurisdiction in equity is confided to the Circuit Courts, to be exercised uniformly through the United States, and does not receive any modification from the legislation of the States, or the practice of their courts having similar powers. *Livingston v. Story*, 9 Pet., 632.

The judiciary act of 1789 conferred upon the Circuit Courts authority "to take cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive

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of costs, the sum or value of five hundred dollars, and * * * the suit is between a citizen of the State where the suit is brought, and a citizen of another State."

The questions presented for inquiry in this suit are, whether the subject of the suit is properly cognizable in a court of equity, and whether any other court has previously acquired exclusive control of it. The court has jurisdiction of the parties. In the Court of Chancery, executors and administrators are considered as trustees, and that court exercises original jurisdiction over them, in favor of creditors, legatees, and heirs, in reference to the proper execution of their trust. A single creditor has been allowed to sue for his demand in equity, and obtain a decree for payment out of the personal estate without taking a general account of the testator's debts. *Attorney General v. Cornthwaite*, 2 Cox, 43; *Adams Eq.*, 257. And the existence of this jurisdiction has been acknowledged in this court, and in several of the Courts of Chancery in the States. *Hagan v. Walker*, 14 How., 29; *Pharis v. Leachman*, 20 Ala. R., 663; *Spottswood v. Dandridge*, 4 Munf., 289. The answer of the defendant contains an assertion that, prior to the filing of the bill, the estate of Whiting was reported to the Probate Court of Claiborne county as insolvent, and thereupon that court had appointed commissioners to audit the claims that might be presented and proved, as preparatory to a final settlement, and that the commission was still open for the exhibition of claims.

But of this statement there is no sufficient proof. Neither the report nor any decretal order founded on it is contained in the record, and the proceedings referring to one are of a date subsequent to the filing of the bill.

The question arises, then, whether the fact of the pendency of proceedings in insolvency in the Probate Court will oust the jurisdiction of the Circuit Court of the United States. In *Suydam v. Brodnax*, 14 Pet., 67, a similar question was presented. A plea in abatement was interposed in the Circuit Court in Alabama, in an action at law against administrators, to the effect that the decedent's estate had been reported as insolvent to a Court of Probate, and that jurisdiction over the

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persons interested and the estate had been taken in that court. This court declared that the eleventh section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one State to sue a citizen of another State in the Circuit Court of the United States. "It was certainly intended," say the court, "to give to suitors having a right to sue in the Circuit Court remedies coextensive with those rights. These remedies would not be so, if any proceedings under an act of a State Legislature to which a plaintiff was not a party, exempting a person of such State from suit, could be pleaded to abate a suit in the Circuit Court."

In *Williams v. Benedict*, 8 How., 107, this court decided that a judgment creditor in a court of the United States could not obtain an execution and levy upon the property of an estate legally reported as insolvent in the State of Mississippi to the Probate Court, and which was in the course of administration in that court. The court expressly reserve the question as to the right of a State to compel foreign creditors, in all cases, to seek their remedies against the estates of decedents in the State courts alone, to the exclusion of the jurisdiction of the courts of the United States.

The cases of *Peall v. Phipps*, 14 How., 368, and *Bank of Tennessee v. Horn*, 17 How., 157, are to the same effect.

The case of the *Union Bank v. Jolly*, 18 How., 503, was that of a judgment creditor who recovered a judgment against administrators, who subsequently reported the estate of their decedent insolvent. After administering the estate in the Probate Court, it was ascertained that there was a surplus in their hands. The creditor had not made himself a party to the settlement in the Probate Court; and the administrators contended that his claim was barred.

This was a suit in Mississippi. This court determined that the creditor had a lien upon the assets thus situated.

Thus it will be seen, that under the decisions of this court, a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and

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settlement of insolvent estates, and that the court will interpose to arrest the distribution of any surplus among the heirs. What measures the courts of the United States may take to secure the equality of such creditors in the distribution of the assets, as provided in the State laws (if any) independently of the administration in the Probate Courts, cannot be considered until a case shall be presented to this court.

The remaining question to be considered is, whether the debt described in the bill entitles a plaintiff to come into a court of equity, under the circumstances. It is well settled, that no one can proceed against the sureties on an administration bond at law, who has not recovered a judgment against the administrator. 5 How. Miss. R., 638; 6 Port., 393. But this rule is not founded upon the supposition that there is no breach of the bond until a judgment is actually obtained. The duty of the administrator arises to pay the debts when their existence is discovered; and the bond is forfeited when that duty is disregarded. The jurisdiction of a court of equity to enforce the bond arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decrees to the substantial justice of the case. *Moore v. Walter's Heirs*, 1 Marsh. R., 488; *Moore v. Armstrong*, 9 Porter, 697; *Carew v. Mowatt*, 2 Ed. Ch. R., 57.

In this case, the original debtor, Tunstall, has died insolvent. Whiting, his surety, has died insolvent. A portion of the assets belonging to the estate of the latter is in the hands of the surety of this administrator. A discovery of the amount and nature of the assets in hand, and their application to the payment of the debt, are required, if they are subject to the application.

We conclude that the Circuit Court was authorized to entertain this suit, and that the decree dismissing the bill is erroneous.

Decree reversed.

Cage's Executors v. Cassidy et al.

ALBERT CAGE AND HENRY HAYS, EXECUTORS OF ROBERT H. CAGE, DECEASED, *v.* ALEXANDER A. CASSIDY, WILLIAM E. DOUGLASS, AND WILLIAM H. HALL, CITIZENS OF THE STATE OF TENNESSEE, AND RICHARD GRIFFITH, MARSHAL OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

Where the surety upon an administration bond was sued, and judgment recovered against him in Mississippi, and a court in Tennessee (where the principals upon the bond resided) decided that but a small amount was due by the administrators upon their account, and that the judgment against the surety had been obtained in defiance of an injunction issued by the Tennessee court, and also by fraudulent representations made to the surety, and it was admitted that the decree in Tennessee was supported by the proofs, the surety was entitled to relief by the court in Mississippi, and the creditor must be perpetually enjoined from proceeding upon his judgment.

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

It was a bill filed by Robert H. Cage, in his lifetime, to stay execution on a forthcoming bond under the circumstances stated in the opinion of the court.

The Circuit Court granted a temporary injunction in the outset of the case, but upon the final decree adjudged that the injunction be dissolved, and that Cassidy be permitted to sue out executions at law upon the judgments of the court, then restrained by injunction.

From this decree the complainant appealed to this court.

It was argued by *Mr. Brent* and *Mr. Phelps* for the appellant, and *Mr. Bradley* and *Mr. McCalla* for the appellee.

The principal point in the case being the effect of the Tennessee judgment, the argument upon that point only will be noted in this report.

The counsel for the appellant noticed this point as follows: It further appears, that while the case was pending in the Tennessee State court, having competent jurisdiction thereof, for the purpose of abating and avoiding the note, and in defiance of the injunction of that court, Cassidy instituted a suit

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in the Circuit Court of the United States for the State of Mississippi against Cage, and recovered judgment on this very note, which was in litigation between the parties in Tennessee, notwithstanding the effort of Cage to defend himself in the premises, when sued at law.

The pending of that suit in Tennessee constituted no legal defence to the suit brought in the United States court on this note, but it is available only in equity, especially now, (as shown by Cage's supplemental bill and the concession of the truth thereof,) that the Tennessee court has finally decreed the abatement of the amount of the note, and the fraud of Cassidy in obtaining the antecedent judgments on which that note was predicated, and which in fact constituted its only consideration.

It is rather inconsistent for the court to have overruled a demurrer to this supplemental bill, and afterwards to have dismissed the same bill when all its allegations were admitted except the one of fraud.

It certainly is inconsistent, unless fraud was the material inquiry, and even in that event the court had the conclusive evidence of this very fraud in the explicit ruling of the Tennessee court in its final decree, as shown in the admission of facts.

The Tennessee court therefore had jurisdiction; and if so, there can be no judicial inspection behind the decree, except by appellate power.

Grignon v. Astor, 2 How., 341.

10 Peters, 449; 2 H. and G., 42.

6 H. and J., 182; 4 H. and J., 394.

The true test of jurisdiction is, whether a demurrer would lie to Cage's bill in Tennessee.

Tomlinson v. McKay, 5 Gill, 256.

Even if this were a case of concurrent jurisdiction, the court first having cognizance has exclusive jurisdiction.

1. Md. Ch. Rep., 351, 295.

2 Md. Ch. Rep., 42; 7 Gill, 446.

Under the Constitution, that decree is just as conclusive in Mississippi as in Tennessee.

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7 Cranch, 481; 3 Wheat., 234.

6 Wheat., 129; 13 Peters, 312.

5 G. and J., 500; 3 Gill, 51.

A recovery on same cause of action in a sister State, *pendente lite*, may be pleaded against further maintenance of suit, though this suit brought first.

7 Gill, 426.

Defendant at law, after judgment, may enjoin judgment on grounds not known or not available at trial in court of law.

Gott v. Caw., 6 G. and J., 309.

12 G. and J., 365.

Surely the abatement or cancellation of that note and its injunction from suit on grounds of mistake, or fraud, or failure of consideration, was a mere personal demand against Cassidy, and to be enforced anywhere he was found, on familiar principles of equity.

15 Peters, 233; 1 Wheat., 440.

1 Peters, 1; 4 Cranch, 306.

Here it is conceded that the Tennessee decree establishing fraud in Cassidy, throughout, was supported by evidence.

3 Peters, 210.

And fraud vacates the judgment as against the party.

Simms v. Slocum, 3 Cranch, 300.

Even after judgment on a note, the defendant may enjoin on ground of fraud in obtaining the note.

4 Peters, 210; 11 Peters, 63.

Jurisdiction once attaching, the court, to do complete justice, decides even a legal claim.

5 Peters, 264; 12 Peters, 178.

At law, the failure of consideration in a note must be total, and here it was partial, as conceded.

2 Wheat., 13.

Even if the note of Cage had been given to Cassidy, in his character of administrator, it was his mere personal chose in action, and his title of administrator would have been surplusage.

Graham v. Fahnstock, 5 Gill, 215.

The counsel for the appellee made the following points:

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The following points and authorities will present to this court the grounds on which the defendants rely to show that the decree of the Circuit Court, refusing the jurisdiction and dismissing the bill ought to be affirmed.

It is conceded that Cage is a citizen of Mississippi, and Cassidy of Kentucky.

I. The decree of the Probate Court, ascertaining the amount due by the administration, remains unreversed.

That court had exclusive and conclusive jurisdiction over the subject matter of controversy.

Gildart v. Starke, 1 How. Miss., 450.

Griffith v. Vertner, 5 How. Miss., 736.

Provided the proper parties were before them, or due notice was given.

Hall, &c., v. Cassiday, 25 Miss., 48.

II. The court in Tennessee had no jurisdiction to settle the accounts of administrators deriving their authority from the State of Mississippi.

Vaughn v. Northup, 15 Pet., 1.

Bell v. Suddeth, 2 S. M., 532.

And the appearance of Cassidy could not give them jurisdiction, whether he had admitted or denied it.

There was no fraud charged, nor any contract or agreement set up in the Tennessee bill, which gave that court jurisdiction over Cassidy, so as to prevent his proceeding in the Federal court in Mississippi to coerce the payment of this note.

The Circuit Court in Mississippi had exclusive jurisdiction over that question, and was open to the complainant, Cage.

McKim v. Voorhees, 7 Cranch, 297.

III. The reversal of the decree of distribution in the Probate Court neither satisfies the equity between these parties, nor destroys the consideration which was the foundation of that note, because the amount ascertained by the only competent authority to be due, still stands a judgment, and, in the absence of creditors, belongs to the distributees of the estate; and

The note was given by Cage, with full knowledge of the circumstances, and when he might have resorted to his pres-

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ent application for relief, when he might have convened the parties in the Probate Court of Madison county, and have had the decree on the account opened, if there was jurisdiction to do so.

But there was no such jurisdiction, either in that court or in a court of equity.

Hendricks v. Huddleston, 5 S. and M., 422, 426.

Turnbull v. Endicott, 3 S. and M., 302.

Griffith v. Vertner, 5 How., 736.

The settlement of that account is final and conclusive.

IV. If Cassidy procured the decree for account by fraud, or especially if the consideration on which the note was given was fraudulent, and the note was given on false and fraudulent representations of Cassidy, these defences would have been good defences in the suit at law on the note. They were not set up. Cage therefore has, by his own laches, lost his equity, if he had any.

Nor does the pendency of the suit in equity in Tennessee excuse his neglect, for that was no bar to the recovery of Cassidy on the note in his suit in the Circuit Court.

There is no equity in the bill, and no error in the dismissal of it.

Mr. Justice CAMPBELL delivered the opinion of the court.

R. H. Cage, the testator of the appellants, filed his bill in the Circuit Court, to be relieved from a judgment rendered there in favor of the appellee, (A. A. Cassidy,) in November, 1852.

The pleadings and proofs contained in the record disclose that the testator, in 1841, became surety to the Probate Court of Madison county, Mississippi, for William Douglass and William Hall, on their bond, as administrators of the estate of Henry L. Douglass, deceased. In 1848, their letters of administration were revoked; and Cassidy, the husband of Mary Douglass, the widow of Henry L. Douglass, and the guardian of Henrietta Douglass, their only child, was appointed administrator *de bonis non.*

In 1849, the Probate Court cited the administrators to ac-

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count, and upon their non-appearance rendered a decree against them for \$6,822.87, and subsequently ordered, that payment should be made to Cassidy and wife and Henrietta Douglass—one moiety to each, being their legal share; and in default of payment authorized a suit on the administration bond. In 1850, suits were instituted on the bond against Cage, the surety, in the Circuit Court, by Cassidy and Henrietta Douglass; but no suit was commenced against the principals, who resided in Tennessee. Judgments were rendered in 1851 against Cage, for the amount of the decree; and these were settled by his giving a note to Cassidy for their amount, payable one year after date, and by paying the costs.

During the year 1851, Cage visited Tennessee, with a view to have a settlement between Douglass and Hall, his principals, and Cassidy, and to obtain an indemnity from those who had induced him to sign their bond. His negotiations were unproductive; and he filed a bill in the Court of Chancery, in Sumner county, Tennessee, to which Cassidy and wife, Henrietta Douglass, and Douglass and Hall, and others, were made parties.

In this bill he stated his relation as surety, and his legal claim to be exonerated from his obligation, and from his impending danger of loss. He insisted that his creditors, the distributees, and his principals, the administrators, should adjust their accounts, and that the balance should be settled. He charged that he had not made defence against the judgments in Mississippi, because the defendant, Cassidy, had assured him that he was not to be vexed or injured, and the suit was simply to serve as an instrument to bring his absent principals to a fair settlement. He charges that the account stated in the Probate Court was erroneous, within the knowledge of Cassidy, who had procured it, and that the balance was subject to credits that he knew to be just. He obtained an injunction against Cassidy, requiring him not to transfer his note or to commence any suit upon it pending the injunction.

The several defendants answered the bill; and in 1854 the cause came on for a hearing upon pleadings, proofs, orders, and a report upon the administration accounts.

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Before this time the administrators had obtained a writ of error upon the judgment rendered in the Probate Court; and in January, 1853, this judgment was annulled by the Court of Errors and Appeals of Mississippi.

The defendant, Cassidy, in 1852, notwithstanding the injunction in Tennessee, commenced a suit upon the note of the surety, (Cage,) in the Circuit Court, and in November, 1852, recovered a judgment for the full amount, and sued out execution for its collection. Thereupon Cage filed the bill for injunction and relief with which the proceedings in the cause before this court were commenced.

In this bill he charges that the account as stated in the Probate Court is unjust. That Cassidy was aware of the injustice of the charges when they were made. That he had quieted the mind of the plaintiff, by assurances that he meditated no harm to him; but merely expected to bring the administrators to a fair settlement by that course, and only expected to hold the claim against him for that purpose. He specifies the errors in the account, and the efforts he had made to bring the parties to a settlement, and the pendency of his suit in Tennessee. Cassidy answered the bill, taking issue upon some of the material averments.

Thus the cause stood when the Court of Chancery in Sumner county, Tennessee, rendered its final decree in 1854. The court declared that the settlement in the Probate Court, the judgments in the Circuit Court on the bond, and the execution of the promissory note by Cage in liquidation, were superinduced by the promises and assurances of Cassidy to Cage, that he was not to be held personally, but they were to be used to bring the principals to a fair accounting. That Cassidy knew that the statement of the account in the Probate Court was erroneous, and unjust to the administrators, and that the recovery of the judgment on the note of Cage was a breach of the injunction, and a fraud upon him.

The court finds, that instead of a debt of \$6,822.87, as reported against the administrators in 1849, there was only due the sum of \$850.37. It charges against this sum the costs paid by Cage in the litigation to which he has been subjected,

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and required the remainder to be paid into court; and thereupon entered a decree against Cassidy, enjoining him from proceeding further upon the judgment in the Circuit Court on the note.

This decree was presented to the Circuit Court in Mississippi, in suitable pleadings, and was considered by that court under a stipulation of the solicitors of the respective parties to this effect: "It is admitted that proof before the Chancery Court of Tennessee was sufficient to establish the state of accounts of Hall and Douglass, as administrators of H. L. Douglass, in Mississippi and Tennessee, as decreed by the chancellor in the Tennessee case, filed in this cause as an exhibit. This agreement is made, in order to dispense with obtaining a copy of the proof before the Chancery Court of Tennessee, or retaking the depositions of the witnesses. In other words, all that is intended to be admitted hereby, and that is admitted, that the decree of said Chancery Court was supported by the proof."

Upon the hearing in the Circuit Court, that court determined that the injunction which had been granted in the preliminary stage of this cause was improvidently allowed, and that the bill must be dismissed. From this decree this appeal is taken.

The natural limit of the obligation of a surety is to be found in the obligation of the principal; and when that is extinguished, the surety is in general liberated. In some codes, the obligation of a surety cannot extend beyond or exist under conditions more onerous than that of his principal. The obligation of the administrators, Douglass and Hall, has been ascertained by the decree of the Court of Chancery in Tennessee, upon proof, conceded to be sufficient, and has been fully discharged by its order. Notwithstanding this, the appellee (Cassidy) seeks to enforce a judgment for nearly ten times the amount of the debt found to be due in that decree, and now discharged. It is apparent that the effort is unconscionable, and can only be allowed under the influence of some inflexible and imperious rule of the court, that deprives the appellants of any title to its interposition. But the Court

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of Chancery of Tennessee, upon sufficient proof, has declared that the surety had been " lulled into security " by the delusive promises of his creditor, and that he has been the victim of artifice and circumvention ; that the judgment against him was obtained in contempt of the injunction of the court, and that the assertion of any right under it would be fraudulent. This decree remains in full force and effect.

These circumstances furnish additional motives for the intervention of the equitable powers of the court for the relief of the appellants.

It is the opinion of this court, that the decree of the Circuit Court is erroneous, and must be reversed. The cause is remanded, with directions to the Circuit Court to enter a decree perpetuating the injunction.

JOSEPH PENNOCK AND NATHAN F. HART, APPELLANTS, v. GEORGE S. COE, TRUSTEE OF THE CLEVELAND, ZANESVILLE, AND CINCINNATI RAILROAD COMPANY.

A railroad company authorized to borrow money and issue their bonds, to enable themselves to finish and stock the road, may mortgage as security not only the then-acquired property, but such as may be acquired in future.

Although the maxim is true, that a person cannot grant what he has not got, yet, in this case, a grant can take effect upon the property when it is brought into existence, and belongs to the grantor in fulfilment of an express agreement, founded on a good and valid consideration, when no rule of law is infringed or rights of a third party prejudiced. The mortgage attached to the future acquisitions as described in it, from the time they came into existence, and were placed on the road.

Hence, where second mortgagees and holders of bonds of a second issue brought suit upon those bonds, recovered judgment, issued execution, and levied it upon a part of the rolling stock, which was not in existence when the first mortgage was given, the judgment creditors must be postponed to the claims of the first mortgagees.

In the present case, a reasonable interpretation of the statutes creating the corporation would justify it in making the road where it was made.

A bondholder of a class covered by a mortgage to secure the class of bonds issued in case of insolvency of the obligors cannot, by getting judgment at law, be permitted to sell a portion of the property devoted to the common security, as this would disturb the pro rata distribution among the bondholders, to which they are equitably entitled.

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

The bill was filed in the Circuit Court by Coe, mortgagee of the road of the railroad company in trust, for securing the payment of its bonds, to enjoin the execution of a judgment recovered at law against the company by Pennock and Hart, two of the defendants.

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

After the case was ready for a hearing, at September term, 1857, the Circuit Court passed the following decree :

“ This cause came on to be heard upon the bill of the complainant, the joint answer of Joseph Pennock and Nathan F. Hart, the separate answer of the Cleveland, Zanesville, and Cincinnati Railroad Company, the replication to said answer, the exhibits and testimony, and the motion of said Pennock and Hart to dissolve the injunction heretofore allowed in this case, and was argued by counsel. On consideration whereof, the court do overrule said motion ; and the entire facts in the case being before the court, and the arguments of the counsel upon the motion to dissolve said injunction embracing the entire merits of the case, the court do order, adjudge, and decree, that said injunction be made perpetual, and that the said Pennock and Hart be forever restrained from selling, or causing to be sold, by the marshal, the locomotives, tenders, and cars, mentioned in said bill, to satisfy the judgment recovered by them against said railroad company therein described.”

From this decree, Pennock and Hart appealed to this court.

It was argued by *Mr. Stanton* for the appellant, upon which side there was also a brief filed by *Mr. Spalding* and *Mr. Parsons*, and by *Mr. Otis* for the appellee.

The arguments upon the question whether the mortgage was void, on the ground of uncertainty as to the property described or attempted to be described therein, and conveyed to the mortgagee, are omitted from this report, inasmuch as the court did not think it necessary to decide that point. Upon

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the other and principal branch of the case, viz: whether the mortgage was good as conveying subsequently-acquired property, the views of the respective counsel were as follows, as also upon the point whether the railroad company were authorized to make the road which they did make.

The counsel for the appellants stated the law which governed the case to be the following:

The laws of Ohio authorizing railroad companies to borrow money and secure the payment of the same, are found in the "act regulating railroad companies," passed February 11, 1848, sec. 13, and in the "act to provide for the creation of incorporated companies in the State of Ohio," passed May 1, 1852, sec. 14.

See Swan's Revised Statutes of Ohio, pages 199 and 203.

To secure the payment of money borrowed, they "may pledge the property and income of such company."

The act to revive and amend an act to incorporate the Cleveland and Pittsburgh Railroad Company, passed March 11th, 1845, which is claimed to be the charter of the Cleveland, Zanesville, and Cincinnati Railroad Company, provides, in section six, that "the said company, by its proper officers, duly authorized by the directors, is hereby authorized and empowered to mortgage, hypothecate, or pledge, all or any part of said railroad, or of any other real or personal property belonging to said company, or of any portion of the tolls and revenues of said company which may thereafter accrue, for the purpose of raising money to construct said railroad, or to pay debts incurred in the construction thereof."

Local Laws of Ohio, vol. 43, page 401.

It is insisted, on the part of the appellants, that so much of the indenture, made between the Akron branch of the Cleveland and Pittsburgh Railroad Company and George S. Coe, trustee, on the first day of April, 1852, as purports to put in pledge or mortgage "future acquisitions," is inoperative and void.

Yelverton v. Yelverton, Croke Elizabeth, 401.

Comyns Digest, Grant D., vol. 4, page 310.

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Mogg v. Baker, 3 Mees. and Welsb., 195.

Jones v. Richardson, 10 Metcalf, 481.

Moody v. Wright, 13 Metcalf, 17.

Otis v. Sill, 8 Barbour S. C. Rep., 102.

Rose v. Bevan, 10 Md., 466.

The railroad company had no authority, as a corporate body, to make a railway from "Hudson to Millersburg," and, as a necessary consequence, had no power to borrow money for that purpose. The charter only authorizes the construction of a railroad from Hudson, in Summit county, to Wooster, in Wayne county, or some other point in the Ohio and Pennsylvania railroad between Massillon and Wooster.

See Ohio Local Laws, vol. 49, page 468.

As the road is located, the southern terminus, according to the charter, would be Orville, in Wayne county, which is a point in the Ohio and Pennsylvania railroad between Massillon and Wooster, distant thirty-eight miles from Hudson.

Money was borrowed to make the road to Millersburg, in Holmes county, which is twenty-three miles south of Orville, where the road should have stopped under the charter.

"Corporate powers are never to be created by implication nor extended by construction."

Penn. Railroad Company v. the Canal Commissioners, 21

Penn. State Rep., 9.

Stormfeltz v. the Manor Turnpike Co., 13 *Penn. State Rep.*, 555.

East Anglian Railway Co. v. Eastern Counties Railway Co., 7 *Eng. Law and Eq.*, 505.

Act regulating Railroad Mortgages in Ohio, *Swan's Rev. Statutes*, 241.

Coleman v. the Eastern Counties Railway Co., 4 *Eng. Railway Cases*, 382.

Perrine v. Chesapeake and Delaware Canal Co., 9 *Howard's Rep.*, 172.

Inhabitants of Springfield v. Connecticut River Railroad Co., 4 *Cushing*, 63.

Logan v. Earl Courtown, 13 *Beav.*, 22.

Green et al. v. Seymour et al., 3 *Sandford's Chan. R.*, 285.

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The Penn. &c. Co. v. Dandridge, 8 Gill and Johns., 248.
"Notes given by a corporation in violation of law are void."
Mr. Justice McLean in *Root v. Goddard*, 3 McLean Rep., 102.

McGintry v. Reeves, 10 Ala., 137.

Commonwealth v. the Erie and Northeast R. R. Co., 27 Penn. State Rep., 339.

Peavey v. the Calais R. R. Co., 30 Maine Rep., 498.

A right cannot be claimed by a corporation under ambiguous terms.

Mr. Justice McLean in *Charles River Bridge Case*, 11 Peters, 559.

With respect to that point of the case which related to the power of the company to make the road in question, *Mr. Otis*, counsel for the appellees, cited and commented on the following statutes of Ohio:

1836, March 14; 1845, March 11.

1851, February 19; 1850, February 21.

1846, February 26; 1846, March 2.

1848, February 18; 1848, February 24.

1847, February 8; 1849, March 12.

It would occupy too much room to follow him through the examination of them all.

With respect to the other point, his argument was as follows:

That the mortgage to Coe is a lien upon the machinery and cars levied upon, though the same were not in existence at the time said mortgage was executed, and though the same did not become a part of the road, by accession, when placed upon it.

For the purpose of this argument, I am willing to admit it to be the general rule of the common law, that nothing can be mortgaged which is not in existence and does not belong to the mortgagor at the time the mortgage is executed.

This proposition is fully established by the following authorities.

Winslow v. Merchants' Ins. Co., 4 Met., 306.

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Jones v. Richardson, 10 Met., 481.

Lunn v. Thornton, 1 M. G. and S., 379.

Otis v. Sill, 8 Barb., 102.

But these very authorities also establish the fact that this rule is founded solely upon a technicality. A mortgage is a sale upon condition; and, as before stated, by the rule of the common law there can be no sale of a thing not in existence, and which is not at the time the property of the seller.

The rule of the civil law is the very reverse of that of the common law in this particular, and is thus stated by Domat:

“Those who bind themselves by any engagement whatsoever may, for the security of their performance of the engagement on their part, appropriate and mortgage, not only the estate they are masters of at the time of contracting, but likewise all the estate which they shall be afterwards seized or possessed of. And this mortgage extends to all the things which they shall afterwards acquire, that are capable of being mortgaged, by what title soever it be that they acquire them, and even to those which are not in being when the obligation is contracted; so that the fruits which shall grow upon the lands will be comprehended in the mortgage of an estate to come.”

1 Domat, (Cushing’s ed.,) 649, art. 5.

“Although the mortgage be restrained to certain things, yet it will nevertheless extend to all that shall arise or proceed from that thing which is mortgaged, or that shall augment it and make part of it. Thus, the fruits which grow on the lands that are mortgaged are subject to the mortgage while they continue unseparated from the ground. Thus, when a stud of horses, a herd of cattle, or a flock of sheep, is put in pawn into the creditor’s hands, the foals, the lambs, and other beasts which they bring forth, and which augment their number, are likewise engaged for the creditor’s security. And if the whole herd or flock be entirely changed, the heads which have renewed it are engaged in the same manner as the old stock. Thus, when the bounds of a piece of ground that is mortgaged happen to be enlarged by that which the course of a river may add to it, the mortgage extends to that which has augmented

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the ground. Thus, a house that is built on a ground which is mortgaged, is subject likewise to the mortgage. And if, on the contrary, a house be mortgaged, and it perishes by fire, or falls through decay, the mortgage will subsist on the ground where the house stood. Thus, when a debtor mortgages a piece of ground of which he had only the bare property, another enjoying the usufruct of it, when the said right to the usufruct comes to be extinct, the mortgage will comprehend the ground with the fruits."

Ib., 650, art. 7.

There is, therefore, no inherent difficulty in making a mortgage which shall extend to after-acquired property, or property not *in esse*. And courts of equity which are not trammelled by the technical rules of the common law in the administration of justice, both in England and in this country, uphold such mortgages, in pursuance of the rule of the civil law, when necessary to carry into effect the honest and just contracts of parties according to their real intentions.

Fonblanque, B. 1, ch. 4, sec. 2.

Ib., ch. 5, sec. 8.

1 Powell on Mort., 190.

Coote on Mort. Law, Lib. ed., 185.

Noel v. Burley, 3 Simons, 103.

Metcalf v. Archbishop of York, 1 Myl. and Cr., 553.

Langton v. Horton, 1 Hare, 539.

Matter of Howe, 1 Paige, 125, 129.

White v. Carpenter, 2 Paige, 217, 266.

Abbot v. Gordon, 7 Shepley, 408.

Foreman v. Proctor, 9 B. Mon., 124.

Jenke's Adm. v. Goffe, 1 R. I. Rep., 511.

Field v. the Mayor of New York, 2 Seld., 179, 186.

Winslow v. Mitchell, 2 Story, 630.

Story Eq. Jur., secs. 1040, 1040 b, 1055.

On page 644 of the case of Winslow v. Mitchell, above cited, Judge Story states the rule to be, "that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or if personal

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property, whether it is then in being or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily or with notice, or in bankruptcy."

And the particular question raised in this case has been determined in the following cases.

Willinck v. the Morris Canal Co., 3 Green's Chy., 377.

Pierce v. Emery, 32 N. H. Rep., 484.

Seymour v. Canandaigua and Niagara Falls R. R. Co., 25 Barb., 286.

Farmers' Loan and Trust Co. v. Hendrickson, ib., 484.

Philips & Jordon v. Winslow, Trustee, &c., (Kentucky Court of Appeals,) 2 Weekly Law Gazette, 4.

Ludlow v. Hurd et al., (Superior Court of Cincinnati,) 6 Am. Law Reg., 493.

I also refer to the opinion of Judge McLEAN, pronounced in the case at bar, in the Circuit Court, reported in 6 Am. Law Reg., 27.

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 Ohio.

The bill was filed in the court below, by Coe, mortgagee of the road of the railroad company, in trust, for securing the payment of its bonds, to enjoin the execution of a judgment recovered at law against the company, by Pennock and Hart, two of the defendants.

The facts of the case are these: The Cleveland, Zanesville, and Cincinnati Railroad Co., created a body politic and corporate by the laws of Ohio, to make a railroad between certain termini in that State, in pursuance of authority conferred by law, issued bonds to the amount of \$500,000, payable ten years from date, with interest at the rate of seven per cent., payable semi-annually, on the first day of April and October in each year, and, to secure the payment of the same, executed a mortgage of the railroad and its equipments to the complainant, in trust for the bondholders, the description of which is

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in the words following: "All the present and future to be acquired property of the parties of the first part; that is to say, their road, made or to be made, including the right of way, and the land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials used therein, or procured therefor, with the above-described bonds, or the money obtained therefor, bridges, viaducts, culverts, fences, depots, grounds and buildings thereon, engines, tenders, cars, tools, machinery, materials, contracts, and all other personal property, right thereto, or interest therein, together with the tolls, rents, or income, to be had or levied therefrom, and all franchises, rights, and privileges, of the parties of the first part, in, to, or concerning the same." At the time of the issuing of these bonds, and the execution of the mortgage, the railroad was in the course of construction, but only a small portion of it finished. It was constructed and equipped almost entirely by means of the funds raised from these bonds, together with a second issue to the amount of \$700,000. The road cost upwards of \$1,500,000. The stock subscribed and paid in, amounted only to some \$369,000.

The mortgage securing the payment of the second issue bears date the first of November, 1854, and was made to one George Mygatt, in trust for the bondholders, and the property described in and covered by it is the same as that described in the first mortgage. The road was finished to Millersburg, its present terminus south, in May, 1854, and the whole of the rolling stock was placed on it previous to the date of the second mortgage. This stock was purchased and placed on the road from time to time, as the locomotives and cars were needed in the progress of its construction.

The mortgage to the complainant contained a covenant on the part of the company, that the money borrowed for the construction and equipment of the road should be faithfully applied to that object, and that the work should be carried on with due diligence until the same should be finished.

In case of default in the payment of the principal or interest of the bonds, the trustee was empowered to enter upon and take possession of the road, or, at the election of a moiety

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of the bondholders, to sell the same at public auction, and apply the proceeds to the payment of the bonds.

The defendants, Pennock and Hart, being the holders of sixteen of the bonds issued under the second mortgage, recovered a judgment on the same, May, 1856, against the railroad company issued execution, and levied on a portion of the rolling stock of the road, and caused the same to be advertised for sale.

This bill was filed to enjoin the sale, and a decree was rendered perpetually enjoining it in the court below, which is now before us on appeal.

The first two grounds of objection taken to this decree may be considered together. They are: 1, that the mortgage to the trustee of the 1st April, 1852, is void or inoperative, as respects the locomotives and cars which were levied on under the execution of the defendants, inasmuch as they were not in existence at the date of it, but were constructed and placed on the road afterwards, being subsequently-acquired property of the company. And, 2, that the mortgage is void, on the ground of uncertainty as to the property described or attempted to be described therein and conveyed to the mortgagee. The description begins by conveying "all the following present and future acquired property of the said parties of the first part;" and after specifying the road and the several parts of it, together with the rolling stock, there is added, "and all other personal property, right thereto, and interest therein." This clause, probably, from the connection in which it is found, was intended to refer to property appurtenant to the road, and employed in its operation, and which had not been enumerated; and if so, the better opinion, perhaps, is, that it would be bound by the mortgage even as against judgment creditors.

But it is unimportant to express any opinion upon the question, as the property in this case (the locomotives and cars) levied on are articles specifically enumerated; and the only uncertainty existing in respect to them arises out of their non-existence at the date of the mortgage. An uncertainty of this character need not be separately examined, as it will be

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resolved by a consideration of the first question, which is, whether or not the after-acquired rolling stock of the company placed upon the road attaches, in equity, to the mortgage, if within the description, from the time it is placed there, so as to protect it against the judgment creditors of the railroad company?

If we are at liberty to determine this question by the terms and clear intent of the agreement of the parties, it will be found a very plain one. The company have agreed with the bondholders, (for the mortgagee represents them,) that if they will advance their money to build the road, and equip it, the road and equipments thus constructed, and as fast as constructed, shall be pledged as a security for the loan. This is the simple contract, when stripped of form and verbiage; and, in order to carry out this intent most effectually, and with as little hazard as possible to the lender, the company specially stipulate that the money thus borrowed shall be faithfully applied in the construction and equipment of the road. And in further fulfilment of the intent, the company agree, that in case of default in the payment of principal or interest, the bondholders may enter upon and take possession of the road, and run it themselves, by their agents, applying the net proceeds to the payment of the debt.

The bondholders have fulfilled their part of the agreement—they have advanced the money on the faith of the security; the company have also fulfilled theirs—they have made the road and equipped it; it has been partially in operation since January, 1852, and in operation upon the whole line since May, 1854. The road, therefore, as described in the mortgage, from Hudson to Millersburg, and which was in the course of construction at the date of the instrument, has been finished, and the rolling stock, locomotives, tenders, and cars, also described in it, and which were to be afterwards acquired, have been brought into existence, and placed upon it—all in conformity with the agreement of the parties; and the question is, whether there is any rule of law or principle of equity that denies effect to such an agreement.

The main argument urged against it is founded upon the

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maxim, that “a person cannot grant a thing which he has not:” *ille non habet, non dat*; and many authorities are referred to at law to prove the proposition, and many more might have been added from cases in equity, for equity no more than law can deny it. The thing itself is an impossibility. It may, at once, therefore, be admitted, whenever a party undertakes, by deed or mortgage, to grant property, real or personal, in *presenti*, which does not belong to him or has no existence, the deed or mortgage, as the case may be, is inoperative and void, and this either in a court of law or equity.

But the principle has no application to the case before us. The mortgage here does not undertake to grant, in *presenti*, property of the company not belonging to them or not in existence at the date of it, but carefully distinguishes between present property and that to be afterwards acquired. Portions of the road had been acquired and finished, and were in operation, when the mortgage was given, upon which it is conceded it took effect; other portions were acquired afterwards, and especially the iron and other fixtures, besides the greater part of the rolling stock.

The terms of the grant or conveyance are: “all present and future to be acquired property of the parties of the first part;” that is to say, “their road, made or to be made, and all rails and other materials, &c., including iron rails and equipments, procured or to be procured,” &c. We have no occasion, therefore, of calling in question, much less denying, the soundness of the maxim, so strongly urged against the effect of the mortgage upon the property in question, as its force and operation depend upon a different state of facts, and to which different principles are applicable. The inquiry here is, not whether a person can grant in *presenti* property not belonging to him, and not in existence, but whether the law will permit the grant or conveyance to take effect upon the property when it is brought into existence, and belongs to the grantor, in fulfilment of an express agreement, founded on a good and valuable consideration; and this, when no rule of law is infringed or rights of a third party prejudiced? The locomotives and cars were all placed upon the road as early as February, 1854,

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when, at the furthest, the mortgage attached to those in question, according to its terms, if at all, and the judgment of the defendants was not recovered till May, 1856.

We think it very clear, if the company, after having received the money upon the bonds and given the mortgage security, had undertaken to divert the fund from the purpose to which it was devoted, namely, the construction of the road and its equipment, and upon which the security mainly depended, a court of equity would have interposed, and enforced a specific performance. One of the covenants was, that the money should be faithfully applied to the building and equipment of the road; or if, after the road was put in operation, the company had undertaken to divert the rolling stock from the use of the road, a like interposition might have been invoked, and this in order to protect the security of the bond-holders. And if a court of equity would thus have compelled a specific performance of the contract, we may certainly with confidence conclude that it would sanction the voluntary performance of it by the parties themselves, and give effect to the security as soon as the property is brought into existence.

The case of *Langton v. Haste* (1 Hare's Ch. R., 549) supports this view. The mortgage security in that case was the assignment of the ship Foxhound, then on her voyage to the South seas, together with all and singular her masts, &c., "and all oil and head matter, and other cargo, which might be caught or brought home on the said ship, on and from her then present voyage." The cargo was levied on by a judgment creditor on the arrival of the ship at home. A bill was filed to have the mortgage declared a good and valid security for the moneys advanced, and that the complainants be entitled to the benefit of the security, in preference to the judgment creditor.

The vice chancellor, in giving his opinion, observed: "Is it true that a subject to be acquired after the date of a contract cannot, in equity, be claimed by a purchaser for value under that contract?"

And, in answer to the question, he said: "It is impossible to doubt, for some purposes at least, that by contract an in-

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terest in a thing not in existence at the time of the contract may, in equity, become the property of the purchaser for value." And, after reviewing the cases in the books, he concludes: "I cannot, without going in opposition to many authorities which have been cited, throw any doubt upon the point that Bixnie, the contracting party, would be bound by the assignment to the plaintiffs."

There are many cases in this country confirming this doctrine, and which have led to the practice extensively of giving this sort of security, especially in railroad and other similar great and important enterprises of the day. (2 Selden R., 179; 3 Green Ch. R., 377; 32 N. H. Rep., 484; 25 Barb., 286; ib., 284; 18 B. Munro, 431; Redfield on Railways, 590, and note; 2 Story R., 630; 7 Jurist, 771; *Tapfield v. Hillman*.)

In the case of *Tapfield v. Hillman*, Tindall, Ch. J., seems inclined to the opinion that, even at law, a mortgage security of future acquisitions might have effect given to it, if the terms indicated an intent to comprehend them.

The counsel for the appellee referred to the case of *Chapman v. Weimer & Steinbacker*, (4 Ohio R., 481,) as denying effect to a mortgage upon after-acquired property. But that was a case at law; and even there the court held that the mortgage attached after the property was acquired, from the time the right was asserted by the mortgagee.

In conclusion upon this point, we are satisfied that the mortgage attached to the future acquisitions, as described in it, from the time they came into existence. As to the claim of the judgment creditors, there are several answers to it.

In the first place, the mortgage being a valid and effective security for the bondholders of prior date, they present the superior equity to have the property in question applied to the discharge of the bonds. It is true, if the property covered by the mortgage constituted a fund more than sufficient to pay their demands, the court might compel the prior encumbrancer to satisfy the execution, or, on a refusal, the mortgage having become forfeited, compel a foreclosure and satisfaction of the bond debt, so as to enable the judgment creditor to reach the

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surplus. Or the court might, upon any unreasonable resistance of the claim of the execution creditor, or inequitable interposition for delay, and to hinder and defeat the execution, permit a sale of the rolling stock sufficient to satisfy it. But no such ground has been presented, or could be sustained upon the facts before us. On the contrary, it cannot be denied but that the whole of the property mortgaged is insufficient to satisfy the bondholders under the first mortgage, much less when those under the second are included. To permit any interference, therefore, on the part of the judgment creditors, with a view to the satisfaction of their debt, consistent with the superior equity of the bondholders, would work only inconvenience and harm to the latter, without any benefit to the former. (3 Hare's Ch. R., 416; 9 Georgia R., 377; Redfield on Railw., 506; 5 Ohio R., 92.)

In the second place, the judgment sought to be enforced by the defendants was recovered upon bonds of the second issue, and secured, in common with all the bonds of that issue, upon this property, by virtue of the second mortgage. These bondholders have a common interest in this security, and are all equally entitled to the benefit of it; and in case of a deficiency of the fund to satisfy the whole of the debt, in equity, a distribution is made among the holders pro rata. The payment of the bonds of the second issue are also postponed until satisfaction of the issue comprehended within the first mortgage, as the second was taken with a full knowledge of the first. To permit, therefore, one of the bondholders under the second mortgage to proceed at law in the collection of his debt upon execution would not only disturb the pro rata distribution in case of a deficiency, and give him an inequitable preference over his associates, but also have the effect to prejudice the superior equity of the bondholders under the first mortgage, which possesses the prior lien.

As the judgment creditors can have no interest in the management or disposition of the property, except as bondholders, on account of the deficiency of the fund, it is unimportant to inquire whether or not the court was right in refusing a receiver, or to direct a sale of the road with a view to a distri-

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bution of the proceeds. For aught that appears, the road has been managed, under its present directors, with prudence and fidelity, and to the satisfaction of the bondholders, the parties exclusively interested.

Another objection taken to the validity of the mortgage is, the want of power under the charter to construct the road from Hudson to Millersburg, and consequently to borrow money and pledge the road for this purpose. There is certainly some obscurity in the statutes creating this corporation as to the extent of the line of its road; but we agree with the court below, that, upon a reasonable interpretation of them, the power is to be found in their charter. They were authorized to construct the road from some convenient point on the Cleveland and Pittsburgh road, in Hudson, Summit county, through Cuyahoga Falls, and Akron, to Wooster, or some point on the Ohio and Pennsylvania railroad, between Massillon and Wooster, and to connect with said Ohio and Pennsylvania road, and *any other railroad running in the direction of Columbus.* It was clearly not limited, in its southern terminus, to its connection with the Ohio and Pennsylvania road, for there is added, "and any other railroad running in the direction of Columbus." The extension of the road to the Ohio Central road at Zanesville, or at some other point on this road, comes fairly within the description.

We have not referred particularly to the authority of the company, under the statute laws of Ohio, to borrow money and pledge the road for the security of the payment, as no such question is presented in the brief or was made on the argument. Indeed, the authority seems to be full and explicit.

Decree below affirmed.

CHARLES FLOWERS, SURVIVOR OF ALICE FLOWERS, PLAINTIFF IN
ERROR, v. FRANCIS FOREMAN, SURVIVING PARTNER OF CHRIS-
TIAN KELLER, DEFENDANT.

Where a party residing in Maryland sold land in Louisiana with a general warranty to a resident of Louisiana, who was afterwards evicted from a part of it, and obtained a judgment against his warrantor, whom he had vouched in,

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this judgment could not be rendered effective against the Maryland vendor, because no notice had been served upon him, and the appointment of a *curator ad hoc* was not sufficient.

An action of assumpsit having been afterwards brought against him in the Maryland court by the parties interested, the statute of limitations of Maryland was considered to be applicable to the case.

The eviction of the vendee took place when he held the land under a title different from that which had been conveyed to him by his grantor, without the necessity of the execution of a writ of possession.

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

It was an action of assumpsit brought by Charles Flowers and Alice Flowers, of Louisiana, claiming to be heirs and universal legatees of Charles Mulholland, against Foreman, surviving partner of Keller & Foreman.

The claim arose in this way:

There was a tract of land in Louisiana, which Calvit conveyed to Davis, Davis to Keller & Foreman, and these last to Mulholland, under a power of attorney dated 21st December, 1827. The attorney conveyed it to Mulholland with a clause of general warranty.

Mulholland, on the same day, conveyed a part of it to Reuben Carnal, but nothing more need be said about this deed for the purpose of explaining the questions which arose in this case.

The heirs of Calvit, in 1838, filed a petition in the District Court, parish of Rapides, State of Louisiana, alleging that they were the sole heirs of their mother, who was the lawful wife of Anthony Calvit; that during the community between said Anthony Calvit and his wife, he purchased said tract of land; that the said wife died, leaving the petitioners her heirs, and their father their natural tutor; that in the year 1822, while petitioners were minors, he sold the whole of said land to A. J. Davis, in violation of the rights of petitioners, who were entitled to one-half thereof, as the heirs of their mother; that said land was then in possession of said Charles Mulholland and Reuben Carnal, and the petition prays that one-half of said land may be adjudged to them.

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Carnal filed his answer, denying the allegations in the petition, alleging that he purchased said land from Charles Mulholland, who was bound to defend the title, and citing him in warranty in the suit.

Mulholland filed his answer, denying all the allegations of the plaintiffs, and alleging that he purchased said land from said Keller & Foreman, under a general warranty, and he prays that said Keller & Foreman, as warrantors, may be cited to defend him in his title and possession, and that *curators ad hoc* may be appointed to represent the said warrantors, who are absentees.

In conformity with the prayer contained in Mulholland's answer, a citation issued, not to Keller & Foreman, but to George K. Waters, who is styled *curator ad hoc* of the parish of Rapides, and said Waters appeared and filed an answer, and undertook to defend the cause for the absentees, on whom no process was served, and who had no notice nor knowledge of the case.

The District Court gave judgment in favor of the defendant.

The case was appealed, and the Supreme Court of Louisiana, on the 26th of November, 1845, reversed the decision of the District Court, and ordered, adjudged, and decreed, "that said James and Coleman Calvit do recover of the defendant, each and respectively, one undivided eighth of the tract of land described in their petition, that they be quieted in their title to the said undivided eighth hereby decreed to them respectively as against the defendant or any person claiming through or under them;" but with regard to the question of improvements and rents and profits, so far as James and Coleman Calvit were interested, and as to the question of damages between the warrantees, the case was remanded to the District Court. And on a rehearing, the Supreme Court, on the 29th of October, 1845, decreed that its former judgment be maintained as far as it went, and that, in addition to the purposes for which it was ordered to be remanded, it be also remanded for the further purpose of ascertaining whether the price received by the plaintiffs' father and tutor for the property in dispute was applied to the payment of the community debts.

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of the father and mother of the plaintiffs, to which said James and Coleman were bound to contribute in proportion to their rights thereto; and that in the mean time no writ of possession issue until they have paid the amount which may be found to be due by them on the trial of the cause in the lower court.

During the progress of the cause, Charles Mulhollan died, and Charles Flowers and Alice Flowers appeared therein as his heirs and universal legatees.

Charles Mulhollan died in 1846. Shortly afterwards, Thomas O. Moore, the acting executor, paid to James and Coleman Calvit twelve hundred dollars each for their relinquishment of their claims to the tract of land in question.

On the 31st of May, 1853, the District Court rendered judgment in favor of Charles Flowers and Alice Flowers against Keller & Foreman, who were represented by the *curator ad hoc*. The judgment was for eight hundred and fifty dollars, with interest thereon, at five per cent., from the 14th of November, 1846, and costs.

There being no mode of reaching Keller & Foreman, under this judgment, an action of assumpsit was brought against them, as before stated, in the Circuit Court of the United States for the district of Maryland. The defendants pleaded the statute of limitations of Maryland.

The two statutes of this State are the following, viz:

The act of 1715, chapter 23, section 2, provides that all actions upon the case shall be brought "within three years ensuing the cause of such action, and not after," with a saving by section 22 in favor of persons beyond seas.

The act of 1818, chapter 216, section 1, repeals the saving in the act of 1715, in favor of persons beyond seas.

The reader will perceive that the only question in the case was when the statute began to run, whether in 1846 or 1853.

The Circuit Court granted the following instruction.

The defendant prays the court to instruct the jury, first, that the act of the State of Maryland, passed in the year 1715, chapter 23, entitled, "An act for limitation of certain actions, for avoiding suits at law," and the act of said State, passed in

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the year 1816, chapter 216, entitled, "An act to avoid suits at law," constitute a bar to the recovery by the plaintiff in this case. To the granting of which instruction the plaintiff excepted, and upon this exception the case came up to this court.

It was argued by *Mr. Brent* and *Mr. Phelps* for the plaintiff in error, and by *Mr. Brown*, upon a brief filed by *Brown and Brune*, for the defendant.

The counsel for the plaintiff in error maintained the following proposition:

That upon all the evidence in the case it appears, either that our cause of action did not accrue at all, until 31st May, 1853, or only accrued *sub modo*, and in abeyance, and did not mature until that date; in either of which cases, we are within the statutory limits.

Such part of the argument of the counsel for the plaintiff in error as there is room to insert, was as follows:

That said contract was broken, giving a right of action to the plaintiff.

(Upon the defence of limitations.) That such action accrued within three years prior to the institution of the suit.

These two points will be considered together.

The contract was concerning land situated in Louisiana. It was made in Louisiana, and there it was to be performed. The inquiry therefore is, what, by the *lex loci*, was necessary to constitute a beach of the contract?

Story's Conf. Laws.

By the civil law, the remedy upon the obligation of warranty is two-fold, and each remedy has respect to a distinct and independent cause of action.

The more usual remedy in the French and Louisiana practice is the one which was originally resorted to in the present case, while pending in the Louisiana court. By it, the warrantor is formally vouched or cited in to defend his vendee's title, as soon as proceedings are commenced against the latter. If the seller thus called in cannot defend, "the judge con-

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demns him to indemnify the defendant, by the same sentence by which he pronounces in favor of the original plaintiff."

In this form of proceeding, the cause of action may be said to arise as soon as the vendee is troubled in his possession by a suit, for at that moment his right to call in his vendor in warranty accrues.

The other remedy is the one now being prosecuted, and which was rendered necessary by the fact that the first was ineffectual, the court which gave judgment not having jurisdiction over the absent parties.

In substance, this remedy corresponds to the ordinary common-law action of covenant, and, like it, is not available until final sentence is pronounced, and cannot be brought before the vendee has sustained an eviction, either actual or constructive.

Pothier des Ventes, part 2, C. 1, sec. 2, art. 5, sec. 2.

Domat, lib. 1, tit. 2, sec. 10.

In the present case, therefore, the cause of action did not accrue until eviction was consummated.

"Eviction" is defined to be "the loss suffered by the buyer of the totality of the thing sold, or a part thereof, occasioned by the right or claim of a third person."

Civil Code, art. 2476.

It is decided that this text does not require actual dispossession. Any holding by the vendee by a title different from that acquired from his warrantor, falls within its terms. As, if the disturbed vendee purchases in the paramount title to quiet his possession, he thereby sustains a constructive eviction, and has a right of action upon his warranty.

Pothier des Ventes, No. 96.

Landry *v.* Gamet, 1 Rob., 362.

Thomas *v.* Clement, 11 Rob., 397.

Before proceeding to apply these principles to the facts, it is necessary premise that those facts appear from two distinct species of evidence. First, the record evidence, consisting of the certified transcript of proceedings of the District Court of Rapides parish, in the suit of Calvit *v.* Mulholland. And second, the parol and documentary evidence returned with the commission.

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This distinction is important, in view of the peculiar form of the instruction given below. If that instruction can be supported upon the facts disclosed by the record evidence alone, we concede that it is unobjectionable in point of form. If, however, it is predicated in any the least degree upon the parol testimony, it is fatally defective; and for this plain reason, that it takes the testimony from the jury, who are the sole judges of its credibility, by a peremptory charge that the statutes of limitations constituted a bar.

The law should have been given to the jury hypothetically, leaving them to find the facts.

Budd v. Brooke, 3 Gill, 198.

Calvert v. Coxe, 1 Gill, 95.

Charleston Ins. Co. v Corner, 2 Gill, 410.

Ragan v. Gaither, 11 G and J., 472.

It may also be premised, that in an action for breach of warranty, the record of the suit in which the title paramount was litigated is conclusive evidence of the eviction, in cases where the warrantor had notice, and an opportunity to defend his vendor's title. Where no such title was given, the record is still *prima facie* evidence, not only of the validity of the paramount claim, but of its extent, &c.

Civ. Code, art., 2493, 2494.

Clark v. Carrington, 7 Cranch, 308.

It may well be argued, that in the present case the defendant had such notice.

Field v. Gibbs, Pet. C. C. R., 155.

Roberts v. Caldwell, 5 Dana, 512.

Wernwag v. Pawling, 5 G. and J., 500.

But, whether notice or not, the record is properly in evidence.

Hanson v. Buckner, 4 Dana, 251.

Owings v. Hull, 9 Peters, 627.

Now, first examine the facts of this case, as they appear from the record evidence, independent of the parol testimony, to determine whether these facts alone do not give the plaintiff a right of action, to which the statute of limitations is not a bar.

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The litigation upon the paramount title commences in 1838. In 1843, the District Court renders an adverse judgment, and the defeated claimants appeal. In 1845, the appellate court affirms this judgment as to two of the claimants, but reverses it as to the two youngest, and decides that they are entitled to recover each an undivided eighth.

Pausing an instant at this point, we ask whether this decree, even if it had been in terms a *final* judgment, would, by the law of Louisiana, have *per se* amounted to an eviction.

The answer is clearly that it would *not*.

Murray v. Bacon, 7 New S., 271.

The recital in the final judgment, "whereas his legal representatives have been evicted by the decree of the court," &c., when taken in connection with the decree to which it refers, obviously does not use the term in its strict, technical sense. If a technical eviction is meant at all, it can only be by relation.

But the decision of the appellate tribunal was not a final decree, but, on the contrary, preliminary and prospective merely, contemplating further proceedings, and prescribing future action as a condition precedent to a complete eviction.

So far, then, there is no eviction—therefore, no breach of warranty—therefore, no right of action; and hence we may safely assume that down to November, 1845, limitations have not commenced to run against us.

Resuming the inspection of the Louisiana record, (to which, for the present, we are confining ourselves,) from the time the decree of the appellate tribunal was filed in the District Court in November, 1845, nothing appears which has the remotest relation to an eviction, until 1853—the intervening minutes showing no more than that the suit was still pending in the District Court, revived in the name of the "legal representatives" of the deceased defendant, Mulholland.

On the 30th May, 1853, the present plaintiff, with his now deceased co-plaintiff, for the first time appear in the cause, make themselves parties in their capacity as "heirs and universal legatees" of the original defendant, adopt his answers and defences, and ask for judgment over against the warrantors, in case judgment be rendered in favor of plaintiffs.

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And on the next day (31st May) there is an entry of what purports to be a final judgment of the District Court, reciting the decree of the court above, and also reciting the fact, which for the first time appears, that "the legal representatives of Charles Mulholland have purchased the claims of said Calvits for the sum of \$2,400."

Within the principles laid down, this recital furnishes at once a state of facts such as by the *lex loci* amounts to an eviction, and gives a right of action upon the warranty.

See cases before cited, 1 Rob. 362, and 11 R., 897.

The record, however, does not furnish the date at which the purchase was made. That it does not do this expressly, is certain. That it does not fix the exact date by implication, is equally clear.

It is true, the judgment in awarding interest upon the \$850, the sum which it entitles the Flowers's to recover against the warrantors, does compute from the 14th November, 1846. But it does not connect this date in any manner with the previous recital of the purchase; and it would be a violent construction, certainly, which should force such a connection, independent of any extrinsic information. And it is to be borne in mind, that we are now considering the case upon the record evidence alone.

Nor is it for us to supply the omission caused by the silence of the record with respect to time. It is for the defendant, who relies upon limitations, to show that we are barred. It is enough for us to show, that at all events, upon the 31st May, 1853, we had a cause of action, without being required to prove how long before we might have had it.

If, then, it appears by the record alone, that upon the 31st May, 1853, the litigation upon the paramount title was brought to a close by final judgment, and that upon that day we stood as purchasers of the paramount claims, with nothing in the record to show that we were such purchasers long anterior to that time, we submit that the instruction given by the court below, that we were barred by limitations, was erroneous, inasmuch as we commenced one suit within less than three years from said date, to wit: on the 3d November, 1855.

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We now proceed to consider the case, as it may be modified by the parol testimony.

The depositions of J. A. Calvit and Judge Ogden disclose the fact that the relinquishment of the paramount claims was made on the 14th November, 1846, and that the purchase was made by Thomas O. Moore, the acting executor of Mulholland.

Upon this evidence, the attempt is made to set up the bar of limitations against the heirs, by dating their right of action back to the time when a voluntary payment was made by the executor.

There is nothing to show that the heirs authorized this arrangement concerning their land, or that they were privy to it in any manner. And we submit, that they were not bound nor concluded by it, directly or indirectly, until the 31st May, 1853, when the final judgment, rendered the day after their appearance in the suit, by reciting the payment, showed that they had ratified and adopted it as their own.

Until adopted by the heirs, the purchase of the Calvits' claims by Moore, although doubtless made in "good faith," and as the "best arrangement that could be made for the estate," yet not being within the scope of his executorial powers, was no more the act of the heirs than if made by an entire stranger for purposes of speculation.

Brush v. Ware, 15 Pet., 93—111.

Code La., art. 1652.

Anderson's Executors v. Anderson's Heirs, 10 La., 35.

The doctrine is well settled, that an action upon warranty may be brought by the executors, provided the breach be during the lifetime of the testator; but if the breach occur after his death, the action can only be maintained by the heirs.

1 Parsons Cont., 109.

Rawlings v. Adams, 7 Md., 49.

It is plain, therefore, that no right of action accrued upon this contract of warranty, until the 31st May, 1853. The executors could not have sued: 1st, because the payment by them did not constitute an eviction at all, they not being authorized to represent the land; and 2d, because, even if

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such payment did constitute an eviction, the breach was not until *after* the death of Mulholland, the warrantee, in which case the heirs alone could maintain an action.

Nor could the heirs have sued, for they had not then ratified the voluntary and gratuitous act of the executors, and made the payment their own.

There being no parties competent to sue, limitations could not run.

Fishwick v. Sewell, 4 H. and J., 393.

The counsel for the defendant in error made the following points:

I. This is an action of trespass on the case on a promise, otherwise called an action of assumpsit.

The cause of action of the plaintiff in error, if any he had, accrued, and limitations began to run on the 14th of November, 1846, when payment was made by the executor of Mulholland in behalf of the estate. And therefore more than three years had elapsed before the bringing of this action on the 3d of November, 1855, and the claim is barred by the acts of limitation of the State of Maryland of 1715, ch. 23, sec. 2, and 1818, ch. 216, sec. 1.

Beatty's Adm'r's v. Burnes's Adm'r's, 8 Cranch, 98.

Murdoch v. Winter, 1 H. and G., 471.

Frey v. Kirk, 4 G. and J., 509.

Sprague v. Baker, 17 Mass., 591.

Loomis v. Bedel, 11 N. H., 74.

Day v. Chism, 10 Wheat., 452.

2 Greenleaf's Ev., sec. 244.

Foote v. Burnet, 10 Ohio Wilcox, 330.

II. The judgment of the District Court of the State of Louisiana, in favor of Charles H. Flowers and Alice Flowers against Christopher Keller and Francis Foreman, for \$850, with interest from the 14th of November, 1846, the date of the payment by Mulholland's executor, is void, the court below having no jurisdiction in the case, the defendants never having been served with process, and never having had notice or knowledge of the case. The judgment against Keller is by a

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wrong name. His true name was Christian, not Christopher Keller, and he was in fact dead at the time when it was rendered, although that fact does not appear by the record. But the plaintiff in error does not sue on this judgment, or claim thereunder. If the judgment were valid, his cause of action would be merged therein, and suit would have to be brought on the judgment, and the form of action would be debt, not assumpsit.

Harris v. Hardeman, 14 How., 339.

Mr. Justice WAYNE delivered the opinion of the court.

We shall cite such facts in this record as are necessary to show the relations and obligations of the parties to it, under the laws of the State of Louisiana, and in that of the Circuit Court of the United States for the district of Maryland, from which it has been brought here by writ of error.

The plaintiffs are the heirs and universal legatees of Charles Mulholland, to whom Keller & Foreman sold a tract of land, with an obligation of warranty. On the same day that the conveyance was executed to Mulholland, he conveyed by deed a part of the land to Reuben Carnal, with a like clause of general warranty.

Afterwards, William J. Calvit, Elizabeth G. Calvit, James A. Calvit, and Coleman W. Calvit, filed their petition in the District Court for the parish of Rapides, alleging that they were the heirs of their mother, the lawful wife of their father, Anthony Calvit, and that they were entitled to half of the land, as it had been purchased by their father during their mother's coverture with him, which superinduced between them a community of acquests or gains—there having been by them no stipulation to the contrary. And they allege, also, that their father, as their natural tutor, had sold the land, for a part of which they petitioned, while they were minors, in violation of their rights.

They further state, that Charles Mulholland and Reuben Carnal were in possession of the land, and ask that one-half of it might be adjudged to them, as the heirs of their mother.

Being thus brought into court, Mulholland and Carnal filed

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their answers. Each deny the allegations of the plaintiffs—Carnal citing Mulhollan into court as his warrantor; and Mulhollan alleges, in his answer, that he had purchased the land from Keller & Foreman, with a general warranty. He asks that they might be cited, to defend him in his title and possession; and that, as they were absentees from the State of Louisiana, he prayed for the appointment of curators ad hoc, to represent them in the case.

George K. Waters was designated by the court as their curator; and, upon being summoned, appeared in that relation, and, assuming to be the attorney of Keller & Foreman, filed an answer for them. Keller & Foreman, however, never had any knowledge of the suit, nor any notice of the appointment of Waters as curator.

Waters, in his answer, cited in warranty the legal representatives of A. J. Davis, deceased, from whom Keller & Foreman had bought the land.

The legal representatives of Davis appeared, by George Purvis, their curator, and in their turn cite in warranty, Anthony Calvit, their ancestor's vendor, who was *the father of the plaintiff*, by whom the land had been sold to Davis. Anthony Calvit appeared by attorney, denying the petitioner's allegations.

After several continuances, the case was brought to trial in the District Court, and judgment was entered for the defendants. The plaintiff carried it by appeal to the Supreme Court of Louisiana. The judgment of the court below was reversed, on the 26th November, 1845. That court decided that the two youngest petitioners, James and Coleman Calvit, were each entitled to one undivided eighth of the land in controversy; but that William J. Calvit and Elizabeth G. Calvit were excluded from recovering, on account of the prescription of ten and twenty years, which Mulhollan had pleaded in his answer. The court then remanded the cause to the District Court, for further proceedings on the question of improvements, costs, and profits, and of damages between the warrantors.

Afterwards, on a rehearing, the Supreme Court directed a further inquiry to be made, for the purpose of ascertaining

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whether the price received for the land by the father and tutor of the plaintiff had been applied to the payment of the debts of the community of their father and mother; "and it ordered, if any of it had been, that James and Coleman Calvit should contribute in proportion to their rights in the land; and that, in the mean time, no writ of possession should issue until they had paid the amount which the court below might determine to be due by them."

After the rendition of the Supreme Court's decree, Charles Mulholland died. His will was admitted to probate on the 11th July, 1846. On the same day his death was suggested, and an order was passed to renew the suit in the names of his legal representatives. Three days afterwards, Thomas O. Moore, the executor of Mulholland, paid to James and Coleman Calvit \$2,400 for a relinquishment of their claims to the land in controversy, and of all their rights in the judgment which had been rendered in their favor.

No further proceedings were had in the suit from the 11th November, 1846, to the 30th May, 1853, when the plaintiffs in this suit made themselves parties, as heirs and universal legatees of their uncle, Charles Mulholland, the original defendant. They adopted his answers and defences, and ask for judgment against his warrantors, Keller & Foreman; which was given on the following day, in the District Court, to which the cause had been remanded, for those purposes only heretofore stated.

Such have been the relations of the parties named in the record, in the District and Supreme Court of the State of Louisiana. Whatever was the liability of Keller & Foreman, as warrantors of Mulholland, they never were subjected to the jurisdiction of the District Court, by any valid proceeding from it, to enable that court to carry that liability into a judgment in favor of Mulholland, their vendee, or in favor of his representatives, Charles and Alice Flowers.

When Mulholland answered the petition of the Calvits, and asked that Keller & Foreman should be cited into court as his warrantors, no citation for that purpose was served upon them to do so. One was issued for and served upon Waters, to represent them as *curator ad hoc*; but that was insufficient

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to give to the District Court jurisdiction to pronounce judgment against them, though that court did do so. Hence it is that this action of assumpsit was instituted, to recover damages alleged to have been sustained upon a breach of the warranty of Keller & Foreman to Mulholland.

In the declaration in this action, it is recited that Keller & Foreman had conveyed to Mulholland a tract of land, with warranty, and that the Supreme Court had adjudged that James and Coleman Calvit were each entitled to an undivided eighth of the same. They were declared to have entered into the same, and evicted Mulholland from it; in consequence of which, Mulholland, to regain his possession, had paid to James and Coleman Calvit twenty-four hundred dollars, for the relinquishment of their claims to the land. To this action, the defendant pleaded non assumpsit; and it was agreed in writing, by the counsel in the cause, that, under such issue, all errors in pleading should be mutually waived, and that the defendant was to be permitted, under it, to rely upon the statute of limitations.

Upon the trial of the case, that point was urged. The statutes of Maryland of the years 1715, ch. 23, and 1818, ch. 216, entitled, *Acts to avoid suits at law*, were insisted upon, as constituting a bar to the recovery of the plaintiffs. Such was the instruction given by the court.

There is no error in the instruction. More than three years had elapsed after their right of action had accrued, before the plaintiffs brought their suit. Their uncle had been judicially declared not to be entitled to a part of the land by the decree of the Supreme Court. That of itself was an eviction under the law of Louisiana, though the court postponed giving a writ of possession to the parties in whose favor its decree was made, for the purpose of having certain points ascertained in which all the parties to the cause were interested—no one of them more so than Mulholland himself. The date of the Supreme Court's decree in favor of the two Calvits is 26th November, 1845, shortly after Mulholland died. The District Court had not then adjudged those points for which the case had been remanded to it.

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Before that was done by the court, and soon after Mulholland's death, his active executor, Moore, on the 14th November, 1846, bought from the two Calvits their claim to that part of the land which had been decreed to them by the Supreme Court. This itself was an eviction, though the Supreme Court, in deciding upon these rights to the land, had withheld from the Calvits a writ of possession. It is not necessary, to constitute an eviction, that the purchaser of land should be actually dispossessed. (11 Rob., 397.) It was also ruled, in the same case, that an eviction may take place when the vendee continues to hold the property under a different title from that transferred to him by his vendor. In this instance, Mulholland's representatives held the title to a part of the land, originally bought by him from Davis as a whole, by the purchase of James and Coleman Calvit's undivided eighth.

The same conclusions had been previously ruled by the same court in *Auguste Landry v. Honore Felix Gamel*, 1 Robinson, 362. The court's language is: "It is true that, by the authorities to which we have been referred, the doctrine is well established, that, in order to constitute an eviction, it is not absolutely necessary that the purchaser should be actually dispossessed. That eviction takes place, although the purchaser continues to hold the property, if it be under a title which is not that transferred to him by his vendor, as if he should extend the property, or should acquire it by purchase from the true owner." (Pothier, *Vente*, No. 96; *Troplong, Vente*, No. 415; *Toullier*, vol. 16; *Continuation by Duvergier*, vol. 1, Nos. 309, 313.) Other cases in the Louisiana reports have the same conclusions, but we do not think it necessary to cite them. The rulings in 1 and 11 Robinson announce it to be the uncontested doctrine in the Louisiana courts, that actual dispossession is not necessary to constitute an eviction, and that, if the purchaser holds under another title than that of his vendee, an eviction may take place. Those decisions cover the case in hand in both particulars, and they show that the purchaser of the land had suffered an eviction by the decree of the Supreme Court, in the meaning of that term in the law of Louisiana, though a writ of possession had not been issued.

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But if that was doubtful, it is certain that the eviction was accomplished when the executor of Mulhollan bought, for the benefit of his testator's estate, the claim to the land which James and Coleman Calvit had acquired.

Mulhollan, by his will, granted to his executors, immediately on his death, full and entire seizin and possession of all his estate, to hold and manage the same until all the legacies given by him were paid over and fully discharged. The signification of a delivery of seizin to an executor will be found in articles 1652, 1664, 1666, 1667, of the Civil Code, and in 35 of Revised Statutes, 3. These articles provide that a testator may give the seizin of the whole or of a part of his estate to his executor, accordingly as he may express himself. The seizin usually continues for a year and a day, but may be prolonged by an act of the court, and may be terminated whenever the heirs shall deliver to the executor a sum sufficient to pay the movable legacies. The seizin of the executor is distinct from and paramount to the seizin which the law vested in the heir immediately on the death of his ancestor, and the heir can only deprive the executor of it by providing security for the performance of his obligations. The executor represented the reception, in so far as respects creditors and legatee. (*Bird v. Jones*, 5 Ann. La. Rep., 645.) When the testamentary executor submitted to the title of the Calvits, and paid them for it, that was an eviction, which gave to him a right of action in behalf of the succession against the warrantors of his testator. His right of action passed to the heirs of Mulhollan when he delivered the succession to them, or whenever it came to their hands by due course of law. It was delivered to them, and the executor's seizin terminated in the year 1847, though the precise day does not appear in the record. The heirs, upon its termination, were reinstated in all the rights which had been temporarily administered by the executor. Those rights will be found in articles 934, 935, 936, of the Code. One of the effects of those rights is to authorize the heir to institute all the actions which the testator could have done, to prosecute to a conclusion such as had been commenced by the testamentary executor, and to commence all

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actions which he had failed to institute belonging to the succession. (15 Lou., 527; 7 Rob., 183; 2 Ann., 339; 7 Ann., 367.) In such a suit by the heirs, the same defences may be made which could have been applied if the executor's seizin had been continued. But in this instance, neither the executor nor the heirs, the plaintiffs in the suit, took any legal step to carry to a judgment Mulholland's citation of Keller & Foreman in warranty in the District Court of the parish of Rapides, until the 30th May, 1853, more than fourteen years after the eviction of Mulholland had occurred, and after the rights of the Calvits had been bought. The heirs now, however, seek by this suit in assumpsit in the Circuit Court of the United States for the district of Maryland, to recover damages from Foreman, the survivor of his partner, Keller, for the failure of their warranty to Mulholland, the suit having been commenced between eight and nine years after their right of action had accrued. The defendant relies upon the statutes of limitation of Maryland as his defence to prevent a recovery. We think it must prevail, and that the court below, in giving to the jury such an instruction, committed no error. We therefore direct its judgment to be affirmed.

**SIMEON BENJAMIN, PLAINTIFF IN ERROR, v. OLIVER B. HILLARD
AND MOSES C. MORDECAI.**

Where there was a contract for furnishing a steam engine, the following guaranty was made: "For value received, I hereby guaranty the performance of the within contract, on the part of Hopkins & Leach; and in case of non-performance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid."

This contract is not in the alternative, but consists of two terms: one, that the principals shall perform their engagement, not merely by the delivery of some machinery, but of such machinery as the contract includes; the other, that if there be a non-performance, whether excusable or not, the money advanced on the contract shall be secured to the plaintiffs, to the extent to which the principals are liable.

An acquiescence of both parties in the prolongation of the time within which the contract was to be fulfilled, will not operate to discharge the guarantor.

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There was no change in the essential features of the contract, and if the parties choose mutually to accommodate each other, so as better to arrive at their end, the surety cannot complain.

So, where the machinery delivered was imperfect, and the two contracting parties had exchanged receipts, but the imperfection was afterwards discovered, and the recipients of the machinery had to expend money upon it, the guarantor is responsible for it.

The defects in the machinery were latent, and could only be ascertained by its use. The settlement between the parties did not embrace the subject to which the warranty applied, nor contain any release or extinguishment of the covenants concerning it.

The damages to be found should be such as would enable the plaintiffs to supply the deficiency, and the jury were not required to assume the contract price as the full value of such machinery.

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

Hillard & Mordecai, the plaintiffs below, of Wilkesbarre, in Pennsylvania, made a contract with Hopkins & Leach, of Elmira, New York, dated September 11, 1847, under seal. Benjamin guarantied the performance of this contract, as follows:

“For value received, I hereby guaranty the performance of the within contract on the part of Hopkins & Leach; and in case of non-performance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid.”

The action was brought upon this guaranty, which resulted in a verdict for the plaintiffs, damages six thousand dollars, and \$1,869.15 costs. A motion was made for a nonsuit, which was overruled. The particulars of the case are stated in the opinion of the court.

It was submitted on printed arguments by *Mr. Tracy* and *Mr. Noyes* for the plaintiff in error, and by *Mr. Goddard* for the defendants.

The counsel for the plaintiff in error made the following points:

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I. The court erred in the construction of the defendant's agreement.

1. It was the contract of a surety, which is to be taken *strictissimi juris*, and is not to be enlarged by a liberal or loose interpretation.

Leggett v. Humphreys, 21 Howard, 66, 76.

Miller v. Stewart, 9 Wheaton, 681, 703.

Wright v. Johnson, 8 Wendell, 512, 516.

2. The motive and design of the writing was to protect the plaintiffs against the loss of the money they were to advance. It therefore guarantied a performance of the contract by a delivery of the articles, and that if they were not delivered the money should be refunded with interest.

3. That it referred to such a performance, or such a non-performance, is evident from the stipulation that provides for a repayment of the entire advances with interest, and not for any partial damages. This suretyship is for such a performance only, and is answerable only for a failure in that respect. Under this agreement, if the articles should be made and accepted, and the business settled by the principals, the surety has no liability.

4. There is nothing in the surety's agreement which binds him to answer for the breach of any warranty which the principals have contracted to make. The sealed agreement binds the manufacturers to warrant the engine capable of driving six run of stones, but the guaranty has no connection with such a prospective warranty. The surety's obligation must be and is definite; he is liable at once, or never; the articles are delivered, or they are not; if delivered, he is clear; if not delivered, he is at once liable to refund the money advanced, but nothing else.

5. The essential idea of having the money refunded in gross, apparent on the face of the paper, shows that it was a total non-performance alone which should charge the surety, and the mention of that sum necessarily excludes all other liability.

6. The surety cannot be supposed to have intended to assume an indefinite future liability for ultimate defects in arti-

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cles accepted and used by the plaintiffs, and as to which the defendant was wholly ignorant.

7. The interpretation adopted by the charge renders three-fourths of the writing senseless and inoperative. The writing is in five lines, and all below the word "Leach," in the second line, is deprived of all force and effect. This passage is manifestly intended to limit and define the extent of the obligation of the surety, and it performs that office, and no other.

II. The undertaking of the defendant was satisfied by the performance of Hopkins & Leach's contract.

1. The delivery and acceptance of the engine, &c., the giving Hopkins & Leach credit therefor, the settlement of the account, and payment of the balance, and the giving of a receipt in full, were acts of the plaintiffs, determining and proving a performance of the contract. The contract for the engine, boiler, and appurtenances, constituted one item at a set price; and the delivery of the whole completed that part of the contract, and the charging, crediting, and allowing of the same as done, and settling for the price, closed that part of the contract.

2. The receipt which went forth from the plaintiffs was justly relied upon by the defendant as a full discharge of the contract; and he acted upon it in relinquishing valuable securities which he held for his indemnity. The plaintiffs are therefore estopped from denying the performance so evidenced by their receipt.

Broom on Common Law, 841, 842, (91 L. L. O. S.)

3. The defendant being a mere surety, and not a principal in the contract, was ignorant of the transaction, and knew not whether the contract was performed or broken. He was informed and assured of its performance by the receipt, and that became his full voucher for treating the performance as established.

4. The making of the last payment was a determination that the contract was "fully completed;" for it was only to be had "when the contract is fully completed."

5. The case shows that the settlement of the plaintiffs with Hopkins & Leach was made December 18th, 1848; before

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the mill was fully tried, which was not done till December 25th, 1848.

Thus the plaintiffs waived the right to test the work by a full trial, and proceeded to a closing of the contract at once. After that, they could not resort to the surety, on the ground of non-performance.

6. The plaintiffs treated this settlement with Hopkins & Leach as a determination of the suretyship. Thus, on the 27th December, 1848, being nine days after the settlement, they gave notice to Hopkins & Leach of the failure of the engine; but they never gave any notice to the defendant till the last of May, 1849. The idea that the defendant owed them any undischarged obligation was an afterthought, occurring five months subsequently to the discovery of the failure of the engine.

III. The defendant's obligations as surety were discharged by the acts and agreements of the plaintiffs and Hopkins & Leach.

1. The time of performance by Hopkins & Leach was enlarged. The contract required them to deliver the articles at Wilkesbarre, by the first navigation of the ensuing spring, which would be in March, 1848. The new agreement, to which the defendant was not a party, gave them till the third rise of water in October, to complete the delivery. Such new agreement was made upon a good consideration, and was valid and binding. It made a permanent and material change in the contract.

The surety thereupon ceased to be liable. The identity of the contract was gone. He was not subject to be made liable thus for a longer period, with increased risks, and larger amounts of interest in case of being charged to refund advances.

Whether the change was for the benefit of the one party or the other, or both, it was, in either case, a change of the contract, and discharged the surety.

Miller v. Stewart, 9 Wheaton, 681, 703.

Burge on Suretyship, 203, 206.

Pitman on Pr. and Surety, 208.

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- Theobald on Pr. and Surety, 154.
Parsons Mercantile Law, 67.
Brigham *v.* Wentworth, 11 Cushing, 123.
Dickerson *v.* Commissioners, 6 Indiana, 128.
Hunt *v.* Smith, 17 Wendell, 179, 180.
Walwrath *v.* Thompson, 6 Hill, 540; 2 Comst., 185.
McWilliams *v.* Mason, 6 Duer, 276.
Bangs *v.* Strong, 7 Hill, 250.
Samuel *v.* Howarth, 3 Merivale, 272.

Thus, in *Miller v. Stewart*, (above cited,) Judge Story says: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal."

So in *Parsons Mercantile Law*, (above cited,) "If the liability of the principal be materially varied by the act of the party guarantied, without the consent of the guarantor, the guarantor is discharged."

So in *Walwrath v. Thompson*, (above cited,) it is laid down that the terms of the guaranty must be strictly complied with, or the guarantor will not be bound. If he propose a credit, that particular credit must be given to the principal.

In 3 Merivale, 272, the Lord Chancellor said that an extension of time to the principal discharged the surety, "although such giving of time is manifestly for the benefit of the surety."

So in *Brigham v. Wentworth*, (above cited,) it is held that an agreement by the plaintiff, for a consideration, changing the obligation of the principal, discharges the surety.

The like rule runs through all the authorities above cited.

After the plaintiffs in this action made the new agreement with Hopkins & Leach, in March, 1848, they could maintain no action against Hopkins & Leach for not completing the de-

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livery by the first water of the spring. The time of performance was effectually enlarged to June and October. For this extension the plaintiffs paid a consideration—the agreement to add \$200 worth of extra work—a consideration of benefit to the plaintiffs and of loss to Hopkins & Leach.

The case thus falls perfectly within the rule, that the contract of the principal being changed, the surety is discharged.

The fact that the time of performance originally contracted for had already arrived, and Hopkins & Leach might be deemed in default of performance, makes no difference in the application of the rule. The plaintiffs chose to waive the default and make a new contract. If the plaintiffs had insisted on the default, then Hopkins & Leach would have kept the engine, and the defendant would have been liable only for the advances previously made, being then about \$4,000; and he would have been more secure of indemnity, by reason of the engine, so far as built, being still the property of Hopkins & Leach.

2. The plaintiffs did not perform the stipulations of the original contract on their own part.

They did not make the advances at the times set by the contract, nor in money as it required.

The contract provided for the payments as follows:

\$2,000 on or about December 1st, 1847.

\$2,000 on or about February 1st, 1848.

And all the balance when the contract was fully completed.

The plaintiffs waited till December 14th, and then remitted a draft for \$2,000. From that time forward they gave acceptances and notes, at various times; thus giving to the principals larger advances, and of other kinds, and at other times, than stipulated for in the contract.

3. The defendant as surety, therefore, is not bound to respond on the guaranty. It is material to the risk or safety of the surety, that the advances be made as specified in the contract to which he is surety; and a change in that respect, although made by the principals, is no less a breach of the contract, and discharges him. An advance made before the time it should be made, or after it, or in a different kind of medi-

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um, is equally a departure from the conditions of the suretyship.

Theobald Pr. and Surety, 154, sec. 183.

1 Starkie N. P. C., 192, *Bacon v. Chesney*.

2 ib., 426, *Simmons v. Keating*.

6 Beavan, 110, (13 L. J. N. S., Ch., 260; *Jurist*, 38; 4 Beavan, 379; 10 L. J. N. S., Ch., 395; 5 Jur., 164,) *Bonsor v. Cox*.

2 Comstock, 185, *Walwrath v. Thompson*, (6 Hill, 540 S. C.)

4 Barbour, 487, *F. and M. Bank, Mich., v. Evan*.

2 Keen, 638, (7 L. J. N. S., Ch., 90; 2 Jur., 62,) *Calvert v. London Dock Co.*

Burge on Suretyship, 117, 118.

8 Wendell, 512, *Wright v. Johnson*.

17 ib., 179, *Hunt v. Smith*.

Fell's Law of Guaranty, 206, et seq., (2d Am. ed.)

The above authorities fully sustain the principle above stated.

Thus in the above case of *Bacon v. Chesney*, the time of credit was shortened from eighteen months to twelve months, and in *Simmons v. Keating* it was changed from one credit of six months to two credits of three months, and the surety was held discharged.

In *Bonsor v. Cox*, the surety was discharged, because the creditor advanced to the principal cash, instead of a three months' draft stipulated in the contract.

Theobald says, (p. 154, sec. 183,) "If the creditor neglects to perform, or performs defectively, any of the conditions, either express or implied, which are incumbent upon him, or any of the terms which collectively form the consideration, either of the sureties' contract or of the contract to which the surety acceded, the surety is discharged, or, rather, his liability never attaches."

In *Walwrath v. Thompson*, (above cited,) there was a guaranty of credit to January 1st, but the credit was, in fact, given to December 25th, and the surety was held discharged, although the principal was not called on to pay till January 1st.

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Judge Bronson says, (p. 542:) "The fact that the credit was abridged only a few days is not important; cutting off a week is as fatal as though it had been a month."

In 4 Barbour, 487, the contract was for a loan of five thousand dollars. The surety was held discharged, because the loan was made for a larger sum than the one specified.

In 17 Wendell, 179, the surety was held not to be liable for two reasons: first, that the credit was given to a larger amount than the one specified in the agreement; and second, that it was given for a longer time. This was a decision by the Supreme Court of the State of New York, when it was composed of Judges Nelson, Bronson, and Cowen.

IV. The court erred in refusing to charge the jury as requested by the defendant's counsel, in relation to the rule of damages.

The engine, boilers, and appurtenances thereof, had a definite price fixed by the contract, viz: \$3,150. The parties had set this as the value of such articles, properly made and fully answering to the terms of the contract. In any assessment of damages for a failure to deliver such articles, that price must be taken as the test of value.

Whatever rule of damages might be applied, this element of the price of an engine of the specific dimensions, and sufficient to drive six run of stones, was an essential consideration, and the instruction asked for should have been granted.

Cary v. Gruman, 4 Hill, 265.

The price of the article stipulated by the contract is *prima facie* the value of such article when it fully conforms to the agreement.

The jury, being left without such instruction, found a verdict against the plaintiff for nearly twice the contract price of the engine, boilers, and appurtenances, although the plaintiffs retained the property, and it had material value.

V. The court erred in admitting the paper called a survey.

This paper was an unsworn statement, made *ex parte*, and contains allegations of particular facts, and also expressions of opinions of the persons signing it.

It was calculated greatly to affect and mislead a jury, and

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ought to have been excluded. It was wholly inadmissible as evidence. The effect of admitting such evidence was to enable the plaintiffs out of court to get up an *ex parte* statement, and then bring it before the jury with the apparent force of regular proof.

The circumstance that the paper had been sent to the defendant made no difference in its admissibility, for it was received in evidence generally, and not for any qualified purpose.

The counsel for the defendant in error made the following points :

The plaintiffs gave evidence to prove that the engine and machinery were not well made; were not put in operation; would not drive six run of stones; that they spent large sums of money to put them in a condition to run, and that they would not then or ever drive six run of stones, and proved the damages sustained; and that when the accounts were balanced, December 18, 1848, the engine had not been tried, or run in connection with the mill.

That notice of the failure of the engine was sent to Hopkins & Leach, December 27, 1848, who again tried to put the engine in operation, and again failed. That notice of such final failure was then sent to defendant, with a copy of a survey upon the engine made by engineers.

I. The first exception in the case was to the admission of this survey.

It was competent evidence to show what notice and information were sent to defendant; and in this light only was it put in evidence.

It being proper evidence for one purpose, and the exception being general to its entire exclusion, it is not well taken.

Cambden v. Doremus, 3 How., 515.

It was, however, admissible for all purposes, as the defendant had already introduced evidence as to its contents, as had the plaintiffs also, without objection.

The objections taken on the execution of the commission were not made at the trial.

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II. The next exception is to the refusal to nonsuit. This cannot be done against the will of the plaintiff.

Elmore v. Grymes, 1 Pet. Rep., 469.

De Wolf v. Rabaud, 1 Pet. Rep., 476.

Crane v. Morris's Lessee, 6 Pet. Rep., 598.

The questions raised on the motion for a nonsuit will not therefore be considered, except such of them as are contained in exceptions to the judge's charge to the jury.

III. The remaining exceptions are to the charge.

1. The construction given to the guaranty is correct.

The last clause of the contract with Hopkins & Leach is, that they would give security for the money and for the fulfilment of this contract. And then on the same paper follows the guaranty, by which the defendant guarantees "the performance of the within contract on the part of Hopkins & Leach." And also agrees to refund the money paid on it, if not performed.

The exception does not indicate with which part of this charge the defendant was dissatisfied. Whether that part of it which relates to the repayment of the money, if the engine, &c., were not delivered at all, or that part which holds defendant responsible, if they were delivered, but not according to contract.

If either portion is correct, the exception is too general.

But the whole is correct.

The defendant guarantees the performance of the contract. That is, he undertakes and binds himself that the contract shall be performed. Not merely that an engine and machinery shall be delivered of certain dimensions, but that they shall be according to the contract. Any other guaranty would have been of no value, and would not have been what the contract entitled the plaintiffs to.

If the contract was not performed, the defendant was liable to such damages as the plaintiffs had legally sustained—as the court afterwards charged—and no more.

2. The charge of the court on the alleged enlargement of the time for completing the contract was correct.

The amount of it is, that such an acquiescence in delay, on

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the part of Hopkins & Leach, as was testified to, would not, as matter of law, discharge the defendant. But that a material alteration of the contract by the parties would discharge him.

The evidence as to the alleged enlargement of the time is on page 20—that of Frederick Leach. He says: “We did not get the whole completed by the first run of water in the spring;” and that he wrote Hillard & Mordecai he could have the engine ready “by the next rise of water in June.”

He then says that he saw Hillard, and it was agreed he might bring down “the engine and other work and materials in the June rise of water.” That is, the residue of it—most of it was brought in the spring.

This was no enlargement of the time, as Leach had already written he could not have them ready till “the next rise of water in June.”

And it seems the articles could only be sent when there was a rise of water.

He also says: “It was also agreed that I might have till October to deliver some parts of the work.” But what those parts were does not appear. They were not “the engine and other work and materials” that were to come in June; nor “a large majority of the machinery and boiler, and pretty much all the engine,” that were taken down in March.

It does not appear that the parts to be sent in October were of any importance in the fulfilment of the contract.

The time for the putting up the engine, &c., was not fixed by the contract. They were to be put up “when the foundations are finished and ready for the reception of the machinery,” of which Hopkins & Leach were to have ten days’ notice. There was no change in this.

An agreement with the principal for delay does not discharge the surety, unless it is one which the principal can enforce; one which is valid in law; and made on sufficient consideration.

McLemore v. Powell, 12 Wheat., 554.

Vilas v. Jones, 10 Paige, 79.

The contract was under seal, and could not be varied by parol, so as to be obligatory on the parties to it.

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Davey v. Prendergrass, 5 Barn. and Ald., 187.

Galm v. Niemcewicz, 11 Wend., 312.

3. There was no error in the charge as to the effect of the settlement of the accounts between the plaintiffs and Hopkins & Leach, and the payment of the balance, December 18, 1848. The account which Hopkins & Leach retained, and took to Elmira, is that signed by plaintiffs.

The witness, Leach, testified that he showed this account to the defendant, and required him to give up certain securities.

He also says that his firm of Hopkins & Leach dissolved at that time, and sold out to Leach, Potter, & Covill; and that, to make such sale, they had to settle with Mr. Benjamin, and get up the chattel mortgage; and that they gave Mr. Benjamin the notes of the new firm, in place of those of the old.

He does not state whether the mortgage or the notes were held as security for the guaranty. There was really no evidence that any security held for the guaranty was given up, unless it was the substitution of one security for another.

The witness sought to create an impression that the securities were given up in part, on the faith of the settlement with the plaintiffs, but he does not say so.

The account and settlement, on page 22, was no discharge of Hopkins & Leach on their contract.

The contract was then completed. The engine was delivered and put up, and the other work was delivered, but not all put up, that being no part of the contract of Hopkins & Leach.

The engine had not been tried in connection with the mill. And of course it could not be determined whether it would drive the mill with six or any run of stones, and whether that part of the contract had been performed.

If the defendant's guaranty of the "performance of the contract" extended to the quality and sufficiency of the work when done, then he had no right to assume, if he did, that his liability thereon ceased when the last payment was made to Hopkins & Leach; for that payment might, and in fact did, become due before the mill was complete, and before the engine could be tried.

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There was nothing in the memorandum of settlement to mislead him.

Whether the contract was performed or fulfilled in the sense of the contract, and as guarantied, could only be ascertained at Wilkesbarre. And the defendant was bound to ascertain, before he could act on such assumption, to the prejudice of the plaintiffs.

4. The guaranty was coextensive with the obligations of the contract.

Mr. Justice CAMPBELL delivered the opinion of the court.

In September, 1847, Hillard & Mordecai employed the firm of Hopkins & Leach to make at Elmira, in New York, and deliver to them at Wilkesbarre, Pennsylvania, a steam engine, and apparatus necessary to put the same in complete operation, of the best materials and in the most substantial and workmanlike manner, according to specifications, and warranted to be of sufficient capacity and strength to drive six run of stones, and the gearing and machinery necessary for flouring and gristing purposes. Also, to make and deliver the cast-iron, wrought-iron, steel, and composition work for driving six run of stones, and the machinery attached, of the best materials and workmanship. These they were to erect and put up on a foundation prepared by Hillard & Mordecai, who were to afford the proper aid for that purpose. The machinery was to be completed and delivered at Wilkesbarre upon the first safe and navigable rise in the water of the river (Chemung) in the ensuing spring; and Hopkins & Leach were to give a responsible individual for security for the money paid on the contract; and for its fulfilment, Hillard & Mordecai agreed to pay two thousand dollars the first of December, 1847; two thousand dollars the first of February, 1848; and the remainder upon the completion of the work, for which payments they were to be allowed interest. Before the first payment, the defendant subscribed an agreement, endorsed on the contract, as follows: "For value received, I hereby guaranty the performance of the within contract on the part of Hopkins & Leach; and in case of non-performance thereof,

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to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid." This suit was brought on this guaranty by Hillard & Mordecai for the insufficiency of the work done by Hopkins & Leach. On the trial, they adduced testimony to show that the engine and apparatus set up by Hopkins & Leach were not of the best material, nor of substantial and workmanlike construction, and had not strength to drive six run of stones, and in improving them they had sustained expense and loss; that from the middle of December, 1847, till December, 1858, the time when the work was finished, they had advanced fifty-five hundred dollars, and that only a trifling balance existed at that date, which was paid before the work had been tested by use; that afterwards, and in that month, defects were discovered, of which Hopkins & Leach had notice. In consequence of which, they made efforts to improve their work; but in June, 1849, the plaintiffs procured an examination to be made by three machinists and engineers, whose report upon the imperfection of the machinery was communicated to Hopkins & Leach and to the defendant, and who were required to amend their work. This notice and report were read to the jury, the defendant excepting to their competency. The defendant, after the case of the plaintiff was submitted to the jury, insisted to the court that his contract was merely a guaranty, either of the performance of the agreement by Hopkins & Leach by the delivery of the machinery, or the refunding of the moneys that might be paid before that event; and that the advances of the plaintiffs, being in drafts or notes, and not within the time limited by the contract, the defendant was not liable at all, or if liable, only to the extent of the payment of \$4,000, until they had fully performed their contract; and the plaintiffs having fully paid off Hopkins & Leach, and receipts being given, the defendant had a right to consider his guaranty as at an end.

The court overruled a motion to nonsuit the plaintiff, and instructed the jury that the defendant was responsible on his contract, not only for the non-payment of the money advanced to Hopkins & Leach in case they failed to make and deliver

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the engine and machinery, but also for the full and faithful performance of all of the agreement of Hopkins & Leach. The general rule is, to attribute to the obligation of a surety the same extent as that of the principal. Unless from the terms of the contract an intention appears to reduce his liability within more narrow bounds, a restriction will not be imposed by construction contrary to the nature of the engagement. If the terms of his engagement are general and unrestricted, and embrace the entire subject, (*omnem causam*,) his liability will be measured by that of the principal, and embrace the same accessories and consequences, (*connexorum et dependentium*.) It will be presumed that he had in view the guaranty of the obligations his principal had assumed. Poth. on Ob., 404; 3 M. and S., 502; Boyd *v.* Moyle, 2 C. B., 644.

In the case before us, the contract of the surety is not in the alternative, but consists of two terms: one, that the principals shall perform their engagement, not merely by the delivery of some machinery, but of such machinery as the contract includes; the other, that if there be a non-performance, whether excusable or not, the money advanced on the contract shall be secured to the plaintiffs to the extent for which their principals are liable.

The defendant, to sustain his defence that the plaintiffs had varied their agreement with Hopkins & Leach, adduced testimony to the effect that the latter had informed them of their inability to complete the work "by the first safe and navigable rise in the river," and that they assented to the delay proposed by them till another rise; that a portion of the work was sent in April, and a portion in June, and a portion in October, and that the plaintiffs were not ready to receive it until October, and it was not erected until December, 1848, at which time a settlement took place, and the plaintiffs paid the small balance then due.

The Circuit Court instructed the jury that the waiver by the plaintiffs of the punctual delivery of the engine and machinery did not constitute such a change in the contract as to discharge the guarantor. That a mutual alteration of the contract by the principal parties would operate to discharge the

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defendant as a guarantor; but an acquiescence on the part of the plaintiffs in a longer time than was specified in the contract for fulfilment, especially as the time of fulfilment was somewhat indefinite, would not, as matter of law, operate to discharge the defendant; and the court declined to charge the jury "that if they believed that the performance of the contract was essentially altered or varied, or the time of the delivery of the machinery at Wilkesbarre extended upon good consideration, without the knowledge or consent of the defendant, the plaintiffs were not entitled to recover."

The agreement of Hopkins & Leach comprised the manufacture of complicated machinery of distinct parts and different degrees of importance, and these were to be transported to a distance, there to be set up in connection with other works about which other persons were employed. That such a contract should not be fulfilled to the letter by either party is not a matter of surprise. The covenants are independent; and there is nothing that indicates that a failure on either part to perform one of these covenants would authorize its dissolution, or that the breach could not be compensated in damages.

The evidence does not allow us to conclude that there was any intention to change the object or the means essential to attain the object of the original agreement. In its execution, there were departures from its stipulations; but these seem to have been made on grounds of mutual convenience, and did not increase the risk to the surety. He was fully indemnified by his principals until after the settlement between the plaintiffs and Hopkins & Leach.

It is clear that the mere prolongation of the term of payment of the principal debtor, or of the time for the performance of his duty, will not discharge a surety or guarantor. There must be another contract substituted for the original contract, or some alteration in a point so material as in effect to make a new contract, without the surety's consent to produce that result. But when the essential features of the contract and its objects are preserved, and the parties, without objection from the surety, and without any legal constraint on themselves, mutually accommodate each other, so as better to

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arrive at their end, we can find no ground for the surety to complain. The Circuit Court presented the question fairly to the jury, and the exceptions to the charge cannot be supported. *Trop. de Caution*, 575; *Beaubien v. Stoney, Spear So. Ca. Ch. R.*, 508; 11 Wend., 312.

The defendant adduced testimony to show that the plaintiffs accepted the engine and machinery; that an account was stated between the plaintiffs and Hopkins & Leach of the work done and money paid, and an acknowledgment of its settlement entered upon it, and signed by the parties; that Hopkins & Leach exhibited this account to the defendant, and demanded a return of the securities they had deposited with him for his indemnity, and that they were yielded on the credit given to that acknowledgment. He requested the court to instruct the jury, that if they believed that the defendant, relying upon the receipt given by the plaintiffs, settled with Hopkins & Leach, and surrendered to them securities he held to indemnify him against the liability he assumed by his guaranty, and such surrender and discharge were made after the settlement between Hopkins & Leach and the plaintiffs, and upon the faith of it, the plaintiffs are bound by such settlement and receipt, so far as the same relates to the defendant, they having put it in the power of Hopkins & Leach to procure the surrender of such securities for the defendant. This prayer finds its answer in the agreement of Hopkins & Leach, and the guaranty of the defendant.

The material of which the machinery was to be composed, and the workmanship and capacity of the manufacture, were warranted. The defects in the machinery were latent, and could only be ascertained by its use. The settlement between the parties did not embrace the subject to which the warranty applied, nor contain any release or extinguishment of the covenants concerning it. The cause of the present suit is not the same as that included in the stated account, or acknowledgment entered upon it.

The present suit originates in the contract between Hopkins & Leach and the plaintiffs. The former could not plead that settlement in bar of a similar suit against them; and, conse-

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quently, their guarantor cannot. They have misconceived the import of that settlement without the agency of the plaintiffs, and are not entitled to charge them with the consequent loss.

The Circuit Court instructed the jury, that if they found the engine, boilers, and apparatus for steam power, were sufficient to drive six run of stones suitable for grinding, the damages to be found should be such as would enable the plaintiffs to supply the deficiency, and that they were not required to assume the contract price as the full value of such machinery.

The principle thus laid down coincides with that in *Alder v. Keightly*, 15 M. and W., 117. "No doubt," say the court in that case, "all questions of damages are, strictly speaking, for the jury; and, however clear and plain may be the rule of law on which the damages are to be found, the act of finding them is for them. But there are certain established rules, according to which they ought to find; and here is a clear rule: that the amount that would have been received, if the contract had been kept, is the measure of damages if the contract is broken." This rule was reaffirmed in *Hadley v. Baxendale*, 10 Exch., 341. The exception to the introduction of the notice to the defendant, and the report accompanying it, cannot be sustained. It was proper for the plaintiffs to notify the principals and their surety of the defects in their work, and to call upon them to amend it. The report was not introduced as testimony of the defects, nor can we assume that it was used for that purpose. Upon the whole record our conclusion is, there is no error, and the judgment of the Circuit Court is affirmed.

DAVID OGDEN, APPELLANT, *v. JOTHAM PARSONS, JOHN A. Mc-RAW, JOSHUA ATKINS, EDWIN ATKINS, AND JOSHUA ATKINS, JUN.*

Where a charter-party stipulated that a vessel should receive a full cargo, the opinions of experts are the best criteria of how deeply she can be loaded with safety to the lives of the passengers.

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THIS was an appeal from the Circuit Court of the United States for the southern district of New York.

Parsons and the other appellees were the owners of the ship Hemisphere, and a charter-party was executed between their agents and Ogden, the terms of which, together with the other facts of the case, are summarily stated in the opinion of the court.

The libel was filed in the District Court, praying for a writ with a clause of foreign attachment. The writ was accordingly issued against Ogden, commanding the marshal to take his person; if not found, then to take his goods and chattels; if none found, then to attach his credits in the hands of garnishees.

Ogden appeared, and the case proceeded through the District and Circuit Courts in the manner stated in the opinion of the court. From the decree of the Circuit Court, Ogden appealed.

It was submitted on printed arguments by *Mr. Owen* and *Mr. Vose* for the appellant, and by *Mr. Parsons* and *Mr. Donohue* for the appellees.

The arguments upon both sides entered into the merits independently of the evidence of their witnesses, whose testimony the court considered to be conclusive upon the point of what ought to be considered a full cargo. It is not thought necessary, therefore, to report those arguments.

Mr. Justice GRIER delivered the opinion of the court.

The libellants let the ship Hemisphere by charter-party to David Ogden on a voyage from Liverpool to New York. The covenants which are the subject of this litigation are briefly as follows: "Ogden, to furnish a *full cargo* of general merchandise, and not exceeding 513 passengers, to pay £1,500 for the use of the ship, to have fifteen running lay days, and for every day's detention beyond that to pay one hundred dollars."

The libel demands \$700 as demurrage for seven days, and for a balance yet due on the contract.

The answer denies any liability for demurrage, admits that

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the whole amount of £1,500 has not been paid, and charges libellants with breaches of their charter-party, and damages in consequence thereof exceeding the balance claimed by them.

1st. "Because that they carelessly, wrongfully, and contrary to usage, stowed portions of the cargo where it ought not to have been stowed," and thereby deprived respondent "of the full and lawful use of the ship," by having room for only 350 passengers instead of 513.

2d. That libellants would not take and receive "a full cargo of general merchandise."

The District Court decided against the charge for demurrage, but allowed the respondent no damages for the alleged breaches of the charter-party by libellants.

On appeal by respondent to the Circuit Court, the sum of \$1,200 was allowed him by that court for the breach first mentioned with regard to the number of passengers received.

From this decree the respondent has appealed to this court.

As the libellants have not appealed from the decree of either the District or Circuit Court, the only question now to be considered is, whether the respondent has shown himself entitled to more damages than were allowed him by the Circuit Court.

The judge of the Circuit Court being of opinion, from the evidence, that the cargo might and ought to have been stowed so as to admit the full number of passengers, (513,) made a calculation from admitted data of the damage to respondent on that account, without referring the case again to a master, and deducted the sum of \$1,200 from the amount of the decree of the District Court. Of this the appellant does not complain, but insists that the owners had refused to receive a "full cargo of merchandise."

The registered tonnage of the ship was 1,030 tons; the cargo of general merchandise received was 1,297 tons.

The charter-party covenants for no specific amount to be received. What was "a full cargo" under all the circumstances, and whether the ship could have been loaded to a greater depth than 18 feet 10 inches with safety to the lives of the passengers, was a question which could be solved only by experienced shipmasters. Where experts are introduced to test-

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ify as to opinions on matters peculiar to their art or trade, there is usually some conflict in their testimony. What was a full cargo for this ship to carry with safety was not a fact which could be settled by any rule of law or mathematical computation, and the court must necessarily rely upon the opinions of those who have experience, skill, and judgment, in such matters. At least three competent witnesses of this character testify that the ship was loaded as deep as prudence would permit, under all the circumstances. Both the District and Circuit Court were of the same opinion, and we do not find in the evidence anything to convince us that they have erred.

Let the decree of the Circuit Court be affirmed with costs.

SAMUEL IRVINE AND PETER FORBES, PLAINTIFFS, *v.* HERMAN J. REDFIELD, LATE COLLECTOR OF THE CUSTOMS OF THE UNITED STATES AT THE PORT OF NEW YORK.

The duties upon foreign merchandise are to be computed on their value on the day of the sailing of the vessel from the foreign port. (See 20 Howard, 571.)

THIS case came up from the Circuit Court of the United States for the southern district of New York, upon a certificate of division in opinion between the judges thereof.

It was an action of assumpsit on the money counts brought by the plaintiffs against the defendant as collector. Upon the trial, the division in opinion between the judges occurred, which is stated in the opinion of the court.

It was submitted on the record, no counsel appearing for either party.

Mr. Justice WAYNE delivered the opinion of the court.

This case comes to this court under a certificate of division of opinion from the Circuit Court of the United States for the southern district of the State of New York.

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The point made is, "whether, by the period of exportation of merchandise from a foreign country to the United States, as used in the act of Congress entitled, 'An act to amend the acts regulating the appraisement of imported merchandise, and for other purposes,' approved the 3d March, 1851, was to be taken to mean the time when the merchandise had been laden aboard a general ship, and the bill of lading therefor given in the foreign port, or at the time when said ship actually departed from said foreign port, destined to the United States."

The facts in the record are, that the ship *Henry Buck* was a general ship at the port of Glasgow, in Scotland, in the month of May, 1855, destined for the port of New York, in the United States. That the plaintiff, on the 9th May, 1855, bought three hundred tons of *Coltness* pig iron, at the then wholesale market price of sixty-four shillings sterling per ton, and immediately commenced to load the same aboard the ship, and that the iron was all laden and bills of lading given for it on the 22d May, 1855, on which day the market price of such iron had risen to sixty-nine shillings per ton; that the ship remained in port, and sailed from Glasgow on the fourth of June, 1855, on which day the market price of such iron had risen to seventy-four shillings and sixpence sterling per ton; and that, on the arrival of the ship in the United States, the iron was appraised at the custom-house at the market price of twenty-four shillings and sixpence sterling per ton. On that valuation the defendant collected duty, and twenty per cent. on such value, in conformity with the 8th section of the act of Congress entitled, "An act reducing the duty on imports, and for other purposes," approved the 30th July, 1846.

This court considered two years since in the case of *Sampson v. Peaslee*, 20 Howard, 571, the meaning the acts of Congress of the 30th July, 1846, and that of the 3d March, 1851, for the collection of duties upon imported goods, and when and upon what twenty per centum should be charged upon an under-valuation made by an importer in his entry of merchandise. It announced then, that if the appraised value of imports which have actually been purchased shall exceed by ten per centum or more the value of them declared upon the en-

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try, then, in addition to the duties imposed by law upon the value of the same, there shall be levied, collected, and paid, a duty of twenty per centum *ad valorem* on such appraised value. That the additional value of twenty per centum could only be levied upon the appraised value, and not upon charges and commissions added to it. Also, that the day of the sailing of a vessel from a foreign port is the true period of exportation of the goods; and that the Secretary of the Treasury had given a proper interpretation of the statute, in directing it to be done on the market value of the goods imported on the day of the sailing of the vessel, and that he was authorized by law to give such a direction.

We see no cause now for a different interpretation of the statute, and direct that the question certified to this court be answered, "that the duties upon foreign merchandise are to be computed on their value on the day of the sailing of the vessel from the foreign port, and that the value for the computation is the wholesale market price there on such day."

EDWARD H. CASTLE, ELIHU GRANGER, AND J. P. PHILLIPS, SURVIVORS OF JOSEPH FILKINS, DECEASED, PLAINTIFFS IN ERROR,
v. EDWARD F. BULLARD.

The Circuit Courts of the United States have no power to grant a peremptory nonsuit against the will of the plaintiff.

And where there are several defendants, against whom the charge is joint and several, there cannot be, at common law, a nonsuit as to one and verdict against the others, although the verdict may be against one and in favor of the others.

And besides, in this case, there was evidence for the jury to say whether the party, in whose favor the nonsuit was prayed, was guilty or not.

Where several defendants are joined in an action of trespass, a verdict of acquittal against one, in order to make him a witness, can only be demanded where there is no evidence against him. The cases upon this point examined.

Where the cause of action against the defendants was, that they had fraudulently sold the goods of the plaintiff, evidence was admissible that they had committed similar fraudulent acts at or about the same time, with a view to

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establish the intent of the defendants with respect to the matters charged in the declaration.

The cases upon this point examined.

So, also, evidence was admissible, to show that the purchaser was largely in debt and insolvent, and that the defendants represented him to be in good credit. The force and effect of such circumstantial evidence is for the jury to judge of the intent.

If the goods were fraudulently sold by one of the firm, and the firm received the profits in the shape of commissions, all the partners are responsible for the sale. In the present case, the instructions given by the court below cannot justly be complained of by the counsel, and moreover were accompanied by explanations which constitute a part of them.

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

The plaintiffs in error were auctioneers and commission merchants in Chicago, Illinois, the firm being composed of Joseph Filkins, J. P. Phillips, Elihu Granger, and Edward H. Castle. An action on the case was brought against them by Bullard, a citizen of the State of New York. The declaration contained five counts, viz :

1. That these four defendants were partners, doing business in Chicago, as auctioneers and commission merchants, under the firm and name of Filkins, Phillips, & Co.; and
2. That certain goods of plaintiff were in the custody of defendants, as such partners, for sale on commission.
3. That, as such partners, defendants sold them to Edmund S. Castle.
4. That E. S. Castle, at the time of the purchase, was insolvent, and not fit to be trusted.
5. That defendants knew at the time that E. S. Castle was insolvent, and effected the sale fraudulently.

The plea of not guilty denied each of these allegations.

The verdict was for the plaintiff, in the sum of \$2,983.32 and costs.

The bill of exceptions taken upon the trial occupied sixty pages of the printed record, and recited substantially the evidence given to the jury.

In the course of the trial, the following proceedings took place:

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After the evidence for the plaintiff had closed, and he had rested his case, there appeared to be no evidence connecting Granger with the transaction, other than what might exist from the fact of his being one of the partners.

And thereupon defendant, Elihu Granger, moved the court as follows: The defendant, Elihu Granger, moved the court to direct the jury to render a verdict of nonsuit, or that the court would order a nonsuit to be entered as to defendant, Granger, upon the ground that the evidence given to the jury by plaintiff did not tend to charge this defendant. This motion the court overruled, and said defendant, Granger, then and there excepted to the decision of the court. And thereupon all the defendants moved the court for a nonsuit as to Granger, upon the ground that the evidence in the case did not tend to charge him. This motion was overruled by the court, to which decision of the court said defendants, and each of them, then and there excepted; and thereupon said defendants asked the court that said jury might be permitted to retire and consider whether they found the evidence in the case sufficient to charge said defendant, Granger; and if not, that the jury might find said Granger not guilty. And the defendants, Castle, Filkins, and Phillips, each urged upon the court, as a reason for this course, that they desired to use said Granger as a witness for their defence if he should be acquitted; but the court overruled this application and motion, to which decision the defendants excepted. Other exceptions were taken as to matters of evidence which need not be here recited.

After the evidence was finished, the court gave the following instructions to the jury, which are inserted in order to show the view of the court below, although the defendants excepted only to the two first:

The court, after saying to the jury that the original and amended declaration alleged in substance that the defendants fraudulently sold the goods for plaintiff to an irresponsible person, and also that, in consequence of false and fraudulent representations made by them, the plaintiff consented to the negotiation and sale by them of the goods to an insolvent per-

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son, by which plaintiff sustained loss, and that one of these allegations must be proved, among various other instructions, gave the following to the jury:

1. If the goods were in the custody of the defendants for sale on commission, and one or more of the partners made false and fraudulent representations as to the party to whom they were to be sold by the defendants, then the partnership would be liable, if in consequence of such representations the plaintiff consented to the sale to that party, and the sale was actually made by the firm to the party.

2. If, however, these goods were not in the possession of the defendants for sale, but were there merely for safe keeping, and one or more of the partners made false and fraudulent representations as to the solvency of a person to whom it was proposed to sell the goods, and in consequence of such representations the goods were sold and delivered to that person by the plaintiff, or he consented to their sale, then the firm is not liable for such false and fraudulent representations, unless the firm, as a firm, were party to such representations. That the false or fraudulent representations made by one of several partners, in order to bind the firm, must be made in the course of and in relation to the business of the firm:

3. If the sale was made by the plaintiff alone, or by the plaintiff through E. H. Castle as his agent, (acting in that behalf, and not for the firm,) then, no matter what were the representations by E. H. Castle, the jury must find for the defendants.

4. Unless the sale was made or negotiated by the firm, the jury should find for the defendants.

5. That the fact of a guaranty of the payment of a debt by Filkins is not evidence of fraud, nor of want of solvency at that time. There is no presumption that the return of the officer is untrue.

6. That, so far as the motives of the defendants are concerned, no fact proved is to be considered, unless the knowledge of such fact is brought home to such defendants.

7. That all the subsequent transactions mentioned by the witnesses have nothing to do with the main fact of the case,

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further than this: they are only circumstances to be considered, which may throw light upon the motives of the parties; that if the subsequent acts and declarations can be accounted for reasonably without assuming a fraudulent motive in the transaction of the 8th November, such circumstances are not to be considered or regarded by the jury as entitled to any weight. And they are to have no influence until the jury are satisfied, from the evidence, that the sale was made by or through the defendants, as commission merchants; that E. S. Castle was not responsible as a purchaser, on the 8th of November, the time of sale, and that the defendants knew him to be irresponsible.

8. That, unless the jury believe that defendants acted fraudulently, as charged in this declaration, it is entirely immaterial whether they, or any of them, acted fraudulently or otherwise in after transactions, or other transactions.

9. That fraud could never be presumed, but must be clearly proved, but it may be established circumstantially as well as by direct proof.

To the first and second instructions, as above stated, the defendants then and there excepted, but to none others; the other instructions above set forth being given to the jury at the request of the counsel for the defendants.

The court also said to the jury, that all the instructions given by the court were to be taken and considered together.

The case was argued by *Mr. Dickey* for the plaintiffs in error, and by *Mr. Gillet* for the defendant.

Mr. Dickey thus noticed the points in the case:

At the close of the plaintiff's evidence in chief, defendants each claimed that a separate verdict be allowed as to Granger, against whom there was no proof, in order that the other defendants might use him as a witness. This the court refused, and defendants excepted.

This was erroneous. There was once some difference of opinion as to this right, but in Phillips's Evidence, 8th edition, 59, it is said: "It is now well settled, by the unanimous opin-

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ion of all the judges, that a defendant, (in torts,) against whom plaintiff adduces no proof, is entitled to a separate verdict at once, on the close of the plaintiff's case."

See, also, 2 Starkie's Ev., 11, 798, 799.

Whether there be any evidence, is a question of law.

1 Greenleaf, sec. 49; Phillips's Ev., 513.

And while it is true, this court will not review a question of fact, yet no court can review the law of a case without looking to the facts to which it is to be applied.

All the extraneous evidence, in any event, was irrelevant until plaintiff had laid a foundation for such proof, by giving evidence of the contract set up in the declaration between plaintiff and defendants as partners; and to do this, the partnership, embracing Granger, had to be proved.

In an action of tort, where a contract is alleged, as ground of the supposed duty violated, such contract must be proved as laid.

Phillips's Ev., 856; 2 Saunders's Pl. and Ev., part first, 582.

The court below therefore erred in allowing plaintiff to go into proof of outside matters, until this vital preliminary proof was forthcoming; and this rule is the more necessary to be observed in a court where an involuntary nonsuit cannot be ordered.

(Then comments on the questions of evidence.)

The charge of the court was erroneous. The court said:

1. "If the goods were in the custody of the defendants for sale on commission, and one or more of the partners made false and fraudulent representations as to the party to whom they were to be sold by the defendants, then the partnership would be liable; if, in consequence of such representations, the plaintiff consented to the sale to that party, and the sale was actually made by the firm to the party."

This clearly is not a sound proposition, unless you add to it, that the party to whom the sale was made was actually unworthy of the credit, and by reason thereof the debt was likely to be lost. The fact is, the whole record shows that the plaintiff and the court assumed, without proof, that E. S.

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Castle at the time of the sale was unfit to be trusted, and that E. H. Castle and Filkins knew this to be so, and by the bearing, and finally the charge of the court, the jury were taught to assume the same thing. It is only on this assumption that proof of mere purchases of goods by E. S. Castle were treated as so many frauds actually perpetrated, and every favorable word about E. S. Castle, spoken by E. H. Castle and by Filkins, were assumed on the trial by the plaintiff as so many wilful lies for some dishonest purpose; and the court, by its general course of ruling, gave sanction to the assumption, and led the jury to do so.

The error in the second article of the charge consists in a false and erroneous idea expressed in the exception. The court says, that, upon a certain hypothesis, defendants are not liable, "unless the firm, as a firm, were party to such representations."

If the goods were not in defendants' possession for sale, but were there merely for safe keeping, and one of the partners made false representations touching the solvency of a proposed purchaser, and thus plaintiff was induced to sell, and did make the sale himself, it is not perceived how it is possible that the firm, as a firm, could be "a party to the representations." I don't know what that does mean, but I know it suggests to the jury that the firm may be held liable in this case for representations touching a sale, made by the plaintiff himself, when they were in no way parties to the sale by being parties to representations made by one of their number touching a matter not within the line of the business of the firm. It is true, the court, in a later part of the charge, says, that unless the firm made or negotiated the sale, they are not liable. But this is no relief, because the court said to the jury, at the last of the charge, that all the instructions given by the court were to be considered together. Now, here are two, which are repugnant; which did the jury take?

The counsel for the defendant in error made the following points:

I. The plaintiff may prove subsequent acts of fraud and col-

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lusion, to obtain goods from other persons, in order to show the previous intent of the defendants, and which the jury might infer from circumstances.

Allison v. Matthiew, 3 John. N. Y. R., 235.

2 Hen. Black, 288.

Van Kirk v. Wilds, 11 Barb. Rep., 526.

Such acts, prior or subsequent, about the same time, are admissible with a view to the *quo animo*.

Carey v. Hoatling, 1 Hill R., 316.

See English cases cited by Cowen, J. Same principle approved by the Court of Appeals of New York.

Hall v. Taylor, 18 N. Y., 589.

II. It was competent to prove the amount of goods on hand in store of E. S. Castle, the amount of his debts, his general embarrassment, and all acts to show his pecuniary condition, with a view to show the defendants' statements to be false and fraudulent.

III. The defendants being partners, and, as such, having sold the goods and received the \$135 commission and freight, were jointly liable.

Story on Part., sec. 131.

The act was within their regular business, as commission merchants.

"If one of a firm of commission merchants should sell goods, consigned to the partnership, fraudulently, or in violation of instructions, all the partners would be liable for the conversion, in an action of trover."

Story on Part., sec. 166.

Collier on Part., sec. 6, pages, 304, 306, 2d ed.

Nicol v. Glemie, 1 Maul. and Selw., 588.

Olmstead v. Hoatling, 1 Hill N. Y., 317.

IV. Upon the merits, the defendants were clearly liable, and the first instruction is correct.

3 John. R., 235; 7 Wend., 9.

Bean v. Renway, 17 Howard N. Y. Rep., 90.

Labriskie v. Smith, 3 Kernan, 322.

The above are the only points made by the bill of exceptions which are important.

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Mr. Justice CLIFFORD delivered the opinion of the court.

This was a writ of error to the Circuit Court of the United States for the northern district of Illinois.

Edward F. Bullard, a citizen of the State of New York, complained in the court below of Joseph Filkins, J. P. Phillips, Elihu Granger, and Edward H. Castle, in a plea of trespass on the case, alleging, at the same time, that they were partners, doing business as commission merchants at Chicago, in the State of Illinois, under the style and firm of Filkins, Phillips, & Company.

According to the transcript, the declaration was filed on the seventh day of July, 1856. As amended, it contained five counts, setting forth, in various forms, two distinct grounds of complaint against the defendants, which may be briefly stated as follows:

In the first place, it is alleged that the defendants, on the eighth day of November, 1855, fraudulently sold on credit, at Chicago, to one Edward S. Castle, certain goods belonging to the plaintiff, and which he had previously intrusted to them, as commission merchants, for sale; and that the purchaser, at the time of the sale, was in failing circumstances and irresponsible; charging, in the same connection, that the defendants, at the time of the transaction, well knew that the purchaser was insolvent, and wholly unfit to be trusted; and that they negotiated the sale with intent to deceive and defraud the plaintiff, whereby he suffered loss to an amount equal to the value of the goods so sold and delivered.

He also alleged, in other counts, that the defendants, prior to the sale of the goods, and at the time when it was made, represented to him that the said Edward H. Castle was worth at least eight thousand dollars above all his liabilities; that he was not embarrassed in his business affairs, or much indebted, and that he was a safe, cautious business man, and every way worthy of credit. Those representations, the plaintiff alleged, were false, and that the defendants well knew they were so at the time of the negotiation, and when the goods were delivered; and that they were so made by the defendants with intent to deceive and defraud him in the premises, and

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had the effect to induce him to consent to the sale, and to deliver the goods, whereby he suffered loss, as is alleged in the other counts.

To those charges, as more formally set forth in the several counts of the declaration, the defendants jointly pleaded that they were not guilty; and on the third day of January, 1857, the parties went to trial on that issue.

Testimony was introduced by the plaintiff in the opening, showing that Filkins, Phillips, & Company, were commission merchants at the time of this transaction, doing business at Chicago, in the State of Illinois, and that they received the goods in question a short time prior to the sale, from one William H. Adams, of that city, to whom the goods had previously been sent by the plaintiff to be sold on commission. He also proved the sale of the goods by one of the firm of Filkins, Phillips, & Company, to Edward H. Castle, on credit, substantially as alleged in the declaration, and that two of the partners and the clerk of the firm were present at the time the sale took place.

Facts and circumstances were also adduced by the plaintiff, tending strongly to show that the purchaser was largely indebted and in failing circumstances at the time of the negotiation, and that two or more of the members of the firm must have known that he was insolvent and utterly unworthy of credit.

Five per cent. was charged as commissions on the sale of the goods, amounting to the sum of one hundred and thirty-five dollars; and the plaintiff introduced testimony tending to show that the purchaser, as a part of the transaction, gave his promissory note to the firm, payable in forty-five days, to secure that amount.

Evidence was also introduced by the plaintiff, showing that representations as to the business circumstances and pecuniary responsibility of the purchaser were made to him at the time of the sale, by one or more of the defendants, substantially in the manner as alleged in the declaration. And it was clearly shown that two or more of the firm well knew that those representations were false, and that the subject of them was wholly unfit to be trusted for that amount.

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Proof was also introduced by the plaintiff, showing that the purchaser was a relative of one of the firm, and that he had repeatedly been assisted by others in obtaining credit. And many of the circumstances were of a character to afford a ground of presumption that all of the defendants must have known the true state of his affairs, and that he was insolvent.

When the plaintiff rested his case, in the opening, the counsel of the defendants moved the court to order a nonsuit as to the defendant, Granger, upon the ground that the evidence offered by the plaintiff did not tend to charge him with a participation in the fraud alleged in the declaration. At that stage of the cause, there was no evidence immediately connecting him with the transaction, except what might properly arise from the fact of his being one of the partners. But the court overruled the motion for a nonsuit, and the defendants excepted.

They then requested the court, that the jury might be permitted to retire, and consider whether the evidence introduced was sufficient to charge this defendant; and if not, that the jury might be directed to find him not guilty; urging, as a reason for the motion, that they desired to examine him as a witness for the other defendants; but the court overruled the application, and the defendants excepted.

After these motions were overruled, evidence was introduced by the defendants, and further evidence was given by the plaintiff; all of which was submitted to the jury, who returned their verdict in favor of the plaintiff.

Numerous exceptions were taken by the defendants in the progress of this trial to the rulings of the court, in admitting and rejecting evidence, and they also excepted to two of the instructions given by the court to the jury.

1. As the facts have been found by the jury, the questions to be determined are those that arise upon the exceptions. Of these, the first in the order of the argument at the bar is the one founded upon the refusal of the court to order a nonsuit as to the defendant, Granger, as requested by the counsel at the close of the plaintiff's testimony.

Several answers may be given to this complaint, each of

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which is sufficient to show that the exception cannot be sustained. In the first place, Circuit Courts have no power to grant a peremptory nonsuit against the will of the plaintiff. It was expressly so held by this court in *Elmore v. Grymes and al.*, 1 Pet., 471, and the same rule was also affirmed in *De Wolf v. Rabaud and al.*, 1 Pet., 497. In the case last named, the defendants at the trial, after the evidence for the plaintiff was closed, moved the court for a nonsuit; which was denied, and the defendant excepted, and sued out a writ of error; but this court held that the refusal to grant the motion constituted no ground for the reversal of the judgment, remarking, at the same time, that a nonsuit cannot be ordered in any case without the consent and acquiescence of the plaintiff.

Repeated decisions have been made to the same effect; and as long ago as 1832 it was declared, as the opinion of this court, in *Crane v. the Lessees of Morris*, 6 Pet., 609, that this point was no longer open for controversy. See also *Silsby v. Foote and al.*, 14 How., 222.

Another answer to this complaint arises from the fact that the motion for nonsuit is inappropriate in a case like the present, where there are other defendants to whom it cannot be applied. In actions of this description, where there is more than one defendant, the charge, beyond question, as a general rule, is joint and several, and, consequently, one may be found guilty and another not guilty; but at common law there cannot regularly be a nonsuit as to one and a verdict as to others; and for that reason, whenever it appears that there is evidence in the case to charge one or more of the defendants, a nonsuit is never granted at common law, even in jurisdictions where the authority to grant the motion in a proper case is acknowledged to exist. *Revett v. Brown*, 2 M. and P., 18; *Collier on Part.*, (Am. ed., 1848,) sec. 809, p. 698.

But a more decisive answer to this ground of complaint arises from the fact that there was evidence in the case tending to charge this defendant which rendered it proper that the question of his guilt or innocence should be submitted to the jury. He was a member of the firm of Filkins, Phillips, & Company, as appears by the bill of exceptions. All of the

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goods in question were deposited in their warehouse, and the jury have found that the goods were sold by the firm. Two of the partners and the clerk of the firm were present at the sale, and the commissions earned in transacting the business went to the benefit of all the partners of which the firm was composed.

In view of all the circumstances as disclosed in the evidence, it would be impossible to say, as matter of law, that it was error in the court to overrule the motion, even if the authority to grant it were conceded.

2. We come now to examine the second exception, which arises out of the refusal of the court to permit the jury to retire at the close of the plaintiff's case, and consider whether the evidence offered in the opening was sufficient to charge this defendant with a participation in the alleged fraud.

Upon this subject the general rule is, that if a defendant who is a material witness for the other defendants has been improperly joined in the suit, for the purpose of excluding his testimony, the jury will be directed to find a separate verdict in his favor; in which case, the cause being at an end with respect to him, he may be admitted as a witness for the other defendants. This course, however, can be allowed only where there is no evidence whatever against him, for the reason that then only does it appear that he was improperly joined in the suit, through the artifice and fraud of the plaintiff. If there be any evidence against him, then he is not entitled to a separate verdict, because, under such circumstances, it does not appear that he was improperly joined, and his guilt or innocence must wait the general verdict of the jury, who are the sole judges of the fact. 1 Greenl. Ev., sec. 358; *Brown v. Howard*, 14 John., 122.

Courts of justice are not quite agreed as to what stage of the trial the party thus improperly joined in the suit may insist upon a verdict in his favor—whether at the close of the evidence offered by the plaintiff in the opening, or whether he must wait until the case is closed for the defendants. Mr. Greenleaf regards it as the settled practice, that if, at the close of the plaintiff's case, there is one defendant against whom no

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evidence is given, he is entitled instantly to be acquitted; and it must be admitted that the decision of the court in *Childs v. Chamberlain*, 6 C. and P., 213, favors that view of the law. But Lord Denman held, in *Sowell v. Champion*, 6 Ad. and Ellis, 415, that the application to a judge in the course of a cause, to direct a verdict for one or more defendants in trespass, is addressed to his discretion, and that the discretion was to be regulated, not merely by the fact that, at the close of the plaintiff's case, no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes. There is, says the learned judge, so palpable a failure of justice, where the evidence for the defence discloses a case against a defendant already prematurely acquitted, that such acquittal ought never to take place until there is the strongest reason to believe that such a consequence cannot follow.

Some courts hold that the application, in all cases, is addressed to the discretion of the court. *Brotherton v. Livingston*, 3 Watts, 334; 1 Holt., 275. Other courts have held, that where there is no evidence to affect a particular defendant in actions *ex delicto* against several, a separate verdict is demandable as a matter of right, and that a refusal to grant the application is the proper subject of exceptions. *Van Dusen v. Van Slyck*, 15 Johns., 223; *Bates v. Conklin*, 10 Wen., 389.

Whatever diversities of decision there may be upon this point, all agree that the application ought not to be granted, unless it appear that there is no evidence to affect the party in whose favor it is made. *Brown v. Howard*, 14 John., 122. Now, it has already appeared that there was evidence in this case affecting this defendant; and, upon that ground, we hold that the Circuit Court was fully warranted in refusing to grant the application.

3. After a careful consideration of the several exceptions to the rulings of the court in admitting and rejecting evidence, we are of the opinion that none of them can be sustained. Considering the great number of the exceptions, their separate examination at this time will not be attempted, as it would

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extend this investigation beyond reasonable limits. One class of them arises out of objections to the admissibility of evidence offered by the plaintiff, tending to show that the defendants, or some of them, had aided the purchaser in this case in committing similar acts of fraud in the purchase of other goods, about the same time, from other persons. According to the evidence, some of those purchases were prior and others subsequent to the period of the sale of the goods in this case. All of this class of exceptions may well be considered together, as they involve the same general principles in the law of evidence. Decided cases have established the doctrine that cases of fraud like the present are among the well-recognised exceptions to the general rule, that other wrongful acts of the defendant are not admissible in evidence on the trial of the particular charge immediately involved in the issue. Similar fraudulent acts are admissible in cases of this description, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration. Assuming the proposition as stated to be correct, of which there can be no doubt, it necessarily follows, that no one of this class of the exceptions is well taken. Some of the decided cases go farther, and hold that such evidence is admissible, as affording a ground of presumption to prove the main charge; but, whether so or not, it is clearly competent, as tending to show the intent of the actor in respect to the matters immediately involved in the issue on trial. *Cary v. Hoatling*, 1 Hill, 316; *Irving v. Motly*, 7 Bing., 543; *Rowley v. Bigelow*, 12 Pick., 307. Another class of the exceptions arises out of objections made by the defendants to the admissibility of evidence introduced by the plaintiff, which, it is insisted, was irrelevant and immaterial. Some twelve exceptions are embraced in this class, and they are addressed to a large portion of the testimony introduced by the plaintiff.

In the course of the trial, the plaintiff offered evidence tending to show the pecuniary circumstances of the purchaser of these goods, his acts and conduct in respect to the goods

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after the purchase, and that he was largely in debt and insolvent.

He also introduced evidence tending to show that two or more of the defendants had represented to other persons, about the same time, that the purchaser of the goods in question was in good standing, and that they had likewise assisted him in obtaining credit with other dealers in merchandise.

To all or nearly all of this evidence, as more fully detailed in the transcript, the defendants objected, and those objections constitute the foundation of the several exceptions included in this class. Much of the evidence was of a circumstantial character; and it is not going too far to say, that some of the circumstances adduced, if taken separately, might well have been excluded. Actions of this description, however, where fraud is of the essence of the charge, necessarily give rise to a wide range of investigation, for the reason that the intent of the defendant is, more or less, involved in the issue. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth. Great latitude, says Mr. Starkie, is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. 1 Stark. Ev., p. 58.

Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. Applying these principles to the several exceptions under consideration, and it is clear that no one of them can be sustained.

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Other exceptions to the rulings of court were taken during the progress of the trial; but it is so obvious that they are without merit, that we think it unnecessary to give them a separate examination at the present time, and they are accordingly overruled.

At the argument, it was supposed by the counsel of the original defendants that the circuit judge had allowed the plaintiff to introduce parol proof of the contents of a writ of attachment, referred to by one of the witnesses; but, on examination of the transcript, we find that no such evidence was admitted.

4. Exceptions were also taken to certain portions of the charge of the court. On this branch of the case, most reliance was placed upon certain objections to the first instruction given to the jury, which is as follows:

“If the goods were in the custody of the defendants, for sale on commission, and one or more of the partners made false and fraudulent representations as to the party to whom they were to be sold by the defendants, then the partnership would be liable, if, in consequence of such representations, the plaintiff consented to the sale to that party, and the sale was actually made by the firm to the party.”

Some criticisms were also made in the printed argument for the defendants upon the second instruction, which, like the former, was duly excepted to; but, inasmuch as it is not essentially different in principle from the other, and as the questions presented in each depend upon the same general considerations, it will not be reproduced.

Both instructions were framed upon the theory that the defendants were not liable, unless the jury found from the evidence that the goods were actually sold by the firm; which, to say the least of it, was a theory sufficiently favorable to the defendants. Judge Story says, in his valuable work on partnerships, that torts may arise in the course of the business of the partnership, for which all the members of the firm will be liable, although the act may not in fact have been assented to by all the partners. Thus, for example, if one of the partners should commit a fraud in the course of the partnership business, all

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the partners may be liable therefor, although they may not all have concurred in the act. So, if one of a firm of commission merchants should sell goods consigned to the firm, fraudulently, or should sell goods so consigned in violation of instructions, all the partners would be liable. Story on Part., sec. 166; Collier on Part., (Am. ed., 1848,) secs. 445 and 457; *Nicoll v. Glennie*, 1 Maule and Selw., 568.

In precise accordance with this view of the law, it was said, and well said, by the court, in *Olmsted v. Hoatling*, 1 Hill, 318, that it does not lie with one to claim property through the fraudulent act of another, whether partner or agent, without being affected by that act the same as if it were his own; and we think the same principle must apply in a case like the present, where a firm doing business as commission merchants have received the fruits of the fraud in the commissions earned for transacting the business.

Where one assuming to be an agent had committed a fraud in a sale, it was held, in *Taylor v. Green*, 8 Car. and P., 316, that the mere adoption of the sale and the receipt of the money, by the person for whom the sale was made, rendered him liable for the fraud.

Suffice it to say, without any further reference to authorities, that the theory of the instructions was sufficiently favorable to the defendants.

5. Complaint is also made that the instructions excepted to were not sufficiently comprehensive; that they did not embrace all the elements which constituted the charge, as laid in the declaration. Strong doubts are entertained whether this point is properly raised by the bill of exceptions; but whether so or not, we are satisfied that the exception cannot be sustained.

Instructions given by the court at the trial are entitled to a reasonable interpretation; and if the proposition as stated is correct, they are not as a general rule to be regarded as the subject of error, on account of omissions not pointed out by the excepting party. Seven requests for instructions to the jury were presented by the counsel of the defendants, every one of which was given by the court, without any qualification.

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If the defendants had supposed that the instructions given were either indefinite or not sufficiently comprehensive, they might well have asked that further and more explicit instructions should be given; and if they had done so, and the prayer had been refused, this objection would be entitled to more weight.

But another answer may be given to this objection, which is entirely conclusive against it. On recurring to the transcript, we find that the court, before the instructions excepted to were given, explained to the jury the nature and character of the charge, describing substantially the two forms in which it was presented in the several counts of the declaration; and in effect instructed them that it must be proved in the one or the other of those forms, in order to entitle the plaintiff to a verdict in his favor. Those explanations immediately preceded the instructions embraced in the exceptions, and, in fact, may be regarded as a part of the same. Beyond question, the instructions excepted to must be considered in connection with those explanations; and when so considered, it is obvious that this objection cannot be sustained.

In view of the whole case, we think the defendants have no just cause of complaint, and that there is no error in the record. The judgment of the Circuit Court therefore is affirmed, with costs.

JOHN BAPTISTE BEAUBIEN AND OTHERS, COMPLAINANTS AND APPELLANTS, v. ANTOINE BEAUBIEN AND OTHERS, DEFENDANTS.

Where a bill in chancery was filed by persons residing in Canada, claiming title to property in Detroit which had been in the exclusive possession of the defendants and those claiming under them since 1793, without, as far as appears, any right being set up by the complainants or by those claiming under them to the title or the possession of the premises until the filing of the bill, or any claim to the rents and profits or to an account as tenants in common, or for partition, or to be admitted to the enjoyment of any right as co-heirs, the case is one resting upon the enforcement of an implied trust, where courts of equity follow the courts of law in applying the statute of limitations.

The averments of concealment and fraud on the part of the defendants, which

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are made in the bill for the purpose of withdrawing the case from the operation of the statute, are too general and indefinite to have that effect.

No acts of fraud or concealment are stated; and the time when even an intention to defraud, which is all that is averred, was discovered, was some fifty years after the exclusive possession of the defendants and those under whom they claim had commenced; and this, although the parties lived in the neighborhood and almost in sight of the city which has, in the mean time, grown up on the premises.

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

It was a bill filed on the equity side of the court, by John Baptiste Beaubien and twenty-one others, aliens and residents of Canada, against Antoine Beaubien and one hundred and twenty-seven others, thirteen of whom were citizens of Michigan and residents of Detroit. The rest of the defendants were admitted to be parties by order of the court.

The complainants began the history of their title as early as 1745, when the Governor and Intendant of the Territory gave to their ancestor, Beaubien, a concession of land of three arpens in front on Lake Erie, by forty arpens in depth; and afterwards, in 1747, the same persons granted to one Barois a concession of two arpens in front by forty arpens in depth adjoining the above. They then traced the title down, as stated in the opinion of the court.

Some of the defendants demurred to the bill, and the rest pleaded that they were bona fide purchasers, without notice.

In 1857, the court passed the following decree:

"This cause having been brought on to be heard on the demurrer of the above defendants and others, to the amended bill of complaint, and the plea of the Right Reverend Peter Paul Le Fevre and Theodore Williams, claiming to be bona fide purchasers for a valuable consideration, without notice, of the lands and premises owned and claimed by them on the Antoine Beaubien and Lambert Beaubien farms, described in the bill of complaint and in said plea, and the said demurrer and plea having been argued by G. T. Sheldon, solicitor and counsel, and W. H. Emmons, counsel for said defendants, and Messrs. Burt and Maynard, counsel for the complainants, and

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the arguments of counsel having been duly considered, it is ordered, adjudged, and decreed, that the demurrer heretofore filed of the above defendants, Theodore Williams and the Right Reverend Peter Paul Le Fevre and others, claiming a portion of the lands and premises in the bill of complaint mentioned, as heirs, donees, or otherwise, without valuable consideration, be, and is hereby, sustained; and the said plea of the said defendants, Right Reverend Peter Paul Le Fevre and Theodore Williams, claiming other portions of said lands and premises in their said plea mentioned, as bona fide purchasers for a valuable consideration, without notice, having been argued by the respective counsel, and the arguments of counsel having been duly considered, it is ordered, adjudged, and decreed, that the said plea of the said defendants, Peter Paul Le Fevre and Theodore Williams, be, and is hereby, sustained; and that the said bill of complaint of the complainants, as to all said land and premises described and set forth in said plea, be, and is hereby, dismissed."

From this decree, the complainants appealed to this court.

It was submitted on printed arguments by *Mr. Platt Smith* for the appellants, and *Mr. Carlisle* for the appellees, upon a brief filed by himself, *Mr. Emmons*, and *Mr. Russell*.

After *Mr. Smith* had argued that the bill set forth a complete title, and that the facts charged were admitted by the pleadings, he proceeded to notice the question of the lapse of time.

Lapse of time is not made a question by the pleadings; the court will not presume for the defendants what they do not claim for themselves.

Anthony Bledsoe was killed by the Indians, 20th July, 1788; he made a will, devising "my estate to be equally divided amongst my children; to each of my daughters a small tract of land." He left five sons and six daughters. There were 6,280 acres of land in Tennessee; the executors assigned 320 acres to each of the girls, and made deeds. Polly, the eighth child, in 1799, being then a minor, married Weatherhead,

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she and her husband took possession of the 320 acres that had been assigned to her. In 1801, the residue of the lands was divided among the sons. In 1818, Polly Weatherhead and her husband sold the 320 acres that had been assigned to her, and they removed to Mississippi. In 1843, Mr. Weatherhead died. In 1846, Polly Weatherhead brought suit for her portion of the whole tract. The boys and their grantees had made valuable improvements, built brick houses, &c. The suit was brought fifty-eight years after the death of the ancestor, fifty-three years after the partition among the girls, forty-five years after that among the boys. She maintained her suit.

Weatherhead's Lessee *v.* Baskerville et al., 11 Howard, 329, 359, 360.

In *Stackpole v. Davoren*, an account of rents and profits of an estate was decreed, after an adverse possession of fifty years.

1 Bro. P. C., 9, referred to in *Hill on Trustees*, 265.

In a recent case, Sir C. Pepys, M. R., set aside a purchase by a steward at an undervalue after an interval of forty-seven years.

2d June, 1835, affirmed 11 Cl. and F., 714.

Hill on Trustees, 265, where reference is given to many other cases of like tendency.

A case is reported in 5 Sim., 640. There the defendants had been in possession for seventy years; and to a bill filed by the remainder man to recover the estate, a plea was put in, stating that adverse possession of the property had been held during the whole time; and that the rents and profits had been received. The vice chancellor overruled the plea, and, on an appeal taken, his decision was affirmed by Chancellor Brougham.

Myrne and Keen, 738, cited in 16 Pet., 468.

In 1747, Edward Charlton, under whom plaintiffs claimed, being indebted to John Rooke by a judgment, it was agreed between them that Rooke should be put into possession of the rents and profits of the estate in question, until the debt should be satisfied, which agreement was carried into effect,

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and Rooke entered into and remained in possession till 1752. Edward Charlton, being at that time indebted to John Reed, under whom defendants claimed, Reed made an agreement with Rooke, for an assignment of what remained due by Charlton to Rooke; under this agreement, Reed entered into possession, and he and his family continued in possession up to 1821. Edward Charlton died in 1767, leaving a widow and a son, then under age. The son married in 1778, and died in 1797, leaving a son, an infant. The question was, whether, under the circumstances, a conveyance either from Edward Charlton or William Charlton to the Reed family might be presumed. Under the instruction of Bayley, J., the jury found for the plaintiff. Abbot, C. J., says: "I am clearly of opinion that the direction was according to law. In cases where the original possession cannot be accounted for, and would be unlawful unless there had been a grant, the rule may perhaps be different; and all of the cases cited are of that description. Here the original possession is accounted for, and is consistent with the fact of there having been no conveyance." Bayley, J., says: "The deeds of 1747 and 1752 were both produced, and if there had been a conveyance, it would probably have been produced also." Holroyd, J., says: "Here the original enjoyment was consistent with the fact of there having been no conveyance, for it was in satisfaction of a debt. The true question was presented to the jury.

Doe, d. Fenwick v. Reed, 5 Barn. and Ald., 232.

7 English Common Law, 79.

Both parties claim by descent from John Ormsby, sen., who died in Pennsylvania in 1805. The deceased had a son, Oliver, who survived him, and who administered on his estate; and a daughter, Sidney, who married Isaac Gregg. He had also a son, called John Ormsby, jun., who married in the Mississippi country, and died in 1795. Mary Swayze, the wife of the plaintiff, is the daughter of this son, and was an infant at his decease. In 1807, Oliver Ormsby gave bond as administrator of his father's estate; he never settled the administration account. In 1826, as administrator, he confessed a judgment for 467 dollars in favor of Messrs. Penns. He

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allowed the lands of his father to be sold on execution on this judgment; they were bid off by Mr. Ross, the attorney for the Messrs. Penns, at the sum of three thousand dollars, Mr. Ross declaring that neither he nor his clients wanted the lands, but that he should allow them to be redeemed for the amount of the judgment and the costs. In 1831, four years after the sheriff's sale, Oliver Ormsby paid Ross 523 dollars, and took a deed from him of the lands; he received a receipt from the sheriff, as administrator, for the three thousand dollars, after deducting what he had paid to Ross. Mrs. Swayze brought suit in 1833, and recovered; the court held that the sheriff's deed to Ross, and the deed from Ross to Oliver Ormsby, did not stand in her way.

Swayze v. Burke, 12 Peters, 11.

"The executor of an officer in the Virginia line on the continental establishment obtained a certificate from the Executive Council of Virginia, as executor, for four thousand acres of land, in the Virginia reserve, in the State of Ohio, and afterwards sold and assigned the same. Entries were made, and warrants issued in favor of the assignees, and a survey was made, under one of the warrants, in favor of one of the assignees, a bona fide purchaser, who obtained a patent from the United States for the land. It appeared that the executor had no right, under the will, to sell the land to which the testator was entitled. The patent was granted in 1818, and the patentee had been in possession of the land from 1808. The heirs of the officer entitled to the land for military services, in 1839, some of them being minors, filed a bill to compel the patentee to convey the land held by him to them. Held that the patentee was a purchaser, with notice of the prior title of heirs, and that he was bound to make the conveyance asked from him." "No principle is better established than that a purchaser must look to every part of the title which is essential to its validity."

Brush v. Ware, 15 Peters, 93.

The plea is no bar to the matters set up in the bill.

The plea of a purchaser for valuable consideration, without

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notice, should aver that the person from whom he purchased had such an interest in the property as entitled him to convey it to the defendant.

2 Daniels Ch. Pr., 687.

Head v. Edgerton, 3 P. Williams, 281.

Daniels v. Davison, 16 Ves., 252.

Craig v. Leiper, 2 Yerger, 196.

The plea traces title from the United States. But this is not enough, for a pre-existing title is distinctly averred and set forth in the bill; and it has been repeatedly held that a patent from the United States does not affect a pre-existing title in a third person.

City of New Orleans v. Armas and Cucullu, 9 Pet., 236.

United States v. Arredondo, 6 Pet., 738.

The bill charges that this patent was obtained by the fraud of Antoine Beaubien, the patentee; that the patent was based on the French titles under which plaintiffs claim, which patent, so far as it purports to convey anything to said Antoine, is fraudulent and void as against complainants; the bill also charges that defendants or some of them have possession of the documents of the original title. The plea does not undertake to deny the fraud, or that the patent was obtained on the claim founded on the original French titles, or that the defendants have not the original title papers; all these should be negatived by averment in the plea.

2 Daniels Ch. Pr., 691.

Possession to be adverse must be in good faith, and not a precarious possession, such as a *possessio fratraris*, or a fraudulent possession. Domat.

“And it has been held, that if a widow remains in possession of land after her husband’s death, and marries again, and she and her husband continue in possession for more than the time limited for the right of entry, neither she nor he can set up the statute against an ejectment by the children of the first husband. [Cook v. Nicholas, 2 Watts and S., 27.] There was a very rigid application of the law, in this respect, in a very modern case, in the Court of King’s Bench in Ireland, in which it was held, that where, on the death of a

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father intestate, seized of lands in fee, his second son enters without title, such entry is deemed for the use of the eldest son; and the statute, therefore, does not run against such eldest son, the possession of the second son being his possession. [Dowdall *v.* Byrne, Batt. (Irish) R., 373.] The real principle, to be extracted from all the cases, the court said, is, that the possession of the younger brother, so entering, is the possession of the heir, who, therefore, cannot be affected by length of time, upon the supposition of a possession adverse to him; and, on this principle, the court found an answer to the argument that the circumstances or motives of the party taking possession ought to be left to the jury, because the question is, not why the one person took possession, but why the other submitted to it; and in the absence of any proof to the contrary, it must be intended that he did so because (as the law intends) it was taken for him."

Angell on Limitations, p. 402.

The points made by the counsel for the appellees will be given, although the argument is inserted upon those only which were decided by the court.

I. The claim of the complainants is barred by the acts of Congress and the action under them, by which Antoine Beaubien obtained a patent.

II. The claim in this case is barred by the statute of limitations.

That this defence, as well as lapse of time generally, may be taken by demurrer.

Petro v. Massachusetts, 15 Peters, 233.

Story Eq. Pleading, secs. 503, 506, 761.

4 Wash., 631, 632; 2 Sch. and Lef., 637.

6 Sims, 51; 4 Johns. Ch., 299.

2 Ves., jun., 94; 1 Johns. Ch., 46.

1 Bald., 418; 19 Vesey, 180.

7 Paige, 195; 11 Eng. Ch., 68.

The bill in this case contains no sufficient averment to avoid the application of the statute, as we shall suggest more fully hereafter.

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The two acts of May 15, 1820, (R. Laws of Mich. 1833, p. 570, sec. 6,) and of Nov. 15, 1829, (R. Laws 1833, p. 408,) and especially the latter, bar all claim in this case.

R. Laws 1833, p. 408, act of 1829, provides that "No writ of right or other real action, no action of ejectment or other possessory action, of whatever name or nature, shall hereafter be sued, prosecuted, or maintained, for the recovery of any lands, tenements, or hereditaments, if the cause of action has now accrued, unless the same be brought within ten years after the passing of this act, any law, usage, or custom, to the contrary notwithstanding."

For the application of this statute to past causes of action, see laws of Michigan 1843, p. 43, declaring that all causes shall be determined by the law applicable to it, when the Rev. Stat. of 1838 were passed. See, also, judicially so holding, Douglass Mich. Rep., 307, *Lesley v. Cramer*.

We need not explain the causes which called for this subsequent legislation and decision. It is now clear the law of 1829 is that which controls the right to sue in this case.

It is hardly necessary to cite the following cases to show, that where the statute commences to run, no subsequent disability will arrest it.

15 Johns., 169.

Adams on Eq., 69, note, (1.)

1 Sugden on Vendors, 389.

3 Brod. and Bing., 217.

3 Johns. Ch., 140, and cases cited.

Plowden, 353; 4 Mass., 282.

C. and Hill, notes, 320.

And most particularly do we ask attention to the decisive fact that in this statute of 1829 there is no saving clause. The bar is general and universal. The non-resident is bound equally with the resident, the infant with the adult, and we therefore need not stop to discuss the particular circumstances of each complaint.

That where the Legislature have made no exceptions, the courts can make none.

1 Sugden on Vendors, 389.

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4 Tenn., 307, per Shippen arguendo.

And many other cases cited elsewhere in this argument.

This court has repeatedly recognised this rule.

Bank of the State of Alabama *v.* Delton, 9 How., 522.

McIver *v.* Ragan, 2 Wheat., 25.

Baron *v.* Howard, 20 Howard, 25.

If, then, this action may be said to have arisen at any time before 1828, it was barred November 10, 1839.

When, within the meaning of this rule, did it arise?

The bill says Antoine Beaubien was in possession with his brother before 1800. That he presented a sole claim before the board in 1804, and did not succeed, because he failed in his attempt to prove a conveyance to himself under the French title. See Schedule A, of the bill. He then, in 1804, claimed sole ownership; attempted to prove it. This was open and notorious. A public record is made of it. All had notice of it. There is no denial that all the co-heirs had such notice; and there is no pretence that he agreed expressly to take in trust for them. This, then, was a hostile sole claim. But the bill further says, that again, in 1807, he presented another claim as sole occupant and improver. He procured witnesses to swear he was such. It was judicially determined he was such in a proceeding *in rem*, which impleaded all the world. Not only is there no averment that he agreed to hold for the other heirs, but there is not one fact or circumstance stated which could lead them to believe so. The naked, meagre, and unlawyer-like expression is used, that they "supposed" he would so hold. Our citations hereafter will show how fully insufficient this is, in order to save any statute of limitations, even under the English rule, and much less to avoid this one. Indeed he could not, without the aid of perjury, have proved in his own name, if he were not the sole occupant.

1 Harrington Mich. Rep., 130, Barnard *v.* Bougard.

These facts are abundant to show a hostile, adverse holding. But further still, he conveys the half to Lambert's heirs in 1818. This surely is an exercise of ownership. There is no denial of full knowledge of all these facts by all the co-heirs

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at the time they took place. They all lived together within the area of a mile. The court will take judicial notice that the town in Canada, where some of them reside, adjoins the town of Detroit, where Antoine and Lambert lived.

In 1840, the bill admitted they knew the fraud. Even under a loose rule, which would give them ten years from this discovery, the legal bar would be complete in 1850, five years before this bill was filed. But there is no such rule. They must be prompt in filing the bill after discovery. Under a twenty years' statute they cannot, because there is fraud, delay forty years, if there is twenty years before the discovery. But fraud is an excuse only where they are diligent the moment they discover the fraud; otherwise, their rights are barred.

But, what is controlling here is, the bill concedes all the original heirs knew the facts. Numerous decisions show this is sufficient for our protection. There is no concealment, no agreement, no act to mislead, imputed to Antoine Beaubien. The naked case is stated, of a right in six heirs, who live in the neighborhood of their brother, having equal intelligence and means, having full knowledge of his open claims, his procuration of title, his sales, his exclusive occupancy without one word of claim on their part, or concession of right on his, from 1800 down to 1840, when, for the first time in forty years, the great-grandchildren of the original heirs began to "suspect" that the grandchildren (and their grantees) of the co-heir of their ancestors intend to claim this land as their own! Such a bill is but a delusion. It is demurable. It contains no sufficient reasons to avoid the application of the statute.

We submit the act of 1829 is a complete bar.

But the act of May 15, 1820, is equally a bar. In the circumstances of this case, the disabilities of non-residence, infancy, and coverture, are wholly immaterial. There can be no successive disabilities, either in the same person, or set up in succeeding heirs. If the disabilities of the first takers are removed, the heirs must sue within ten years or twenty years, (according to the statute thereafter.) Thus, if A, an heir, be a

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non-resident, and dies, and his heir is also a non-resident, the disability of the latter cannot be added to that of his ancestor, but he must sue within the time limited after the death of the first taker; otherwise, statutes of limitation would be perpetual.

The act of 1820 limits the right of action to twenty years, and the saving section is as follows:

"This act shall not extend to bar any infant, person imprisoned, beyond seas, &c., &c., from bringing either of the actions before mentioned within the term before set and limited for bringing such actions, calculating from the time such impediment shall be removed."

In 10 Ohio, 513, *Whitney v. Webb*:

Plaintiff resided out of, and had never been within the State of Ohio, and his ancestor, and those under whom the ancestor claimed, had in their lifetime been in the same situation; and the question was, whether the exception in the law (which was like ours) saved the rights of the plaintiff, who and whose ancestors had been successively and continually under the technical disability of non-residence.

The court cites and analyzes *Plowd.*, 358; 6 *East*, 80; 4 *Miss.*, 182; 2 *Conn.*, 27; and 3 *Johns. Ch.*, 129—which is an elaborate review of all the old cases—and hold that the action was barred immediately on the death of the ancestor or first taker, provided twenty years had then elapsed. That as the statute provided for no period after that for the heir to sue, and saved the rights only of the person to whom the right accrued, there was no mode in which by mere construction the heir could be allowed any time after the lapse of twenty years. That the person to whom the right accrued might have sued within twenty years after his disability removed. But this right did not accrue to the heir. Page 517 says, successive disabilities cannot be set up where they exist in the same person, any more than when one man attempts to protect himself by one in himself after the removal of one in his ancestor.

The doctrine was strictly applied in a case in equity in the same volume, 10 Ohio, 524, *Ridley v. Wethman*, where a

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bill was dismissed on the plea of the statute of limitations, when it appeared that the complainants sought to avail themselves of successive disabilities of non-residence.

The court, in 16 Howard, 247, *Thorp v. Raymond*, held that where a right of entry accrued to a person who was under disability, and so continued until his death, the statute began to run immediately upon his death, although the heir was under disability. This under New York statute similar to ours.

The non-residence of the complainants is immaterial, even if the act of 1829 contained any exceptions, which it does not; under this principle, the law of 1820 equally bars the whole action.

The court will not fail to perceive the disgraceful vagueness and studied evasion with which the bill is drawn.

It makes no averment that these complainants have been continuously out of the Territory and the State of Michigan. Such it is notorious is not the fact. They all reside within half a mile of Detroit, and, though in Canada, are and have for years, as have all their ancestors, been weekly there. Hence the statement that they have "resided" in Canada.

This may be true, and still, if they have been within the State, the running of the statutes will be conceded. No authority need be cited for this. The bill should have averred that the complainants had not been within the State. See the common precedents of pleading the old exception of "beyond seas."

This, then, answers the pretence that some of the complainants are within the exceptions of the statute of 1820.

Still, we repeat, that of 1829 has no exceptions.

That our holding is adverse, so as to start the running of the statute, whether it be said there is a trust or a tenancy in common, we cite a few decisions. They show equally what we cannot take time distinctly to argue, that this is a case where the presumption of a grant is full and clear.

Still, the main object is to show an adverse holding within the statute of limitations.

4 Mason, 326, *Prescott v. Nevens*.

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2 Smith's Leading Cases, 450.

Notes to *Taylor v. Horde*, in 1 Burr, 60.

Nessun v. Doe, in 1 M. and W., 910.

If a party holds in a character incompatible with the idea of a freehold in another, his holding is adverse. In order to ascertain the character of the holding, courts will look at the parties' conduct while in possession. The cases are very fully cited in 5 Bing. N. C., 161; Eng. Com. Law Rep., 65, *Davis v. Lowndes*; see per *Tindal*, Ch. J., page 71; also, pages 72, 73, 74. For the evidence in the case, see page 66.

That a patent from the Government invests the patentee with seizure in law, so that he is considered in actual possession until an ouster by a third person.

2 Smith's Leading Cases, 469.

The patentee's conveyance transfers a like possession to his grantee.

4 Wheat, 215, *Burr v. Grottz's Heirs*.

2 Smith's Leading Cases, 469.

There need not be an assertion of any previous title, but an assumption of ownership at the time of the entry and during the occupancy, and this is what is meant by its being made "under claim or color of right."

Page 472 cites the cases fully, to show that one tenant in common, by claiming to hold as owner of the whole, will constitute an ouster of his co-tenant.

In 24 Wendell, 601, 602, *Humbert v. Trinity Church*, on page cited, it is said: "Although a man may hold possession rightfully as a tenant in common, and the presumption is that he does so, still the contrary may be shown; and if his conduct be such as to satisfy the mind that he means to hold out his co-tenants, and he does in fact exclude them, this is an ouster, his possession is adverse, and the statute will apply as fully as if he never had any right to claim as a tenant in common." See the preceding pages, where the facts evincing the claim of title of the defendant are commented on. They are no more decisive than the averments in the present bill.

III. The statute of limitations of Michigan relied on in this case is broader than the English statute, and it is equally a

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bar in a court of equity as at law. This court under this statute can make no exception in cases of undiscovered fraud.

The English statutes of limitations simply bar certain enumerated legal actions, and none of them therefore apply in terms to proceedings in equity. Hence courts, acting simply from analogy, felt at liberty to make exceptions in cases when conscience demanded it. And as we pass over the cases under the following divisions, the truth of our averment will abundantly appear, that the only reason why courts have made such exceptions, is that there were no words in the statute which literally could be extended to courts of equity.

That the courts can make no exceptions when the statute makes none, see ante. That infants, feme coverts, and persons beyond seas, are all concluded when not expressly excepted. See *Humbert v. Trinty Ch.*, 24 Wendell, ante, and the cases cited, to show that when the statute applies *ex directu*, then even fraud makes no difference, and that case goes the length of saying that in cases of concurrent jurisdiction, fraud is no excuse, even in equity, under a statute which in terms did not apply to a court of equity.

But it is not necessary for us to go thus far here. Our statute does apply equally to a court of equity as to that of law. Its language is, "no real or possessory action, of whatever name or nature," shall be sustained after ten years from 1829. So is the act also of 1820.

Farmer v. Brooks, 9 Pick., 242; *Johnson v. Ames*, 11 Pick., 182, are directly in point, holding that a statute like this bound, *ex directu*, both courts of equity and law alike.

We claim this statute has no exceptions, express or implied, at law or in equity. That the court can engraft none upon it, growing out of the ignorance, infancy, or non-residence of the complainant, or the alleged frauds of the defendants; see authorities cited under II.

Very many decisions fully set forth the reasons of the equity rule in England, as we have stated it. This grows out of the words of their statute, and when one like ours comes up as in 17 Ves., they apply it as they would in an ejectment.

IV. If it is held that this act is to receive the same construc-

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tion as those which simply bar specifically enumerated legal actions, and that this court will therefore admit the same exceptions to its applications, such as trust and undiscovered fraud, then we say the bill does not set up facts to bring the case within these exceptions, and the remedy is barred by the statute under the general principle applicable to all statutes of limitations.

V. If the complainants contend there was a complete legal title under the French grant, this wholly answers the argument that the statute of limitations does not apply, because the defendants hold in trust, and the complainants were ignorant of the fraud.

VI. The bill does not show a legal title under the French grant.

VII. The plea of bona fide purchasers is a good plea, both in form and substance, and constitutes a perfect bar to the matters set up in the bill.

VIII. The bill does not show or state the citizenship of the several defendants brought in by the amendment thereto, and is therefore fatally defective.

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 district of the State of Michigan.

The bill was filed by the plaintiffs against the defendants, claiming to be tenants in common with them in a tract of land now lying in the city of Detroit, each party deriving title from a common ancestor, who made the settlement as early as the year 1745, under a concession from the French Government. The tract contained five arpens in front on Lake Erie, and eighty arpens back. The ancestor, John Baptiste Beaubien, died in 1793, having had the uninterrupted possession of the property from the time of the concession in 1745, leaving a widow and several children. Two of the sons, Antoine and Lambert, resided with their father at the time of his death, and continued in the possession and occupation with their mother till her death, in 1809.

In 1804, Antoine, one of the heirs in possession, applied to

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the board of commissioners to adjust land claims, under the act of Congress of 1804, to confirm his claim to the land; and which was confirmed accordingly, and a patent issued in 1812. Acts of Congress, 26th March, 1804; 3d March, 1805; 3d March, 1807.

Lambert, the other brother, continued in the joint occupation of the tract till his death, in 1815, and subsequently, in 1818, Antoine conveyed to the heirs of Lambert a moiety of the premises; and the present occupants and defendants are the descendants of the two brothers, or purchasers from them under this title.

The tract constitutes a portion of the city of Detroit, and is averred in the bill to have been worth, at the time of the filing of it in 1855, from half a million to a million of dollars, exclusive of the improvements.

The case was presented to the court below on demurrer to the bill, and on pleas by some of the defendants, as bona fide purchasers for valuable consideration, without notice.

The plaintiffs aver in the bill, in addition to the facts already stated, that they are the descendants of the brothers and sisters of Antoine and Lambert, from whom the title of the defendants is derived, and that Antoine and Lambert and their descendants possessed and occupied the tract in subordination to the right and title of their co-tenants, and that they were permitted to possess and occupy the same in confidence, that they so held the premises for the common benefit of all parties interested. They further aver, that they verily believed that the brothers, Antoine and Lambert, and their legal representatives, were acting in good faith in this respect, until about the year 1840 they discovered, after examination and inquiry into the facts and circumstances, that they intended to cheat and defraud them, and those under whom they claim, of their just rights in the premises.

The bill further states that Antoine, in his lifetime, and his son, who is one of the defendants, and the heirs of Lambert, have conveyed to divers individuals rights in the said tract; that, in some instances, they made donations without consideration; in others, conveyances for a pretended consideration;

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and that there now are in possession, as heirs, donees, and purchasers of different portions of the premises, several hundred persons, most of whose names are unknown to the plaintiffs, which persons set up claims and pretended rights and interests therein. And further, that neither Antoine nor Lambert's heirs, down to the year 1834, committed any open or notorious act, inconsistent with the rights of the plaintiffs, or in any way disavowed the trust and relation as co-tenant, or of brothers or co-heirs, nor in any manner asserted any title to the land, to the exclusion of their rights.

The court decreed upon the demurrer to the bill, and also upon the pleas, in favor of the defendants.

The case comes before us on an appeal from this decree. Antoine and Lambert, the two sons of J. B. Beaubien, the common ancestor, and those claiming under them, have been in the exclusive possession of the premises in question since 1793, a period of sixty-two years before the commencement of this suit. The plaintiffs and those under whom they claim, during all this time, as averred in the bill, resided in Canada, and, as appears, most of them in the county of Essex, in the neighborhood of the premises. The four hundred arpens which, in 1793, were worth some six or seven thousand dollars, now embrace a portion of the city of Detroit, and are worth, with the improvements, over a million of dollars; and, for aught that is averred in the bill or appears in the case, no right has been set up by them, or by those under whom they claim, to the title or the possession of the premises, until the filing of the bill; no claim to the rents and profits, or to an account as tenants in common, or for partition, or to be admitted to the enjoyment of any right as co-heirs.

The case is one, so far as the title of the plaintiffs is concerned, which depends upon the establishment of an implied trust to be raised by the evidence, and hence falls within that class of cases in which courts of equity follow the courts of law, in applying the statute of limitations. (*Kane v. Bloodgood*, 7 John. Ch. R., 91; *Hovenden v. Annesly*, 2 Sch. and Lef., 607.)

There are two acts of limitation in the State of Michigan, either of which bars the claim of the plaintiffs:

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1. The act of May 15, 1820, which limits the right of action to twenty years after the same has accrued; and

2. The act of November 15, 1829, which limits the right of entry to ten years, if the cause of action has then accrued..

The language is: "No writ of right or other real action, no ejectment or other possessory action, &c., shall hereafter be sued, &c., if the cause of action has now accrued, unless the same be brought within ten years after the passage of this act, any law, usage, or custom, to the contrary notwithstanding."

There is no saving clause in this as to infants, feme coverts, or residence beyond seas.

The pleader has sought to avoid the operation of the limitation, by an averment of concealment and fraud on the part of the defendants, and those under whom they claim. The plaintiffs aver, "that, until within the last few years, your orators and oratrixes, and those under whom they claim, verily believed and supposed that the said brothers, Antoine and Lambert, and their legal representatives, were acting in good faith towards them, but that, about the year 1840, they discovered by information, after examination and inquiry into the facts and circumstances of the case, that the said brothers, Antoine and Lambert, and their legal representatives, intended to cheat and defraud them, and those under whom they claim, of their just rights in the premises."

This averment is too general and indefinite to have the effect to avoid the operation of the statute. The particular acts of fraud or concealment should have been set forth by distinct averments, as well as the time when discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been before made. (Stearns *v.* Page, 7 Howard, 819; Moore *v.* Greene, 19 ib., 69.)

Here, no acts of fraud or concealment are stated; and the time when even an intention to defraud, which is all that is averred, was discovered, was some fifty years after the exclusive possession of the defendants and those under whom they claim had commenced; and this, although the parties lived in the neighborhood, and almost in sight of the city, which has, in the mean time, grown up on the premises.

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We think the statute of limitation applies, and that the decree of the court below should be affirmed.

THE PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD COMPANY, APPELLANTS, *v.* THE PHILADELPHIA AND HAVRE DE GRACE STEAM TOWBOAT COMPANY.

The jurisdiction of courts of admiralty in torts depends entirely on locality, and this court have heretofore decided that it extends to places within the body of a county. The term "torts" includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case.

Hence, where a railroad company employed contractors to build a bridge, and for that purpose to drive piles in a river, and, owing to the abandonment of the contract, the piles were left in the river, in such a condition as to injure a vessel when sailing on her course, the railroad company were responsible for the injury.

That the vessel so injured was prosecuting her voyage on Sunday, is no defence for the railroad company. The statute of Maryland and the cases upon this point examined.

Where there was conflicting testimony in the court below upon the amount of damages sustained, and there was evidence to sustain the decree, this court will not reverse the decree merely upon a doubt created by conflicting testimony.

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

It was a libel filed by one corporation against another corporation in the District Court of Maryland, under the circumstances stated in the opinion of the court. The District Court decreed in favor of the libellants, the appellees, and awarded damages to the amount of \$7,000.36. The Circuit Court, on appeal, affirmed the decree, and the railroad company appealed to this court.

It was argued by *Mr. Schley* and *Mr. Donaldson* for the appellants, and by *Mr. Dobbin* for the appellees.

The counsel for the appellants made the following points:

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1. That the District Court of the United States has no jurisdiction in a case like the present.

The cases show that "marine torts," over which courts of admiralty have jurisdiction, are trespasses done and committed on navigable waters, as in the case of a collision between two vessels; and a main ground on which such cases have been put is the power *in rem* possessed by those courts, but not by courts of common law.

The placing and leaving the pile in the bed of the Susquehanna, and within the body of a county, was a nuisance at common law, and the appellee's remedy was in the State courts, in an action on the case for particular damage caused by that nuisance. Indeed, the ordinary rules of an admiralty court in apportioning damages could not be made applicable to such a case.

The question is not one of mere locality. The subject matter itself is not within the admiralty jurisdiction; and it is believed that none of the decisions of this court have gone to an extent which would include it.

Conkling, 21, 24.

Thomas *v.* Lane, 2 Sumn., 9, 10.

Cutler *v.* Rae, 7 How., 737.

Schooner Tilton, 5 Mason, 465.

Waring *v.* Clark, 5 How., 467.

Angell on Tide Waters, 113.

Hancock *v.* York N. and B. R. W. Co., 70 E. C. L. Rep., 347.

Abbott on Shipping, 233.

9 Stat. at Large, 1851.

2. That the appellees could not recover in this case, because they were engaged in an unlawful act at the time when the accident occurred, which caused the injury complained of. The steamer Superior left her wharf at Havre de Grace, with a fleet of canal boats, on Sunday, the 11th May, 1856, and while engaged in towing the boats down the Susquehanna on that day, struck the pile which disabled her.

It is the law of Maryland, that no person whatever shall work or do any bodily labor, or willingly suffer any of his ser-

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vants to do any manner of work or labor, on the Lord's day, works of necessity and charity excepted; and a penalty is prescribed for the breach of the law.

There is nothing in this provision inconsistent with any of the laws of the United States regulating commerce, and the Federal courts would therefore take notice of and conform to the law of the State.

Act of Assembly of Md., 1723, c. 16, sec. 10.

Bank of U. S. *v.* Owens, 2 Pet., 527.

Bosworth *v.* Inhabitants of Swansea, 10 Metc., 363.

Robeson *v.* French, 12 Metc., 24.

Phillips *v.* Innes, 4 Clark and Fin., 234.

Smith on Contracts, 171.

3. That even if the appellees could in the present case recover in admiralty against any party, they still had no cause of action against the appellants; the act of negligence which caused the injury not having been the act of the appellants or of its servants.

The evidence shows that the Superior struck upon a sight-pile driven by the servants of Messrs. Goss, Cooke, & Co., who had contracted for a stipulated compensation to build the piles of the bridge across the Susquehanna.

By the second sentence of the 9th section of that contract, the contractors were "to furnish (and remove when done with) all scaffolding and piles that may be used while building;" which terms, according to the testimony of engineers and experts, included the sight-piles, which were necessary to the proper construction of the bridge. It was the duty of the contractors to remove these sight-piles when done with; and the act of the contractors, or of their servants, in sawing off those piles below the surface, and leaving them so as to obstruct the navigation, was in no sense the act of the appellant.

There is nothing to show that the appellant ever had knowledge of the fact that these piles were sawed off, instead of being removed, as the contract required; and the termination of the contract could not make the appellants liable for the consequences of a previous wrongful act of the contractors, the

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appellants not consenting either to making or continuing the nuisance.

Allen v. Hayward, 53 E. C. L., 974.

Reedie v. London and N. W. R. W. Co., 4 W., H., and G., 244, 245.

Knight v. Fox, 5 Exch., 721.

Steel v. S. E. R. W. Co., 32 E. C. L., 366.

Overton v. Freeman, 73 E. L. and E. Rep., 866.

Peachey v. Rowland, 13 C. B., 182, (76 E. C. L. Rep.)

Blake v. Ferris, 1 Seld., 48.

Hilliard v. Richardson, 3 Gray, 354.

Rapson v. Cubitt, 9 M. and W., 710.

Milligan v. Wedge, 40 E. C. L., 177.

Burgess v. Gray, 1 C. B., 578, (1 Man., Grang., and Scott.)

4. That the sinking of the *Superior* after striking upon the sight-pile was owing to the mismanagement of her captain, and the appellees cannot be entitled to recover the damages consequent upon her sinking, for the cost of raising her, or the loss of time while she was under water.

The testimony of a number of steamboat captains, and of persons well acquainted with the river near *Havre de Grace*, shows that the true course for the captain to have pursued, after the vessel struck, was to run her upon the flats indicated on the illustrative map by the letters C, B, D; and that if he had done so, she would not have sunk.

Even if there was no error in returning to the wharf, the evidence shows great want of care in the omission properly to secure the vessel to the wharf, and in other particulars.

5. That the amount of the decree is greater than the actual loss which naturally or necessarily resulted from the injury; and greater, indeed, than the total value of the injured boat.

Mr. Dobbin, for the appellees, made the following points:

1. That the steamer "Superior," the subject of the injury, being, at the time of the wrong committed, a licensed vessel, sailing in her lawful business, on waters within the ebb and flow of the tide, a court of admiralty has jurisdiction to redress

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any trespass upon her, notwithstanding an action at law might have been maintained for the same injury.

3 Story on Con., 530.

2 Brown's Civil and Ad. Law, 110, 203.

Thomas *v.* Lane, 2 Sumner, 9.

The Ruckers, 4 Rob. Ad. R., 73.

Steele *v.* Thatcher, Ware's Rep., 98.

Thackery *v.* the Farmer, Gilp. R., 529.

Waring *v.* Clark, 5 How., 464.

New Jersey S. B. Co. *v.* Merchants' Bank, 6 How., 481, 432.

Manro *v.* Almieda, 10 Wheat., 473.

Plummer *v.* Webb, 4 Mason, 383.

Chamberlain *v.* Chandler, 3 Mason, 242.

Bees Ad. R., 369.

Angell on T. W., 119.

The Volant, 1 W. Robinson, 387.

Zouch, 117, 122.

Com. Dig. "Admiralty" E., 13.

Sir Leoline Jenkins, 2 Brown's C. and Ad. L., 475.

De Lovio *v.* Boit, 2 Gall., 437.

Judge Winchester, 1 Pet. Ad. Dec., 234.

2. That the act of Assembly of Maryland did not contemplate a restraint on the sailing of vessels engaged in foreign commerce, or in the coasting trade, and that, if it did, such restraint is repugnant to the Constitution and laws of the United States; and that the "Superior," being a vessel duly enrolled and licensed, in the district of Philadelphia, for the coasting trade, had a right to pursue such trade without any restraint thereon by the laws of the State of Maryland, in respect to the time within which such coasting trade might be prosecuted.

Gibbons *v.* Ogden, 9 Wheat., 240.

Brown *v.* State of Maryland, 12 Wheat., 448.

Brown *v.* Jones, 2 Gall., 477.

Willard *v.* Dorr, 3 Mason, 93.

3. That the railroad company, and not the contractors under them, are responsible for the injury:

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First—because the whole work was done under the direction and superintendence of the company, the contractors undertaking to do only as directed by the company's engineers; and there being no proof that the contractors violated their instructions, the presumption is that all that was done was by order of the company's superintendent.

Second—because the pile upon which the steamer ran was not such an one as is contemplated by the contract, where it speaks of "scaffolding and piles that may be used while building," the proof being that this was one of a group erected away from the line of the bridge, for the exclusive use of the company's engineers employed in performing the duty of superintendence, which the company had reserved to itself.

Third—because, at the time of the accident, the company had discharged the contractors, and taken possession of all that was built of the bridge, in its then unfinished condition; and they are responsible for any damage which might arise from their leaving the work in a position to inflict injury upon vessels navigating the Susquehanna.

4. That the captain of the steamer exercised the utmost prudence, skill, and judgment, after the accident, as the record abundantly shows; but even if this were less apparent as a question of fact, it having undergone full examination in the District Court, and in the Circuit Court on appeal, this court will not disturb the decree, unless in a clear case of mistake.

Walsh v. Rogers, 13 How., 284.

5. That the sum decreed against the appellant is less than the proof shows to have resulted from the injury.

Williamson v. Barrett, 13 How., 110.

Mr. Justice GRIER delivered the opinion of the court.

A brief statement of the facts of this case will be sufficient to show the relevancy of the questions to be decided.

The appellants were authorized by a statute of Maryland to construct a railway bridge over the mouth of the Susquehanna river, at Havre de Grace. They entered into an agreement with certain contractors, to prepare the foundations and erect the piers. In pursuance of their contract, these persons drove

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piles into the channel of the river, under the direction of the engineers employed by the appellants. Before the completion of the contract, the appellants abandoned their purpose of building the bridge, and discharged the contractors. During the progress of the work, the contractors had driven certain piles, called sight-piles, into the channel of the river, which were not removed or cut off level with the bottom, but were cut a few feet under the surface of the water, so that they became a hidden and dangerous nuisance. The steamboat Superior, engaged in towing boats between Philadelphia and Havre de Grace, left a port in Maryland on Sunday morning, and soon after came into forcible collision with one or more of these piles; in consequence whereof she suffered great damage, and for which this libel was filed.

The appellants have, in this court, insisted chiefly on three points of defence to the charges of the libel:

I. It is contended that the "marine torts," over which courts of admiralty have jurisdiction, are trespasses done and committed with force on the sea and navigable waters, such as collision of vessels, assaults, &c., and that the placing and leaving the piles in the bed of the river, and within the body of a county, is a nuisance at common law, and the remedy of the appellees should have been by an action on the case.

The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality. If the wrongs be committed on the high seas, or within the ebb and flow of the tide, it has never been disputed that they come within the jurisdiction of that court. Even Lord Coke (4 Inst., 134) declares, "that of contracts, pleas, and *querels*, made upon the sea or any part thereof, which is not within any county, the admirall hath and ought to have jurisdiction."

Since the case of *Waring v. Clark*, (5 How., 464,) the exception of "*infra corpus comitatus*" is no longer allowed to prevail. In such cases, the party may have his remedy either in the common-law courts or in the admiralty. Nor is the definition of the term "*torts*," when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed

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by direct force. It includes, also, wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case. It is a rule of maritime law, from the earliest times, "that if a ship run foul of an anchor left without a buoy, the person who placed it there shall respond in damages." (See Emerigon, vol. 1, page 417; Consulat de la Mer., chap. 243; and Cleirac, 70.)

In the resolution of the twelve judges, in 1632, it was determined in England, "that the courts of admiralty may inquire of and redress all annoyances and obstructions that are or may be any impediment to navigation, &c., and *injuries done there which concern navigation on the sea.*"

Hence, "the impinging on an anchor or other *injurious impediment negligently left in the way,*" has always been considered as coming within the category of maritime torts, having their remedy in the courts of admiralty. (See 2 Brown Civ. and Adm., 203.)

The objection to the jurisdiction of the court is therefore not sustained.

II. The testimony showed that the injury to the steamer was caused by her coming in contact with one of the sight-piles, driven into the channel by the contractors, and left in the situation already stated.

This contract is set forth at length. It showed that the contractors were bound to "provide all necessary machinery, &c., and to furnish (and remove, when done with) all scaffolding and piles that may be used while building."

It is contended by the appellants that they are not liable for the negligence which caused this injury, because the piles were not placed in the channel by their servants, but by those of the contractors; and that the case was not altered by the fact that the contractors were directed to do so by the engineers, who were the servants of appellants.

If the contractors had proceeded to complete their contract, and left the piles in the condition complained of, this defence to the action might have availed the appellants. But as the driving the piles for the legitimate purpose of the erection was

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by authority of the law and in pursuance of the contract, the contractors had done no wrong in placing them there. The nuisance was the result of the negligence in cutting off the piles, not at the bottom of the river, but a few feet under the surface of the water. This the contractors were bound to do, after the piles had served their legitimate purpose in the construction of the bridge, and after they had completed their contract. But before this, the railroad company determined to discontinue the erection of the bridge. They dismissed the contractors from the further fulfilment of their contract. Under such circumstances, it became the duty of the appellants to take care that all the obstructions to the navigation, which had been placed in the channel by their orders, and for the purpose of their intended erection, should be removed. The nuisance which resulted from leaving the piles in this dangerous condition was the consequence of their own negligence or that of their servants, and not of the contractors.

III. The appellants urge, as a further ground of defence, that this collision took place on Sunday, shortly after the steamboat had commenced her voyage from a wharf, "parcel of the territory of Harford county, in the State of Maryland; that the boat was used and employed by her owners in towing canal boats; and that, when entering on her voyage, those who had her control and management were engaged in their usual and ordinary work and labor—the same not being a work of necessity or charity—contrary to the laws of the State of Maryland."

A statute of Maryland forbids persons "to work or do any bodily labor, or to willingly suffer any of their servants to do any manner of work or labor, on the Lord's day—works of necessity and charity excepted;" and a penalty is prescribed for a breach of the law.

It has been urged, that there was nothing in this provision inconsistent with any of the laws regulating commerce, and that the Federal courts should therefore take notice of and conform to the laws of the State.

But assuming this proposition to be true, the inference from it will not follow as a legitimate conclusion; for, if we admit

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that the master and mariner of a ship or steamboat are liable to the penalty of the act for commencing their voyage from a port in Maryland on Sunday, it by no means follows that the appellants can protect themselves from responding to the owners of the vessel for the damages suffered in consequence of the nuisance.

The law relating to the observance of Sunday defines a duty of a citizen to the State, and to the State only. For a breach of this duty he is liable to the fine or penalty imposed by the statute, and nothing more. Courts of justice have no power to add to this penalty the loss of a ship, by the tortious conduct of another, against whom the owner has committed no offence. It is true, that in England, after the statute of 29, ch. 2d, forbidding labor on the Lord's day, they have, by a course of decision perhaps too obsequiously followed in this country, undertaken to add to the penalty, by declaring void contracts made on that day; but this was only in case of executory contracts, which the courts were invoked to execute. It is true, that cases may be found in the State of Massachusetts, (see 10 Metcalf, 363, and 4 Cushing, 322,) which, on a superficial view, might seem to favor this doctrine of set-off in cases of tort. But those decisions depend on the peculiar legislation and customs of that State, more than on any general principles of justice or law. (See the case of *Woodman v. Hubbard*, 5 Foster, 67.)

We would refer, also, to a case very similar in its circumstances to the present, in the Supreme Court of Pennsylvania, in which this subject is very fully examined by the learned chief justice of that court; and we concur in his conclusion: "That we should work a confusion of relations, and lend a very doubtful assistance to morality, if we should allow one offender against the law, to the injury of another, to set off against the plaintiff that he too is a public offender." (See *Mohney v. Cook*, 26 Penn. Reps., 342.)

We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of seven thousand dollars on the libellants, by way of set-off, because their servants may have been subject

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to a penalty of twenty shillings each for breach of the statute.

Moreover, the steamboat in this case was sailing on a public river, within the ebb and flow of the tide; she had a coasting license, and was proceeding from a port in one State to a port in another. Has it ever been decided that a vessel leaving a port on Sunday infringes the State laws with regard to the observance of that day?

We have shown, in an opinion delivered at this term, that in other Christian countries, where the observance of Sundays and other holidays is enforced by both Church and State, the sailing of vessels engaged in commerce, and even their lading and unlading, were classed among the works of necessity, which are excepted from the operation of such laws. This may be said to be confirmed by the usage of all nations, so far, at least, as it concerns commencing a voyage on that day. Vessels engaged in commerce on the sea must take the advantage of favorable winds and weather; and it is well known that sailors (for peculiar reasons of their own) give a preference to that day of the week over all others for commencing a voyage.

In the case of *Ulary v. the Washington*, (Crabbe, 208,) where a sailor justified his departure from a ship in port, because he was compelled to work on Sunday, Judge Hopkinson decided, "that, by the maritime law, sailors could not refuse to work on Sunday—the nature of the service requires that they should do so."

We have thus disposed of the questions of law raised in this case, and concur with the District and Circuit Court in their decision of them.

Some objections have been urged to the assessment of damages, and their amount.

On this subject there was much contradictory testimony, as usually happens when experts are examined as to matters of professional opinion. The judges of the courts where this question was tried can better judge of the relative value of such conflicting testimony, from their knowledge of places and persons, and they may examine witnesses *ore tenus*, if they see fit.

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There was evidence to support the decree; and we can see no manifest error into which the court below has fallen. Appellants ought not to expect that this court will reverse a decree, merely upon a doubt created by conflicting testimony.

The judgment of the Circuit Court is affirmed, with costs.

ANN R. DERMOTT, PLAINTIFF IN ERROR, v. ZEPHENIAH JONES.

Where there was a special contract to build a house by a certain day, which was not fulfilled, owing to various circumstances, and the contractor brought a suit setting forth the special contract and averring performance, it was erroneous in the court to instruct the jury to find for the plaintiff, as the work was not finished by the appointed day, though it was completed after the time with the knowledge and approbation of the defendant.

By the terms of the contract, the performance of the work was a condition precedent to the payment of the money sued for.

The general rule of law is, that whilst a special contract remains open, that is, unperformed, the party whose part of it has not been done cannot sue in *indebitatus assumpsit*, to recover a compensation for what he has done, until the whole shall be completed. But the exceptions from that rule are in cases in which something has been done under a special contract, but not in strict accordance with it; but if the other party derives any benefit from the labor done, the law implies a promise on his part to pay such a remuneration as the work is worth, and to recover it an action of *indebitatus assumpsit* is maintainable.

The case must be remanded to the Circuit Court, to be tried upon such counts as are in the original declaration, which charges the defendant in the sum of \$5,000 for work and labor done, for materials furnished and used by the defendant in the erection and finishing certain stores and buildings in the city of Washington; and upon the money counts for a like sum paid by the plaintiff for the defendant; for a like sum had and received, and for a like sum paid, laid out, and expended, by the plaintiff, for the use of the defendant, at her request. And in such action the defendant may recoup the damages which she has sustained from the imperfect execution of the work.

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

It was an action of debt brought by Jones against Ann R. Dermott for the sum of five thousand dollars. The declaration contained four counts, viz:

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1. That the defendant, on the first day of July, 1852, was indebted to the plaintiff, in the sum of five thousand dollars, for work and labor done and materials furnished to the defendant by plaintiff, and used by her in and about the erection of certain buildings, and finishing and completing certain stores in said buildings, in the city of Washington.
2. For a like sum paid by plaintiff for defendant.
3. For a like sum had and received.
4. For a like sum paid, laid out, and expended by plaintiff, for defendant, and at her request.

The plaintiff below had also filed a bill on the equity side of the court, which was pending; whereupon the defendant moved for a rule upon him to elect between his said action of debt, pending on the common-law side of this court against this defendant, and his said bill pending on the equity side of this court against the said defendant, as to the sum of money, to wit: \$14,000, with interest, for which a decree is prayed against said defendant by plaintiff in his said bill.

Whereupon the plaintiff says he elects to recover in this action only the \$5,000 mentioned in his said bill in equity, to be paid by defendant on the completion of the said stores and warehouse in said bill mentioned, and claimed on the 1st October, 1851, with interest, and hereby disclaims all and every right or pretension in this cause to recover any portion of said \$14,000.

Whereupon the court made the following order, to wit:

The plaintiff having made his election under the said order or rule made at March term, 1854, as aforesaid, to prosecute this action of debt for the recovery of the said sum of \$5,000:

It is further ordered by the court, that the said bill in chancery be dismissed, and the same is dismissed accordingly, quoad the said \$5,000.

The reporter will not carry the reader through the following process of pleading, the mention of which will be sufficient.

It has been already stated that the declaration contained four counts. The defendant pleaded specially to the declaration setting up the special agreement, &c. Whereupon the

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plaintiff amended his narr., adding special counts upon the contract. The amended narr. was objected to. Objection overruled, and exception taken. The amended narr. contained the following counts:

1. On the contract alleging performance, and that \$5,000 was due, stating the time mentioned in the contract, (1st October,) under a videlicet.

2. Treating the time (1st October) as material, averring that the plaintiff had performed his part, but that the defendant departed from the contract.

3 and 4. The common counts in debt for the extra work.

The pleas were—

To the first count, *nil debet*, non-performance generally, and non-performance specially, in not completing the stores and warehouse on or before the 1st of October.

To the second, third, and fourth, demurrers.

To the plea of non-performance, in not completing the work on the 1st of October, the plaintiff demurred, and judgment for the demurrer.

Upon the demurrers of the defendant to the second, third, and fourth counts, demurrers overruled, and judgments for the plaintiff.

Verdict for the plaintiff on the first count, and inquisitions, with nominal damages, on the second and third counts, and for the value of the extra work on the fourth count. Judgment accordingly.

From this account of the pleadings, the reader will readily perceive the points of law which came up to this court. But in order to make it more clear, the prayers to the court by the defendant (none being offered by the plaintiff) are inserted. There were five prayers, the only one of which was granted was the fourth. Numbers one and three were granted with a qualification; numbers two and five were refused.

Fourth Prayer. If the jury find, from the evidence aforesaid, that the plaintiff so negligently and unfaithfully executed the work specified in the contract and specifications aforesaid, that, from insufficient drainage, bad workmanship, departure from the written specifications, or other acts or omissions of

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the plaintiff, in so negligently and unfaithfully executing said work, the three stores and warehouse aforesaid were damaged and injured, as stated in the evidence, then the defendant is entitled to recoup or deduct from the amount claimed in this action all damages sustained by the defendant, and resulting from said injury. Granted.

Fifth Prayer. That, under the issues joined on the first count of the amended declaration, the defendant is entitled to the verdict, unless the jury shall find, from the evidence, that the plaintiff did finish and deliver over to the defendant the three stores and warehouse described in said written contract, ready for use and occupation, on or before the 1st day of October, A. D. 1851. Rejected.

Second Prayer. That, by the true intent and meaning of the written contract and specifications read in evidence, the said Zephaniah Jones undertook and obliged himself to finish the three stores and warehouse therein described, and deliver them over to the defendant, fitting for use and occupation, on or before the 1st day of October, 1851; and the said Jones also undertook and obliged himself to procure and supply all and singular the materials, implements, fixtures, matters and things requisite and proper for the execution of said —, and for the complete finishing and fitting for use and occupation of said warehouse and stores. And if the jury find that the said warehouse and stores, when delivered over by said Jones to the defendant, were not fitting for use and occupation, but the same were defective, unsafe, and untenantable, by reason of the cracking of parts of the walls and the settlement of portions of the store walls, or otherwise; and if the jury further find that it was possible for said Jones to have constructed said warehouse and stores, and to have delivered the same to the defendant fitting for use and occupation, by his furnishing additional labor, materials, matters and things, (not named in said written specifications,) in and about the fitting of the same for use and occupation, then the said Jones did not perform and discharge the obligation of his said contract, although the jury may believe that the said warehouse and three stores were erected and constructed in strict conformity

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to the specifications made a part of said contract; and although the cracking of said walls and settlement of said foundations may have resulted from causes wholly unforeseen by either party at the time of executing said contract and constructing said foundations and walls; and although the said cracking and settlement may have been caused by the weight placed on said walls and foundations, or some part thereof, according to the requirements of such specifications, or of additional weight placed on the same or some part thereof by said Jones, at the request of said defendant, and which additional weight was not called for in said specifications; but the court further instructs the jury that the plaintiff is entitled to recover nominal damages at all events. Refused.

DEFENDANT'S FIRST AND THIRD PRAYERS, WITH THE QUALIFICATION.

First Prayer. And thereupon the defendant prayed the court to instruct the jury, as follows:

If the three stores and warehouse in the contract mentioned were not executed and finished, fit for use and occupation, and so delivered to defendant, either on the said 1st day of October, 1851, in the said contract mentioned, nor at any other time, but were, at the time the same were delivered, wholly unfit and unsafe for use and occupation, with walls, or some of them, sunken out of plumb and cracked, and in danger of falling, so as to be utterly untenantable and unfit for use and occupation, then the plaintiff was not entitled to demand and recover in this action the said sum of five thousand dollars, as the stipulated instalment which the said contract purports to make payable on the said 1st October, on the terms and conditions therein mentioned, but the plaintiff is entitled to recover the value of his said work, after deducting the cost and expense incurred by the defendant in repairing said stores and warehouse, and rendering them fit for use and occupation, but the plaintiff is entitled to nominal damages at all events.

Third Prayer. If the defendant did not, at any time or times whatever, execute, finish, ready for use and occupation, and in that state and condition deliver over to the defendant the

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said stores and warehouse mentioned, but delivered the same over to the defendant in a state wholly unsafe and unfit for use and occupation, and untenantable, with walls sunken, cracked, and out of plumb, and in danger of falling into ruin, whereby the defendant was greatly injured and suffered great loss, by having to reconstruct the said walls in part, and repair the dilapidated condition of the building, and fit it for use and occupation at her own costs and charges, then the defendant may recoup or deduct said losses, costs, and charges, against the plaintiff's claim for the said instalment of five thousand dollars, claimed in this suit, or the value of the work done by said plaintiff in and about said stores and warehouse, but the plaintiff is entitled to recover nominal damages at all events; which instructions the court refused to grant without the following qualification, that is to say:

Qualification. But, if the jury shall find, from the evidence, that the said Jones hath executed the said work according to the specifications forming a part of the said contract, and in a skilful, diligent, and careful and workmanlike manner, or that his execution thereof was with the knowledge and approbation of the defendant, then they are to find for the plaintiff the said sum of \$5,000, with interest from the date of the delivery of the said stores and warehouse.

To the granting of which instructions the plaintiff excepts, and prays the court to sign and seal this his bill of exceptions, which is accordingly done, this eleventh day of November, 1857.

JAMES S. MORSELL. [SEAL.]

WILLIAM M. MERRICK. [SEAL.]

To the refusal of which instructions, as prayed by the defendant, to the granting of the qualification annexed thereto, the defendant, by her counsel, excepts, and claims the same benefit of exception as if the refusal of the court to grant each of said instructions as prayed, and the granting of the same with the qualification thereto attached, were each separately excepted to; and thereupon this, her bill of exceptions, is signed, sealed, and enrolled, this eleventh day of November, 1857.

JAMES S. MORSELL. [SEAL.]

WILLIAM M. MERRICK. [SEAL.]

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The case was argued by *Mr. Brent* and *Mr. Poe* for the plaintiff in error, and by *Mr. Bradley* and *Mr. Carlisle*, upon a brief by the latter gentleman and *Mr. Badger*, for the defendant.

The arguments of the counsel were so interwoven with the dates and facts of the case, that it is thought best to omit them entirely.

Mr. Justice WAYNE delivered the opinion of the court.

This record shows that the plaintiff and the defendant entered into a building contract, under seal, with specifications annexed, on the 22d April, 1851. It was agreed between them, that Jones, the plaintiff, should do in a good, substantial, and workmanlike manner, the houses, buildings, and work of every sort and kind described in a schedule annexed to the contract, of which it was a part; that he should procure and supply all the materials, implements, and fixtures, requisite for executing the work in all its parts and details; and that the stores fronting on Market Space, and the warehouse on Seventh street, should be finished and ready for use and occupation, and be delivered over to the defendant, on the first day of October after the date of the contract, and all the rest of the work on the first day of December afterward. The defendant agreed, upon her part, to pay the plaintiff for the performance of the work, and for the materials furnished, twenty-four thousand dollars by instalments: five thousand dollars on the first day of July, 1851; five thousand dollars on the first day of October following; it being expressed in their contract, that the stores and warehouse were then to be delivered to the defendant ready for use and occupation; and that the residue of the twenty-four thousand dollars was to be paid to the plaintiff on the first day of January, 1860, with interest upon four thousand of it from the first day of May, 1851, and with interest on ten thousand dollars from the first day of December, 1851. We do not deem it necessary to notice the other covenants of the contract, as they have no bearing upon the case as we shall treat it.

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The suit as originally brought is an action of debt for the recovery from the defendant of the second instalment of five thousand dollars, and for the value of certain extra work done and materials furnished by the plaintiff for the defendant's use. The original declaration contains four counts: first, charges the defendant in the sum of five thousand dollars for work and labor done, and materials furnished and used by her in the erection and finishing certain stores and buildings in the city of Washington; second, for a like sum paid by the plaintiff for the defendant; third, for a like sum had and received; and fourth, for a like sum paid, laid out, and expended by the plaintiff for defendant at her request. The defendant pleaded to the declaration four pleas: first, that she was not indebted as alleged; second, a special plea setting out in detail a contract under seal, with the plaintiff, for the erection of such buildings as are mentioned in it, and for the completion of them—protesting that the plaintiff had not complied with the terms of the same, and declaring that the sum of five thousand dollars claimed by the plaintiff was the second instalment, which, by the contract, was to be due and payable to the plaintiff on the first day of October, 1851, and denying that the buildings were done by that day, or that any claim for the five thousand dollars had accrued before the bringing of the suit, by reason of any contract or agreement different from the special contract, or for any consideration other than the five thousand dollars claimed in the declaration. In the third plea, the identity of the sum sued for with the second instalment is reaffirmed, payable on the 1st of October, 1851, upon condition that the buildings and stores should be completed and ready for use by that day—averring performance on her part of the conditions and covenants of the contract, and non-performance on the part of the plaintiff, especially his failure to complete and have ready for use the warehouse and stores by the time specified. The fourth plea refers to the special contract, avers performance on her part, non-performance on the part of the plaintiff, and especially, that he had not finished and completed the buildings and stores by the day specified in the contract, or at any time, either before or

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after that day. At this point of the pleading the plaintiff applied to be permitted to amend his declaration, and added to it four counts. The first sets out in detail the special contract referred to in the defendant's second, third, and fourth pleas; avers performance generally, on his part, and non-performance on the part of the defendant. The second count is the same as the first, down to the averment of performance by plaintiff inclusive, and then it avers that the defendant departed from the stipulations of the contract, and required the plaintiff to do additional work, and to furnish additional materials, whereby the defendant delayed the plaintiff, and prevented him from completing the buildings by the time agreed, which the plaintiff would otherwise have done. It is then averred that, notwithstanding the additional labor, the plaintiff had completed the work in a reasonable time after the first day of October, 1851, to wit: on the 4th December following, and that the defendant then accepted the same, whereby the second instalment of \$5,000 became payable. The third count is substantially a repetition of the original declaration, and the fourth claims \$10,000 for work and labor done, and for a like sum laid out by the plaintiff for the defendant, from all of which his right of action had accrued before it was instituted.

The defendant filed three pleas to the first count of the amended declaration: 1st, that she was not indebted as was alleged; 2d, that the plaintiff had not performed the special agreement; and 3d, that he had not performed the condition precedent of the contract, to complete the building, which he had agreed to do by the first day of October, 1851. To the rest of the count the defendant demurred. As the verdict of the jury and the judgment rendered for the plaintiff are upon the first amended count, contrary to instructions asked of the court by the defendant, we shall not notice the subsequent pleadings and proceedings in the case, and will confine ourselves to what we consider to have been the legal rights of the parties under the original declaration and the first amended count. The evidence shows that the three stores and the warehouse were not finished by the 1st of October, 1851. It is also proved that

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the special contract had been departed from in the course of its execution; that the defendant insisted that alterations and additions should be made in the buildings after they were begun, contrary to the specifications of the special contract, and that the plaintiff had yielded to her requirements. It may have delayed the completion of the stores and warehouse, as it increased the work to be done; but it having been assented to by the plaintiff without any stipulation that the time for performance of the whole was to be delayed, it must be presumed to have been undertaken by the plaintiff to be done, as to time, according to the original contract. The sinking of the wall probably caused the delay, but that cannot give to the plaintiff any exemption from his obligation to finish the stores and warehouse on the 1st of October, without further proof as to the cause it; nor could it in any event entitle him to an instruction from the court that he might recover under a count or a special contract, in which he avers that the work had been completed by him on the 1st of October in conformity with it. The defendant in the court below, plaintiff in error here, to maintain the issues on her part, and to reduce the damages claimed by the plaintiff, introduced witnesses to show that the work, though it had been done, had not been so in a skilful and workmanlike manner, and that the materials used for it were of an inferior kind, especially in the construction of the store wall, and that it was so deficient in other particulars that she had been put to a large expense to make the buildings fit for use and occupation, which amounted to ten thousand dollars. The plaintiff gave rebutting testimony, and then the defendant prayed the court to instruct the jury, "that if the three stores and warehouse were not finished fit for use and occupation, and delivered to her on the 1st of October, 1851, but were at the time when they were delivered wholly unfit and unsafe for occupation, with the walls of some of them sunken out of plumb, and cracked, and in danger of falling, so as to be utterly untenantable, then the plaintiff was not entitled to demand and recover in this order the said sum of \$5,000, as the stipulated instalment which the special contract purports to make payable on the 1st October, 1851, but

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that the plaintiff was entitled to recover only the value of his work, after deducting the cost and expense incurred by the defendant in repairing the stores and warehouse, to render them fit for occupation, but that the plaintiff, as claimant, was entitled only to nominal damages.

Also, if the defendant did not, at any time whatever, execute and finish, ready for use and occupation, and deliver in that state and condition to the defendant, the stores and warehouse, but had delivered them over to the defendant in a state wholly unsafe and unfit for use, and untenantable, &c., &c., and that the defendant had been obliged to reconstruct the walls, and to refix the buildings, so as to fit them for use and occupation, at her own cost and charges, then that the defendant may recoup or deduct the same against the plaintiff's claim for the said instalment of five thousand dollars claimed in the suit, or the value of the work done by the plaintiff upon the stores and warehouse; but that, in all events, the plaintiff could only recover nominal damages.

These instructions the court refused to give, without the following qualifications :

“ If the jury shall find from the evidence that the plaintiff, Jones, has executed the work according to the specifications forming a part of the contract, in a skilful, diligent, and careful and workmanlike manner, and that his performance of it was with the knowledge and approbation of the defendant, then they should find for the plaintiff the said sum of five thousand dollars, with interest from the date of the delivery of the stores and warehouse to the defendant.”

The defendant excepted to the refusal of the instructions as they had been prayed for, and to the qualifications of them as they were given to the jury.

There is error in this instruction. The count and the plea of the defendant, and the instruction asked, raised the construction of the special contract, whether or not the right of the plaintiff to recover the second instalment did not depend upon the completion of the stores and warehouse by the 1st of October, 1851; whether that was not a condition precedent, or a case in which the parties had agreed—one to deliver the buildings finished, according to the special

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contract, and the other to pay the second instalment concurrently, if they were then so delivered. A failure by the plaintiff to finish and deliver on that day is fatal to a recovery upon the special contract. The plaintiff in the first amended count declares upon it as such, avers his performance accordingly, and the proof is that he had not so performed. We infer, from the whole contract, that it was the intention of the parties that the performance of the work was to be a condition precedent to the payment of the second instalment. There is no word in the contract to make that doubtful.

The plaintiff undertook to furnish the materials and to construct the buildings, according to specifications. Part of them were to be finished, and to be delivered to the defendant, on the 1st of October, 1851, and the residue on the 1st December afterwards. For the whole, the defendant was to pay \$24,000—\$5,000 on the 1st of July, 1851; \$5,000 on the 1st of October, 1851, if the stores and warehouse were then finished for use and occupation, and delivered over on that day to the defendant; and if that was done, then the balance of the \$24,000 was to be paid on the 1st of January, 1860, with the interest, as mentioned in the special contract.

The words of the contract for payment are, "in consideration of the covenants, and their due performance." Such words import a condition. It is difficult at all times to distinguish whether contracts are dependent or independent; but there are rules collected from judicial decisions, by which it may be determined. We have tested the correctness of them by an examination of several authorities.

"When the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other." Such is the case with the special contract with which we are now dealing. "If the agreements go to a part only of the consideration on both sides, the promises are so far independent. If money is to be paid on a day certain, in consideration of a thing to be performed at an earlier day, the performance of that thing is a condition precedent to the payment; and if money is to be paid by instalments, some before a thing shall be done and some when it is

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done, the doing of the thing is not a condition precedent to the former payments, *but is so to the latter*. And if there be a day for the payment of money, and that comes before the day for the doing of the thing, or before the time when the thing from its nature can be performed, then the payment is obligatory, and an action may be brought for it, independently of the act to be done. Concurrent promises are those where the acts to be performed are simultaneous; and either party may sue the other for a breach of the contract, on showing, either that he was able, ready, and willing to do his act at a proper time and in a proper way, or that he was prevented by the act or default of the other contracting party." 2 Parsons on Contracts, ch. 3, 189.

The first instalment was to be paid on an appointed day, in consideration of the work to be begun; and the second instalment was to be paid on a subsequent day, if the work should then be finished and delivered over to the defendant, ready and fit for use and occupation. Before that day it could not have been demanded; on that day, the work having been performed, it might have been. The evidence shows that the work had not been done on the 1st of October, 1851, and was not finished until the 1st of December.

The plaintiff avers in his first amended count that he had, on his part, complied with his undertaking in the special contract. The issue upon it is, that he had not done so, and he gave no proof to sustain the averment.

The evidence entitled the defendant to a verdict on that count; but the court, without regard to the time fixed upon for the work to be finished, instructed the jury, that if the work had been done according to the specifications forming a part of the contract, in a skilful and workmanlike manner, or if his execution of it was with the knowledge and approbation of the defendant, then they were to find for the plaintiff the sum of five thousand dollars, with interest from the date of the delivery of the stores and warehouse. It must be obvious that this instruction makes between the parties a different contract from that into which they had entered, and one different from that the plaintiff had declared upon.

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The plaintiff gave no evidence to support the count; but there was evidence showing the reverse of performance on his part. For this error in the court's instruction to the jury upon the first amended count, we shall remand the case for another trial upon the plaintiff's original declaration in debt with the common counts, as in *indebitatus assumpsit*.

We do not consider that the plaintiff's right to recover upon that declaration was in any way affected by the extra work which was done upon the requisition of the defendant, or by the increase of materials which he furnished for that purpose; or that the sinking of the foundation of the buildings excused him from finishing the work by the time specified; or that the acceptance of the buildings by the defendant as they had been constructed by the plaintiff was any release of the plaintiff from his undertaking to finish them in the time specified in the contract. But after that time had passed, the plaintiff continued, with the knowledge and permission of the defendant, and also with the knowledge of her superintending architect, to do the work specified in the contract, and also to do the extra work, and to furnish the materials necessary for both. And when the work was done by the plaintiff, however imperfectly that may have been, the defendant accepted it.

The law in such a case implies, that the work done and the materials furnished were to be paid for. The general rule of law is, that while a special contract remains open—that is, unperformed—the party whose part of it has not been done cannot sue in *indebitatus assumpsit* to recover a compensation for what he has done, until the whole shall be completed. This principle is affirmed and acted upon in *Cutter v. Powell*, 6 Term Reports, 320; also in *Hulle v. Heightman*, 2 East., 245, and in several other cases.

But the exceptions from that rule are in cases in which something has been done under a special contract, but not in strict accordance with that contract. In such a case, the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration of it. Still, if the other party has derived any benefit from the labor done, it would be unjust to allow him to retain

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that without paying anything. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred is really worth; and to recover it, an action of *indebitatus assumpsit* is maintainable.

Such is the law now in England and in the United States, notwithstanding many cases are to be found in the reports of both countries at variance with it. It was recognised by this court to be the existing rule in the case of *Slater v. Emerson*, 19 Howard, 224, 239.

The difference between the rule now and in earlier times, it is believed, has caused much of the difficulty in the establishment of the present rule. Formerly it was held, that whenever anything was done under a special contract not in conformity with it, the party for whom it was done was obliged to pay the stipulated price; but that he might resort to a cross-action, to indemnify himself for the deficiency in the consideration. *Blair v. Davis*, 1794, cited in 7 East., 470. See *Smith's L. Cases*, in the notes following the case of *Cutter and Powell*, 2d vol., for a full description, historical and chronological, of the rule as it now prevails and as it formerly was.

The rule as it now exists has been recently discussed and affirmed in the Queen's Bench, in the case of *Munroe v. Phelps and Bell*, 8 Ellis and Blackburn, 739; 92 English Common Law.

It has been the rule in the courts of New York for more than thirty years. In the case of *Jewell et al. v. Schroepnell*, 4 Cowan, 564, it was decided, that if there be a special contract under seal to do work, and it be not done pursuant to the agreement, whether in point of time or in other respects, the party who did the work may recover, upon the common counts in *assumpsit*, for work and labor done. If, when the time arrives for performance, the party goes on to complete the work, with the knowledge of his employer, it was evidence of a promise to pay for the work. So if the employer does not object.

This rule prevails, also, in Massachusetts, in Pennsylvania, and in several of the other States. Also in Alabama, as may

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be seen in the case of *McVoy v. Wheeler*, 6 Porter, 201. It is discussed, with a very accurate discrimination of its application, in the 2d vol. of Professor Parsons upon Contracts.

In the trial of such an action, where the defence is not presented as a matter of set-off, arising on an independent contract, but for the purpose of reducing the plaintiff's damages, because he had not complied with his cross obligations arising on the same contract, the defendant may be allowed a recoupment from the damages claimed by the plaintiff for such loss as she shall have sustained from the negligence of the plaintiff. Such evidence is allowed to prevent circuity of action, and to prevent further litigation upon the same matter. It may be well to say, that the court allowed a recoupment in *Green and Biddle*, 8 Wheat., 1, to a disseizor, who was a bona fide occupant of land, for the improvement made by him upon it, against the plaintiff's damages. But such recoupment cannot be claimed unless the defendant shall file a definite statement of his claims, with notice of it to the plaintiff, sufficiently in time before the trial term of the case to enable the latter to meet the matter with proof on his side.

We have pursued the case in hand further than may have been necessary; but it was thought best to do so, as the points now here ruled have not before been expressly under the consideration of this court.

The judgment given in the court below is reversed; and we shall order that the case shall be remanded to it, with directions for its trial again, pursuant to our rulings in this opinion.

NATHAN E. HOOPER, LOUISA J. HOOPER, AND AMANDA E. HOOPER, MINORS, BY ABSALOM FOWLER, THEIR NEXT FRIEND, PLAINTIFFS IN ERROR, *v. JACOB SCHEIMER.*

It is the settled doctrine of this court, that no action of ejectment will lie on an entry made with the register and receiver of the land office, such being merely an equitable title, notwithstanding a State Legislature may have provided otherwise by statute.

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The law is only binding on the State courts, and has no force in the Circuit Courts of the Union.

It is also the settled doctrine of this court, that a patent carries the fee, and is the best title known to a court of law.

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

It was an ejectment brought by the Hoopers against Scheimer, for an undivided one-fourth part of lots numbered one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve, in block numbered ten, in that part of the city of Little Rock lying east of the Quapaw line, and known as Governor Pope's addition; and are embraced in the northwest fractional quarter of section number two, in township one north, range twelve west.

The plea was, not guilty, &c.; and upon the trial of the issue by a jury, a verdict for the defendant was returned, and he had judgment for costs.

The mode of bringing an ejectment in Arkansas is merely to state in the declaration that the plaintiff was entitled to the possession of the property, and that the defendant entered upon it and ejected the plaintiff therefrom.

The Hoopers were the heirs of Cloyes, and claimed under his pre-emption, which has been mentioned more than once in these reports.

The defendant claimed under a patent embracing the lots in controversy, to the reading of which in evidence the plaintiffs objected, on the ground that it was inoperative and void as to the said northwest fractional quarter on which said pre-emption had been established, because said fractional quarter had been previously appropriated to the private use of said Nathan Cloyes, deceased, and that such patent had been issued without authority, in violation and without warrant of law, and for land not subject to be granted or patented; but the court overruled the objection, and permitted the patent to be read; whereupon the plaintiffs excepted.

There was other evidence on both sides given upon the trial, but it is not necessary to mention it in this report.

After the evidence was finished, the plaintiffs offered two

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prayers to the court, the purport of which was to declare the patent inoperative and void; which prayers were refused. The defendant offered five which were granted, of which it is only necessary, in this report, to notice the two following.

1. The patent from the United States, conveying the fee to the northwest fractional quarter of section two, in township one north, of range twelve west, to the grantee therein named, dated 2d November, 1833, not appearing to be void, is a complete and paramount legal title, and must prevail in this action over the title of the plaintiffs, and any equities that may exist between parties behind it can only be assisted and be made available in a court of chancery, but cannot affect the patent in this action; and if the jury believe that the undivided interest mentioned in the declaration is embraced in the patent as a portion of the said tract of land, the finding of the jury should be for the defendant.

2. That the action of ejectment is founded on the legal title, and the plaintiffs must recover on the strength of their own title; that a patent from the United States is a higher and better legal title, and must prevail, in an action of ejectment, over an entry with the register and receiver or a pre-emption right under the laws of the United States, notwithstanding the State statute may authorize an action of ejectment to be instituted on the latter, and maintained against any person not holding under a superior title.

The case was submitted on printed arguments by *Mr. Stillwell* for the plaintiffs in error, and *Mr. Hempstead* for the defendant.

Mr. Stillwell's first point was this: Can the plaintiffs, claiming under a grant of pre-emption, recover against the defendant, claiming under a patent issued subsequent to the pre-emption?

We respectfully submit, that by the act of Congress of 29th May, 1830, the N. W. fractional quarter section 2, 1 N., 12 W., was appropriated to the use of the occupant, Nathan Cloyes, was not subject to be granted to any other person, by

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Congress or any officer of the United States, until the expiration of the time allowed him to make payment therefor, by that act and the act of 15th July, 1832; and it appearing that payment was made by his heirs within the time, the patent was void.

Perry v. O'Hanlon, 11 Missouri Rep., 595.

McAfee v. Keirn, 7 Smed. and Marsh Rep., 789.

Nicks v. Rector, 4 Ark. Rep., 283, 284.

Wynn v. Garland, 16 Ark. Rep., 454.

13 Pet. Rep., 513; 6 Ib., 738.

5 Wheat. Rep., 303.

Cromelin v. Waiter, 9 Ala. Rep., (N. S.) 605.

Stoddard v. Chambers, 2 How. Rep., 318.

10 Smed. and Marsh, (Miss.,) 461.

7 Smed. and Marsh, (Miss.,) 366.

2 Laws Ins. and Ops., p. 16, No. 15.

2 Laws Ins. and Ops., No. 39, 40, p. 1045.

8 Mo. Rep., 94.

6 Cow. Rep., 282.

A pre-emption is a legal vested right.

9 How. U. S. R., 333.

4 Ark. Rep., 283.

The patent issued to Gov. Pope being void, as issued without authority, may be impeached in a court of law.

6 Cond. Rep., 358; 10 Johns. Rep., 26.

4 Cond. Rep., 653; 5 Cond Rep., 724, 664.

11 Mo. Rep., 595; 16 Ohio Rep., 66.

8 Mo. Rep., 94.

Under the statute of Arkansas, the patent certificate is of equal grade and dignity with the patent itself.

Rev. Stat. of Ark., p. 344, ch. 53, secs. 1 and 2.

McClaren v. Wicker, 8 Ark. Rep., 195.

Penn v. O'Hanlon, 11 Mo. Rep., 595.

Morton v. Blankenship, 5 Ib. Rep., 356.

Burner v. Marlow, 1 Scum. (Ill.) Rep., 162.

James v. Steel, 3 ib., 99.

And is a better title than a patent founded on a subsequent entry, within the meaning of the statute.

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Pettigrew v. Shirley, 9 Mo. Rep., 688.

5 ib., 350; 11 ib., 595.

The patent could not affect the pre-existing title of the ancestor of the plaintiffs.

N. O. v. Armas, 9 Pet. Rep., 236.

U. S. v. Arredondo, 6 ib., 738.

Catlin v. Jackson, 8 Johns. Rep., 555.

Jackson v. Covey, ib., 388.

Fletcher v. Peck, 2 Cond. Rep., 321.

Nicks v. Rector, 4 Ark. Rep., 283.

And extraneous evidence was admissible to show that the patent was void, for want of authority to issue it.

Polk's Lessee v. Wendell, 3 Cond. Rep., 294.

4 ib., 653.

2 How. U. S. Rep., 317, *et seq.*

Collins v. Beaumin, 1 Mo. Rep., 385, (540.)

The title of the plaintiffs related to the date of the pre-emption act, (29th May, 1830.) The making of proof of occupation and cultivation, the adjudication of the right by the land officers, and the payment of the purchase money, were successive steps to perfect the right, and are to be regarded as having been done on that day.

Pettigrew v. Shirley, 9 Mo. Rep., 688.

Wynn v. Garland, 16 Ark. Rep., 454.

And, consequently, the intervening rights cut out.

Landes v. Brant, 10 How. Rep., 372.

12 Mo. Rep., 148; *Walker's (Miss.) Rep.*, 97.

3 Cow. Rep., 75; *Viner's Abr.*, Tit. Relation, 290.

Cruise on Real Property, vol. 5, p. 510, *et seq.*

When the patent was issued, the land had been appropriated, and was not subject to grant; and it ought to have been excluded by the Circuit Court, or the jury instructed to disregard it, as the plaintiffs asked. The act of issuing it was a mere ministerial act, and, as to the rights of the plaintiffs' ancestors, was wholly ineffectual to prejudice them.

Ware v. Busk, 1 McLean's Rep., 535.

Mr. Hempstead treated this point as follows:

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The first and principal question is, whether a patent issued by the United States can be impeached, annulled, and set aside, in an action at law.

I affirm that a patent is unimpeachable at law, except, perhaps, when it appears on its own face to be void; and the authorities on this point are so uniform and unbroken in the courts, Federal and State, that little else will be necessary beyond a reference to them.

In ejectment, the rule is universal, that the plaintiff must show the right to possession to be in himself positively. It is immaterial, as to his right of recovery, whether it be out of the tenant or not, if it be not in himself; and it follows, a tenant is always at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself.

Love v. Simms, 9 Wheat., 524.

Greenleaf's Lessee v. Birth, 6 Pet., 312.

King v. Stevens, 18 Ala., 475.

Rupert v. Mark, 15 Illinois, 540.

1 Blackf., 131; 8 Blackf., 320, 366.

And this grows out of a doctrine, universal in that action, requiring the plaintiff to recover on the strength of his own title, and not allowing him to be successful, on account of the weakness of the title of the defendant, or because he may have none at all.

2 Greenl. Ev., 331.

Marsh v. Brooks, 8 How., 233.

In Kentucky, it is a settled principle that courts of law will not look beyond the patent, and it is only in a court of equity that a prior right or equity can be established. The courts of the United States have adopted the same principle.

Finley v. Williams, 9 Cranch, 167.

The general rule in Kentucky appears to be, that patents cannot be impeached collaterally by evidence *dehors* the patent. They have the dignity of records. It is true a patent, when it appears on its face to be illegal, may be treated as a nullity, or considered as void; yet, if it appears perfect on its face, it cannot be vacated or annulled by matter *dehors* the patent. It is only by *scire facias*, or other regular mode, that it can be

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vacated. The reason of the distinction is evident. The Commonwealth cannot be divested of her title but by matter of record; and when she has so divested herself, she cannot regularly reinvest herself of the title but by matter of record. If a patent be illegal upon its face, it is itself record evidence of the matter which renders it a nullity; but if it be legal and perfect upon its face, it is a record of the title having passed to the grantee, and it cannot regularly be defeated but by matter of as high a nature.

Bledsoe's Devisees v. Wells., 4 Bibb, 329.

The same doctrine will be found explicitly recognised in Virginia, in *Alexander v. Greenup*, 1 Munf., 134.

It is fully supported by the English authorities.

5 Com. Dig., F. 1, F. 4, F. 6, F. 7, title Patent

2 Bl. Com., 346.

A patent is a record of high dignity. It issues under the great seal, is enrolled, and the proceeding to vacate or annul it must emanate from chancery, and may be set on foot by the Government, or any one prejudiced.

5 Com. Dig. Patent, F. 6, p. 357.

2 Com. Dig. Chancery, C. 1, p. 366.

Taylor v. Fletcher, 7 B. Monroe, 81.

There are certain exceptions to this rule, which may go far towards reconciling contradictory cases:

1. Where the Legislature has declared that the patent shall be void, if issued in contravention of a described state of case.

2. Where the Legislature has declared that the patent shall be deemed fraudulent, if issued under similar circumstances.

Taylor v. Fletcher, 7 B. Monroe, 83.

Ray v. Barker, 1 B. Monroe, 368.

Dallam v. Handley, 2 A. K. Marsh., 418.

Atchley v. Latham, 2 Litt., 362.

Jennings v. Whittaker, 4 B. Monroe, 51.

Pearson v. Baker, 4 Dana, 322.

Cain v. Flynn, 4 Dana, 501.

Sutton v. Mencer, 6 B. Monroe, 438.

Little v. Bishop, 9 B. Monroe, 246.

A patent cannot be declared void at law, because the pat-

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entee failed to give one in actual possession the three months' notice required by the act of 1831, (2 Stat. Law, 1037;) but the settlers' rights under the act may be enforced in chancery.

Pearson v. Baker, 4 Dana, 321.

A party cannot travel behind a patent to avoid it.

4 Monroe, 51.

A patent, when attacked incidentally, cannot be declared void, unless it be procured by actual fraud, or is void on its face, or has been declared void by law.

Underwood v. Crutcher, 7 J. J. Marsh., 532.

A patent cannot be avoided at law in a collateral proceeding, by matters *dehors* the patent, unless it is declared void by statute, or its nullity indicated by some equally explicit statutory denunciation.

4 Bibb, 330; 4 Mon., 51; 4 Dana, 322.

In Pennsylvania, where there are no courts of chancery, an action of ejectment may be sustained on an equitable title; but the rule always has been there, in the courts of the United States, that the plaintiff must show a paramount legal title.

2 Wash. C. C. R., 35.

12 Peters, 23.

Although State courts cannot interfere with the primary disposal of the public land, yet, if one obtain a legal title from the United States improperly, and to the prejudice of a prior right, equity will relieve and hold him as a trustee.

Groves's Heirs v. Fulsome, 16 Miss., 544.

Huntsucker v. Clark, 12 Miss., 337.

Stephenson v. Smith, 7 Miss., 610.

Gaines v. Hale, 16 Ark., 25.

It is only where letters patent are void on their face, as being issued contrary to law, or where the grant is of an estate contrary to law, as against the prohibition of a statute, that it possibly may be held void in a collateral proceeding.

Jackson v. Marsh., 6 Cowen, 282.

Jackson v. Lawton, 10 Johns., 23.

Parmlee v. Oswego Co., 7 Barb., 622.

The People v. Livingston, 8 Barb., 278, 284, 285, 286, 287, 295.

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Jackson v. Hart, 12 Johns., 77.

People v. Mauran, 5 Denio, 389, 398, 400.

A patent must prevail in a trial at law, unless it is in fact a *felo de se*—unless it carries on its own face the evidence of a nullity. One perfect on its face is not to be avoided, in a trial at law, by anything short of an elder patent. It is not to be affected by evidence or circumstances which might show that, in a court of equity, the party offering impeaching evidence would probably prevail. The jurisdictions of the two tribunals must be kept distinct, and the patent must prevail at law, although it may be made to yield to the superior right of the adverse party in another forum. In the case of an actual and perfect patent, there is no remedy but to set it aside in a court of equity, or in some direct proceeding having that for its direct end and object. It cannot be done in the ordinary progress of a trial at law, on evidence which the party had no means to know would be relied on, and therefore could not be prepared to meet. In other words, you cannot go behind a patent in a trial at law. The patent alone must prevail.

The principle interdicting the introduction of extrinsic evidence to impeach a patent free from objection on its face, does not depend on the grade or nature of the evidence.

Norvell v. Camm, 6 Munf., 233, 238.

Witherington v. McDonald, 1 Hen. and Munf., 303.

Alexander v. Greenup, 1 Munf., 140.

The same doctrine was laid down by Marshall, C. J., in *Stringer v. Lessee of Young*, 3 Peters, 340. He said no case had shown that a patent may be impeached at law, unless it be for fraud—not legal and technical, but actual and positive fraud, in fact, committed by the person who obtained it; and even that, said he, is questioned, citing the above case of *Witherington v. McDonald*, 1 H. and M., 306; also *Hoofnagle v. Anderson*, 7 Wheat., 212; *Boardman v. Reed*, 6 Pet., 342; 6 Cranch, 131; 8 How., 233; *Patterson v. Winn*, 11 Wheat., 380. The opinion of the Chief Justice evidently was, that a patent could not be impeached at law, even for fraud—actual, positive fraud. It has been said, a patent is void and confers no title when it issues for land that has been previously pat-

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ented to another individual, or granted to him by act of Congress, which is equivalent to a patent.

Stoddard v. Chambers, 2 How., 318.

Grignon v. Astor, ib., 344.

Why is this so? Why, under such circumstances, may a patent be held inoperative at law? Those cases themselves answer—because the fee has passed out of the United States, and vested in the first patentee or grantee.

18 How., 88; 9 Cranch, 99.

Those cases do not warrant, nor are there any cases to be found in the courts of the United States which warrant, the impeachment of a patent, at law, in a case where a pre-emptioneer claims in opposition to that patent. Resort must be had to a court of equity, and to that alone.

An elder equitable right may be investigated, and asserted in chancery against a patent, but this cannot be done at law. This court, says McLEAN, J., (6 Peters, 342,) have repeatedly decided that, at law, no facts behind the patent can be investigated.

A patent is a better legal title than an entry with the register and receiver, and in an action of ejectment must prevail over it.

Gaines v. Hale, 16 Ark., 25.

Griffith v. Deerfelt, 17 Miss., 31.

Dickinson v. Brown, 9 S. and M., 130.

Bruckner v. Lawrence, 1 Doug. (Mich.,) 37.

Bagnell v. Broderick, 13 Peters, 436.

Wilcox v. Jackson, 13 Peters, 516.

Wiggins v. Lusk, 12 Ill., 132.

A patent is evidence, in a court of law, of the regularity of all previous steps to it, and no facts behind it can be investigated.

6 Peters, 724; 5 Wheat., 293.

7 Wheat., 151; 11 Wheat., 580; 4 Peters, 340.

In actions at law, the legal title must prevail, and there can be no inquiry into the equities of the parties. They must be ascertained and adjusted in a court of equity. Where land is purchased in the name of one person, with the funds of an-

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other, the legal estate is vested in the former. The latter acquires only an equitable estate, and he must resort to a court of equity to enforce it, and cannot assert it in an action of ejectment.

Phelps v. Kellogg, 15 Ill. R., 136.

No equitable title can be set up in ejectment, in opposition to the legal estate.

Jackson v. Chase, 2 Johns., 84.

Jackson v. Pierce, ib., 222.

To recover in ejectment, the plaintiff must show a paramount legal title.

Swayze v. Burke, 12 Peters, 23.

A patent is conclusive in a court of law.

West v. Cochran, 17 How., 403.

14 How., 382; 15 How., 450.

The legal title must prevail at law.

13 How., 24; 11 How., 568.

9 How., 171; 8 How., 365.

A plaintiff must recover upon the strength of his title, and that must be a legal as contradistinguished from an equitable title.

Livingston v. Story, 9 Peters, 632.

United States v. King, 7 How., 846.

Gilmer v. Poindexter, 10 How., 297.

The fee remains in the United States until the issuing of the patent, and it must be so considered at law, although in equity the holder of the patent certificate of the register is held to be the owner.

Carroll v. Safford, 3 How., 460, 461.

Fraud, which goes to the question, whether the instrument ever had any legal existence, may be admitted in a court of law. But, otherwise, chancery is the proper forum.

Hartshorn v. Day, 19 How., 211, 223.

A patent cannot be collaterally avoided at law, even for fraud.

Field v. Seabury, 19 How., 324, 332.

This case is conclusive on the subject, and it was said that the case in 2 How. S. C. R., 318, did not authorize the im-

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peachment of a patent at law. Courts of justice have no authority to disregard surveys and patents, when dealing with them in actions of ejectment.

West v. Cochran, 17 How., 403.

Willet v. Sandford, 19 How., 82.

The Legislature of Arkansas has provided that an action of ejectment may be maintained on an entry made with the register and receiver of the proper land office of the United States, or on a pre-emption right under the laws of the United States.

Digest, 454.

But a patent, being a superior legal title, must, of course, prevail over them; nor would it be competent for any State legislation to give such titles, which are only of an equitable nature, precedence over the legal title.

Wilcox v. Jackson, 13 Peters, 516.

Irvine v. Marshall, 20 How., 566.

Bagnell v. Broderick, 13 Peters, 450, 451.

And although actions of ejectment may be maintained on an equitable title, or less than a complete legal title, in the State courts, by virtue of positive legislation, yet it may admit of great doubt, whether, in the courts of the United States, that action can be sustained on anything but the paramount legal title. Such I understand to have been decided.

In *Carson's Lessee v. Boudinot*, 2 Wash. C. C. R., 33, Judge Washington so held, although, there being no courts of chancery in Pennsylvania, the State courts allow a recovery in ejectment on an equitable title.

And, also, in *Swayze v. Burke*, 12 Peters, 23, also from Pennsylvania, it was held by this court, Justice McLEAN delivering the opinion, that, "as there is no court of chancery under the laws of Pennsylvania, an action of ejectment is sustained on an equitable title by the courts of that State. Such is not the practice in the courts of the United States; and in this case," says he, "if the plaintiffs fail to show a paramount legal title in themselves, they cannot recover."

Certainly the action never can be maintained against the superior title—certainly the dignity of a patent can never be

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imparted to the certificate of purchase; or, to what is a title of inferior grade, a pre-emption right.

Bagnell v. Broderick, 13 Peters, 450.

What security would there be in titles, if, in actions at law, juries should undertake to pronounce on the validity of patents—undertake to say whether they rightfully or wrongfully issued—or whether the officers of Government had proceeded according to law, and, if not in a collateral proceeding, a trial at *nisi prius*, annul the highest and most solemn titles emanating from Government? Here is a patent from the United States, regularly issued, under the great seal, signed by the President, and having passed through all the formalities requisite to make it the highest and most perfect evidence of title that can possibly exist, under any Government—regular and formal on its face—and the proposition is, that a jury, ignorant of law and legal proceedings—composed, it may be, of persons not fit to try a six-bit case—are to pronounce upon its validity, and avoid it, if they please. What they might think to be fraud, might be no fraud at all; there might be ample power in the officer to issue it, and yet the jury might think otherwise. One jury might set aside a patent—another jury sustain it; and so, what ought to be the highest evidence of right, is something, or nothing, according to the whim, caprice, intelligence, or ignorance, of the jury. The whole thing is absurd; everybody sees it; and such a doctrine ought to receive no countenance whatever. If a patent issued, in many cases, after a long contest, and against vehement opposition, as this was issued, is not to import absolute verity at law, the issuing of patents ought to cease altogether, as they would only delude the purchaser; if, indeed, the disappointed contestant, in each case, could, the next day, in effect, take an appeal from a solemn act of Government to a jury, and reinvestigate the whole matter, and have the patent avoided at law. A claimant, disappointed in obtaining a patent himself, and his adversary having got it, forthwith brings an action of ejectment, and transfers the question to a jury, and reopens it again, with a view of having the patent annulled, in a forum where no issue can be made upon it, nor parties in interest

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brought before the court. I say again, the whole thing is absurd. If a patent is to be impeached or annulled, it can only be done by a direct proceeding in chancery for that purpose, and where all parties in interest can be brought, and their respective rights ascertained and protected. And to that forum these claimants resorted; and, after full investigation, the pre-emption claim was declared fraudulent, and the patent to be good; and they then commenced again at law to retry that question, and want to have a jury decide it, when they have failed in the proper tribunal. I have no idea parties can be successful in the attempt to commit such legal outrages.

The instructions given on that point are sustained by both principle and authority, and nothing further need be said to demonstrate their correctness.

2. The right forum to impeach the patent was a court of chancery, and that had been resorted to, and the pre-emption claim of Cloyes declared invalid, and to be in fact a base fraud, as the proof in the chancery case conclusively showed it was.

Lytle et al. v. the State et al., 17 Ark., 608. See transcript in this court, No. 123.

It was purely vexatious to bring this ejectment suit, and the plaintiffs had no right to do it, as the same matter was involved in their chancery suit.

Mason v. Chambers, 4 J. J. Marsh., 401

Mr. Justice CATRON delivered the opinion of the court.

An action of ejectment was brought in the Circuit Court of the United States for eastern district of Arkansas, founded on an entry made in a United States land office. This was the only title produced on the trial by the plaintiffs.

The defendant held possession under a patent from the United States to John Pope, (Governor, &c.,) with which the defendant connected himself by a regular chain of conveyances. The Circuit Court held the patent to be the better legal title, and so instructed the jury, who found for the defendant; and the plaintiffs prosecute this writ of error to reverse that judgment.

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By the statute of Arkansas, an action of ejectment may be maintained where the plaintiff claims possession by virtue of an entry made with the register and receiver of the proper land office of the United States. Ar. Digest, 454.

This court held, in the case of *Bagnell et al. v. Broderick*, (13 Peters, 450,) "that Congress had the sole power to declare the dignity and effect of a patent issuing from the United States; that a patent carries the fee, and is the best title known to a court of law." Such is the settled doctrine of this court.

But there is another question, standing in advance of the foregoing, to wit: Can an action of ejectment be maintained in the Federal courts against a defendant in possession, on an entry made with the register and receiver?

It is also the settled doctrine of this court, that no action of ejectment will lie on such an equitable title, notwithstanding a State Legislature may have provided otherwise by statute. The law is only binding on the State courts, and has no force in the Circuit Courts of the Union. *Fenn v. Holme*, (21 How., 482.)

It is ordered, that the judgment be affirmed.

No. 60 depends on the same titles and facts and instructions to the jury as are set forth in 59; and the same verdict and judgment were given in the Circuit Court.

We order it to be affirmed likewise.

THE UNITED STATES, APPELLANTS, *v.* ELLEN E. WHITE, ADMINISTRATRIX OF CHARLES WHITE, DECEASED.

Where two persons appear to have conflicting claims to land in California, and the United States do not appear to have any interest in the matter, and the case is brought to this court by proceedings to which the United States are a party, this court will remand the record to the court in California, with directions to allow the contesting parties to proceed in the manner pointed out by the act of Congress passed in 1851.

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

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The petition was filed by Charles White, claiming under Manuel Ortega, who gave in evidence the following documents of title, viz:

1. June 12, 1840. A petition of Ortega to the Governor Alvarado for a grant of land called Arroyo de San Antonio, describing its boundaries.
2. June 20, 1840. Reference by the Governor to the military commander of the frontier of Sonoma, to make report.
3. Report of M. G. Vallejo, that the land may be granted.
4. The marginal decree signed by Alvarado, as follows:

MONTEREY, August 10, 1840.

In conformity with the information given by the military commander of the frontier of Sonoma, and in virtue of the faculties with which I am invested, I grant to Don Antonio Ortega the land petitioned for, with the understanding that, to expedite the respective title and to regulate the necessary documents by which he shall mark out the lines and perform those necessary acts, he shall make a map, as required by law, which he will present opportunely.

This decree shall be returned to him, that it may serve him as a security during the other operations indicated.

(Signed)

ALVARADO.

This title never having been completed by a final grant, the expediente is not to be found among the archives, having been returned to the petitioner to "serve him as a security" in the mean while. But its authenticity is proved by the testimony of the officers, Vallejo and Alvarado, who themselves signed the documents. Their genuineness is therefore not disputed, at least there is no testimony going to impeach the characters of these witnesses.

In order to establish an equity, the claimants examined, first, Ortega himself, who testified that, after the decree made by Alvarado in his favor and in the same year, he applied to Alvarado for a full and formal title; but it was during a recess of the Departmental Assembly, and he could not obtain it. That he presented a diseno or map to the Governor, and went to Oregon, leaving his papers in the private custody of Gov-

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ernor Alvarado. A copy of this map is attached. He says he did not occupy the land himself in person; but that Juan Miranda, his father-in-law, occupied it for him, by placing his son there. That Miranda, the father, died in 1845, and his son continued to occupy the land. That he (Ortega) went to Oregon in 1843, and did not return till after the occupancy of California by the Americans. That after his return he went to Alvarado and got his papers for the purpose of establishing his claim, which he conveyed to a priest named Brouillet. As to the custody and delivery of the papers, he is corroborated by Alvarado.

Richardson, another witness, also testified that he knew the land; that it was occupied by virtue of a contract between Ortega and Miranda, and the occupation continued till 1850 by the son of Miranda; that both Ortega and Miranda told him that Miranda occupied the rancho for Ortega; that a house was built; and the land occupied by cattle and horses, and by cultivation.

Vallejo testified as follows:

"It was, I think, about 1838 or 1839 that Ortega applied to me for permission to settle there; and immediately after I gave that permission, he moved on to the land, taking with him his father-in-law, Juan Miranda, and his family; he built a house there and a corral, and stocked the place with horses and cattle; I furnished him with stock to stock the place, and he went on to cultivate a portion of the land; he after that obtained a grant from Governor Alvarado about 1840; Ortega, when he placed his father-in-law on the land, was an officer in the army, and was a portion of the time with his command, and went occasionally to his ranch."

One Jose de la Rosa also testifies that he made the map for Ortega in 1839 or 1840—wrote his petition for him, and saw the grant of Alvarado in his possession on the ranch of San Antonio. That Ortega's wife and family resided on the ranch with her father's family; that Ortega himself left the country, and did not return till 1847; that in 1844 the witness wrote a petition for Miranda for this same land, and presented it to the Governor Micheltorena for him; that a grant to him was

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written by one Clark, in the Secretary's office, which was never signed, on account of civil disturbances.

A witness named Martin was called by the attorney for the United States, who swore that he occupied this land in 1832 by license from General Vittoria, and had "a loan of the land;" that he continued such possession till 1837; built a house and cultivated the land; that he delivered possession of the land to Miranda, and removed his house to another tract; that Miranda took possession by putting his son on the land, with cattle, &c.; that Ortega was married, in 1838, to Miranda's daughter; that he had delivered the possession to Miranda *before that time*; that Miranda's son continued the possession till he was sold out by the sheriff.

Mesa, who lived in the family of Miranda at the time this land was occupied, swears that it was claimed and occupied by Miranda, who had been working in the mission for some years; that the cattle were given to him in pay for his labor, and branded with Miranda's brand; that Miranda occupied it, with the consent of Vallejo, for the purpose of applying to the Government for a title; that Ortega was poor, and had no property but a horse. This witness is also confirmed by the testimony of Francesca Miranda, the wife of Ortega, and whom he had forsaken when he went to Oregon.

The expediente of Miranda is found among the archives. It commences with a petition in February, 1844, by Miranda, representing that for more than four years he had been in possession of a place in the Arroyo San Antonio, which had been granted to him by Vallejo, but that the papers were lost. The informe is in due form; the grant drawn out, but not signed.

The board of commissioners adjudged that the claim of the petitioner was valid, and decreed that it should be confirmed.

The District Court affirmed this decree, and the United States appealed to this court.

It was argued by *Mr. Black* (Attorney General) and *Mr. Crittenden* for the United States, and by *Mr. Cushing* and *Mr. Phillips* for the appellee.

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The arguments in the case involved the title of Miranda as contradictory to the title of Ortega, and, under the opinion of the court, it is deemed proper to omit them.

Mr. Justice GRIER delivered the opinion of the court.

It is clear, from the evidence in this case, that, as against the United States, either Ortega or Miranda has a just claim to a confirmation of his title to the tract in dispute. But whether Ortega was landlord, and Miranda his tenant, or which of the claimants has attempted to overreach the other, are questions in which the Government has no interest. The United States officers are not bound to settle this dispute between these parties in these proceedings. Nor should either party be permitted to carry on their litigation, by assuming to act for the Government, and thus take the advantage of their opponents, by fighting under its shield and at its expense. The District Attorney of California had neither interest nor authority to represent Miranda in order to defeat Ortega; nor can this court be thus compelled, on an appeal by the Attorney General, to become the arbiters of disputes in which the Government has no concern.

The patent issued in pursuance of the act of Congress which authorizes these proceedings, is conclusive only between the United States and the claimants. It does not affect the interest of third parties.

The act of Congress (3d March, 1851, section 13) points out the mode in which contesting claimants may litigate their respective rights to a patent from the Government.

Instead of an appeal to this court to settle the rights of Miranda in a proceeding in which he is no party, the claimants under him, if there be any, should proceed in the mode pointed out by the act, which provides: "That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same; a copy of which petition shall

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be served upon the adverse party, thirty days before the time appointed for hearing the same. And it shall and may be lawful for the district judge, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same until the title thereto shall have been finally decided; a copy of which order shall be transmitted to the Commissioner of the General Land Office; and thereupon no patent shall issue until such decision has been made," &c.

It appears from the record that Valentine, who purchased the title of Miranda at sheriff's sale, had filed his claim before the board of commissioners for confirmation, and afterwards withdrew his petition. Now, if Miranda or his assignee makes no claim; if he admits the tenancy, and does not allege that Ortega has fraudulently overreached him, the Government surely has no right to claim that the land shall be considered as part of the public domain. It cannot set up Miranda to defeat Ortega, or the contrary, admitting, as it must, that either of them can show a claim worthy of confirmation in the absence of the other. Nor can third persons be admitted to interfere, to use the claim of one to defeat the other.

If the heirs or assigns of Miranda object to the issuing of the patent to Ortega or his assigns, their remedy is clearly pointed out. They can have their rights tried where the witnesses are known, where they may be examined *ore tenus* before the court, or before a jury, if the court chooses so to order. They have a far better tribunal to settle this question than if they were permitted to appeal to this court, to guess out the truth from conflicting depositions.

Now, if this court should enter a judgment affirming that of the District Court, it would appear as if we had decided the title of Ortega to be superior to that of Miranda, and that Miranda was the tenant of Ortega. This we are unwilling to do; for, if there be bona fide claimants of the Miranda title, such a judgment might seem to conclude them. Nor can we reverse the judgment, for this would imply that we considered Miranda had the better title, and that he or his assignees

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might be justified in attempting to get the judgment of this court in their favor, in this oblique and irregular manner, under the protection of the Attorney General.

We have concluded, therefore, to remand the record to the District Court, with directions to suspend further proceedings till the heirs or assigns of Juan Miranda, if they see fit so to do, may have an opportunity to contest the claim under Ortega, according to the provisions of the thirteenth section of the act of 3d March, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and have such further proceedings as to justice and right may appertain.

And now, to wit, May 1, 1860, the court having reconsidered the opinion and order before made in this case, do now order and adjudge that the decree of the District Court in favor of the appellees be reversed and set aside, and the record remitted for further proceedings in the case.

We do this that the District Court may not be trammelled in their future consideration of the case on all its merits, but without intimating an opinion as to the validity of the grant to Antonio Ortega. It is due to the Attorney General to say that, on the argument of this case, he challenged this grant as fraudulent; and it is because we do not think the whole evidence on that point was fully developed on the former trial below, that this order is made.

THE UNITED STATES, APPELLANTS, v. WILLIAM BENNITZ.

The general title of Sutter to land in California again decided to convey no valid title.

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

It was a claim for five leagues of land on the Sacramento river, which was presented to the board of commissioners with the following evidence and result:

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In this case, the petitioner has placed on file an application made by him to Governor Micheltorena, on the 18th day of June, 1844, and states in his petition that the same was referred to John Sutter for his opinion, and that on the 16th day of July, 1844, the said Sutter reported in favor of the issue of a grant, and the signatures of the said Micheltorena and the said Sutter being satisfactorily established by proof.

Here the proceeding on the part of the petitioner ends.

The board are of opinion that no sufficient proofs have been offered to entitle the said petitioner to a confirmation, and that the same should be rejected. Rejected.

Additional evidence was produced to the District Court, viz:

June 18, 1844. Petition of Bennitz for a tract of land called Breisgan, five leagues on the Sacramento river.

Same day. Referred to Jimeno, and by him to Sutter for report.

July 16, 1844. Report by Sutter that the land is unoccupied.

July 26, 1844. Jimeno's recommendation that it should wait until the Governor can visit the Sacramento; to which the Governor says: "Let him occupy it provisionally until I go up to conclude it."

These documents were proved by J. J. Warner, who swore that he believed the signatures of Micheltorena, Jimeno, and Sutter, to be genuine.

December 22, 1844. Micheltorena's general grant to J. A. Sutter.

John A. Sutter, being called as a witness, says that Bennitz was one of the persons to whom the general grant applies.

Ernest Rufus says that Bennitz served in 1844 under Micheltorena, as a member of the Sacramento riflemen, &c.

Adolph Brenheim (another German) says that one Julien, a Frenchman, had possession of the land for a while as tenant of Bennitz.

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

It was argued by *Mr. Stanton* for the United States, and by *Mr. Benham* and *Mr. Gillet* for the claimant.

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Mr. Stanton contended that this case fell within the decision of the court in 21 Howard, 408, 412, where Sutter's general title is set forth.

The counsel for the claimant contended that this case was to be distinguished from those cases as follows, which is taken from the brief of *Mr. Gillet*:

First. Bennitz acquired an interest in the land claimed by virtue of the license granted by Micheltorena on the 26th of July, 1844.

Bennitz petitioned for the land in the ordinary manner. It was referred to the secretary, and by him sent to Sutter for report. The latter reported favorably. On returning the papers to the Governor, the secretary suggested that the formal grant of the legal title should be delayed until the Governor should visit that part of the country, and dispose of the previous applications. Thereupon the Governor authorized Bennitz to take possession and hold it until he should go up and conclude the matter of the grants. He endorsed: "Let him occupy it provisionally until I go up and conclude the matter." But he never went up.

This conferred a right of possession and occupancy which has never been revoked. The petitioner took possession by his agent, and occupied for fifteen or eighteen months, until the agent was killed by the Indians, as in Reading's case, and he continued to claim the land.

On the 22d of December, 1844, Micheltorena gave what is denominated the "general title," which was intended as a confirmatory grant of this and other lands. This satisfied Bennitz that he had acquired a legal title, and he continued to occupy down to 1846, (when his agent was killed,) and he also continued to claim the land.

This case is clearly distinguishable from those of Sutter and Nye, decided at the last term, (21 How., 170, 408.) In each of those cases there was a petition, a reference, and a report by the local officer, but no further action by the Governor in either. All rested upon the subsequent general title.

In Sutter's claim for the sobrante there was a petition and

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favorable report, but no further action. Mr. Justice CAMPBELL, in the opinion of the court, says "that the Governor reserved the subject for consideration until he could visit the Sacramento valley, and that the papers were returned to the claimant." (21 How., 179.)

In Nye's case he said: "The secretary referred the petition to Senor Sutter, commissioner of the frontier of Sacramento. Sutter certifies, on this reference, that the land is now unoccupied. His certificate is dated the 29th of January, 1844. There is no evidence to show that these papers were returned to Micheltorena, or that he ever saw the certificate. They are produced by the claimant. The remainder of the evidence consists of what is termed" Sutter's general title. (21 How., pp. 409, 410.)

In Bassett's case, there was no evidence that possession had been taken of the land or improvements made by the grantee, nor that he performed any act in confidence that he had acquired any interest therein. The case does not show that he believed he had acquired any rights, or that he sought to exercise any. There is no evidence of the Governor's understanding in relation to that particular case. There is nothing to show that Bassett expended time or money, on the strength of his belief that he had received any right to the land, or that he expected a legal title would be conferred upon him as a necessary and proper conclusion of what had previously been done.

The case at bar presents quite a different aspect from either of those decided at the last term. Bennitz made application for a grant in the usual manner, and received a license to occupy until the Governor should act after a personal examination. Bennitz treated this as conferring a substantial right. He caused a settlement and improvements to be made, and cattle to be placed on the land. The person whom he placed on the land lived on it near a year and a half, until he was killed by the Indians. He himself served the Government in the army, and was assured by the Governor that his grant had been confirmed. He believed it, and acted accordingly. Both he and the representative of the Government (the Governor)

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apparently entertained the same opinion upon this subject. Both believed that Bennitz had rights to the land. No one interfered to denounce the land, or meddle with or question Bennitz's rights. Things remained unchanged until the Government changed hands. No steps have ever been taken to deprive him of his claim. The representative of Mexico did what he thought would confirm Bennitz in his title. Bennitz, like many others, thought the general title, granted the same year, rendered his rights perfect. He continued his possession, and took steps towards further settlement, either by way of tenancy or sale, and submitted his papers to a proposed purchaser, by way of showing that he had rights.

True, all this did not create legal title. But it did create an equitable title, of a distinct and unquestionable kind. The steps taken, and acts performed, created an interest in Bennitz, which was of value to him, and which really cost him something. He took the incipient steps to acquire title, and the representative of Mexico concurred in them, and conferred a right which he was to look after at a future day, and, if all was right and proper, he would convert what he then did into a legal title.

Bennitz had done all on his part, and there was nothing in the way of the Governor conferring perfect legal title. It was no fault of Bennitz that it was not actually done. Mexico assented to his rights, by leaving him in the quiet and full possession of the land down to the treaty.

Would Mexico ever have questioned Bennitz's rights? Certainly she did not; and by taking possession and making improvements, Bennitz paid the usual consideration required to secure a perfect grant. By not giving him notice that his rights would not be recognised, Mexico led him into expenses that he would not otherwise have incurred. She, by the acts of her lawful representative, induced Bennitz to go on and expend money in improvements. She told him he might go into possession until she should determine that he could not have the land. She sent him word that his land was confirmed to him. She sent out a broad paper, inducing him to believe that perfect title had been made to him. He confided in these

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acts, which were of a character calculated to secure his confidence. There is no evidence that Mexico did not really mean what she said. While she remained the sovereign there, she never questioned the act of her representative, even after he was driven from the country by local enemies.

These acts of Mexico created clear equitable rights in Bennitz, and they have never been forfeited or taken from him. They existed when, by the treaty, the United States succeeded to the rights of Mexico. Bennitz's rights were good, and bound the conscience of Mexico until they were divested according to law, which has not yet occurred. Since the purchase by the United States, they have not been changed. No branch of our Government could change them against Bennitz. They are now just what they were under Mexico, when he was occupying and improving the land.

This court cannot take away any right, however small, which he then had; but it must confirm it, if it was a right at all, which, in the ordinary course of events, if there had been no change of Government, would have ripened into a legal right. If the Government of Mexico had done any act which conferred such a right, whether it had ripened into a perfect right or not, then, in equity and good conscience, our Government is bound to recognise that right, and to confirm it to the claimant, freed from all claim on its part.

The court can, under the law of 1851, declaring the rights of parties, declare an inchoate right to be a legal and perfect one. It can do what Mexico would have done under the circumstances. But it cannot deprive the party of any right, however trifling, which had become his, either in law or equity.

The cases heretofore passed upon in this court have involved only legal titles. No case has presented a simple equitable title. The statute recognises equitable titles as proper for the court to pass upon and confirm.

In the Louisiana and Florida cases, the party desiring land petitioned for it, and obtained an order to survey; and when the survey was made, occupancy conferred an equitable title, which this court would confirm. The petition in California is

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the same, except it is usually accompanied with a map, which rendered the survey unnecessary. The reference to ascertain whether the land was vacant, and the report thereon in California, were equal to a survey in Florida and Louisiana. Occupancy in the latter places completed the equitable rights of the party. In California, when occupancy follows the petition, reference and report, and permission to occupy, the effect must be the same. The party has everything that he could have, except the formal grant, which would confer perfect legal title. When the case falls short of legal title, but there is something of it, then it must be an equitable claim; and if that exists, then the court must confirm it.

There was something in this case which was treated by Mexico and the claimant as an interest. There was an application for a definite spot which was not occupied, and it was so reported, and permission given to occupy until further action by the Governor, and then there was possession and continued occupancy. Mexico could not have recovered against him as a trespasser, after the license and occupancy under it; and no one denouncing the land, the Governor could not eject him. Here were tangible facts. The claimant thought he had some rights, and no one questioned them. He was told his title was confirmed, and a formal document followed. Here was something of substance. Not being a legal title, but still being something which would affect the conscience of Mexico, it was clearly an equity. If it was an equity, this court is bound to recognise and confirm it.

Mr. Justice CAMPBELL delivered the opinion of the court.

The claimant applied to Micheltorena, in 1844, for a concession of five square leagues of land, lying in the valley of the Sacramento river, and bounded on the west by that stream. The petition was referred to Captain Sutter, who reported that the land was vacant.

The secretary reported, that the Governor having deferred any action upon petitions like the present, until he could make a visit to the region of the Sacramento and San Joaquin, it would be proper to dispose of this in the same manner.

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The Governor so ordered, authorizing the applicant to take provisional possession, until he could make his visit. The suit of the claimant was submitted to the board of commissioners on this testimony, and it was rejected, as invalid.

Upon appeal to the District Court, the claimant proved that he was a soldier in the war of Micheltorena, and an officer in one of the companies of Sutter. That the Governor acknowledged his services in that war, and verbally recognised the validity of his claim for the land specified, and that it would be perfected by means of the "general title" of Sutter. The claimant also proved, that in March, 1845, two persons went upon the land, to make improvements under his claim. That one of them shortly after retreated, from fear of the Indians; that the other (Julien) made some improvement and cultivation, and occupied the land twelve or fifteen months, when he was killed by them. In the case of the *United States v. Reading*, 18 How., 1, it was proved that Julien occupied the land of that claimant.

The merits of the claims arising under the general title of Sutter have been discussed in the cases of *Nye* and *Bassett*, reported in 21 How. R., 408, 412. This claim is in all respects similar; and, for the reasons assigned in those cases, is invalid.

Decree reversed. Cause remanded, with directions to dismiss the petition.

THE UNITED STATES, APPELLANTS, *v.* JOHN ROSE AND GEORGE KINLOCK.

Sutter's general title to lands in California again examined, together with the historical events which preceded and attended it. The court again decides that claims under this title are not valid.

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

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

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It was argued by *Mr. Stanton* for the United States, and by *Mr. Crittenden* and *Mr. Benjamin* for the appellees.

One of the objects of the counsel for the appellees was to induce the court to reconsider the decision in the cases of Bassett and Nye, reported in 21 Howard; and another, to show that if the judgment in those cases were to stand, the present case did not fall within it.

Mr. Crittenden reviewed the facts of the case, and contended that the grant was within the power of the Governor; that it was an exercise of political power, binding on all concerned; that it proceeded from the highest executive authority charged to do that very act; that it rested upon the same principles as the case of *Chisolm v. the State of Georgia*; that we had no right to inquire into the motives of the Governor. He was besieged, and made a speech to the people, whom he wished to induce to support his authority; that the transaction resembled our revolutionary promises, when Congress appealed to the people to sustain the war of independence; that the Governor conferred a present right, in which there was no ambiguity; that the court appeared to think, in the former decision, that the Governor only promised a grant, whereas it took effect at once; that it was a valid act of political power, no matter what the motives were; that one construction impeached the motives of the Governor and the integrity of the people, and the other only confirmed an act of justice.

With respect to the circumstances which distinguished this case from Nye's, *Mr. Crittenden* referred to the following:

John Smith was one of the class entitled under the general grant of the 22d December, 1844. It is proved that before that date, in the year 1844, he had presented to the Governor, Micheltorena, his petition, with a map or diseno, for the six leagues of land in question—called or marked on the map, "Rancho de Yuba," and "bounded on the north by the river Yuba, on the west by Sutter's claim, on the south by Johnson's ranch, and extends eastwardly so as to contain six square leagues;" and that he had also obtained the favorable report

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of Sutter, to whom his petition had been referred, in the usual course.

It is further proved that Sutter recognised Smith as one of the persons entitled, and gave him a copy of the "general title" as evidence of his right.

It is further proved that Smith lost all his title papers—their loss, their authenticity, and their contents, are all clearly proved.

Smith was put in possession by Sutter, and within twelve months after the date of the "general title," he was in the occupation of the land, "made improvements, and built an adobe house, and had upon the said land about 400 head of cattle, with some horses."

Bidwell's testimony is, that Smith settled on the land in the fall of 1844, or early in 1845, and continued to live upon it till he sold in 1848. He had previously lived on adjoining land, which he had purchased of Sutter.

Smith's petition for the land in question, and the favorable report thereon by Sutter, were made to the Governor in September, 1844; and in that year, according to his own testimony, he not only made improvements, but "had about six hundred cattle and a few horses on this land." He was a Canadian by birth, was naturalized as a Mexican, and had been in California since 1835.

It does not appear that he was ever engaged in the military service, or that the grant was made to him otherwise than in the due administration of the colonization laws of Mexico.

These latter circumstances distinguish the present case from those of Nye and Bassett, reported in 21 Howard, 408, *et seq.*

Mr. Benjamin reviewed the facts of the case, and said the claimant had been put into possession, and the only way to get him out was to drive him from the soil. He then reviewed the preceding decisions in California cases, and contended that the rules established in Fremont's and subsequent cases were reversed in that of Nye. The Louisiana and Florida cases were applicable. Where there was permission to settle and possession taken, it constituted an equitable title. True, there was an uprising of the people and a stump speech;

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but the political power was there, and ready to act. Had not the Governor power to confirm these grants, one by one? You confirmed Larkin's title, issued from the same place, because it was to one person only. The Governor was sent there, and had extraordinary powers, (for which *Mr. Benjamin* referred to 3 Archives, in *U. S. v. Limantour*, page 5.)

Mr. Stanton, in reply to these arguments, said that the only question was, whether or not this was public domain. Sympathy was out of the case. The possession of the claimant was doubtful; but if true, what right did that give? Sovereignty was always in possession, and could not be ousted. The court cannot confirm this claim without obliterating all previous decisions. There are no new facts proved. The court held in Cambuston's case (20 Howard, 59) that they would inquire into the motives of the grant, and all the circumstances attending it. The Louisiana and Florida cases were not like these; the difference is pointed out by the court in Cambuston's case, (20 Howard, 63.) The instructions to Micheltorena were before the court in a former case. Whatever power he might have proclaimed to the people that he possessed, when his instructions were produced they did not justify him. A change in political government did not authorize the Chief or President to change the law. Santa Anna, in his instructions to Micheltorena, did not attempt to change the law; he made a difference between foreigners and natives, and said that "foreigners ought to be prevented from taking part in domestic quarrels." If those people had no claim upon the Mexican Government, they have none on ours. The Mexican laws give them no claim. The cases referred to by the counsel on the other side as being confirmed, were all genuine grants, made strictly within the colonization laws.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellees were confirmed in a tract of land in Yuba county, California, containing six square leagues, bounded north by the Yuba river, west by the eastern line of Captain Sutter's land, south by Johnson's rancho, and easterly for quantity.

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The original claimant is John Smith. He was examined as a witness, and testifies that he was a naturalized citizen of Mexico. That in September, 1844, he petitioned the Governor of California for the land, and obtained a favorable report from Captain Sutter, and in 1845 received from the latter a copy of the "general title," which the Governor had authorized him to give. That in 1844 he built a house upon the land, planted an orchard of fruit trees, and in that and the following year enclosed a field by ditches, and cultivated it, and that he had there a stock of cattle. He says he resided on the land until 1848, when he sold it to persons under whom the claimants derive their claim.

To account for the non-production of any documentary evidence, he says that the petition and report, with a copy of the general title, were lost in the Sacramento river in 1845; that subsequently he obtained another copy, and this, with his naturalization papers, was sent to Monterey, to be laid before the Departmental Assembly, but that they were never returned to him. Bidwell testifies that he prepared a petition for Smith to Sutter, representing the loss of his papers, and asking for another copy of the title, and that Sutter admitted the claim. He testifies that Smith cultivated the land.

The two depositions of Sutter show that he recognised the claim of Smith to have the benefit of the general title, and that he gave him copies, as stated by the other witnesses. Other testimony in the record disproves the statements of these witnesses in reference to the improvement of the land, and shows satisfactorily that they were made on a different tract of land, and in no connection with this claim.

The "general title of Sutter" was considered by the court at its last term, and its operation declared in the cases of the *United States v. Nye* and the *United States v. Bassett*, reported in 21 How. R., 408, 412. The opinion of the court in those cases has been examined in the argument at the bar, and has been re-examined by the court.

The testimony of Sutter in the case of Nye was, that the general title was enclosed to him in a letter by Micheltorena, the Governor, by his request. That the Governor was block-

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aded at Monterey, and was in need of military aid, and the general title was sent to him upon his advice. That he executed the trust conferred upon him, by giving copies of the title to those "who had rendered meritorious services to the country, and who applied to him." The general title was issued before his men marched from New Helvetia to join Micheltorena, and, in some cases, copies were given before and some after his return from the expedition, "but only to such as he thought deserved it." Governor Micheltorena made a speech to the soldiers, and promised to deliver grants to all "whom he should recommend," "referring as well to those to whom copies had been delivered as to those to whom he should deliver them."

In the cases of Nye and Bassett, it was proved that the claimants were soldiers in the war of Micheltorena, and had taken possession of the land within their claim under a temporary license from the Governor. There is no evidence of the kind in this case. The statement of facts in this testimony, and the inferences drawn from it by the court, are corroborated by public documents existing in the archives of California. These show that, in the autumn of 1844, there was an insurrection against the authority of Micheltorena, which terminated in a compact signed at Santa Teresa, the 1st December of that year, by the contending chiefs. Micheltorena agreed to disband and send away a battalion of infantry, (presidiarios,) "with some vicious officers," within three months, and should himself retire to Monterey; that the headquarters of the opposing forces should be at San Jose, and that their expenses should be charged to the Department. In that month, both parties recommenced preparations for renewing hostilities. On the 24th of December, Alvarado asked Sutter for explanations "in relation to the assembling of men" at his fort, and charged him with the design of "invading the Californias."

He transmitted to Micheltorena a copy of this letter, and arraigned Sutter "for preparing to attack the forces of the north, under the pretext of placing himself in the defence of Micheltorena's Government, claiming to have relations with

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him for this purpose." He says: "Considering the movement of Sutter and his conduct as an arbitrary act of his own, unauthorized by the Government, and knowing positively that he is organizing a force, composed of adventurers and Indians, to attack this garrison, I assure your Excellency that I am in a condition to make a defence, and to attack him as soon as he marches against this place, to carry out his dark designs."

On the 28th December, Micheltorena replied to a letter from Sutter, in which he says: "I approve in its whole what you say to me in your last. What you may do, I approve; what you may promise, I will fulfil; what you may spend, I will pay. * * * The country calls for our services; our personal security requires it, and the Government will know how to recompense all. * * * If you have not left, owing to some event, without the necessity of a new order, when you learn that I am moving from Monterey to San Juan, you will move at once; for I will have well calculated the time to act against them."

On the 12th January, 1845, he addressed a letter to an officer, in which he says: "All which is said to you under this date by Senor Don Sutter, who is now, with arms in hand, defending the rights of the nation, and, supporting the Departmental Government that I exercise, will be duly obeyed by you."

Sutter, under these orders, reached Santa Barbara in the early part of February, with two companies, and placed them under the command of Micheltorena.

On the other hand, Alvarado and Castro, in January, 1845, denounced the Governor to the Departmental Assembly, "that he appointed as commander of armed adventurers the same Sutter, of whom there is sufficient evidence that he seeks to possess himself of the Department, attacking the national integrity; a proof that the country is in danger; and the presumption is, that Governor Micheltorena does not deserve the public confidence." They arraign him, because he had called "to promote civil war in the country the foreigner, (Sutter,) accused before the Supreme Government of the country as a conspirator against the national integrity, and

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because united to more than one hundred adventurous hunters, proceeding from the United States, without more fortune than the muzzles of their rifles, he has increased his files, and causing devastation," &c. They asserted to the Departmental Assembly, as the only legal authority which they and their party recognised, "that General Micheltorena is a traitor to his country, and as such he ought to be presented to the tribunals of the Republic, to be judged in accordance with the laws. 2d. That the Assembly should in the interim regulate all the branches of the administration. 3d. That they should transmit the charges against the Governor to Mexico, by a commission, and ask that the Government of the Department may be committed to its natives and residents, of sufficient capacity and knowledge for its management.

This communication was referred to a committee of the Assembly, who reported that the Governor had repudiated the compact of Santa Teresa, and prepared himself to chastise those who had demanded its conditions; that his connection with Sutter was dangerous to the safety of the Department, and had deprived him of the support of the citizens, "for there is not a single individual therein," they say, "who, at seeing Don John Auguste Sutter commence a campaign in California, that does not remember that this gentleman has expressed his fatal design of subduing the country."

On the 15th February, the Departmental Assembly disavowed the authority of the Governor, pronounced his office vacant, and called upon Pio Pico, the first member of the Assembly, to take charge of the Departmental Government in the interim.

On the 22d February, 1845, a treaty was concluded between the commissioners of the Assembly and of the Governor, which was sanctioned by the respective chiefs, in which it was stipulated "that, from this date, the political command of the Department is delivered to the first member of the most excellent Departmental Assembly, because it was so disposed by said body, agreeably to the laws; for which purpose, his Excellency General Micheltorena will deliver a circular order in the hands of the chief of the division of the opponents, that

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the same be published throughout the limits of the Department."

It is acknowledged that the Governor "could no longer contend, with his small forces and scanty resources, against the general outbreak of the country;" and therefore he obligates himself to march to San Pedro, thence to be conveyed to Monterey, and thence to some port in the Republic of Mexico.

Sutter remained a prisoner in the hands of his enemies. On the 26th of the month, (February,) he addressed a letter to Pio Pico, as Governor, in which he speaks of his detention in the city, and attributes it to his connections with Micheltorena. He refers to his relations and duties as an officer, protests that he was ignorant, and deceived as to the cause of the insurrection against Micheltorena, and that he was then convinced of his delusion, and repented of his credulity. He promises obedience to the authorities, offers to place his fort at the disposal of the Government, and prays for his release. It does not appear that he was able to return home until the first of April, about which time Micheltorena sailed from Monterey.

Pio Pico remained in charge of the Government, as senior member of the Assembly, until the 15th day of April, 1846, when he was installed as constitutional Governor of the Department, pursuant to an appointment made in consequence of the memorial of the Assembly on the 27th of June of the previous year.

We have entered into this minute statement of the relations of Sutter to the authorities of Mexico, and especially those in the Department of California, in order to estimate with exactness the import of his acts, under the power conferred by Micheltorena, and how far they imposed an obligation upon the public faith of those Governments, and upon this Government, as their successor.

The authority of Micheltorena to distribute the lands of the Department arises in the colonization laws of 1824 and 1828. The object of those laws was to secure for the Republic a population composed of industrious, obedient, and loyal

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citizens, who might contribute to its strength and prosperity.

In the distribution of the public domain for this purpose, the political chief was directed to inform himself particularly of the circumstances and condition of every applicant for land; and that his power of selection should not be inconsiderately or corruptly used, he was required to preserve a record of his acts of administration, and to submit reports to the Departmental Assembly and the Supreme Government, the approval of one or the other being necessary for their definitive validity.

The claims presented to the land commission of the United States in California, and to this court on appeal by the claimants, under the "general title of Sutter," exhibit a wide divergence from the essential rules prescribed in the colonization laws. The petition is not preserved in the archives, but was retained by the applicant. The Governor declined to act, until he could examine the country of which the colonization is proposed. In the absence of the petition, and without the desired information, under a "supreme pressure of business," he decides suddenly to send to a subordinate and suspected officer the authority to determine the most serious question of administration confided to his care—that of selecting persons who should own and occupy the soil of the Department. He does not preserve a record of this act, nor a copy of the paper he issues, nor did he present it to the Departmental Assembly for its ratification.

We are compelled to seek an explanation of this anomalous exercise of authority, and to examine the conditions attached to this unusual mode of administration; to inquire of the relation which the proposed objects of the favor occupied and were to occupy to the Department and its authorities, and the consequences contemplated by the Governor and his agent to ensue from their use of this title, to ascertain its signification. We have no doubt that the court may employ this medium of proof for this purpose.

We learn that the treaty concluded at Santa Teresa was an armistice merely, and that Micheltorena, immediately after,

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concluded to use the agency and influence of Sutter to punish his enemies and sustain his power; and, to increase that influence, issued this "general title." Their alliance was regarded by the Departmental Assembly as treasonable, and justifying the deposition and expulsion of the Governor from the Department. Sutter became their prisoner, and was compelled to renounce his connection with his chief to make his peace. His companies were regarded as public enemies, and were disbanded and dispersed. The Supreme Government acquiesced in the decisions of the Assembly, and recognised and commissioned the Governor of their appointment.

No indemnity was granted to the adherents of Micheltorena, nor provision made for the fulfilment of his promises to them; nor have we discovered an instance in which their accomplishment was demanded of the succeeding Government. Our opinion consequently is, that these acts and promises were not considered in California or Mexico as valid obligations, binding the conscience of the Republic; and therefore they are not valid claims under the treaty of Guadalupe Hidalgo.

In some of the instances, Micheltorena granted a permission to the applicant to occupy the land provisionally, until he could visit that portion of the Department to act upon their petition. It is contended that this license is so far a recognition of the merit of the application, as to impose upon the United States the obligation to accede to it; that it confirmed an interest in the land, that they should perpetuate by a grant.

We agree that every species of title that originated in the rightful exercise of legitimate authority, and existed under the safeguard of Mexican laws at the date of the acquisition of California by the United States, is protected by the treaty of cession. The change of the Government does not alter the relations of the inhabitants in this particular. This court is charged with the duty, in the last resort, to recognise the validity of all such claims. But it is the duty of the court to distinguish between rights acquired under the laws and usages of Mexico, and claims depending upon the mere pleasure of those who were in power—between the vested estate and the hope or expectation of favor or bounty. The license of the

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Governor to the applicant to make a temporary occupation, until he could inform himself, so as to act considerately or intelligently, we think, cannot be treated as conferring a property in the land.

We have examined these cases with unusual care, in consequence of the number of parties in interest and the amount of property involved. Upon the most liberal estimate of the powers of the Governor, and the most indulgent view of the claims of the petitioners, we are unable to determine that they are valid.

Judgment of the District Court reversed, and cause remanded, with directions to dismiss the petition.

THE UNITED STATES, APPELLANTS, v. ANTONIO MARIA OSIO.

Where an island in the bay of San Francisco, in California, was claimed, not under the colonization law of 1824, or the regulations of 1828, but under certain special orders issued to the Governor by the Mexican Government, and the Governor was alleged to have issued a grant in 1838, the petitioner never took possession or exercised acts of ownership of the island under that decree, which therefore affords no foundation for his claim.

In 1839, a petition was addressed to the Governor, praying for a new title of possession, and it was alleged that a grant was issued, but it does not appear that it was recorded according to law, nor is the testimony satisfactory to show that it was signed by the Governor.

Where no record evidence is exhibited, the mere proof of handwriting by third persons, who did not subscribe the instrument as witnesses, or see it executed, is not sufficient in this class of cases to establish the validity of the claim without some other confirmatory evidence.

The special orders above mentioned were contained in a despatch from the Mexican Government, giving the power to the Governor, in concurrence with the Departmental Assembly.

This provision differs essentially from the regulations of 1828, under which the action of the Assembly was separate and independent, and subsequent to the action of the Governor. But the power conferred by this despatch could not be exercised by the Governor without the concurrence of the Departmental Assembly. Both must participate in the adjudication of the title; and as the Assembly did not concur in this grant, it is simply void.

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

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The case is stated in the opinion of the court.

It was argued by *Mr. Stanton* for the United States, and by *Mr. Gillet* for the appellee.

Mr. Gillet made the following points:

1. No form of grant is required by the order of the Supreme Government, authorizing the grant of the islands, nor required by the colonization law or regulations.
2. Meritorious, useful, and patriotic services, were good considerations for a grant.
3. Confirmation by the Departmental Assembly is not necessary in order to confirm a California grant made by a Governor. That it was the duty of the Government, and not of the grantee, to present it for confirmation.
4. When an equitable right has once vested under a California grant by the Governor, it cannot be divested, except by the denunciation of a third person legally made.
5. The question of the bona fides of this grant cannot now be raised, as it was not raised below.
6. Conditions subsequent, if not complied with, do not render the grant void, nor authorize the Government to forfeit the grantee's rights to its own use.
7. When an officer of the Mexican Government, who had the legal power to make grants of land, exercises that power in a manner to create a reasonable belief, in the mind of an applicant for a grant, that the instrument given is a grant, and he takes possession, occupies the same, and makes improvements thereon in good faith, such grant, if not in strict legal form, creates an equitable right, which entitles the grantee to a confirmation thereof.
8. By the laws, usages, and customs of Mexico, this claim would have been confirmed, and therefore this court must confirm it.
9. It is a well-settled rule, that equity cannot be resorted to for the purpose of enforcing forfeitures, but only to avoid them.

Mr. Justice CLIFFORD delivered the opinion of the court.

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This is an appeal from a decree of the District Court of the United States for the northern district of California, affirming a decree of the commissioners appointed under the act of the third of March, 1851, to adjudicate private land claims. Every person claiming land in California, by virtue of any right or title derived from the Spanish or Mexican Government, is required by the eighth section of that act to present his claim, together with the evidence in support of the same, to the commissioners in the first instance, for their adjudication.

Pursuant to that requirement, the appellee in this case presented his petition to that tribunal, claiming title to the island of Los Angeles, situated near the entrance of the bay of San Francisco, and praying that his claim to the same might be confirmed. As the foundation of his title, he set up a certain instrument or document, purporting to be a grant of the island to him by Governor Alvarado. It bears date at Monterey, on the eleventh day of June, 1839; and the claimant alleged in his petition to the commissioners that the grant was made under certain special orders issued to the Governor by the Mexican Government. He obtained a decree in his favor before the commissioners, and the District Court, on appeal, affirmed that decree; whereupon an appeal was taken, in behalf of the United States, to this court; and the question now is, whether the claim, upon the evidence exhibited, is valid, within the principles prescribed as the rule of decision in the eleventh section of the act requiring the adjudication to be made.

Unlike what is usual in cases of this description, it will be noticed that none of the documentary evidences of title introduced in support of the claim purport to be founded upon the colonization law of 1824, or the regulations of 1828; and for that reason we shall refer to these documents with some degree of particularity, in order that their precise import and effect may be clearly understood.

On the seventh day of October, 1837, the present claimant presented a petition to Governor Alvarado, praying for a grant of the island in question, "to build a house thereon, and breed horses and mules;" representing, in his petition, that as early

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as 1830 he had made a similar request, and expressing the hope that the grant might be made.

Some further delay occurred in the contemplated enterprise of the petitioner, as appears from the fact that no action was taken on his second petition until the first day of February, 1838, when the Governor, by an order appearing in the margin of the petition, referred it, not to the alcalde of the district, but to the military commandancy north of San Francisco, for a report. That office was filled at the time by Mariano G. Vallejo, who accordingly reported, on the seventh day of the same month, that the island might be granted to the petitioner; but suggested that it would be well to make an exception in the grant, to the effect that, whenever the Government might desire or find it convenient to build a fort on the principal height thereof, it should not be hindered from so doing. With that report before him, the Governor, on the nineteenth day of February, 1838, made a decree, wherein he states that he had concluded to grant to the petitioner the occupation of the island in question, "to the end that he may make such use of it as he may deem most suitable, to build a house, raise stock, and do everything that may concern the advancement of the mercantile and agricultural branches—upon the condition that, whenever it may be convenient, the Government may establish a fort thereon."

Direction was given to the petitioner, by the terms of the instrument, to present himself, with the decree, not to the office where land adjudications under the colonization laws were usually recorded, but to the military commandancy, that an entry thereof might be made, for the due verification of the same.

No such note of the proceeding was ever made in the office of the military comandante, or in any book containing the adjudications of land titles. But the several documents are duly certified copies of unrecorded originals which were found in the Mexican archives. Their genuineness is controverted by the counsel for the appellants; but we do not think it necessary to consider that question on this branch of the case, for the reason that the petitioner never took possession of the

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island under that decree, and does not claim title under it in the petition which he presented to the land commissioners.

All that the decree purports to grant to the petitioner, in any view which can be taken of it, is the right or license to occupy the island for the purposes therein described, subject to the right of the Government to enter at any time and appropriate the premises as a site for a military fort; and inasmuch as the petitioner never availed himself of the license granted, or made any improvements on the island under the decree, it is quite clear that he had acquired no interest in the land, by virtue of that proceeding, at the date of the cession to the United States, which the Mexican Government was bound to respect.

Four other documents were introduced by the petitioner, before the commissioners, in support of his claim: 1. A despatch from the Minister of the Interior of the Republic of Mexico, addressed to Governor Alvarado. 2. A petition from the appellee to the same. 3. A duplicate copy of the grant set up in his petition to the commissioners, which is without any signatures. 4. The original grant of the island in question, which purports to be signed by the Governor, and to be countersigned by the secretary. Of these, the first three are duly-certified copies of unrecorded originals which were found in the Mexican archives.

As exhibited in the transcript, the despatch bears date at Mexico, on the twentieth day of July, 1838. By that despatch the Governor was informed that "the President, desiring on the one part to protect the settlement of the desert islands adjacent to that Department, which are a part of the national territory, and on the other to check the many foreign adventurers who may avail themselves of those considerable portions, from which they may do great damage to our fishery, commerce, and interests, has been pleased to resolve that your Excellency, in concurrence with the Departmental junta, proceed, with activity and prudence, to grant and distribute the lands on said islands to the citizens of the nation who may solicit the same."

In addition to what is here stated, two persons, Antonio

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and Carlos Carrillo, are named in the communication, to whom, on account of their useful and patriotic services, preference was to be given in making the grants, to the extent of allowing them to select one exclusively for their benefit.

Such is the substance of the despatch, so far as it is material to consider it in this investigation.

On the fifteenth day of February, 1839, the present claimant presented to Governor Alvarado another petition, wherein, after referring to the fact that the island in question had been granted to him during the preceding year, for the breeding of horses, he prays that a new title of possession may be given to him, in accordance with the superior decree, which, as he assumes, empowered the Governor to grant, for purposes of colonization, the islands near by, on the coast.

Some idea of the situation of the island, and of the importance which was attached to it in a military point of view, may be gathered from the exposition of the military comandante, made to the Governor on the seventeenth day of August, 1837. One of the purposes of that report was to recommend that the custom-house established at Monterey should be transferred to the port of San Francisco. Various reasons were assigned for the change; and among others, it was stated that the latter port was impregnable, by reason of its truly military position.

After describing the port, and expatiating upon the advantages which would flow from the transfer, the report goes on to state, that near its entrance and within the gulf are several islands, where are found water and a variety of timber most suitable for a fortification; adding, that it contains safe anchorages and suitable coves for landing goods and for store-houses, particularly the island of Los Angeles, which is one league in circumference, lying at the entrance of the gulf, and forming two straits with their points—giving their names—so that it is the key of the whole of it, inasmuch as from this very place the coming in or going out of vessels can be prevented with the utmost facility.

Suffice it to say, without repeating any more of its details, that the whole report is of a character to afford the most convincing proof that the public authorities of the Territory, as

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early as August, 1837, fully appreciated the importance of the island, as a necessary site to be retained by the Government for the purposes of national defence. Arch. Exh., p. 5.

Grants under the colonization laws were usually issued in duplicates—one copy being designed for the party to whom it was made, and the other to remain in the archives, to be transmitted, with the expediente, to the Departmental Assembly for its approval. They were in all respects the same, except that the copy left in the office, sometimes called the duplicate copy, was not always signed by the Governor and secretary, and did not usually contain the order directing a note of the grant to be entered in the office where land adjudications were required to be recorded.

In this case there is no expediente, other than the one presented with the first-named petition, which is not necessarily or even properly connected with the grant set up by the claimant. Two copies of this grant were produced by the petitioner, both bearing date at Monterey, on the eleventh day of June, 1839, nearly two years after the Governor received the before-mentioned exposition of the military comandante, showing the importance of the island to the Government as a site for works of defence. They are of the same tenor and effect, and both purport to be absolute grants, without any of the conditions usually to be found in the concessions issued under the colonization laws. As before remarked, the copy not signed, together with the petition, were found in the Mexican archives; but the original, properly so called, was produced from the custody of the party.

Adjudications of land titles were required by the Mexican law to be recorded. That requirement, however, was regarded as fulfilled, according to the practice in the Department of California, when a short entry was made in a book kept for the purpose, specifying the number of the expediente, the date of the grant, a brief description of the land granted, and the name of the person to whom the grant was issued. In this case there is a certificate appearing at the bottom of the instrument to the effect that such an entry had been made, but it is wholly unsupported by proof of the existence of any such record.

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An attempt was made before the commissioners, or in the District Court, to account for the absence of such record evidence, by showing that a book of Spanish records, of the description mentioned, was consumed by fire, at San Francisco, in 1851; but the recollections of the witness called for the purpose are so indistinct, and his knowledge of the contents of the book so slight, that the evidence is not entitled to much weight. Jimeno, who signed the certificate, was not called, and, in view of all the circumstances, there does not appear to be any ground to conclude that any such record was ever made.

Colonization grants were usually made, subject to the approval of the Departmental Assembly, and the regulations of 1828 expressly declare that grants to individuals and families shall not be held to be definitively valid without the previous consent of that deputation. No such approval was ever obtained in this case; and it does not appear that the despatch, or order, as it is denominated by the Governor, was ever communicated by him to the Departmental Assembly, until the twenty-seventh day of February, 1840. His message communicating the despatch, though brief, clearly indicates that the members of the Assembly had no previous knowledge upon the subject.

A document, purporting to be an unsigned copy of the grant, and the petition, are all the papers that were found in the archives, except those connected with the first proceeding under which the license to occupy the island was granted. They were loose papers, not recorded, or even numbered, and, in view of all the circumstances, add little or nothing to the probability in favor of the integrity of the transaction. Two witnesses were examined by the claimant to prove the authenticity of the grant. Governor Alvarado testified that his signature to the grant was genuine, and that he gave it at the time of its date. In effect the other witness testified that he was acquainted with the handwriting of the Governor, and also with that of the Secretary, and that they were genuine. Where no record evidence is exhibited, the mere proof of handwriting by third persons, who did not subscribe the in-

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strument as witnesses, or see it executed, is not sufficient in this class of cases to establish the validity of the claim, without some other confirmatory evidence. But the testimony of Governor Alvarado stands upon a somewhat different footing. His statements purport to be founded upon knowledge of what he affirms, and if not true, they must be wilfully false, or the result of an imperfect or greatly impaired and deceived recollection. Resting as the claim does in a great measure, so far as the genuineness of the grant is concerned, upon the testimony of this witness, we have examined his deposition with care, and think proper to remark that it discloses facts and circumstances which to some extent affect the credit of the witness. By his manner of testifying, as there disclosed, he evinces a strong bias in favor of the party calling him, as is manifested throughout the deposition. Some of his answers are evasive; others, when compared with preceding statements in the same deposition, are contradictory; and in several instances he refused altogether to answer the questions propounded on cross-examination. Suffice it to say, without entering more into detail, that we would not think his testimony sufficient without some corroboration to entitle the petitioner to a confirmation of his claim.

On the part of the United States the confirmation of the claim is resisted chiefly upon two grounds. It is insisted, in the first place, that the evidence introduced by the claimant to establish the authenticity of the grant is not sufficient to entitle him to a confirmation, and that in point of fact the grant was fabricated, after our conquest of the territory. Secondly, it is contended that the grant, even if it be shown that it is genuine, was issued by the Governor without authority of law.

In support of the first proposition, various suggestions were made at the argument, in addition to those which have already been the subject of remark. Most of them were based upon the state and condition of the title papers, the circumstances of the transaction, and the conduct of the parties, as tending to show the improbability that any such grant was ever made. Much stress was laid upon the fact that the grant was never approved by the Departmental Assembly, or any note of it

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entered in the office where the adjudications of land titles were required to be recorded. Attention was also drawn to the fact that the paper produced as the expediente is without any number, which circumstance, it was insisted, furnished strong evidence that they were fabricated, or at least that they had never been completed. To support that theory, an index, prepared by the secretary, and found in the Mexican archives, was exhibited, containing a schedule of expedientes numbered consecutively from one to four hundred and forty-three, covering the period from the tenth day of May, 1833, to the twenty-fourth day of December, 1844, and including in the list one in favor of this petitioner for another parcel of land granted on the seventh day of November, 1844. Reliance was also placed upon the omission of the appellee to call and examine the secretary who prepared that index, and whose name purports to be signed to the grant set up in the petition. Another suggestion was, that, from the nature of the property, it was highly improbable that any private person should desire such a grant in a Department where there were vast tracts of fertile land to be obtained for the asking, and that it was past belief that the Governor would have been induced to make the grant, especially after the receipt of the exposition of the military comandante, except upon the same conditions as those inserted in the decree of the preceding year. Every one of these suggestions is entitled to weight, and when taken together and considered in connection with the unsatisfactory character of the parol proof introduced by the petitioner, they are sufficient to create well-founded doubts as to the integrity of the transaction. But it is unnecessary to determine the point, as we are all of the opinion that the second objection to the confirmation is well taken, and must be sustained.

Nothing can be plainer than that the Governor, in making the grant in question, did not assume to act under the colonization law of 1824, or the regulations of 1828. Were anything wanting beyond what appears in the terms of the grant to establish that proposition, it would be found in the deposition of the Governor himself, in his answer to the fourth interrogatory propounded by the claimant. His answer was, that he

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made the grant by an express order in writing from the General Government. He further states, that his predecessors had applied to the General Government for such authority, but without success. On coming into office, he renewed the application, and, after considerable delay, he says he received the before-mentioned despatch by the hands of a courier.

Neither side, in this controversy, disputes the authority of the Mexican President to issue the order contained in the despatch. From its date, it appears to have been issued during the administration of General Anastasio Bustamente. He succeeded to the Presidency, for the second time, on the nineteenth day of April, 1837, after the capture of Santa Anna in Texas, and remained in office until the sixth day of October, 1841, when he was driven from the capital by the partisans of his predecessor.

At the beginning of his administration, he professed to be guided by the principles of the Constitution; and from the well-known antecedents of his Cabinet, he could hardly have expected to adopt any different policy. His Cabinet, however, shortly resigned, and a new one was formed, believed to have had much less respect for the fundamental law. On the ninth day of March, 1838, the Minister of the Interior of the new Cabinet resigned, when Joaquin Pesado, whose name is affixed to this despatch, was appointed in his place.

After the new Cabinet was organized, the policy of the administration was changed; and it cannot be doubted but that, at the date of this despatch, the President had assumed extraordinary powers, and was in point of fact, to a considerable extent, in the exercise of the legislative as well as the executive powers of the Government.

Assuming that the despatch was issued in pursuance of competent authority, it must be considered as conferring a special power, to be exercised only in the manner therein prescribed. In this view of the subject, it is immaterial whether the power to grant the islands on the coast was vested in the Governor before or not, or in what manner, if the power did exist, it was required to be exercised, as the effect of this order, emanating from the supreme power of the nation, was to repeal the pre-

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vious regulations upon the subject, and to substitute a new one in their place.

Strong doubts are entertained whether the islands situated immediately in the bay of San Francisco are either within the words of the despatch or the declared purpose for which the power was conferred; but it is unnecessary to determine that point in this investigation.

Waiving that point at the present time, we come to consider the question whether, upon the proofs exhibited, the power was exercised in this case in a manner to give validity to the grant; and that inquiry necessarily involves the construction of the despatch.

Omitting the formal parts, its effect was to authorize the Governor, in concurrence with the Departmental Assembly, to grant and distribute the lands on the desert islands adjacent to the Department to the citizens of the nation who might solicit the same. By the terms of the despatch, the power to grant and distribute such lands was to be exercised by the Governor, in concurrence with the Departmental Assembly; by which we understand, that the Assembly was to participate in the adjudication of the grant. Whenever a petition was presented, the first question to be determined was, whether the grant should be made and the title-papers issued; and, by the plain terms of the despatch, an affirmative adjudication could not be legally made, without the consent of the Departmental Assembly. Whether a subsequent ratification of the act by the Assembly might not be equivalent to a previous consent, is not a question that arises in this case, for the reason that no such ratification ever took place.

All we mean to decide, in this connection, is, that by the true construction of the despatch, the act of adjudication cannot be held to be valid without the concurrence of the Departmental Assembly, as well as that of the Governor.

In this respect, the provision differs essentially from that contained in the regulations of 1828, under which the approval of the Assembly was an act to be performed after the expediente had been perfected, and after the incipient title-papers had been issued by the Governor. His action pre-

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ceded that of the Assembly, and in contemplation of law was separate and independent. After the grant was made and executed by the Governor, and countersigned by the Secretary, it was the duty of the Governor to transmit it to the Departmental Assembly, for its approval; and if it was not so transmitted, it was the fault of the officer, and not of the party.

Other differences between the regulations of 1828 and the provisions of that despatch might be pointed out; but we think it unnecessary, as those already mentioned are deemed to be sufficient to show that the decisions of this court, made in cases arising under those regulations, have no proper application to the question under consideration.

From the words of the despatch, we think it is clear that the power conferred was to be exercised by the Governor in concurrence with the Departmental Assembly; and, consequently, that a grant made by the Governor without such concurrence was simply void. This view of the question finds support in the Mexican law defining the functions and prescribing the duties of the Governor, and those of the Departmental Assembly. That law was enacted on the twentieth day of March, 1837, and continued in force during the administration under which this despatch was issued. 1 *Arrillago Recop.*, vol. 1, pp. 202 and 210. Many duties were devolved, by that law, upon the Governor, and also upon the Departmental Assembly, where each was required to act independently of the other. But other duties were prescribed, in the performance of which the Governor and the Assembly were required to act in concurrence. In the latter class, the Governor could not act separately, though in some instances it was competent for the Assembly to act in his absence.

Concurrent duties, it seems, were usually performed in open session, in which the Governor, when present, presided; but he had no vote, except when, from absence or otherwise, the members present were equally divided. The Assembly consisted of seven members, chosen by the electors qualified to vote for deputies to the general Congress.

Those in charge of the Supreme Government, or some of them, had been much in public life, and it must be presumed

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that the despatch under consideration was not framed without some reference to that law. On examining the words employed in the law, to express and define concurrent action, and comparing them with the words of the despatch translated "as in concurrence with," we find they are the same in the original language. Further support to the construction here adopted is derived from the declared purpose of the despatch, as appears in its recitals. Mexican authorities had long dreaded the approach of foreigners to her western coast, and the language of the despatch shows that its great and controlling purpose was to promote the settlement of the unoccupied islands by trustworthy citizens of the nation, with a view to ward off that apprehended danger. They feared that those islands, especially those further south and nearer to the track of commerce into the Pacific ocean, might become the resort of military adventurers, and be selected by those desirous of invading that remote Department as places of rendezvous or shelter; and in the hope of averting that danger, or, in case of its approach, of supplying the means of timely information, they desired that their own citizens might preoccupy those exposed positions. In this view of the subject, the President, no doubt, regarded the power to be exercised under the despatch as one of importance and delicacy, and might well have desired to prescribe some check upon the action of the Governor; and if so, it would have been difficult to have devised one more consonant with the then existing laws upon the general subject, or better suited to the attainment of the object in view, than the one chosen in this despatch.

For these reasons, we are of the opinion that the Governor, under the circumstances of this case, had no authority, without the concurrence of the Departmental Assembly, to make this grant. Whether the persons specially designated in the despatch as the fit subjects for the bounty of the Government stand in any better situation or not, is not a question in this case. Having come to the conclusion that the grant is void, it does not become necessary to consider the evidence offered to prove possession. On that point, it will be sufficient to say, it is conflicting and unsatisfactory; and if true, is not of a

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character to show any right or title in the land under the Mexican Government, or any equity in the claimant, under the act of Congress requiring the adjudications to be made.

The decree of the District Court is therefore reversed, and the cause remanded with directions to dismiss the petition.

BENJAMIN HANEY, CHARLES OGDEN, AND JOHN TRENCHARD, LIBELLANTS AND APPELLANTS, *v.* THE BALTIMORE STEAM PACKET COMPANY, OWNERS OF THE STEAMER LOUISIANA, AND GEORGE W. RUSSELL.

In a collision which took place in the Chesapeake bay between a steamer and a sailing vessel, the steamer was in fault.

It was the captain's watch, and his duty to be on deck, which he was not.

The only man on deck, acting as pilot, lookout, and officer of the deck, was not in the proper place for a lookout to be.

A former decision of this court referred to, indicating the proper place for a lookout.

When the collision was impending, the order on the steamer was to starboard the helm instead of porting it, the schooner having previously kept on her course, as the rules of navigation required her to do.

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

It was a case of collision occurring in the Chesapeake bay, between the steamer Louisiana and the schooner William K. Perrin, by which the schooner was sunk.

The libel was in rem, filed by the appellants against the steamer, and George W. Russell, master thereof. The Baltimore Steam Packet Company intervened and answered as the owner of the steamer.

The evidence in the case is so fully commented upon in the opinion of the court and in the dissenting opinion of Mr. Chief Justice TANEY, that any repetition of it is unnecessary.

The District Court decreed in favor of the libellants in the sum of seventeen hundred dollars, and of Charles Ogden, the master of the schooner, the additional sum of \$173 and costs.

On an appeal to the Circuit Court, additional evidence was

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offered, and the decree of the District Court was reversed and the libel dismissed.

The libellants appealed to this court.

It was argued by *Mr. Addison* and *Mr. Battee* for the appellants, and by *Mr. Schley* for the appellee.

The points made by the counsel for the appellants were the following:

1. That it is the right and duty of sailing vessels, when meeting steamers, to hold their course, and of steamers, to give way to them.

St. John v. Paine, 10 Howard, 583.

Steamer Oregon v. Roca, 18 Howard, 572.

2. That the schooner, from the time the steamer hove in sight until a moment or two before the collision, steadily held her course. The answers of the defendants, the evidence of the witnesses for the defence, and the evidence for the libellants, all concur in this; and there is not a witness who alleges the contrary. And this must be taken as a fact in the cause, admitted by the defendants, proved by the defendants, and proved by the plaintiffs.

3. That it was the right of the schooner to change her course, when her continuing to hold it would have caused her to have been run down.

New York and Liverpool U. S. Mail Steamship Company v. Rumball, 21 Howard, 372.

4. That if the danger of being run down was imminent, and the schooner made a false manœuvre, when a right one would have saved her, even then the steamer is responsible; for she ought not needlessly to have run so close to the schooner as to have excited such well-founded apprehensions of danger as to have disturbed the judgment of those in charge of her.

The Genesee Chief, 12 Howard, 44.

5. That the account of the disaster set up in the answer, and given by Captain Russell and second mate Ward, is incredible, because it is impossible it can be correct.

For if the parallels on which the vessels were running were 150, or 200, or 300 yards asunder, and the schooner changed

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her course at the distance of 100 or 150 yards from the point at which they would have passed each other, if there had been no change of course, the schooner could not have crossed the steamer's bows, as the steamer's speed was twice that of the schooner.

6. That although Captain Russell and second mate Ward testify to the events immediately preceding the collision, it is very clear:

First. That Capt. Russell did not see the schooner after she got within three or four miles of the steamer, until the schooner's course had been changed—that is, for nine or twelve minutes before such change.

Second. That the second mate Ward's attention was directed to and absorbed in the changing of the course of the steamer when the schooner changed her course.

7. That the schooner, in attempting to avoid the steamer, turned to the right, and thus conformed to the rule of navigation established and promulgated by the Supreme Court in the case of the steamer *Oregon et al. v. Roca et al.*, 18 Howard, 572, where this language is employed: "The rule adopted by the Trinity masters, and sanctioned by this court, is the safe one: that when two vessels on opposite tacks are approaching each other, each should turn to the right, passing each other on the larboard side. This rule is too simple to be misunderstood, and if observed, collisions would not occur between moving boats, whether propelled by sail or steam. The rule once established, every deviation from it should be chargeable as a fault."

The Friends, 1 W. Robinson, 479.

Steamer Oregon v. Roca et al., 18 Howard, 572.

8. That the steamer violated said rule by turning to the left, and thereby caused the collision.

9. That there was not on the steamer "a trustworthy and constant lookout," "whose whole business was to discern vessels ahead or approaching, so as to give the earliest notice to those in charge of the navigation of the vessel;" and that the omission is *prima facie* evidence that the steamer is in fault.

Steamboat New York et al. v. Rea et al., 18 Howard, 225.

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Genesee Chief, 12 Howard, 449.

Chamberlain v. Ward, 21 Howard, 548.

10 Howard, 585.

10. That the person alleged to have been acting as lookout was not "actually and vigilantly employed in his duty as lookout," (12 Howard, 459;) but was in effect the helmsman, superintending a negro who performed merely the manual labor of working the wheel; who, the lookout testifies, "acted by my orders in the management of the wheel," and "I leave nothing to his discretion;" and "I give the order, and see and hear if it is obeyed."

Ward says: "I" (on the occasion of the collision) "put the helm of the steamer starboard. I had just steadied the boat on that course, and discovered the schooner had altered her course."

11. The fact that the steamer was engaged in carrying the United States mail furnishes no excuse for proceeding at a speed endangering the lives and property of citizens.

The Rose, 2 W. Robinson, 3.

The Iron Duke, 2 W. Robinson, 385.

Rogers et al. v. Steamer St. Charles et al., 19 How., 112.

12. In cases of collision between steamers and sailing vessels, "*prima facie*, the steamer is chargeable with fault. The exception to this rule must be clearly established by strong circumstances, to excuse the steamer."

New York and Virginia S. Ship Co. v. Calderwood et al., 19 Howard, 246.

Steamer Oregon v. Roca, 18 Howard, 572.

13. The pretended lookout was stationed in the pilot-house, and not in the forward part of the vessel, where he should have been.

Newton v. Stebbins, 10 Howard, 607.

St. John v. Paine et al., 10 Howard, 585.

Chamberlain et al. v. Ward, 21 Howard, 571.

Mr. Schley made the following points:

1. The change of the course of the schooner was the proximate and only cause of the collision; and if such change had

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not been made, the vessels would have passed each other in safety.

2. The change of course on the part of the schooner, at the time and under the circumstances, was a gross and inexcusable fault.

3. The pilot-house on the steamer *Louisiana* (as shown by the uncontradicted testimony taken on behalf of the appellee since this appeal, and contained in the depositions of Captains Virden, Turrer, Rice, and Weems) was the best position for the lookout on the steamer; and there was no want of care and no error of judgment on board of the steamer, in any respect.

Mr. Justice GRIER delivered the opinion of the court.

The appellants, owners of a schooner called the *William K. Perrin*, charge in their libel that between nine and ten o'clock of the evening of 20th of February, 1858, as the schooner, laden with oysters, was on her way down the Chesapeake bay, she was run into and sunk by the steamboat *Louisiana*; that it was a bright moonlight night, and the schooner, though of only forty-three tons burden and deeply laden, could be and was seen at the distance of a mile.

The answer admits the collision and the result of it. It admits, also, the schooner was seen at a distance of two or three miles; that the steamer was proceeding at a rate of fourteen miles an hour, "heading due north," and the schooner holding her course nearly due south. But it alleges as an excuse, that while the steamboat and schooner were meeting on parallel lines, the schooner suddenly changed her course and ran under the bows of the steamer.

This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable, and generally false.

There is not the usual conflict of testimony in this case; for the single person on board of the steamer who was able to give any account of the collision, who acted as pilot, and by whose want of vigilance and skill the collision was caused, does not materially contradict, but rather confirms, the testimony of the libellants. The facts of the case are as follows:

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The steamer Louisiana, of eleven hundred tons burden and five hundred horse-power, was on her way coming up the wide bay of the Chesapeake, steering a due north course, between nine and ten o'clock at night. The small heavy-laden schooner is seen two or three miles off, coming in an opposite direction. The captain of the steamer, (whose theory of action appears from his own testimony to be, that all small vessels are bound at their peril to get out of the way of a large steamer carrying the United States mail,) although he had seen the schooner, and knew that the vessels were approximating at the rate of over twenty miles an hour, retires to his cabin. It was his watch and his duty to be on deck as officer of the deck. He leaves on deck one man, besides the colored man at the wheel, to act as pilot, lookout, and officer of the deck. These two persons constituted the whole crew on duty, besides firemen and engineers. This person, who had to perform these treble functions, was the second mate. His theory is, that the best place for a lookout is in the pilot-house, where, he says, "*I generally lean out of the window, and have an unobstructed view.*" Accordingly, as pilot, he remained in the pilot-house to direct the steersman; and as lookout, he occasionally leaned out of the window.

The result shows the value of this theory with regard to the place and person proper for a lookout. The schooner kept on her course, as the rules of navigation required her to do, on the presumption that the steamer would diverge from her course so as to leave a free berth to the schooner, as it was the duty of the pilot of the steamer to do. The boats were approximating at the rate of six hundred yards a minute, or one hundred yards in ten seconds. A slight turn of the wheel of the steamboat, if given in due season, would have left a wide berth for the schooner. But this, by his own account, was neglected by this pilot and lookout till within *ten seconds* or less of a collision; and then the order was to starboard the helm, instead of porting it, in direct contravention of the rules of navigation.

The steamer, it is true, had a right to pass on either side, and it was her duty to keep clear and give a wide berth to the

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sailing vessel; but having neglected this duty till the danger of a collision was so imminent that it was probable the schooner would be making some movement to avoid destruction, such a movement only increased the danger of a collision.

The man at the wheel of the schooner had his orders to keep steady on his course south. It is proved, without contradiction, that this order was strictly complied with till the pilot or steersman heard the noise of the steamer's wheels; and being warned of her approach by the lookout, he looked under the boom, and discovered the steamer almost on him; when, in order to save his own life and the lives of the crew, he ported his helm and received the blow on the larboard side of the schooner, near the stern, instead of the bow. The point of collision confirms, beyond a doubt, this view of the case.

The hypothesis set forth in the answer to excuse this collision, that the boats were passing on parallel lines, three hundred yards apart, and that, when within one hundred or one hundred and fifty yards of passing each other, the schooner turned round and run herself under the bows of the steamer, is not only grossly improbable in itself, but contradicted by the testimony, and is a mathematical impossibility.

With this pregnant example of the value of the theory of lookouts contended for in this case, let us compare it with the rules established by this court. Without referring to the numerous cases, the correct doctrine on this subject will be found laid down by Mr. Justice CLIFFORD in delivering the opinion of this court in *Chamberlain v. Ward*, 21 How., 570:

"Steamers navigating in the thoroughfares of commerce must have constant and vigilant lookouts stationed in proper places on the vessel." They must "be persons of suitable experience, and actually and vigilantly employed on that duty." "In general, elevated positions, such as the hurricane deck, are not so favorable situations as those more usually selected on the forward deck, near the stem." "Persons stationed on the forward deck are less likely to overlook small vessels deeply laden, and more readily ascertain their exact course and movement."

The entire disregard of these rules of navigation by the

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steamer, and the consequent destruction of property, demonstrate their correctness and utility.

In fine, we are of opinion that the collision in this case, and destruction of the schooner Perrin, was caused wholly by the negligence and inattention to their duties of the officers who navigated the Louisiana, and that the steamboat should be condemned to pay the whole damage incurred by the said collision.

Let the decree of the Circuit Court reversing the decree of the District Court be reversed.

Mr. Chief Justice TANEY dissenting.

I dissent from the judgment of the court. It is a case of collision on the Chesapeake bay, and involves principles and rules of decision of great interest in the navigation of its waters, where sailing vessels and steam vessels are continually meeting and passing each other in the night, as well as in the day. I think it my duty, therefore, to state the principles of law and the evidence in the case, upon which my opinion has been formed.

The rules of law applicable to a case of this description, as established by this court, I understand to be the following:

1. The vessels, whether sailing vessels or steamboats, must be manned and in charge of a crew competent to navigate them on the voyage in which they respectively engaged.

2. It is the duty of each vessel to have a lookout, acquainted with his duty, and faithfully discharging it, and stationed at that part of the vessel which will best enable him to see any impending danger, and promptly warn the helmsman of the point from which it is approaching.

3. It is the duty of a sailing vessel when meeting a steamboat to keep on her course, unless she is prevented by the change or direction of the wind; and it is the duty of the steamboat to keep out of her way, passing on the starboard or larboard side, as the steamboat may prefer.

4. Each vessel has a right to act on the presumption that the other knows its duty, and will act accordingly. But if the steamboat fails to shape her course to avoid the sailing vessel,

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in proper time and at a sufficient distance, the steamboat is answerable for the disaster, although the collision may in fact have been produced by an erroneous movement made by the sailing vessel in the moment of peril, and intended to avert the impending danger.

5. The distance at which a steamboat should pass must in some degree depend on the wind and weather, and on the light or darkness of the time and the size of the respective vessels. And, in order to excuse an erroneous movement on the part of the sailing vessel, the proximity of the steamboat, and her course and speed, must be such that a mariner of ordinary firmness, and competent skill and knowledge, would deem it necessary to alter his course to enable his vessel to pass in safety. But, in order to justify this, the dangerous proximity must be produced altogether by the steamboat.

These principles and rules of navigation are distinctly laid down in the cases of the *Genesee Chief v. Fitzhugh*, 12 How., 461, and the *New York and Liverpool United States Mail Steamship Company v. Rumball*, 21 Howard, 383, 384, and have been recognised and maintained by this court in many other cases of collision between steamboats and sailing vessels. It would be tedious, and is unnecessary, to enumerate them, as they all affirm the same rules of navigation.

I have stated them in separate propositions, because it is of the first importance that they should be clearly defined and understood. And impartial justice requires that they should be administered and enforced where they apply to the sailing vessel, as well as to those propelled by steam. Indeed it is impossible for the steamboat to perform its duty of keeping out of the way at a safe distance, unless the sailing vessel performs its duty by keeping steadily on her course when the wind will permit. And those who intrust their property in sailing vessels, or their cargoes to the care of persons ignorant of their duty, or incompetent in any other respect, have no just right to ask that others who have committed no fault should be compelled to share in their loss.

Keeping in view these established laws of navigation, I proceed to examine as briefly as I can the testimony; and first,

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the conduct and management of the schooner Perrin, the sailing vessel.

The collision took place near the mouth of the Rappahannock, at about ten o'clock on the night of the 28th of February, 1858. It was a moonlight night, and a vessel under sail, without lights, could be seen at the distance of three or four miles.

The schooner was an oyster-boat, of about 40 tons burden, and about sixty feet long, and eighteen feet beam. She belonged to Philadelphia, and had obtained a cargo of oysters in the Patuxent river, and sailed from the river about two o'clock of the day above mentioned, down the bay, for the capes of the Chesapeake, bound for her home port. It was a cold night, the wind from the northwest, a stiff breeze, nearly fair, but coming rather from the western land. The sails of the schooner were consequently spread out on her larboard side—that is, on her eastern side, as she went down the bay. She moved at the rate of six or seven miles an hour. Her crew consisted of Charles Ogden, captain, and five other persons, including the oystermen on board; and the latter, when not dredging for oysters, assisted in navigating the vessel.

At half past eight o'clock, on the night of the disaster, the captain and all of the crew, except the witnesses, William J. Miles and Charles Cory, went below to sleep; and from that time until the collision, no one but these two men were on deck, or assisted in any way to navigate the vessel, and therefore have no knowledge of what led to the disaster.

In weighing the testimony given by these two witnesses, it must be borne in mind that both of them have a direct interest in the result of the case, and will share largely in the damages that they may by their testimony recover from the steam-boat. Cory says, that two-thirds of the oysters belonged to Miles and himself, and Ogden, the captain, after one-third and the expenses were taken out. Each of these witnesses, therefore, is giving testimony in his own cause to support his own claim; and they are substantially parties prosecuting the suit, although they appear only as witnesses in the record. They may be admissible from necessity. But it is a departure and

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exception to the general rules of evidence, long and well established in courts of common law and equity, and goes always strongly to their credit; and the facts stated by such witnesses, as well as their manner of stating them, are carefully scrutinized by courts of justice, in considering the case. The wisdom and justice of the common-law rule will, I think, be apparent when we examine the testimony of Cory and Miles.

Cory's account of himself is this: He has been following the water as an oysterman four years and a half, during the oyster season; and on such occasions, when he is not dredging for oysters, it is a part of his duty to help to navigate the vessel and to help to look out, and he is always in one of the watches. But he had never before been down the bay below the Patuxent. He was the lookout, and the only one, in this part of the voyage. He says he saw the steamboat when about three or three and a half miles off; that he was walking on the larboard—that is, the leeward and eastern side of the vessel, and saw the steamboat between the night-head and fore shroud of the schooner; and she was to the leeward, larboard and eastward; and that, immediately upon seeing her, he said to Miles, the helmsman, "hadn't you better keep away?" and about five minutes afterwards, asked him again, if he hadn't better keep away; and receiving no answer to either question, he seems to have supposed that he had performed his whole duty as a lookout; for he appears to have made no further effort to communicate with the helmsman, and to have taken no further concern in the navigation of the vessel, before the collision happened.

It is evident from this testimony, given by the witness himself, that he was utterly unfit for a lookout, and performed none of its duties. He was not at the bow or near the head of the vessel, nor even on the windward side, where the sails would not have obstructed his view ahead, but was walking on her larboard or leeward side, and must have been aft of the foremast, as he first saw the Louisiana between the night-head and fore shroud. This was no place for a lookout, for the foresail and head sails were directly before him, and made it

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impossible for him to see the bearing or distance of any vessel approaching directly ahead, or on her larboard or eastern bow. And although he swears that he did, notwithstanding these obstacles, see her to the leeward and eastward of his vessel, he obviously contradicts himself, when he immediately after states that he twice advised the helmsman to alter his course more to the east; for if he really thought the steamboat bore to the east of south, his advice to the helmsman was to put the schooner directly in her way, instead of avoiding her; nor can the slightest reliance be placed upon his statement that the steamboat was to the eastward, or that the schooner was standing due south when he first saw the steamboat, or that she did not change her course until she luffed to the west a moment or two before the collision; for he had no compass before him; had never before been in that part of the bay, and under such circumstances could form no accurate judgment of the cardinal points of the compass; it was simply impossible that he could know whether the steamboat bore some points to the east or west of south, or that his vessel was heading due south, or two or three points to the east or to the west of south; or whether she did not vary in her course two or three points as she was approaching the steamboat before she changed directly to the west.

It would seem that he placed himself on the larboard side under the lee of the mainsail to shelter himself from the cold northwest wind, and in that situation it is literally impossible that he could know the precise course the schooner steered, or the bearing of the steamboat when he first saw her, and as he approached her; and it is equally impossible that he should have given the advice he did to the helmsman, if he really thought the steamboat bore east from the schooner.

The testimony of Miles, the only other material witness for the libellants, will show that he was as unfit for a helmsman as Cory was for a lookout, and that the facts he states are as little to be relied on.

He says he has been following the water as an oysterman thirteen or fourteen years, and accustomed to take the helm for the last four or five years; and it does not appear that he

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was ever before in that part of the Chesapeake bay; he was standing on the larboard side of the vessel, the same side with the sails, with his right hand on the helm, and from his position could see nothing ahead without going upon one knee, and looking under the boom; and when Cory told him there was a light ahead, he looked under the boom, and saw the Louisiana about one-half or three-quarters of a point to the eastward of the schooner.

Now, when he saw the steamer approaching, it was his duty, according to the repeated decisions of this court, to stand by his helm, with his eye on the compass, and keep the vessel steadily in her course, and rely on the lookout for information as to the approach and bearing of the steamboat; his own course at the time, he says, was due south.

But instead of doing this, he immediately took upon himself the additional duty of lookout, under circumstances that made it impossible he could perform either. He was on his knee from a half to three-quarters of an hour before the collision took place, watching the steamboat under the boom of his vessel. He says, indeed, that he did not watch her all the time, but watched his course; yet he tells us the boom was only 3 or $3\frac{1}{2}$ feet from the deck, and therefore, in order to look under it, he was obliged not only to go on his knee, but to bring his head down to within two or three feet of the deck; and in that posture, while watching the steamboat, it was absolutely impossible for him to know the exact course he was then steering, or form a correct judgment of the distance or bearing of the steamboat, for the compass was hid from him by the sides of the binnacle in which it stood, and his view ahead, and on the eastern bow of his vessel, obstructed by the foresail and head sails, which were spread out on the same side. And when he speaks of bearings and distances, he speaks, necessarily, not by the compass, but from vague conjectures, and states facts of which he could have no certain knowledge, and was not in a situation to form an opinion upon which any reliance could be placed; he admits that where he stood, with the compass before him, he could not

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see the Louisiana, and consequently could not see how she bore by the compass.

Again, he says Cory was looking out at the time of the collision, and was a competent lookout; yet his own testimony shows that he did not think so, nor places the slightest confidence in him; for as soon as Cory reported the steamboat in sight, he took upon himself the duty of lookout, as well as helmsman, although he was at the stern of the vessel, and could see nothing ahead except under the boom. And from the time the Louisiana came in sight, he was so absorbed in these double duties, or confused and bewildered by the appearance of the steamboat, that he does not appear to have remembered there was such a person as Cory on deck; he asked no information from him, and did not even hear him when he twice advised him to keep his vessel off; yet Cory was standing within a few feet of him, with nothing but the mainsail between them, and he had heard readily and distinctly when he reported to him that the steamboat was in sight.

He says he kept his course due south. I have already said he could not know the fact, as a large portion of his time was passed in watching the steamboat, with his head in a position which made it impossible for him to see his compass. And with his right hand on the helm, and stooping low on the larboard side to see under the boom, his right arm would naturally and necessarily follow the movement of his body to the larboard, and draw the tiller with it, and cause the vessel from time to time, with such a strong wind pressing on her mainsail, to head towards the west, and edge nearer and nearer to the due north line in which the Louisiana was moving, and thus, by his own incapacity and fault, produce the proximity which so much alarmed him, and induced him suddenly to change his course to the west. It is true, the lookout on board the Louisiana says she appeared to be standing south, and that he did not observe any change until she suddenly luffed to the west. But Captain Russell states, and every seaman knows, that you cannot, in the night, determine the precise course which an approaching vessel ahead is steering; and coming, as this schooner did, with a free wind, she might

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frequently vary from her general course, from time to time, one or two points, for two or three minutes, and the most vigilant lookout on the steamboat fail to discover it or observe it; yet, at the speed at which she was going, she would, by the slightest movement of the helm to the larboard, or the least relaxation of the hold of the helmsman, head more to the west, and approach nearer to the line of the steamboat, and increase the danger of a collision.

Indeed, Miles admits that his vessel did vary a little, but not enough, he says, to take her from her course; he does not, however, tell us how much she varied, nor what variance he thinks necessary to take her from her course, nor how long it continued, nor in what direction. It is obvious, from what he says of his own position and movements, that every variation from her general course must have been towards the west.

I do not think it necessary to comment further on the evidence given by these two witnesses. Testifying in the manner I have stated, and under the influence of a direct pecuniary interest in the result, I cannot think their statements would be entitled to any weight against the steamboat, even if uncontradicted by other testimony; but in all of its essential parts it is contradicted by disinterested witnesses who were on board of the Louisiana, and I proceed briefly to state the testimony of Captain Russell, and Ward, the second mate, who are the only two material witnesses on behalf of the steamboat. The disaster happened in the captain's watch, during which the second mate, Ward, was the lookout, and charged with the running of the vessel; the wheelsman was a colored man, and could not, therefore, be examined as a witness; but it is abundantly proved that he was an experienced wheelsman, and accustomed to perform that duty on steamboats, and was fully competent and trustworthy.

Captain Russell and the mate have for many years been engaged in the navigation of steamboats up and down the bay, at all seasons of the year; are both pilots of long experience, and well acquainted with the dangers to be apprehended, and are accustomed to meet and pass vessels at all hours of the night

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and of the day. Neither of them have any pecuniary interest in the result of this controversy, and they are both men of undoubted character for intelligence and veracity.

It has indeed been said, that the answer of Captain Russell to the libel, and his testimony as a witness, contradict one another, and that, on that account, credit ought not to be given to his testimony; but I can see no discrepancy between them. In his answer, he speaks in general terms of the disaster and the causes which led to it, and that is all that was proper or usual to state in an answer. When examined as a witness, he enters more minutely into the circumstances, and mentions his momentary absence from the deck just before the Perrin changed her course to the west, but there is no contradiction or discrepancy in this; and it is hardly just to a witness to select a detached sentence from the answer, and another from the testimony, to show an apparent contradiction, when the two papers, read throughout, are perfectly consistent with each other, and substantially the same; and in both his answer and his deposition as a witness he supports and confirms the testimony of Ward, the lookout, in every fact material to the decision of the case. Ward says he was stationed in the wheel-house, or pilot-house, as the place is indifferently called; the house is about sixty feet from the bow, upon the upper deck, and elevated about twenty-five feet; he stood by the side of the wheelsman on the larboard side of the house, and the wheelsman on the starboard, about four feet from him; and the compass was in the wheel-house, in front of the wheelsman.

It has been argued that the lookout ought to have been at the bow, and some passages in the opinions of this court in former cases are relied on to support this objection. But the language used by the court must always be construed with reference to the facts in the particular case of which they are speaking, and the character and description of the vessel. What is the most suitable place for a lookout, is obviously a question of fact, depending upon the construction and rig of the vessel, the navigation in which she is engaged, the climate and weather to which she is exposed, and the hazards she is

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likely to encounter, and must, like every other question of fact, be determined by the court upon the testimony of witnesses—that is, upon the testimony of nautical men of experience and judgment. It cannot, in the nature of things, be judicially known to the court as a matter of law. All that the law prescribes is, the rule that the lookout shall be stationed in that part of the vessel where he can most conveniently and effectually discharge the duty with which he is charged. And all of the experienced pilots who have been examined as witnesses in this case, accustomed to the navigation of the bay, well acquainted with the form and construction of the Louisiana, unite in testifying that the place where Ward was stationed was the best and most suitable; and they point out the serious disadvantages that might arise from stationing him at the bow. There can hardly be a rule of law which requires a steamboat to station a lookout in a place where he cannot effectually perform his duty. In a vessel propelled by sails, he is uniformly stationed at the bow, because, in any other part of the vessel, his view ahead would be obstructed by the head sails and rigging. But this reason does not apply to steamboats constructed like the Louisiana.

Taking it, therefore, as fully established by proof, that Ward, the lookout, was competent, and stationed in the proper place, I proceed to state his testimony, which is as follows:

He saw the schooner when about three or four miles off. The steamboat was heading a due north course, and the schooner appeared to be heading south, and bore by the compass north half east on the starboard (eastern) side of the steamboat. When the two vessels approached within the distance of 300 or 400 yards, the schooner bore north one point east on the starboard side of the Louisiana; and when within about 150 yards of the schooner, in order to give a wider space in passing, he headed the steamboat north by west, which left the schooner bearing two points east on her starboard bow. He had just steadied his boat in this course when he discovered that the schooner altered her course, and was heading west across the bay, and continued to hold that course until the collision took place. The moment he dis-

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covered that the schooner had changed her course, he gave the signal to stop and back, which was instantly obeyed. But the vessels came together before the headway of the steam-boat was entirely stopped.

The testimony of this witness, supported as it is by that of Captain Russell, can hardly be impeached by such testimony as that which has been given by such witnesses as Cory and Miles.

And I regard this as the true history of the disaster, and of the movements of the vessels by which it was produced.

The facts established by this proof, that the schooner bore north half east when first seen at the distance of three or four miles, and north one point east when at the distance of about 300 yards, show that, from the causes I have before mentioned, she had not maintained her course due south during that time, but had been luffing and edging to the west, so as to bring her nearer and nearer to the due north line in which the steamboat was steering; for, if they had approached each other in parallel lines, the schooner would have borne more and more to the east, and would have been directly east when they passed, and would therefore, when within 300 yards, have borne more than one point to the east of north. But even then, if she had continued to hold her course due south, and the steamboat had continued hers due north, they would have passed in safety, but nearer, indeed, than a steam vessel of the size of the Louisiana ought to pass so small a vessel as the oyster-boat. But when the steamboat changed her course one degree more to the west, it is evident that they would have passed each other not only in safety, but at a convenient and sufficient distance; for, it will be observed, that, for the distance of one hundred and fifty yards at which the steamboat changed her course, she was proceeding slowly, backing with all the force of her machinery, and with so much effect that her headway was nearly stopped when they came in contact. This is proved by the character of the injury inflicted. It is true that the side of the schooner was broken in, and an opening made, through which the water rushed in, and filled and sunk her in a few minutes. The witnesses for the libellants,

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who examined the schooner at Norfolk after she had been raised and carried into port, say that the blow "had hit the main beam across the break of the quarter, and split it—knocked the knees out from each side of it, and cut her down to light-water mark." But it did not even upset her. Cory, indeed, says that her stern was driven under the water. But Miles, who was at the stern, does not support him. On the contrary, he says the blow threw him to the windward, (that is, to the opposite side,) and that he went up the rigging of his vessel until he got on the bow of the steamboat. He does not intimate that he was in danger of being washed overboard or plunged into the water. Now, with the immense weight and size of the Louisiana, coming stem on, against the broadside of the comparatively slender and frail timbers and planks of this little oyster-boat, if the headway of the steamboat had not been very nearly stopped before she struck the schooner, the injury inflicted must have been much greater than that described by the witnesses. If she had been moving at even one-third of her ordinary speed, she would unquestionably have buried this little boat in the water, and passed over her. These facts of themselves show that her rate of speed for these 150 yards, taking it all together, could not have averaged, at the outside, more than four or five miles an hour.

Now, the schooner changed her course to directly west almost simultaneously with the reversal of the engine of the steamboat, approaching her line of movement nearly at a right angle, and was moving from east directly west during the time the steamboat was passing over this 150 yards. She was moving, also, with equal or greater speed, for all of the witnesses agree that she was sailing at the rate of six or seven miles an hour; and when she changed her course to west, she was in full headway, with all sails set, and must have maintained, during that time, at least very nearly the speed at which she had before been sailing; and this being the case, she must, in order to bring the vessels into contact, have passed nearly the same distance to the west which the steamboat, while backing, had passed to the north—that is, 150 yards; and consequently, if she had held on her course, would

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have passed at that distance, or nearly so, to the eastward of the steamboat.

It has, indeed, been said that the collision was immediate after the change of course by the schooner, and the backing of the steamboat; and calculations have been presented to show that it must have been so, because, from the combined speed of the two vessels, taken together, the 150 yards would be passed over in a few seconds. But this argument has no foundation in the evidence; for the steamer was not proceeding at her ordinary speed, but backing all the way, and had nearly stopped when she came in contact with the schooner. And the latter vessel was not meeting her from an opposite direction, but standing directly across her path, leaving the steamboat to pass over these 150 yards, and at the reduced rate of speed of which I have spoken, before the vessels could come together.

In reference to this part of the evidence, it is, perhaps, hardly necessary to notice the evidence of Miles, who says they were within thirty yards of the steamboat when he changed his course to the west. No one, I presume, will think that his testimony in this respect is entitled to any weight, when in conflict with the testimony of Captain Russell and the mate, Ward, who were both in a position to see perfectly what was before them, and accustomed, by long experience, to measure distances on the water by the eye, while Miles was looking under the boom of his mainsail with his head near the deck, and his vision obstructed by the sails and rigging of his own vessel. He was in no position to form a correct judgment of distances any more than of bearings; and even Cory contradicts him, and says, that "we did not change our course until we were within 150 yards, if, indeed, we were more than 100 yards from the Louisiana." He, in effect, corroborates the testimony of Captain Russell and Ward.

It has been said, also, that the steamboat ought to have slowed her speed before she approached so near as 150 yards to the sailing vessel. But this argument loses sight of the fact that, until the schooner changed her course to the west, those on board of the steamboat had no reason to suppose that

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there was the slightest danger of collision, or any reason for slackening her ordinary speed. They had a right to presume, and indeed were bound to presume, that the schooner would steadily hold on the course she was steering, and the steam-boat had shaped its course to keep out of her way, and pass her at a safe and convenient distance. And the moment they discovered that the schooner had changed her course, and was heading in a direction that might produce collision, she instantly stopped and backed, and took every measure in her power to avert the danger. But until the change of course by the schooner, there could be no reason and no obligation whatever to slacken her speed; for it can hardly be supposed that a steamboat is bound to stop or slacken her speed whenever she sees a sailing vessel coming in an opposite direction, and wait to see whether she will conform to the rule laid down by this court, and hold her course, or suddenly change it to cross the line in which the steamboat is moving. Such a rule would make steamboat navigation of very little value on the Chesapeake. But unless such is to be the rule, I can see no ground for imputing it as a fault to the steamboat, that she did not slacken her speed until she came within 150 yards, when it is admitted that the schooner did not change her course to the west until she had come within that distance of the steamboat.

As relates to the general rate of speed of the steamboat, no one acquainted with the navigation of the Chesapeake has ever suggested or supposed that it was dangerous to life or property on that wide bay; and there is no evidence from which such an inference can be drawn. The fact that the Louisiana carried the mail, and was obliged to proceed at the rate of fourteen or fifteen miles an hour, in order to fulfil her contract, certainly gave her no rights or privileges beyond those of any other steam vessel, nor exempted her in any degree from the care, caution, and watchfulness, in speed as well as in everything else, required of others. The fact that a contract was made is perhaps some evidence that the public authorities of the United States, having all the means of information within their reach, were satisfied that the rate

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of speed required was not dangerous to the life or property of our citizens who are accustomed to navigate the bay.

It is unnecessary to remark upon the testimony given by the captain of the Keyser, which sailed from the Patuxent in company with the Perrin. He was, he says, three-quarters of a mile off, and could in the night, even by moonlight, have no certain and accurate knowledge of the bearing of the colliding objects towards each other as they approached, or the particular incidents of the collision; the more especially as both vessels were ahead of him, and to leeward, and hidden from him by his own sails as he stood at his helm. He says, too, that before the collision, he paid very little attention, and what he did see was by looking under his boom.

Neither do I attach any importance to conversations and statements made on board the Louisiana after the collision. Declarations made in conversation are apt to be loose and unguarded—are often misunderstood, and, in my judgment, entitled to very little weight in any case, and least of all in a case like this, where the minds of all had been excited and agitated by the scene through which they had so recently passed.

There is no other evidence in the record which appears to be material to the points I am discussing, and I forbear, therefore, to refer to it. This opinion already occupies more space than I anticipated. But, as the full statement of the testimony cannot be given in the report of the case, I have found myself unable to present the facts truly and fairly, as I understand them, in fewer words.

I fully agree with the court, that the strictest supervision should be held over steamboats. But it is impossible for them to perform the duty of keeping out of the way, unless the sailing vessel is held to the correlative duty of keeping her course. Even-handed justice requires that the law of navigation should be as obligatory upon the sailing vessel as it is upon the steamboat. This is a question of property, and the rights of the parties are to be ascertained and determined by the rules of law. And where the evidence shows, as I think it does, that the Louisiana performed her duty, and took

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proper measures to keep out of the way, and her efforts were counteracted and defeated by the sailing vessel, and a collision forced upon the steamboat by the incapacity and misconduct of those in charge of the Perrin, I cannot think that the steamboat should be charged with any part of the damage which the sailing vessel brought upon itself. Those who intrust their property on the water to incompetent hands have no just right to complain of disasters, and claim indemnity for losses arising altogether from the incapacity and unfitness of those to whom they have confided it, and still less have Cory and Miles, whose incapacity and misconduct were the sole cause of disaster.

And entertaining this view of the controversy, I dissent from the judgment of the court.

GEORGE W. DAY, BOWEN MATLOCK, ISAAC H. FROTHINGHAM,
AND GEORGE W. WARNER, APPELLANTS, *v.* WILLIAM A.
WASHBURN AND JOHN A. KEITH.

Where a motion was made to dismiss an appeal, upon the ground that the appeal was taken by part only of the complainants below, and that the other complainants had not been made and were not parties to the appeal; and it appeared from the record that a fund had been decreed by the court below to be distributed ratably amongst two classes of creditors, one of which was composed of judgment creditors, and the other of those who had come in after the filing of a creditor's bill; and the first class only conceived themselves aggrieved by the decree admitting the others to a ratable proportion, and therefore became the appellants; this court will, in such a state of things, refuse the motion to dismiss and reverse this, together with all other points to be decided, when the case shall come up for argument hereafter.

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

A motion was made by Albert G. Porter, as *amicus curiae*, to dismiss the appeal, because the appeal was taken by part only of the complainants below, and that the other complainants have not been made and are not parties to said appeal.

The authorities cited were the following:

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A writ of error was brought by Mary Deneale and others, as plaintiffs. The court say, "who the others are cannot be known to the court, for their names are not given in the writ of error, as they ought to be. Mary Deneale alone cannot maintain a writ of error on this judgment, but all the parties must be joined, and their names set forth, in order that the court may proceed to give a proper judgment in the case."

Writ of error dismissed for irregularity.

Deneale v. Archer, 8 Peters, 526.

Smyth v. Strader, 12 How., 327.

The writ of error did not contain the names of the parties to the judgment set out in the record.

Cause dismissed.

"If a writ of error be brought in the names of several parties, and any one or more of them refuse to appear and assign errors, they must be summoned and severed, after which the writ of error may be proceeded in by the rest alone."

2 Tidd., 1135.

Mr. Justice WAYNE delivered the opinion of the court.

Albert G. Porter, Esquire, a counsellor of this court, and who was concerned as counsel in the court below for certain petitioners, claiming an interest in the matter in controversy adversely to the appellants, asked to be permitted, as *amicus curiae*, to move for the dismissal of this appeal, alleging for cause that it had been irregularly brought to this court, in this particular, that the appeal had been taken only by a part of the complainants, and that such of them as had been omitted were not parties to the appeal.

The record discloses the following facts:

The appellants filed in the Circuit Court a bill to set aside, as fraudulent, a conveyance of property, and to subject it to the payment of their claims against William A. Washburn, and associated with him as a defendant John A. Keith, the grantee of the conveyance. The bill was separately answered by Washburn and Keith, and proceedings were had in the case, until at December term, in 1858, the issue was made up, upon bill, answer, replication, and exhibits. At that term of

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the court, December 21, 1858, a number of persons, claiming also to be creditors of Washburn, filed a petition by their counsel, Hall, McDonald, and Porter, praying to be made parties to the bill, as complainants, and to be permitted to share in such distribution as might be made out of the property charged to have been fraudulently conveyed by Washburn to Keith, in the event of the courts decreeing that it had been so done, and that it was liable for the payment of Washburn's creditors. The court directed these petitioners to be made parties to the bill of the appellants, as complainants, and under that order the decree now appealed from was made.

But before the decree was rendered, the cause was referred to a master, to report the sums due to the creditors, as they were then appearing to be so in the original bill and other proceedings of the cause. It was done. Subsequently a decree was rendered, declaring Washburn's conveyance to Keith void and fraudulent. In consequence of it, a large sum was made out of the property and deposited in court for distribution. And the court decreed that it should be ratably distributed between the appellants and those other creditors of Washburn who by its orders had been made parties to the original bill. It is from this decree that the appellants have brought the case to this court. They had insisted, before the court rendered its decree, that, being the original complainants, they were entitled to have their claims paid in full, and that the remainder of the fund might then be distributed, in the discretion of the court, pro rata, amongst the other creditors of Washburn. But the court overruled the motion, and ordered the money to be paid ratably to the creditors. It is from this decision and decree that this appeal has been brought, so as to have it decided, whether, in the particular just mentioned, it is not erroneous.

It also appears that the appellants were judgment creditors of Washburn when they filed their bill to set aside his deed to Keith, and that the other creditors, who have been made participants in the fund to be distributed, are not so. And we gather from the proceedings in the cause, that their application to be made parties to the original bill was with the view

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to defeat the appellants of any legal or equitable priority which they may have acquired for the payment of their claims over the other creditors, either from their being judgment creditors, or from their vigilance in first filing a bill to set aside the conveyance from Washburn to Keith. We do not mean now to decide those points upon this motion, nor any other point connected with the merits of this controversy. All such points will claim the attention of the court upon the argument of the case hereafter. The record also suggests an inquiry, whether those persons who were made parties to the original bill, and who have become by the decree of the court participants in the fund to be distributed, were necessary parties to the bill, or were allowably so, in their then attitude in respect to their claims against Washburn. And in no other way can the question of right between themselves and these appellants in the fund be reached; for the former, having accomplished their purpose, for which they were made parties, are neither willing to appeal from the decree nor to be considered as parties to this appeal.

The record, indeed, suggests many points connected with the real merits of the controversy, and others in respect to proper pleadings in equity, which cannot be considered and determined upon a motion to dismiss the appeal summarily for any irregularities in the process by which it has been brought to this court. We therefore refuse the motion for the dismissal of the appeal, allowing it, however, to be brought to the notice of the court again, when the case shall be argued upon its merits.

This course has often been taken by this court upon a motion to dismiss a case, for irregularities in the appeal or writ of error, similarly circumstanced as this is.

THE UNITED STATES, APPELLANTS, *v.* JAMES NOE.

Where a grant of land in California was made in 1841, under the colonization laws, which looked to the settlement and improvement of the country, and eleven years elapsed, during which time the applicant took no step towards

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the completion of his title or the fulfilment of the obligations it imposed, nor is there any expediente in the archives to show the segregation of the land from the public domain, nor was there any delivery of judicial possession, nor any other assertion of right, the claimant must be considered guilty of an unreasonable delay in fulfilling his part of the engagement, and has slept for a lengthened period on his rights, coming forward at last, when circumstances have changed in his favor, to enforce a stale demand.

The excuse for the laches of the applicant, that the Indians were numerous and hostile, is not sufficient. That fact existed at the date of the decree in 1841. The claim must be treated as one abandoned prior to the date of the treaty of Guadalupe Hidalgo, and is not entitled to confirmation.

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

It was a claim for an island in the Sacramento river, in California.

The case is stated in the opinion of the court.

It was argued by *Mr. Black* (Attorney General) and *Mr. Stanton* for the United States, and by *Mr. Benham* for the appellee.

The arguments upon the merits of the case generally need not be stated, as the decision of the court turned upon a single point, which was treated by *Mr. Benham* thus :

The land was not occupied, but it was situated in a very remote quarter of the country, in the midst of hostile Indians. This rendered settlement impossible for several years after the date of the grant, and until political disturbances arose, which prevented the grantee from occupying it up to the change of flags.

In regard to this point, the case is stronger than Fremont's. Elwell's inability to make a *diseno* at the time the petition was presented was stated as in that case, and, as the evidence discloses it, for the same reasons. Here its preliminary production was dispensed with, as in that case, and the conditions usually imposed were not inserted in the grant. Yet, in the Fremont case, where the conditions were imposed, the court expressed themselves as being encouraged in holding him ex-

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cused for his default, because the Mexican Governor had dispensed with the *diseno*, for the reasons urged.

There could not, however, be default in this case, for no time was fixed for performance.

Arredondo's Case, 6 Peters S. C. R., 745.

The presumption of abandonment cannot arise.

There was no denouncement, and the right was unimpaired at date of cession. Denouncement was necessary to divest the grant.

Fremont's Case.

Mr. Justice CAMPBELL delivered the opinion of the court.

Robert Elwell, in a petition to Governor Alvarado, that bears date in 1841, represents that he had resided in the country sixteen years, was married to one of the natives, and had a numerous family, and had been employed in commercial business; that his capital had been impaired, and he had been reduced to enlist as a private soldier in the militia, and had served in the year 1838, under the command of the Governor, in the south, and had received no compensation. He solicits of the Governor, as a generous recompense to his subordinate, and also with a view to promote the progress of agriculture, to confer upon him a concession of a parcel of land situated in the northern frontier, and forming an island in the Sacramento river, eighteen leagues from the establishment of Don Aug. Sutter, containing five square leagues.

The Governor, in March, 1841, "in consideration of the services and merits specified," grants the land asked for, the claimant to abide the reports, as to whether the land is vacant, with whatever else that is proper, and that he shall furnish the *diseno*, in order to commence the expediente.

Two days before the claim was presented to the board of commissioners in 1852, Elwell conveyed his claim to the appellee. He (Elwell) was examined as a witness, and testifies that he had presented a *diseno* some three months after he had exhibited his petition; that there was no information or formal report made to the Governor, and that he had never

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occupied the land or had judicial possession delivered to him; that there was no officer to perform these duties.

There is some testimony to show that Noe had a tenant on the land in 1851, who inhabited a small house, and that the whole region of the Sacramento above Sutter's fort was not in a situation to be occupied, owing to the dangerous character of the Indians.

The board of commissioners rejected this claim; but, on appeal, their sentence was reversed by the District Court, and the claim confirmed to the entire island, provided it did not contain more than eleven leagues. From this decree cross-appeals have been prosecuted to this court.

As an inducement to the allowance of his petition, the applicant refers to the services he had rendered to the Governor in a military campaign; but the consideration of the grant is the proposed improvement of the Department, by the settlement and occupation of its waste lands. The authority of the Governor to make the grant is derived from the laws that provide for that object.

The decree of the Governor indicates that the title was to be perfected in the usual manner; and, consequently, that it was to be subject to the conditions of colonization. An interval of eleven years elapsed from the date of this decree till the presentation of the claim to the board of commissioners in 1852. During this time, the applicant took no step towards the completion of his title, or the fulfilment of the obligations it imposed. There is no expediente in the archives to show the segregation of this island from the public domain, nor report to the Departmental Assembly or the Supreme Government to testify that a citizen had been enlisted, "to give impulse to the progress of agriculture in the country." There was no delivery of judicial possession, nor any other assertion of right, by which the inhabitants could be charged with notice of this claim. A great change has taken place in the condition of the country; and other persons have assumed to settle and improve the land, which the applicant failed to do.

It is a general principle of equity, to grant a decree of specific performance only in cases where there is a mutuality of

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obligation, and when the remedy is mutual, and that it will not be rendered in favor of one who has been guilty of an unreasonable delay in fulfilling his part of the engagement, or who has slept for a lengthened period on his rights, and comes forward at last, when circumstances have changed in his favor, to enforce a stale demand. And it would be manifestly unjust to revive long antecedent covenants and dormant engagements in California, since the change in the condition and circumstances of that country, where it is evident that they were treated as abandoned, and imposing no obligation previously to that change.

The only explanation for the laches of the applicant is found in the testimony of the witnesses Castro and Combs, who say: "The whole of the region of country of the Sacramento above Sutter's fort, or New Helvetia, was not in a situation to be settled upon by individual grantees, owing to the hostilities of the Indians;" "that the Indians were numerous and hostile."

But this fact existed at the date of the decree in 1841, and will account for the abandonment of the purpose, that the applicant seems to have entertained at one time, of making a settlement. It is hardly probable that he could have anticipated the revolution that took place long afterwards in the condition of the country, and was then preparing to avail himself of the advantage to be derived from it.

In the *United States v. Kinsgbury*, 12 Pet., 476, the claimant sought to excuse the non-performance of the condition, because "the country was in a disturbed and dangerous state, from the date of the grant, and for a long time previous, till the transfer of the province." The court say: "All the witnesses concur in stating there was no more danger after the appellee petitioned for the land than there had been before and at the date of the application. The appellee, then, cannot be permitted to urge as an excuse in fact or in law, for not complying with his undertaking, a danger which applies as forcibly to repudiate the sincerity of his intention" to improve the land when he petitioned, as it does "his inability from such danger to execute it afterwards."

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The court say: "That concessions of land upon condition have been repeatedly confirmed by the court, and it will apply the principles of its adjudications to all cases of a like kind. It will, as it has done, liberally construe the performance of conditions precedent or subsequent in such grants. It has not nor will it apply, in the construction of such conditions in such cases, the rules of the common law. But this court cannot say a condition wholly unperformed, without strong proof of sufficient cause to prevent it, does not defeat all right of property in land, under such a decree as the appellee in this case makes the foundation of his claim."

In *De Vilemont v. United States*, 13 How., 261, the court say: "The only consideration on which such a title could be founded was inhabitation and cultivation, either by *De Vilemont* himself or his tenants; and having done nothing of the kind, he had no right to a title; nor can the excuse be heard, that he was prevented from a compliance with the conditions by the hostility of the Indians, as he took his concession subject to that risk."

In the cases of the *United States v. Fremont*, 17 How., 560, and *United States v. Redding*, 18 How., 1, the court have considered the effect of the conditions usually accompanying the grants to land in California, and how far their fulfilment is to be exacted in determining the validity of those claims. The court say, in the first case, "there is nothing in the language of the conditions, taking them altogether, nor in their evident object and policy, which would justify the court in declaring the lands forfeited to the Government, where no other person sought to appropriate them, and their performance had not been unreasonably delayed."

In the latter case, it is shown that the grantee displayed good faith and reasonable diligence to perform the conditions annexed to his grant; and all presumptions of an abandonment of his claim were repelled by affirmative and satisfactory proof.

But, in the present instance, we find nothing to have been done to place the claim of the applicant upon the records of the Department; and the duty of a colonist was wholly dis-

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regarded. Within the doctrine of the cases we have cited, the claim must be treated as one abandoned prior to the date of the treaty of Guadalupe Hidalgo, and is not entitled to confirmation.

Decree of the District Court reversed; cause remanded; petition to be dismissed.

THE UNITED STATES, APPELLANTS, v. JOSE ANTONIO ALVISO.

Where proceedings for a grant of land in California were commenced by a Mexican in 1838, and continued from time to time, and the claimant has been in possession since 1840, and no suspicion of the truth of the claim exists, this court will not disturb the decree in his favor made by the court below.

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

The case is stated in the opinion of the court.

It was argued by *Mr. Stanton* for the United States, and by *Mr. Robinson* and *Mr. Leigh* for the appellee.

The arguments upon the value of the title are omitted.

Upon the subject of possession, the counsel for the appellee said:

In such a case as this, lapse of time may operate for, but not against, the petitioner. As was said by the Court of Appeals of Virginia, its weight "is thrown in favor of the party who insists that the state of things existing during that lapse shall not be disturbed."

Evans, &c., v. Spengin, &c., 11 Grat., 622.

In these cases the court said: "The appellees seek only to preserve the existing state of things; they and those under whom they claim have been in possession of the subject in controversy, and have held it since August, 1809, at least. They are demanding nothing at the hands of the appellants; they seek to defend their long-continued actual possession by

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means of their superior equitable title—a title fully proved by the direct testimony, and confirmed by the lapse of time. There is nothing on the record on which to found the allegation that the appellees, or those under whom they claim, have abandoned or waived their rights; on the contrary, from 1805 or from 1809 they have, in the most emphatic manner, asserted these rights, by holding and enjoying their property.” With a change of dates, according to the facts, these remarks emphatically apply to the present case.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee was confirmed in his claim to two square leagues of land in the county of Santa Cruz, and known as La Canada de Verde y Arroyo de la Purissima, by the board of commissioners and the District Court of California.

His testimony consists of a petition by his brother (Jose Maria Alviso) to the Governor of California, in 1838, for a grant of the land, and permission to occupy it, while the proceedings for the perfection of his title were pending. This petition was granted, and the administrator of the ex-mission of San Francisco, de Assis, was directed to make a report upon the subject.

In 1839, this order was exhibited to the prefect of that district, who agreed to reserve the land for the claimant, and that the claimant might occupy it, referring him to the Governor for a complete title. In 1840, the administrator reported that the land was unoccupied, and was not recognised as the property of the mission or of any private person. The claimant has a conveyance from his brother, the petitioner, dated in 1840.

The testimony shows that his occupation commenced in 1840, and has continued for fourteen years; that he has improved and cultivated the land, and that his family have resided on it.

The claimant appears to have been a citizen of the Department, and no objection was made or is suggested why he should not have been a colonist of that portion of the public domain he has solicited. No imputation has been made against the

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integrity of his documentary evidence, and no suspicion exists unfavorable to the bona fides of his petition, or the continuity of his possession and claim. He has been recognised as the proprietor of this land since 1840.

Under all the circumstances of the case, the court is not willing to disturb the decrees in his favor.

Decree of the District Court affirmed.

WILLIAM B. SUTTON, SAMUEL L. GRIFFITH, AND JAMES SUTTON,
COPARTNERS UNDER THE FIRM AND STYLE OF SUTTON, GRIFFITH, & Co., PLAINTIFFS IN ERROR, *v.* STACY B. BANCROFT,
THOMAS BEAVER, AND OTHERS, COPARTNERS UNDER THE FIRM
AND STYLE OF BANCROFT, BEAVER, & Co.

Where parties were sued on a promissory note executed by them, did not pretend to have any defence, entered a false plea which was overruled on demurrer, refused to plead in bar, and had judgment entered against them for want of a plea, this court will affirm the judgment with ten per cent. damages.

THIS case was brought up by writ of error from the District Court of the United States for the western district of Arkansas.

It was submitted on a printed brief by *Mr. Watkins* for the defendants in error, no counsel appearing for the plaintiffs in error.

Mr. Watkins stated the case, and said that the judgment was rendered on the 22d of May, 1856, since which time the hands of the plaintiffs below have been tied from having execution, and the plaintiffs in error have never appeared in this court, nor have they taken any steps to prosecute their writ of error.

The defendants in error now ask for an affirmance of the judgment, with exemplary damages for delay.

Mr. Justice GRIER delivered the opinion of the court.

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The plaintiffs in error were sued on a promissory note executed by them. They did not pretend to have any defence. They entered a false plea, which was overruled on demurrer. They refused to plead in bar. Judgment was entered against them in due form, for want of a plea.

They do not pretend to allege any error in the proceedings. The judgment is therefore affirmed, with ten per cent. damages.

THE UNITED STATES, APPELLANTS, *v.* FRANCISCO PICO AND OTHERS.

Where the archives of California show that a petition for land was presented to the justice of the peace and military commandant at New Helvetia in 1846; that a favorable report was made on the 1st May, 1846; that the prefect certified, on the 18th May, 1846, that the land was vacant; that the Governor, on the 11th of June, 1846, made an order for a *titulo* in form, and the claimant produced from his custody a *titulo* dated at Los Angeles on the 20th of July, 1846, there is a departure from the regular and usual mode for securing lands under the colonization laws.

The *titulo* bears date on the 20th of July, and the 7th of July, 1846, is the epoch established by the act of Congress of 1851 and the decisions of this court, at which the power of the Governor of California, under the authority of Mexico, to alienate the public domain, terminated.

The evidence that the claimant occupied the land in 1847 is not satisfactory, or that he made any assertion of claim or title until the presentation of the claim in 1853 to the board of commissioners.

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

The nature of the claim is stated in the opinion of the court.

The case was argued by *Mr. Stanton* for the United States, and by *Mr. Gillet* for the appellee, upon a brief filed by himself, and adopting also a printed argument by *Messrs. Stanly and King*.

The points made by *Mr. Stanton* were the following:

1. There was no petition to the Governor soliciting the land agreeably to the regulations of 1828.

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2. The marginal decree made by Pico upon the 11th of June, 1846, was not a grant, and does not profess to be a grant.

3. The grant itself, which is dated on the 20th July, 1846, was after the conquest of the country by the American arms, and when the Mexican authorities had been entirely displaced and expelled.

4. There being no record evidence of the grant, there could be no legal title in the grantee.

Upon the third point, *Mr. Stanton* said that the Governor had no power over this land when the grant purports to have been made. It was fifty miles north of Monterey, where his power was destroyed.

Senate Documents, vol. 1, page 653, of 2d session Twenty-ninth Congress.

On the 9th of July, the flag of the United States was flying at Sonoma, and on the 11th, at every place north of Los Angeles. Suppose Pico had transferred a county to England. There is a grant of two hundred square leagues conferred by the Departmental Assembly on 24th July. There was no more power in the one case than in the other.

Mr. Gillet made many points with regard to the title, which there is not room to insert. With respect to the date of it, he contended that it became operative on the 11th of June, when an equitable title was vested in the grantee. His tenth point was as follows:

10. If the paper dated the 20th of July, 1846, at Los Angeles, is held to be the origin of the title, such title is valid, and no way affected by the American forces taking possession of Monterey only thirteen days previous thereto.

Monterey is on the Pacific coast, from one to two hundred miles southerly of San Francisco, and near that distance southwest of the grant in question, and about four hundred miles northerly of Los Angeles. The Costa mountains are between Monterey and Los Calaveras, the latter being to the northeast of the great marshes on the San Joaquin, and near the Sierra Nevada. On the 20th of July, 1846, the American

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forces had possession of no portion of California east of the Costa mountains nor south of Monterey. In neither was the authority of the United States exerted or recognised. The people and those in authority had not even heard of the war, and both might and doubtless did think it a re-enactment of the Commodore Jones affair, long years since, at Monterey, which was not approved by our Government. The only war that they knew of was a civil war, which had been carried on a couple of months, under the "bear flag" on one side, and Castro on the other. The California Government was going on as usual, without the least apprehension of a conflict of arms with the United States. All branches of the Government were performing their usual functions, both at the capital, at Los Angeles, and elsewhere, except at Monterey and the bay of San Francisco, where there were vessels of war. There is no evidence that there was a soldier in the field at the time, when a limited number of marines and sailors constituted the whole force, prior to the arrival of General Kearney from New Mexico, long afterwards. There was no order from Sloat or his successors, suspending the functions of the Mexican officials, or notifying them that their acts would not be recognised. They were not apprized that a conquest was contemplated, or a purchase desired or intended; and there is no evidence that the United States contemplated such conquest.

Under such circumstances, the acts of the Mexican authorities, at a distance from the places occupied by the American forces, and at points where they did not attempt to control, must be as valid and effectual as at any anterior period. The former laws remained in force, and these authorized the Governor to make grants. These laws were not annulled, nor others made in their place; the former officials were not removed, nor others substituted. If the old laws were changed, by whom, when, and how, were they changed? Except at the points where the American forces were in actual possession, everything remained as theretofore. Justice was administered by Mexican officials in all parts of the Territory, except in the few places where the Americans actually occupied the place,

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and appointed others to perform that duty. And it has not been shown that one such appointment was made, and notice thereof given, before the 20th of July.

Under these circumstances, both the Mexican officials, and those doing business with them, had a right to believe that the powers of the one and the rights of the other remained the same. The attempt to change either without giving formal notice, so that both could understand, would be springing upon them a law or rule of action of which they had no knowledge, and no means of acquiring it, and for the reason that the law or rule was made after the occurrence to which it applied.

The political branch of the Government having fixed the date of the acquisition of California, this court cannot alter it, or fix one for itself. That branch fixed the date of the American acquisition on the 2d of February, 1848, and agreed to protect those who had previously acquired rights under Mexico, not excepting those dated after the 7th of July, 1846.

The title of the United States to lands in California dates, not from the commencement of hostilities, but from the date of the treaty by which we acquired them.

[The argument upon this point is omitted for want of room.]

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee, a Mexican by birth, obtained a decree of confirmation in the District Court for a parcel of land, known as Las Calaveras, containing eight square leagues, and situated in Tuolumne county, in California.

His testimony is an expediente, existing in the archives, in the custody of the surveyor general, from which it appears that the claimant presented, to the justice of the peace and military commandant at New Helvetia, a petition, representing that he desired to obtain a grant for the land described in his *diseno*; and, to expedite his purpose, he requested a favorable report. One was made, bearing date the 1st of May, 1846. A similar representation was made to the same officer in the district of Yerba Buena, who declined to act, because the place was not within his jurisdiction. The prefect of that

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portion of the Department certifies, on the 18th of May, 1846, to the capacity of the claimant, and that the land was vacant. The Governor, on the 11th of June, 1846, made an order for the issue of a *titulo* in form.

Here the expediente terminates; but the claimant produces from his custody a *titulo*, bearing date at Los Angeles, the 20th July, 1846.

To strengthen his case, he adduces the testimony of a witness, to the effect that the witness had built a house upon the land in 1847, and had occupied it as tenant from that date; that there were people who inhabited and cultivated the land for the claimant, and that before 1847 the disturbances in the country hindered any improvement or settlement.

This testimony is contradicted by a witness produced on the part of the United States, who testifies with precision, and seems to have had every opportunity of acquiring exact information. He says that he came to reside in the vicinity of the land in 1848, and that there had been no improvement or occupation of it, and that the cattle seen upon the land did not belong to the claimant; that he had never heard of a claim by the petitioner until 1853.

There are grave objections to the allowance of this claim. There is a departure from the regular and usual mode for securing lands under the colonization laws. There is some reason to believe that the Governor was not at Los Angeles at the date of the order; and there is a failure to show, in any satisfactory manner, any assertion of claim or title under it, until the presentation of the claim, in 1853, to the board of commissioners. The claimant is a kinsman of the Governor, and we should expect to find on the part of the Governor the most exact attention to the laws prescribing rules for his guidance under such circumstances. Besides, the *titulo* bears date of a day when the conquest of Upper California had been completed by the military occupation of Monterey, Sonoma, Bodega, Yerba Buena, and the region of the Sacramento and American rivers, by the forces of the United States.

The commandant in that portion of the Department was making a rapid retreat to Lower California, leaving the coun-

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try to the control of the United States. From the capture of Monterey, on the 7th July, 1846, till the surrender of Los Angeles and the organization of a Territorial Government by Commodore Stockton, under the United States, there was scarcely six weeks. The Californian Government, for all practical purposes, was subverted by the capture of Monterey and the country north of it.

In the act of Congress of 1851, and the decisions of this court, that day is referred to as the epoch at which the power of the Governor of California, under the authority of Mexico, to alienate the public domain, terminated. Previously to that date, the claimant did not acquire a title to the land, nor has he acquired an equitable claim to it by any act done upon the land in the fulfilment of the colonization policy of the State.

Upon the whole case, our opinion is, that the appellee has not sustained the validity of his claim, and that the decree in his favor must be reversed, and his petition dismissed.

THE UNITED STATES, APPELLANTS, v. VICENTE P. GOMEZ.

When this court is satisfied, from the evidence before it, that no appeal to it had been granted by the court below, and that the cause was not before it when an order was passed, at the instance of the appellee, to docket and dismiss the case, it will rescind and annul the decree of dismissal, and revoke and cancel the mandate issued thereupon.

A motion to docket and dismiss a case from the failure of the appellant to file the record within the time required by the rule of this court, when granted, is not an affirmance of the judgment of the court below. It remits the case to the court, to have proceedings to carry that judgment into effect, if in the condition of the case there is nothing to prevent it. That is for the consideration of the judge in the court below, with which this court has nothing to do, unless his denial of such a motion gives to the party concerned a right to the writ of mandamus.

In the present aspect of this case, such a motion is not to be considered. Cases cited to sustain the above principles.

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

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It was docketed and dismissed at the preceding term of the court, under the circumstances which will presently be briefly stated. The attention of the court was now called to the case by the following motions, namely:

1. A motion by the Attorney General, to vacate the order dismissing the cause, and to recall the mandate.
2. A motion by Gomez, for a mandamus to the District Court, to compel it to file the mandate, and to permit the execution of the decree of the District Court confirming the land claim.
3. A like motion by Gomez, for a like writ to compel the said District Court to dismiss proceedings before it on the part of the United States, which proceedings were an application to open the decree below and to grant a new trial. These two motions may be considered as one.
4. A motion for a mandamus to compel the surveyor general of California to survey the land confirmed to Gomez by the decree of the District Court.

The history of the case is so fully given in the opinion of the court, that a very brief outline of it will be sufficient.

On the 9th of February, 1853, Gomez, by P. Ord, his attorney, filed his petition before the board of land commissioners, praying the confirmation of his claim to a tract of land called Panoche Grande.

On the 26th of March, 1855, the board decided against the claimant. An appeal was had to the District Court for the northern district of California, but upon representation made that the land claimed lay in the southern district, the transcript was sent to that court.

The occurrences which took place there, and the manner in which an appeal found its way to this court from the decree of that court confirming the claim, are narrated in the opinion of this court.

On the 31st day of January, 1859, a transcript of the record was filed in this court, and a motion made on the part of the claimant to docket and dismiss the cause, which motion was granted, and a mandate sent down to the court below. The mandate was, "that this cause be, and the same is hereby,

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remanded to the said District Court. You, therefore, are hereby commanded that such proceedings be had in the said cause, as, according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

On the 4th of May, 1859, a motion was made in the District Court, for leave to file the mandate and for leave to proceed under the decree. This motion was resisted by the district attorney, Mr. J. R. Gitchell, on the ground that no appeal had ever been taken by the United States in this case. The records of the court were offered in evidence, and Judge Ogier decided that it was satisfactorily proven to him that no such appeal had ever been taken.

This was the posture of the case when the motions were made which are inserted in the previous part of this report.

The following is the affidavit which is referred to and directed to be published in the opinion of the court.

In the United States District Court for the southern district of California. Vicente P. Gomez *ad.* the United States:

Pacificus Ord, late attorney of the United States for the southern district of California, being duly sworn, says: That at the June term, 1857, of the District Court of the United States for the southern district of California, held at Monterey, Isaac Hartman represented that he was a member of the law firm of Sloan & Hartman, authorized and retained as counsel for Vicente P. Gomez, in the above entitled cause. That he had as counsel for the said claimant obtained an order from the District Court of the northern district, removing the case to the southern district; and that he was ready and willing to present the same to the court, as soon as the same could be heard. Affiant further says, that shortly thereafter, the court being then in session, the said Hartman, acting as counsel for said claimant, presented the said case to the court by reading the petition for review, and the other papers and transcript in the case to the court, for the appellant. That after so doing, this affiant, acting for the United States, admitted, in open court, that in his opinion the claim was a valid one, and that, in accordance with the rulings of the court in previous cases,

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the case should be confirmed. That thereupon the court ordered that the decision of the land commissioners should be reversed, and a decree of confirmation entered therein for claimant. Affiant further says, that at the next term of the said District Court, held in Los Angeles, in December, the said Hartman, as counsel in said case, presented to affiant a draft of the decree of confirmation of said claim. That upon reading the same, affiant objected to the said draft, on the ground that the same would cover all the land embraced within the limits of the named boundaries, to the extent of eleven leagues. Whereupon the said Hartman made another draft of a decree, restricting the quantity of land to not more than four leagues; which said draft, after being approved by affiant as United States attorney, was signed by the court. That thereafter affiant drafted an order of appeal to the Supreme Court of the United States in said case, on the part of the United States; and on the last day of the term of said court, Col. Kewen, acting for the United States, at the request of affiant, district attorney as aforesaid, asked for and obtained, as affiant was afterwards informed, the said order in said case. Affiant further says, that at or about the time the said Hartman informed him that he had been retained by the said claimant in said case, affiant informed said Hartman that he had been the attorney for said Gomez before the United States land commissioners; and that, for his services therein, the said Gomez had conveyed to him the one undivided half of the tract of land claimed therein. That he had endeavored for a long time to get the Attorney General to appoint some attorney to represent the United States in cases in which he was interested, but without success. That this case had been unacted upon for a long time; and that as the commissioners had, upon the evidence before them, passed favorably upon the validity of the claim, and though they rejected it, it was only on the ground of want of occupation by the grantee; and that as that ground had been overruled by the Supreme Court, there could be no injury to the United States, and no impropriety on his part, as United States attorney, in appearing and consenting to its confirmation; in all of which views of this affiant the said

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Hartman then concurred. Affiant further says, that he wrote to the Attorney General of the United States shortly after assuming the duties of the office of district attorney, about December, 1854, stating that he had been employed as counsel, and was interested in several claims then pending on appeal in his district from the land commissioners, and requested that he would cause some attorney to be specially named to represent the United States in such cases. But the Attorney General never made or named any person to act in the matter, as requested. That affiant, being thus left to act in the matter as best he might, did act with the most scrupulous good faith, and to the best of his ability, for the United States, in all such cases. Affiant further says, that he has been informed and believes that the parties who are now and have been endeavoring to impede and defeat this claim, since the confirmation by the United States District Court, are private persons in possession of a valuable quicksilver mine, believed to be within the limits of said grant, lately opened and worked by them, of which one Daniel Gibb, of San Francisco, is believed to be the principal person interested. Affiant further says, that the substantial allegations in certain depositions of said Isaac Hartman and E. W. F. Sloan, dated December, 1859, in said case, are wholly untrue, except as herein admitted.

And further affiant sayeth not.

P. ORD.

The case was argued by *Mr. Black* (Attorney General) in support of his motion, and by *Mr. Johnson* and *Mr. Gillet* against it.

The reporter does not consider that the arguments upon these motions would be interesting to the profession generally, and therefore omits them.

Mr. Justice WAYNE delivered the opinion of the court.

This cause was docketed and dismissed in this court upon the motion of the appellee, and a mandate sent to the District Court from which the transcript of its record was obtained, for proceedings to be taken by that court to give to the complainant the benefit of its confirmation to the land in question.

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The Attorney General now moves for the revision of the order of dismissal, and that the mandate may be recalled.

He does so, alleging that no appeal had been granted to the United States in the court below by which the cause could be brought to this court for its revision; because there was then pending in the court below, when the claimant obtained the transcript, a motion for the review of the decree which had been given confirming the claimant's title; secondly, that the court had also under its advisement a motion concerning an appeal.

And the Attorney General further alleges, that the appeal from the decision of the board of land commissioners rejecting the petition, and also that the appeal from the District Court to this court, are fraudulent.

The charges as to the two first rest upon the records which the appellee presented to this court, to have the cause docketed and dismissed.

The Attorney General relies upon depositions and other papers which are on file in the District Court for southern California, and which have been transmitted to this court by Judge Ogier, to establish the charge of a fraudulent combination between the then district attorney of the United States, Pacificus Ord, Esquire, and the claimant of the land in controversy, and his assignees, to allow them to obtain from the District Court a reversal of the land commissioners' decree rejecting the claim.

W. C. Sims, the clerk of the District Court for the southern district of California, deposes that the document on file, giving notice that the claimant intended to prosecute an appeal from the decree of the board of land commissioners, is in the handwriting of Mr. Ord, with the exception of the figures No. 278 and the signature of E. O. Crosby.

The purpose for which this affidavit was made is, to show the interested connection between Mr. Ord and the claimant of the land, from the beginning of the institution of his suit to establish his right, and its influence upon the official conduct of Mr. Ord afterward, in every proceeding in the cause, after it had been removed from the northern district of California to the southern.

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Mr. Ord was originally the attorney of Gomez before the board of land commissioners, and filed his petition there as such on the 9th February, 1853. He was not then district attorney, but he became so on the first of July, 1854, before the land commissioners decided the case against his client. After his appointment, and after an order had been obtained, at his instance, to remove the cause from the northern district of California to the southern, of which he was the district attorney, and whilst the cause was pending in the latter, he took from Gomez, for the nominal consideration of one dollar, a transfer to himself for one-half of the land in controversy. This Mr. Ord admits in his affidavit presented to this court by counsel. The conveyance to him bears date on the 24th of November, 1856. It was acknowledged on the same day by Gomez before a notary public of the county of San Francisco, and was, at the request of Mr. Ord, recorded in the county of Merced on the 26th November, 1857; was also filed for record in the county of Fresno on March 26th, 1858, and again recorded by Mr. Ord in Monterey county the 3d May, 1858. A copy of that conveyance is now before us. These dates show that no record of the conveyance to him was made until after the claim had been confirmed by the district judge, upon his representation that, as district attorney, there was no objection to its confirmation; in other words, that he thought the claim a valid claim, and was within the rulings of the court in other claims of the same kind.

We shall cite the notice in its words, for, as it had been in fact the subject of the court's action, and could not have been so without the knowledge of Mr. Ord, and without his agency, it devolves upon him the task to disprove the declarations of Mr. Hartman of the forgery of the name of the law firm of Hartman & Sloan to the paper. We ought to remark, however, that Mr. Sloan, of the firm, is not shown by any paper to have had any personal agency in the matter. The notice is: "Now, on this day, came the parties, the appellant by Hartman & Sloan, and the appellee by P. Ord, United States district attorney: Whereupon, on motion of the attorney of the appellant, it is ordered that the transcript and papers

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transmitted from the northern District Court be filed in this court, and that the petition for a review of the same be entered thereon, and that the claimant have leave to proceed in said cause, the same as if it had been originally filed in this court." On the same day, a petition was filed for a confirmation of the claim.

After the confirmation of it in the manner as will hereafter be stated, Mr. Sloan, upon being told of the motion, and that it was signed by the firm of Sloan & Hartman, but, in fact, as if the style of their firm was *Hartman & Sloan*, made his affidavit under a commission instituted by Judge Ogier, that neither as a member of the then firm of Sloan & Hartman, nor otherwise, was he ever retained or employed in the case; that he never wrote nor authorized to be written any *petition or other paper* in the case; that he never had seen such a petition; that he had never authorized any one to use his own name, or that of the firm of Sloan & Hartman, in the case; and that, if the paper was signed as it is represented to be, it had been without any consultation with him, or his consent or approbation.

The notice for a review of the decision of the board of land commissioners by the District Court, signed, as has been said, by E. O. Crosby, and wholly in the handwriting of Mr. Ord, was given after his connection as attorney for Gomez had ceased, and after he had become the half owner of the land. Mr. Crosby does not appear afterwards in the suit as the retained attorney of Gomez, nor does it appear in any other proceeding in the record of the case that he ever was so. It does not appear that Mr. Crosby was ever recognised by the land commissioners or by the District Court as the attorney of Gomez, from which we infer, as the notice was in the handwriting of Mr. Ord, that Mr. Crosby was his agent for the purpose of obtaining a review of the case in the District Court. Afterward, upon its being found out that the land in controversy was in the southern district of California, and not in the northern, a petition was filed for its removal to the southern district, which was granted.

At this point began those irregularities which, until ex-

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plained, must leave an unfavorable impression in respect to Mr. Ord's discharge of his official obligations to the United States.

The motion made for the removal of the cause to the southern district is said to have been signed by E. W. F. Sloan, Esquire, and presented by him in open court; and the order said to have been passed recognises that as a fact. On the same day, the firm of Hartman & Sloan is reported in the transcript to have filed a notice of appeal with the clerk of the District Court for the southern district. The paper has all of the formality and substance which such a paper should have, but Hartman & Sloan deny the fact of having had any agency in making such a motion; and these separate affidavits would be sufficient to sustain their disclaimer, were it not, so far as Hartman is concerned, that his subsequent conduct in the case shows a connection between himself and Mr. Ord, which throws suspicion upon both; and that is aggravated by Hartman's deposition, by that of other persons, *and by the narrative given by Mr. Ord of his conduct in the suit.*

Hartman then makes his affidavit, that he had no knowledge who made and caused the petition to be filed, nor by whose authority and direction the same was done. But he states that, whilst attending the June term of the southern District Court in 1857, Mr. Ord, then United States district attorney, asked him if he would do him the favor to present a claim to the court for confirmation, stating it was a case in which there would be no opposition on the part of the Government. That, not suspecting there would be anything wrong about a claim to which the Government had no objection, he consented to do so; that, on the same day, the court being in session, and he being seated at the bar table, Mr. Ord passed to him the transcript in the case of Gomez and the United States, which he read to the court without any remarks, supposing it to be the case of which Mr. Ord had spoken to him; that after he had finished reading it, Mr. Ord remarked to the court that there was no opposition upon the part of the Government to a confirmation; whereupon the court replied, that there being no objection, the claim would

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be confirmed, as a matter of course. Mr. Hartman continues his narrative of his further connection with the case and with Mr. Ord, six months after, at the December term of the court, when it was held at Los Angeles. He says that then Mr. Ord remarked to him that it had been omitted, at the time of the confirmation of the claim, to have a decree signed by the judge; that Mr. Ord requested him to draw a decree, and to present it to the judge, to be signed *nunc pro tunc*. He says that he did so without knowing or suspecting that Mr. Ord had an interest in the land claimed by Gomez. This statement by Hartman of his agency in the confirmation of the claim, and in getting a decree upon it six months afterward at the instance of Mr. Ord, is denied by the latter in his affidavit, *excepting as to his declaration to the court that the Government had no objection to the confirmation of the decree*. The latter he admits in stronger terms than have been given. We shall use the affidavit for other purposes, and will have it printed in connection with this opinion, in justice to Mr. Ord, that the relations between himself and Mr. Hartman may be properly estimated from their respective declarations concerning it, only remarking now that there is proof that Mr. Hartman had subsequently declared himself to have been the attorney of Gomez in the case; that he had been so in all that he had done in the case; and that he had charged and demanded a fee for his services. It is not necessary for us to attempt to reconcile these differences, but it has certainly turned out unfortunately for Mr. Ord, in raising a violent presumption, from the manner in which they acted in the cause, that there was a concert between them to reverse the decision of the commissioners, and to obtain a decree in the District Court for the claimant.

Besides the motion of the Attorney General to vacate the order dismissing the cause, and to recall the mandate, a motion has been filed by the claimant for a mandamus to compel the judge of the District Court to file the mandate, and to permit the execution of the decree confirming the claim. Another motion has also been made by the claimant for a mandamus to compel the judge to dismiss the proceedings before it upon the part of the United States, to open the decree, and to ob-

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tain a new trial. And there is also a third motion for a mandamus to compel the surveyor general to survey the land confirmed to Gomez.

We shall not go into the consideration of these motions, but will confine ourselves to that of the Attorney General, using, however, such depositions as have been made under each of them, which correspond with and confirm the record presented to the court by the appellee, when he moved to have the cause docketed and dismissed.

Judge Ogier, in a return made to the first motion for a mandamus, certifies that the cause was tried by him upon the appeal from the land commissioners, and that he gave a judgment confirming the claim under the following circumstances:

Mr. Hartman presented the cause to the court, stating only its title and its number upon the docket, and Mr. Ord appeared for the Government, and stated that there was no objection by the United States to its confirmation. As a matter of course, without inquiry or examination, that he directed a judgment of confirmation to be entered, but that no decree was given at that term of the court, nor was a motion made for one, or any motion for an appeal by the United States to the Supreme Court. At a subsequent term of the court, E. J. McKewen, representing Mr. Ord, made a motion for an appeal in this cause and in several others; that, being then in doubt if an appeal could be given after the expiration of the term of the court at which judgment was rendered, he took the subject under an advisement, and that then Mr. McKewen suggested that the same point was under consideration in another case before the Supreme Court, which determined him to reserve his decision until that point was ruled here; then that Mr. Hartman offered a judgment of confirmation, Mr. Ord assenting thereto, on behalf of the United States, and it was ordered.

The case remained in this condition, the right of the United States to an appeal being reserved until the 7th day of December, 1858, when Mr. Gitchell, having succeeded Mr. Ord as district attorney, filed a motion for leave to withdraw Mr. McKewen's motion for leave to appeal, and also filed another motion for a rehearing of the cause, substituting the last for a

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motion which had been made by Mr. Stanton, then in San Francisco, and also representing the United States as its specially retained attorney. A day was then fixed, with the consent of all the parties, for hearing the pending motion. When the day arrived, Mr. Gitchell made a motion for a continuance, with an affidavit setting forth that the decree which had been given for the confirmation of the claim had been fraudulently obtained from the court, Mr. Ord having become the owner of half the land in controversy by a conveyance from the claimant, and that he had conspired with Gomez, or his assignees, to permit the judgment to be given for Gomez without a contest on the part of the United States. A copy of the conveyance from Gomez was filed with the consent of the claimant.

Mr. Gitchell's motion for a continuance was refused, on the ground that the proper motion under his charges was to ask for leave to file a bill of review. But Judge Ogier, feeling and thinking that he had improvidently given a judgment of confirmation, did continue the hearing of the motions to obtain proofs, if any could be had, concerning the contrivance by which he had been imposed upon. A commission was issued by him for that purpose, and under it Mr. Sloan made the affidavit denying all connection and attorneyship for Gomez, as has already been recited in this opinion. The case then remained in the District Court as it was when the motions which were made, without any further action upon that for an appeal.

This narrative has been given from documents, depositions, and declarations of the parties concerned in the case, and also by other persons, apparently disinterested, in respect to the land. They will be found either on the record upon which the cause was docketed and dismissed in this court, or in the book of exhibits sent to this court by Judge Ogier, which were obtained to enable him to act understandingly upon the merits of the case. The case *being still before the court*, we do not perceive any irregularity in the proceedings. Besides the motion for granting the appeal, the court had jurisdiction of the cause to determine what proceedings the claimant was entitled to

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under the circumstances of the case, to get the benefit of the decree, by survey or otherwise.

We will now proceed to show, from the record of the case filed in this court by the claimant, and from the official declarations of the clerk of the District Court from whom the record was obtained, that this court had no jurisdiction in the case when it was docketed and dismissed.

Mr. Sims, the clerk of the court, deposes, that in this case a transcript was called for by letter, signed W. W. McGarrahan; that, when that letter was received, no appeal had been allowed to carry the case to the Supreme Court, and that a motion for that purpose was still under the advisement of the court. The deputy clerk, Mr. Coleman, however, sent to McGarrahan a transcript, which was received by McGarrahan; and, that not being satisfactory, it was returned to the clerk, with a letter from McGarrahan, stating in what particulars it was deficient; and among them, that it was deficient in *not having a copy of the order for an appeal to the Supreme Court*, which McGarrahan suggested would be found on the minutes of the court. To this letter a reply was given by Mr. Stetson, who had succeeded Mr. Coleman as deputy, containing an order for an appeal, as it appears on the transcript before us. It is difficult to determine how such an order found its way into the second transcript of the record, when it was not in the first, and when the clerk deposes that no such order had ever been given. The order for an appeal may have been drawn in anticipation of the action of the court upon the pending motions, and left in the clerk's office unintentionally, and supposed by the deputy clerk to have been passed by the court, or it may have been drawn by Mr. Ord and left in the office, to keep up the semblance of his having faithfully represented the United States in the case, or it may be that some one of the parties interested in the land had surreptitiously placed it in the transcript to accomplish the purpose of having the case docketed and dismissed in this court. Dates will, in some measure, throw light upon the matter. It was written and dated on the same day that the court took under its advisement the motion relating to the appeal. Such antagonism in

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the action of the court upon the same subject matter of such importance as this was, would, indeed, be extraordinary; and the record shows that it does not exist.

It is a delicate and most unwelcome task which we are performing; but it must be done, in order that violated justice may be vindicated, and that official purity of conduct in our courts may be preserved and be unsuspected.

The record upon which this case was docketed and dismissed, in connection with the book of exhibits sent to this court by Judge Ogier, establish, in our view, the following facts:

That Mr. Ord became the purchaser of half the land in controversy from Gomez, the claimant, when he was the district attorney of the United States; that whilst he was district attorney, he prepared in his own hand the paper, signed by S. O. Crosby, for the removal of the cause from the board of land commissioners to the District Court; that Mr. Ord did not officially, as district attorney, represent the United States in the case in the District Court, in any one particular, but allowed it to be done by others, who were interested in establishing the claim of Gomez, to whom he gave his official confidence, and who are shown by the record not to have been the retained attorney of Gomez; that he permitted a judgment to be taken against the United States without argument, or the production of proof to establish the validity of the claimant's right to the land, by saying to the court, in his official character, that the United States had no objection to the confirmation of the claim. And it is established by the record itself that no appeal has been given to the United States by the court below. Mr. Ord admits that he relies upon the declaration only of the person to whom he confided the order which he drew for an appeal, that it had been granted by the court.

Under such circumstances, we conclude that no appeal had been granted; that the cause was not before us when the appellee made his motion to docket and dismiss it.

A motion to docket and dismiss a cause from the failure of the appellant to file the record within the time required by the

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rule of this court, when granted, is not an affirmation of the judgment of the court below. It remits the case to the court to have proceedings to carry that judgment into effect, if in the condition of the case there is nothing to prevent it. That is for the consideration of the judge in the court below, with which this court has nothing to do, unless his denial of such a motion gives to the party concerned a right to the writ of mandamus. The case is before us also upon such a motion, but we do not consider it upon the ground that this court had no jurisdiction of the case when it was docketed and dismissed, and that the appellee had no right to make that motion, under the rule of this court. All that we shall now do will be to correct an irregularity in the order given by this court in a case in which we believe it had no jurisdiction, and because the circumstances of it disclose that the judgment in the court below had been obtained by contrivance, and with the consent of the district attorney, in violation of his obligations to the United States, from which he necessarily anticipated a benefit, being then owner of half the land in controversy.

In vacating the order for the dismissal of the case, and for recalling the mandate, we do no more than to correct a proceeding improvidently allowed by the court, under a misrepresentation to it of the actual condition of the cause in the court below. Orders of the same kind for misrepresentation have often been made and allowed. We cite two cases from the English reports. In *Stewart and E. Drew*, petitioners, and *P. J. Agnew*, in *Shaw's Reports*, it was held to be incompetent to repeal a case on the merits formerly argued, and on which judgment had been pronounced by the House of Lords, but that the judgment might be amended on a point in which no decision had been given by the court of session, and on which no argument had been had, through misrepresentation stated in the House of Lords by the party against whom the judgment was pronounced. 1 *Shaw*, 413.

In *ex parte James White, Courtenay et al.*, 4 *House of Lords Cases*, 313, it was ruled upon petition that a judgment of the house given on appeal cannot be reversed; but when such appeal and judgment have been obtained by suppression

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and misrepresentation, the house will afterwards discharge the order granting leave to appeal, and the order constituting the judgment thereon.

Much was said in the argument of this motion concerning declarations, and a correspondence of the Attorney General in relation to an appeal having been taken in the court below for the United States. It matters not what they were, or how the attorney treated the matter, if he was deceived as to the actual fact of an appeal having been allowed. If it turns out to be that it had not been, any admission to the contrary cannot affect the United States.

Since the case was argued, the counsel for the claimant, with the consent of the Attorney General, has placed before us an affidavit made by Mr. Ord, in explanation of his conduct in the trial of the cause in the District Court, embracing his connection with Gomez, and his purchase from him of half of the land in controversy. We believe it to be proper to give him the benefit of his own narrative, and therefore shall direct his affidavit to be printed in the forthcoming volume of the Reports of this term of the court, with this opinion.

We direct that the order for docketing and dismissing this cause shall be vacated, and that the mandate which followed it shall be recalled.

The motion of the Attorney General for such purpose is granted.

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Where a claimant of land in California produced as evidence of his title a grant, dated on the 10th February, 1846, made by Pio Pico, "first member of the Assembly of the Department of the Californias, and charged with the administration of the law in the same," the claimant had neither a legal nor an equitable title.

He had no legal title, because—

1. He had not complied with the mode of acquiring a legal title which is found in the regulations of 1828. These require a petition to the Governor, an inquiry by him into certain circumstances, which being satisfactory, a formal grant was to be executed. The petition, grant, and map, were to be recorded.

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This record was the evidence of grant, and the Government is entitled to require the production of that official record.

The degree of record evidence required was adjudged in the case of *Cambuston*, 20 Howard, and of *Fuentes*, 22 Howard.

2. The claimant was bound to prove that records showing a substantial compliance with the laws of colonization did exist when the copy he produces was given to the grantee before he could be heard to prove their loss and their contents.
3. That the grantee had presented a petition, is stated incidentally, but indistinctly, by a single witness, and this unsatisfactory statement is disproved by the absence of the record and the evidence of his successor.

And that the grant was confirmed by the Departmental Assembly early in 1846 is not credible, not being sustained by the journal, and no such confirmation being found in a list of grants which were confirmed.

4. It is not probable, from all the historical circumstances of the case, that the archives have been lost.

He had no equitable title, because—

1. He was a secular priest, and a grant of mission lands to a priest for his own benefit was not heard of in any other case.
2. He was in necessitous circumstances, and subsisted on alms.
3. A condition was, that he should pay the debts of the mission, and there is no evidence of the amount of this debt, to whom it was owing, or how it was to be paid.
4. Until the spring of 1850, none of the large community then building up a city on the land had any suspicion that he claimed to be the owner of ten thousand acres of land, with an outer boundary including three other grants, and embracing nearly thirty thousand acres.
5. He had made some claim for the church, as a priest and administrator of the mission; and when no title was found to justify this, then, for the first time, he made this claim on his own account.
6. In November, 1849, he went to Santa Barbara, and on his return made use of expressions indicating that the acquisition of the deed was newly made. The testimony does not disclose what was the depository of this grant in Santa Barbara, nor when nor under what circumstances it was placed there, nor under what circumstances withdrawn. Neither the priest nor his agent were examined as witnesses, nor was Pio Pico interrogated in reference to the authenticity of the grant.

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

The circumstances of the case are fully stated in the opinion of the court.

It was argued by *Mr. Black* (Attorney General) and *Mr.*

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Reed for the United States, and by *Mr. J. Mason Campbell* and *Mr. Walker* for the appellee.

The record and arguments consisted of four large printed books, and a report of them would occupy a volume. A condensed view would be very apt to be unsatisfactory, and perhaps unjust; and therefore the points and arguments will be entirely passed over.

Mr. Justice CATRON delivered the opinion of the court.

In March, 1852, the appellee presented his claim to the commissioners for settling land claims in California for a parcel of land situated in the county of San Francisco, and bounded north by what was formerly known as Yerba Buena; northwest by lands of the presidio of San Francisco; west by the lands of Francisco Haro; south by the lands of Sanchez; and east by the bay of San Francisco, with a reservation of the curate's house, the church of Dolores, and other previously granted lands within the external boundaries of the tract, which include 29,717 acres; and the claims previously granted within those boundaries are 19,531 acres; leaving, as the unquestioned claim of Bolton, 10,186 acres. The original claimant is Jose Prudencia Santillan, a secular priest, who, together with his general agent, Manuel Antonio Rodriguez de Poli, in April, 1850, upon the recited consideration of two hundred thousand dollars, conveyed it to Bolton, the appellee. An interested party testifies that, in 1851 and in 1854, it was worth, at a low estimate, more than two million of dollars. The claim was confirmed in 1855 by the board of land commissioners, and in 1857 their decree was affirmed in the District Court. The grant to Santillan bears date the 10th February, 1846. It purports to have been made by Pio Pico, "first member of the Assembly of the Department of the Californias, and charged with the administration of the law in the same," and to be signed by Covarrubias, as secretary. It recites that the priest Santillan has petitioned for a grant, for his own benefit, of all the common lands known as belonging to the mission of Dolores, as well as the houses of the rancherias of the

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mission, which were in a state of abandonment; and that thereupon the Governor had proceeded to grant them, subject to conditions:

1. He shall pay, as a compensation for said grant, all the debts that exist against the mission.

2. He shall petition the proper judge for the judicial possession, in virtue of the grant, of all the lands and houses conveyed; and in the mean time, the possession which he has of the houses and lands, in his capacity of administrator, appointed as such by the prelate of the missions of the college of Our Lady of Guadalupe, in Zacatecas, for the temporalities of the mission of Dolores, shall serve as legal.

3. The judge who shall give the possession shall have it measured and marked with the customary landmarks, the contents being three square leagues, more or less.

4 and 5. That the houses of the curate, and the church of Dolores, and the property which some persons hold under good titles, shall be respected, and that the title be recorded.

The claimant exhibits a letter from Covarrubias to Santillan, dated 15th January, 1846, which informs him of an order made by the Governor to the administrator of the mission to make formal delivery of all the appurtenances of the mission Dolores to Santillan, that he (Santillan) may administer the temporalities of the mission.

In March, 1850, Santillan published a notice in a newspaper in San Francisco, which stated that the Governor, Pio Pico, on the 10th February, 1846, had granted to him all the uncultivated lands and all the unoccupied houses appertaining to the mission; that the grant was made and is recorded in the city of Los Angeles, and that it was written by Covarrubias, then secretary of the Governor; that in the month of January, 1846, an order had issued to the administrator of the mission, to put Jose Prudencia Santillan in possession of the temporalities of the mission, which was done; and that the grant, being made one month after, recognises and refers to this order of the Government, and provides that the possession under the order was for the purposes of the grant. This notice was designed to warn persons from trespassing on the land,

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or purchasing titles from the justice of the peace, acting in the capacity of alcalde in San Francisco. The grant itself was recorded shortly after in the county records of San Francisco; and in May, 1852, the claim was filed, with a petition demanding its confirmation, before the board of land commissioners, sitting at San Francisco.

In its support, four principal witnesses were relied on, namely: Jose Maria Covarrubias, Cayetano Arenas, Jose Matias Moreno, and Narciso Botello. Covarrubias's deposition was filed with the petition. He was secretary of the Government when the grant bears date, and deposes that he wrote the document; that Governor Pio Pico signed it, and that he, Covarrubias, countersigned it as secretary; all of which was done in the secretary's office at Los Angeles, at the time the grant bears date. He says the paper there exhibited was one of those delivered to the party, and that he believes it is a substantial copy, if not a literal one, of an order of the Governor for the purposes therein stated.

Arenas states that he was employed as an officer in the office of the secretary of the Government; that he saw the grant now filed before the board of land commissioners, produced at the office of the secretary of the Government in the month of February, 1846, about the time it bears date. "It is a document given out by the Government to padre Santillan." He declares the signature of the Governor and secretary to be genuine; that he saw the document made; also, that had the grant remained in the secretary's office, it is probable he should have seen it. Being asked whether a note of the grant was ever made in any book of titles, he answers that there were then only loose sheets of paper kept on which to note titles at Los Angeles, the regular book being at Monterey; and that a note of this title was made on said loose sheets of paper. "I wrote the note of this title myself." The sheets of paper were stitched together.

Moreno proves that he was appointed Government secretary as successor of Covarrubias, and came into office on the 1st day of May, 1846, and continued to act as secretary until the country was conquered in July following. He is asked on

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behalf of the claimant, "Whilst acting as secretary, did you ever see a paper purporting to be a petition of Jose Prudencia Santillan for a grant of the land of the ex-mission of Dolores, or any other paper in relation to said grant?" and answers, "I never did."

He further states, that he had never seen any such grant, or any papers relating thereto. "All I recollect is, that I saw the name of padre Santillan in the book in which the note of titles was taken; it was on the last page, but I do not know whether it was in relation to a grant or not. The book contained nothing but the notes which were taken of titles.

Narcisco Botello deposes, that he was a deputy of the Departmental Assembly during the first four months of 1846, and served as one of the committee on public lands; and during that time the original expediente and grant made to Santillan, of the mission of Dolores and its lands, came up for action before the Assembly; that the title was duly submitted and approved. He swears to its confirmation in the most precise terms. To meet this evidence, it is suggested for the United States that the Assembly never acted on sales of land made by the Governor of mission property; and this may be true; but the grant to Santillan was not a sale of the mission of Dolores. It is in form an ordinary colonization grant, made according to the act of 1824 and the regulations of 1828, and under their authority; nor can the recital in it—that Santillan shall pay the debts of the mission—affect the title. The title is vested, whether the debts were or were not paid. The petition and grant were undoubtedly proper papers to be submitted to the Assembly for approval.

Under the acts of colonization, the records of the Departmental Assembly in 1846, during the time that Botello says he acted on the committee of public lands, are well preserved. The different meetings and daily proceedings of that body are minuted in regular form, in the journals. From these it appears that its first session for 1846 commenced on the 2d day of March, and on that day Norega and Arguillo were appointed the committee on public lands; and in the session of the 4th of March, Senor Botello obtained a leave of absence

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for a term not exceeding three months. His absence is usually noted at the end of each day's proceedings, and his name does not again appear as an acting member until the 15th of June. On the first of July, he was elected temporary secretary of the Assembly, in the absence of Olvera, the regularly-appointed secretary. Botello certainly did not belong to the committee of public lands during the year 1846.

The first report of the Governor to the Assembly respecting the disposal of lands was of forty-five grants to sundry individuals, and was made the 8th day of May, and referred to the committee. The committee reported favorably, and the grants were confirmed in the session of June 3d. The decree of confirmation includes grants down to May 3d, 1846. That of Santillan is not among them.

The decrees of confirmation are distinct, regular, and definitive, and there is no reason to suppose that any grant that had been made was reserved from the Assembly. And, in addition, Moreno proves that, whilst he acted as secretary to Governor Pico, he never sent to the Departmental Assembly any expediente or grant of lands to Santillan. And as it was his official duty to do so, he can hardly be mistaken. We deem it true beyond controversy that Botello was not one of the committee on vacant lands; that the claim of Santillan was not presented to the Departmental Assembly; and that the statement of Botello, in his deposition of his official relation to this grant, is without any foundation in truth.

Covarrubias having stated that padre Santillan filed a petition for a grant of the mission lands of Dolores, and that Governor Pico made an order on which the grant was founded, it becomes necessary to inquire whether such petition and order ever existed in the archives; and secondly, the probability of their being lost, as not the slightest evidence now exists in the archives of any petition, order, or the record of a grant.

Moreno states that he took possession of all the archives, when he came into office as successor of Covarrubias. Arenas says this was the next day after Covarrubias had resigned, in February, 1846. Moreno states that it was on the 1st day of May, 1846. It is certain that Moreno submitted to the As-

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sembly the titles confirmed in June. He proves that no such papers were ever seen by him; and as he was examined on behalf of the claimant to prove the authenticity of this grant, and whatever might conduce to that end; and as he was interrogated relative to the existence of papers properly connected with it, if authentic, and remaining in the public repository under his official care; and as he denies knowledge of the deposit or existence of such papers, his testimony raises a strong presumption that the requirements of the colonization laws were not complied with on this subject. We are confirmed in this opinion by the examination of other testimony.

Arenas says he took the name of the title and the number and date of the grant; that is to say, of the grant then before him, and then delivered to Santillan. But he says nothing of the petition nor decree conceding the land. All that Covarrubias states is, that there was a petition and decree of the Governor, on which papers the grant was founded. But he does not swear that they were filed or recorded.

As respects the probability of a loss of Santillan's title papers, Moreno proves, that when the United States forces suppressed the Mexican Government of California, in August, 1846, by order of Governor Pico, he deposited the archives belonging to the Secretary's office in boxes, and placed them in the house of Don Louis Vignes, in Los Angeles; and he knows nothing further of them. And Olvera proves that he made a similar deposit of the records of the Departmental Assembly at the house of Don Louis Vignes. This occurred about the 10th of August, 1846. He says that he then had expedientes in his charge as secretary of the Assembly. How many does not appear. Up to this time, it is not assumed that any documents were lost.

Commodore Stockton directed the removal of these archives, and for that purpose they were taken possession of by Colonel Fremont; and after some delay and some exposure, they were eventually delivered to Captain Halleck, of the United States army, at Monterey, then acting Secretary of State under the military Governor of California. Captain Halleck proves that,

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when delivered to him, they were in a bad condition, being much torn and mutilated. They were shortly after arranged, numbered, and labelled.

It is a historical fact, that the expedientes and grants made for some ten years before the year 1846 are referred to in an index, and in a register known as the *Toma de Razon*—the former made by Manuel Jimeno, who was the Government secretary before Covarrubias. And as the title papers to which reference is made in this index, and the register, are found in the archives as they now exist, it is reasonable to suppose that those expedientes made in 1846 were carried with equal safety, as they came into Colonel Fremont's hands, according to the testimony of Moreno and Olvera, in the same condition; and, according to the testimony of others, they were transported in the same manner, and were continued in the same custody; and it is true, that the expedientes of 1846 are apparently as well preserved as the others; but from the loss of the *Toma de Razon*, and the absence of a contemporary catalogue like Jimeno's index, we have not the same assurance of their entire existence.

Be this as it may, the claimant was bound to prove that records showing a substantial compliance with the laws of colonization did exist when the copy he produces was given to Santillan before he could be heard to prove their loss and their contents.

In deciding on this controversy, we are to be governed by the laws and usages of the Mexican Government administered in the Department of the Californias (as respects the granting of lands) before the conquest of the country, and according to the principles of equity. These are the rules prescribed by the act of March 3, 1851, sec. 11.

The laws and usages applicable to this claim are found in the regulations of 1828.

Lands were to be granted "for the purpose of cultivating or of inhabiting them;" and the mode of obtaining a grant is prescribed to be by an address to the Governor, setting forth the petitioner's name, profession, &c., describing distinctly, by means of a map, the lands he asks for. Then the Governor

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was to obtain the necessary information whether the petition embraced the legal conditions, both as regards the land and the applicant. This being done, the Governor was required to proceed to make an order for the formal grant to be drawn out, which he should execute.

Sec. 11 directs that a proper record shall be kept of all the petitions presented and grants made, with maps of the lands granted.

This record is the evidence of grant. It being made, the Governor (sec. 8) shall sign a document, and give it to the party interested, to serve as a title, wherein it must be stated that said grant (to wit, *the record*) is made in exact conformity with the provisions of the laws. In virtue of this document issued to the party, possession of the lands shall be given. But the document is not sufficient of itself to prove that the Governor has officially parted with a portion of the public domain, and vested the land in an individual owner. This must be established before the board of commissioners by record evidence, as found in the archives, or which had been there, and has been lost. The *titulo* given to the party is merely a certificate by the Governor of the acts that have been done in the regular course of official procedure towards the disposal of a part of the public domain. Among individuals, this certificate serves the purpose of evidence. But when the Government institutes inquiries in reference to the subject, it is entitled to require the production of that official record, which it has prescribed to its officer, for its own security, and as a necessary condition of a legal administration, and a necessary precaution against fraud. That a petition was presented by Santillan is stated incidentally, but indistinctly, by a single witness, (Covarrubias;) and this unsatisfactory statement is disproved by the absence of the record and the evidence of his successor, Moreno. The claim, as presented to the board of commissioners and the District Court, has no legal foundation to rest upon.

The degree of record evidence which is required to support a claim of the above description is considered and adjudged in the case of Cambuston, (20 How., 59,) and more at large

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in the decision made at this term in the case of Fuentes against the United States; so that a further consideration on that head is not required in this case.

Such being the *legal* condition of this claim, the next question is, how does it stand on its *equities*?

The grantee is one of the eighteen secular priests who were in California. He arrived at the mission of Dolores either in 1844 or 1845, probably in the latter year. He was of Indian extraction, and in necessitous and distressed circumstances. A number of witnesses say he subsisted on alms. A grant to a priest for his own benefit is a singular fact in California. The bishop elect since 1850 says: "I learned that padre Santillan obtained a grant of land from Governor Pio Pico. I know of no other instance excepting this, and have heard of no other case in which the grant has been made to a priest personally, and for his own benefit." Berreyesa, when pressed for the reason for the retention of a casual conversation in his memory for so long a period, says: "It was an unusual thing for a mission to be granted to a padre, for it was thought that the padres could not hold such property, and it seemed strange to me."

But the grant was made to this necessitous padre upon the primary condition that, "in consideration of this grant, he shall pay the debts of the mission which exist up to this time." It would seem that a grant of land with such a condition, to such a person, was a vain thing. There is no testimony to show what the amount of the debt assumed by Santillan was, to whom it was owing, when and how it was contracted, or what security was required for its payment. Neither Pio Pico nor Covarrubias afford the slightest information of the manner in which the consideration was to be paid.

Until the spring of 1850, none of the large community then building up a city on the land in dispute had any suspicion that this poor man claimed to be owner in his own right of ten thousand acres of land, with an outer boundary including three other grants, and embracing nearly thirty thousand acres.

He had made some claim for the church as a priest and ad-

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ministrator of the mission, and had caused the papers of the mission to be examined by a competent lawyer, and endeavored to repel intruders at his door by some title which he supposed might exist among the documents of what had been an important missionary establishment. No title was found which vested this property in the church, and superseded the public title; and then this claim was first made known to the public.

There were at that time a thousand settlers on the land claimed, holding their possession and titles by purchases made from a justice of the peace, appointed under the authority of the military Government of the United States in California, and who professed to make grants not exceeding fifty varas square, but with a reservation of the claims of individuals and that of the United States. Of course, these claimants expected to receive an acknowledgment, or some recognition, of their title by the United States. The padre Santillan seems to have been much excited by his contest with these occupants. In September, 1849, he constituted O'Connor, an attorney at law, and Salmon, a merchant, his attorneys, and authorized them to enter into possession, for the uses and benefits of the mission of Dolores, and of which he was pastor, of lands, tenements, and hereditaments, that he had a right to enter into, possess, and enjoy, and the same dispose of by lease, for the benefits and objects of the mission, with all the powers that he possessed by virtue of his pastoral care and tutorship, in his own right and the rights of others represented by him. "He also empowered them to ask, demand, recover, and secure, the sum or sums of money now due or owing for occupancy and use of the lands, houses, tenements, and hereditaments, belonging to the parties represented by him, or belonging to him, by virtue of his office."

The attorney mentioned in this deed is a leading witness to discredit the genuineness of the grant.

He had no notice or imagination of its existence when this power was accepted. In November, 1849, the padre Santillan, with Dr. Poli, made a journey to Santa Barbara, the place of residence of Covarrubias, and on his return intimated to his

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friends "that he had been to the Governor, and that the Americans could not rob the church any longer;" that he had the paper, "in which were all his hopes;" "that he was well off;" and used other exultant expressions, which denote that the acquisition of the deed was newly made, and that a great change was effected by it in his condition and feelings. In the month of March, 1850, he announced to the public of San Francisco that such a grant was in his possession, with other circumstances before detailed, and in the month of April conveyed the land to the claimant.

The testimony does not disclose what was the depository of this grant in Santa Barbara, nor when nor under what circumstances it was placed there, nor under what circumstances withdrawn. Neither Santillan nor Dr. Poli have been examined as witnesses; nor was Pio Pico interrogated in reference to the authenticity of the grant.

There is no proof to show that any of the conditions of the grant have been fulfilled. The testimony as to the payment of any portion of the mission debts is vague and unsatisfactory. There was no judicial possession sought or obtained, and no claim made for the land as the grantee thereof, to give the community at large any information concerning it.

Our opinion consequently is, that the validity of the grant has not been sustained, and that the decrees of the board of commissioners and the District Courts are erroneous and must be reversed, and that the cause be remanded to the District Court, with directions to dismiss the claim.

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In California, where a will with its codicils was offered in evidence, the testator of which died in 1848, an objection to its admission because it had never been admitted to probate was not well founded. The codicil was not inadmissible as testimony on that account.

Neither was it inadmissible because the witnesses who were present at its execution had never been examined to establish it as an authentic act.

An objection to the admission of the codicil, because it does not appear on the face of the instrument that the witnesses were present during the whole time

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of the execution of the will, and heard and understood the dispositions it contained, was not well founded.

Cases cited to establish this point.

It was proper in the court to allow evidence to go to the jury of a custom in California as to the manner of making wills, and to instruct them that the evidence was competent; and that if the custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, it will operate to repeal the prior law.

The Spanish law upon this point examined, and also the decisions of the State courts in California.

It was proper in the court to instruct the jury that the testator and witnesses should alike hear and understand the testament, and that, under these conditions, its publication as the will of the testator should be made.

With regard to the proof of the will, as all the witnesses were dead, evidence of their signatures and that of the testator was admissible, and also of a declaration by him that he had made a will with a similar devise. The sindico, who attested it, should be counted among the witnesses.

The binding force and legal operation of the codicil are to be determined by the law as it existed when the codicil was made. But the mode in which it should be submitted to the court and jury, and the effect to be given to the testimony that accompanied it, depend upon the law of the forum at the time of trial. It was a proper question to be submitted to the jury, whether, under the circumstances of the case, it was probable the formalities required by law were complied with.

THIS case was brought up by writ of error from the Circuit Court of the United States for the districts of California.

It was an ejectment brought by Adams and Grimes, citizens of Massachusetts, against De Cook and Norris, to recover a rancho in California. The amended complaint reduced the parties to Adams, plaintiff, against Norris, defendant.

Adams claimed, as representing the heirs at law of one Eliab Grimes, and Norris under a codicil to the will of Grimes. The question therefore was, whether the will should stand.

Grimes, who was a Mexican citizen by naturalization, made a codicil to his will in 1845, by which he devised the rancho to his nephew, Hiram Grimes, under whom Norris claimed. The codicil was signed by himself and executed "before me, in the absence of the two alcaldes.

"ROBERTO T. RIDLEY, *Sindico.*

"Witnesses: NATHAN SPEAR.

GUILLERMO HINCKLEY."

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Upon the trial, the plaintiff made out his title, when the defendant offered the original will and codicil in evidence, the will never having been probated.

The witnesses were all dead. Hinckley died in 1846, Spear in the fall of 1849, and Ridley in April, 1852. Grimes, the testator, died in November, 1848.

The first exception was as follows :

The plaintiff admitted the genuineness of the signatures to the documents A and B, and they were given in evidence without objection ; but the plaintiff objected to the admissibility of document C, upon the following grounds :

First. Because a paper offered in evidence as a will or codicil without probate, and which has never been duly probated, cannot be admitted in evidence for want of such probate, and does not become a will until probated.

Second. Because the courts of the United States have no probate jurisdiction ; and no document or paper purporting to be a will can be probated in any court of the United States.

The court overruled the said objections, and admitted the said document to be given in evidence, and permitted the defendant to offer proof of the execution of said document, the same not having been admitted to probate by any probate or other court.

The complainant then and there immediately excepted to the ruling of the court, and the exception was then and there allowed.

It would be tedious to follow the trial through the numerous points made, prayers to the court, and rulings thereon ; and unnecessary, because the substance of them is stated in the opinion of the court. The jury found for the defendant, and the plaintiff brought the case up to this court.

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

The California cases referred to in argument were the following :

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Panaud *v.* Jones, 1 California Reports, 497.

Castro *v.* Castro, 6 California Reports, 158.

Grimes's Estate *v.* Norris, 6 California Reports, 621.

Tewis *v.* Pitcher, 10 California Reports, 465.

1 McAllister's Reports, (this case,) 253.

The arguments of the counsel upon both sides, investigating minutely the provisions of the Hispano-Mexican law in force in Mexican California, and referring to the authorities upon that branch of jurisprudence, would not be interesting to the generality of the readers of this volume, and are therefore omitted.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff claimed, as the assignee of heirs at law of Eliab Grimes, deceased, the title and possession of an undivided seven-eighths of a parcel of land in Sacramento county, known as the rancho del Paso, containing ten square leagues, being the land granted to Eliab Grimes by Micheltorena, Governor of California, the 20th December, 1844. The defendant resisted the claim, as the assignee of Hiram Grimes, who is a devisee of the land by a codicil to the last will of Eliab Grimes, which is in the Spanish language, and of which the following is a translation :

“SEAL FIRST—EIGHT DOLLARS.

“Provisionally empowered by the maritime custom-house of the port of Monterey, in the Department of the Californias, for years eighteen hundred and forty-four and eighteen hundred and forty-five. PABLO DE LA GUERRA.

“MICHELTORENA.

[SEAL.]

“I, Eliab Grimes, a Mexican citizen by naturalization, having to add a codicil to my testament heretofore made, and desirous of doing it in conformity with law established in this Republic, do make and declare it to be of my will and intention, in presence of the alcalde of this jurisdiction, his secretary, and two witnesses of assistance, as follows :

“Codicil 2d. I give and bestow to Hiram Grimes, my nephew, all the right and title which the Government con-

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ceded to me to the rancho known (or named) as the 'rancho del Paso,' in Upper California, situated on the American river, as is delineated and appears in the plan and title, the original of which exists in the public archives of Monterey, together with all the cattle, horses, and other animals, that are on said rancho, as also all the buildings and laboring and cooking utensils, and all other property of mine which is met with on said rancho, deducting always a certain proportion of all the cattle, horses, and other animals, and of their produce, for those who have had the care of said rancho, in payment of their services, according to the agreement made.

"And in order that it may be evident, I sign in the manner above expressed this 18th day of April, 1845, at the pueblo of San Francisco de Asis, and at the same time there remains deposited a copy in the archives of the same.

"ELIAB GRIMES.

"Before me, in the absence of the two alcaldes.

"ROBERTO T. RIDLEY, *Sindico.*

"Witnesses:

"NATHAN SPEAR.

"GUILLERMO HINCKLEY."

The verdict and judgment in the Circuit Court were in favor of the defendant; and the cause is presented to this court upon exceptions to decisions of the presiding judge in the course of the trial.

The defendant, to sustain the codicil, established, by the admission of the plaintiff, the genuineness of the signatures of the testator and of the witnesses to the codicil, and that they were all dead, the testator having died in 1848. He also adduced the testimony of a number of witnesses to prove the existence of a custom in California as to the mode of making wills prior to any change in the Mexican law by the State Government, and that Grimes, shortly before his death, had informed a witness that he had devised his place of del Paso, with the stock on it, to Hiram Grimes, his nephew, and desired of him some aid for his nephew in the settlement of his affairs. No other testimony is reported in the bill of exceptions. It was contended, on behalf of the plaintiff, that the

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codicil was not competent as evidence, nor sufficient to transfer property:

1. That the codicil had never been admitted to probate in California, and that the proof of the signatures to the codicil was not sufficient to establish its validity.

2. That there is no statement in the paper itself tending to show that the disposition was dictated by the testator in presence of the witnesses, or read over to the witnesses in the presence and hearing of the testator, they being present at one and the same time, without interruption or turning aside to any other act, and having been so dictated, or so read over, was declared by the testator to the witnesses to be his last will and testament.

3. That three witnesses of assistance are necessary to the validity of a will, and that the sindico, not having professed to act as a witness, and being without authority to receive wills in that capacity, the codicil is void for want of the sufficient number of witnesses, and that this deficiency could not be cured by proof of any custom at variance with the written law.

The court did not support these objections, but instructed the jury that a will, executed under the Mexican laws, in presence of only two witnesses, affords no sufficient proof of the execution. But if they should be satisfied, from the proofs in this case, that a uniform and notorious custom existed uninterruptedly for the space of ten years in California, which authorized the execution of wills in the presence of two witnesses only, and which custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, then the proof of such a custom, and for such a length of time, will operate a repeal of the prior law, and that two witnesses will be sufficient. On the contrary, if a custom of the character described and for the period mentioned was not proved to their satisfaction in such case, if three witnesses have not attested to the codicil, it is a nullity.

The court further instructed the jury, that if, from the evidence and under the instructions given, they should find three witnesses required, they will inquire whether each and all of

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the three witnesses to the will is or are competent; that the will being written in the Spanish language, if either of the witnesses did not speak or read that language, and could not understand the disposition of the property made by it, and that the testator was in the same predicament, such witness would be incompetent, and, unless the custom was established, the codicil would be null; but if the custom was established, that custom would control the case; and if the signatures of the testator and of a sufficient number of witnesses is established, in the absence of countervailing testimony, the jury may infer a due execution of the will. This selection from some twenty exceptions will sufficiently present the questions that were considered in the Circuit Court and have been discussed at the bar of this court.

These instructions require an examination of the law of California, previously to its organization as a State, relative to the execution of a testament, and the modification of that law by the revolution made in its legal system after that event. The law of Spain was introduced into Mexico, and forms the basis of its jurisprudence. By the laws of the Council of the Indies, it was provided in all cases, transactions, and suits, which are not decided nor provided by the laws contained in that compilation, nor by the regulations, provisions, or ordinances, enacted and unrepealed concerning the Indies, and by those which may be promulgated by royal orders, the laws of the kingdom of Castile shall be observed conformably to the law of Toro, with respect as well to the substance, determination and decision of causes, transactions, suits, as to the form of proceeding. The *Partidas* (6 part, tit. 1, l. 1, 2) describes two kinds of wills. "The one is that which is called, in Latin, *testamentum nuncupativum*, which means a declaration openly made before seven witnesses, by which the testator makes known by words or in writing who the persons are whom he institutes as his heirs, and the manner in which he disposes of his other property." This form of will is of Roman origin, and can be traced to the modes of testamentary disposition employed in the time of the republic. Originally the form was wholly nuncupative, but the use of writing

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was allowable before the testamentum in scriptis was introduced.

The Partidas proceeds to describe the other form of will—"that which is called, in Latin, testamentum in scriptis, which means a declaration made in writing, and in no other way. This will ought to be made before seven witnesses, called at the instance of the testator for that purpose. Each of the witnesses ought to write his name at the end of the will; and if one of them should not know how to write, either of the others may do it for him, at his request. We also say that the testator ought to write his name at the end of the will; and if he should not know, or could not write, then another may do it for him, at his request."

The witnesses were formerly required to superscribe and seal as well as sign the will. If the testator desired to conceal the contents of his will from witnesses, he could do so, either by writing the will, or procuring it to be written, and enclosing it in an envelope, and by writing his name and causing the witnesses to write their names on the envelope, with the declaration that the paper contained the last will and testament of the testator.

The essence of the testamentum in scriptis consists in the writing, and whether it was published to the witnesses who subscribed and attested it, or was concealed from them, was not a fact of any consequence. But the writing contained in the envelope was subject to no formality. It might be written by the testator, or by the hand of another. His signature to the will itself was not required.

The announcement to the witnesses that it was his will, and their attestation of that declaration, and the sufficiency of the seals, were the only securities against forgery or fraud. Other formalities were added, and a rigid exaction of those that were prescribed, rendered this form of testamentary disposition onerous. On the other hand, the nuncupative or oral will was subject to the objections that the witnesses might die, or fail to remember the declarations of the testator, or misrepresent them. In the process of time, the form of making a will orally became unfrequent. The olographic will and the mystic will

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served the purpose of those who desired to conceal the disposition of their property; while the written will, prepared by a public officer, and attested by witnesses, was the form commonly used on the continent of Europe.

The last-named form, with a reduced number of witnesses, was permitted in Spain by the law of Toro. This testament might be made before a notary public, but he was not indispensable. If made before a notary public, there should be three witnesses of the vicinage; but if there was not a notary, five witnesses were necessary, unless they could not be had, in which event three witnesses of the place, or seven strangers, would be sufficient. 1 *Tapia Febrero*, 364.

The authentication of the will by the intervention of judicial authority is also of Roman origin.

Savigny traces the changes in that administration, and explains the manner in which this system penetrated the jurisprudence of Europe; 1 *Sav. hist. du droit Ro.*, 83; and the result, as it affects the question under consideration, is clearly ascertained in the writings of the civilians.

Ricard says: "It results from what has been established, that the depositions of the seven witnesses before the judge, when the nuncupative will has not been drawn up in writing at the time it was made, is in a manner of the essence of the testament, since it could not have effect without those depositions." * * * "But in respect to those that were drawn up in writing," he says, "the opening and reading that were made after the death of the testator contributed nothing to the validity of the testament, and served only to verify the seals of the witnesses, and to render the testament public. We see, however, from laws of the title, in what manner shall testaments be opened (quem ad mod. testam. oper.) in the Code and Digest, that it was the ordinary practice for those who were interested in the execution of the testament to apply to the *prætor*, who obliged the testamentary witnesses to come before him to admit or deny their signatures and seals, and of which he made a proces verbal; and that this is the practice in the countries where the Roman law prevails."

Ricard des don., 1325—1398.

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The Mexican jurists agree that the written testament from its form is not a public and authentic act, and that it is necessary, to the full enjoyment of their rights, that those interested in the will should invest it with that quality. They show that such a person may compel the production of a will from private custody, and that the witnesses may be examined in reference to all the circumstances relative to the execution of the will, and the capacity and death of the testator; and if it shall result from these that the testament is legal, the judge may order it to be protocolled, and it obtains the faith due to an authentic or public act. These writers describe the measures to be taken in case of the death or absence of the witnesses, in order to obtain the same result. 2 Sala Mex., 127, 128; 2 Curia Felip. Mej., 327; 2 Febrero Mej., ch. 25, section 5.

We do not consider it necessary to inquire whether the elevation of this writing to the grade of an authentic act was a necessary condition to the support of a suit upon it by an heir or legatee in the ordinary tribunals in the Department of California. We think it is clear that the heir was not restrained from entering upon the inheritance, by the fact that this was not done; and that there are circumstances that would have authorized the heir to maintain a suit, even though the testament could not be produced. The right exists independently of that evidence. Merlin, *verbo preuve*. Gab. des preuves, 368, 450. This testator died in 1848. His devisee seems to have taken possession of the property bequeathed to him. There is no testimony of any action by the tribunals in California previously to the organization of the State Government. We know that the political condition of California from the time of the death of the testator until the organization of that Government was chaotic, and no inference can be drawn from such an omission. Immediately after the organization of that Government, the common law of England was introduced, and the ancient legal system of the Department abrogated. No provision was made for the probate of wills that had been executed before the introduction of that system. "The statute of the State," say the Supreme Court of California, "fails

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to require wills executed before its passage to be probated;" and "this was not a *casus omissus*;" but "the Legislature actually intended to exclude them from the operation of the statute altogether, leaving their validity to rest upon the laws under which they were made."

Grimes v. Norris, 6 Cal. R., 621.

And in *Castro v. Castro*, 6 Cal. R., 158, they say, that a will is regarded by the courts of England and the United States as a conveyance, and takes effect as a deed, on proof of its execution, unless there be some express statute requiring it to be probated." Conceding, therefore, that, under the Mexican system, the preliminary proof of the will before some public authority was necessary to give it probative force in a court of justice, that condition has been altered by the statutes of California before adverted to.

Our conclusion is, that the codicil was not inadmissible as testimony, because it had never been admitted to probate, and because the witnesses who were present at its execution had never been examined to establish it as an authentic act. The next inquiry will be, whether the codicil is null because it does not appear on the face of the will that the witnesses were present during the whole time of the execution of the will, and heard and understood the dispositions it contained. The laws that prescribe these formalities do not require that express mention shall be made of their observance under the penalty of the nullity of the testament. In *Bonne v. Powers*, 3 Martin, N. S., 458, the question arose in Louisiana upon a will made in 1799, before the change of government.

The Supreme Court say: "The Spanish law did not require, as our code does, it should appear on the face of the instrument itself that all the formalities necessary to give effect to a will previous to the signature of the testator and the witnesses had been complied with." In *Sophie v. Duplessis*, 2 Louis. Ann. R., 724, the Supreme Court say: The principle invoked by the defendants, that a will must exhibit upon its face the evidence that all the formalities required for its signature have been fulfilled, has no application to nuncupative testaments under private signatures. Such testaments are not required

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to make full proof of themselves, and the observance of formalities which do not appear on the face of the will may be shown by testimony dehors the instrument. Biec, in his supplement to Escriche, reports the case of a mystic will attached for nullity, because the solemnities required for those of that class, in the law of the Partidas before cited, did not appear to have been followed. The supreme tribunal of justice in Spain sustained the will. Sup. al. dic. *v. Testamento.* And the same conclusion is maintained by the French jurists upon similar statutes. *Merl. Rep. v. Testament.*

In order to show that the codicil was valid and translative of property, the defendant introduced evidence of a custom in California as to the manner of making wills, and the jury were instructed that the evidence was competent; and that, if the custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, it will operate to repeal the prior law. The civilians state that customs which are opposed to written law are held to be invalid, unless they have been specially confirmed by the supreme power of the State, or have existed immemorially; and it is not material whether they consist in the non-observance of the written law, or in the introduction of principles or practices opposed to such law; that every valid custom presupposes a rule, observed as binding by the persons who are subjected to it, by an unbroken series of similar acts; and that it belongs to the sound, legal discretion and conscience of the tribunals to determine by what testimony such a custom can be established.

Lind's Study of Juris., 14, 17, and note.

The Spanish codes recognise these principles. They say, to establish a custom, the whole or greater part of the people ought to concur in it; that ten years must have elapsed amongst persons present, and twenty at least amongst persons absent, in order to its being introduced; that it may be proved by two sentences of judges or judgments given upon or according to it; that, being general and immemorial, it may repeal or alter the anterior law, the approbation of the Prince being supposed or presumed.

De Asso & Rodri. Inst., ch. 1. 1 Febrero, 55.

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The custom under consideration is one of a general nature, and its existence for the period must be assumed from the verdict of the jury. It is a rule of property pervading in its application, and necessary to be known in order that judicial administration should be carried on. The recognition of such a rule, if it exists, was therefore to be looked for from the superior and supreme tribunals of the State of California. In the case of *Panaud v. Jones*, 1 California R., 497—505, the Supreme Court say: “The custom with respect to the execution of wills, so far as the testimony goes, appears to have prevailed generally and for a long time in California. It may have been the universal practice from the first settlement of the country.” In *Castro v. Castro*, 6 Cal., 158, this observation is cited, and the court say: “That it is shown, from the testimony of various witnesses, that two [witnesses to a will] were sufficient under the customs of California.” The same fact is restated in the case of *Tevis v. Pitcher*, 10 Calif. R., 465.

Nor is such a change in the mode of transfer of property a singular fact in the history of the American States. Several cases are mentioned in the opinion of the court in *Panaud v. Jones*, above cited, and a similar instance is mentioned in *Fowler v. Shearer*, 7 Mass., 14.

Nor is the existence of such a departure from the written law extraordinary, when the circumstances of the early history of the Department are understood. The most important of the arrangements for the colonization of the Department related to the establishment of the military districts and presidios, and the mission establishments in close proximity to them. The priests and soldiers were the most conspicuous and influential members of the Department, and exerted supreme influence in its political and economical arrangements. The Spanish laws relieved the soldier from the inconvenient formalities that attended the execution of the ordinary nuncupative or closed testament, and authorized him to make a nuncupative will before two witnesses, or an olographic will.

The canon law distinctly reprobates (*præscriptam consuetudinem improbamus*) the requirement of seven or five witnesses for the testation of a will: “*secundum quod leges humanæ decer-*

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nunt; * * * “*quia vero a divina lege et sanctorum Patrum institutis et a generali ecclesiæ consuetudine id noscitur esse alienum cum scriptum sit, in ore duorum vel trium testium stet omne verbum.*” Decret. Greg., lib. 3, tit. 26, ch. 10.

The precept and example of these dominant classes in the Department may possibly have exercised a controlling influence in forming the habitude of the population on this subject. And if it became prevailing and notorious, so as that the assent of the public authorities may be presumed, upon principles existing in the jurisprudence of Spain and Mexico, the acts of individuals, in accordance to it, are legitimate. This codicil was written in the Spanish language; and it is to be inferred that there was testimony that the testator and one or more of the witnesses understood that language imperfectly.

The instructions of the Circuit Court required the jury to find that the testator dictated the contents of the codicil to the witnesses, they being assembled at the same time, and that it should be then read in the presence of all, so that it was understood by all, and that the testator should then have declared it to be his last will; and the court informed them that if the testator did not understand the language, and there was not present any one who explained and interpreted the codicil in the presence and hearing and understanding of the witnesses, the document was not a valid instrument; and also, if neither the testator nor a sufficient number of the witnesses understood the language of the codicil, that it was not valid.

The Roman law did not require the witnesses to a Latin will to understand the Latin language: “*nam si vel sensu percipiat quis, cui rei adhibitus sit, sufficere.*” It is admitted by the civilians that a testator may dictate his will in his own language, and the will may be drawn in another, provided that the witnesses and notary understand both. The object of the law is that the instrument shall express the intentions of the testator, and it does not require the reproduction of his exact words. Whether the witnesses should understand the language of the will, has been the subject of much contest among those writers; and names of authority may be cited in favor of

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either opinion. But the current of judicial authority seems to have decided it is not necessary that the witnesses to a testament should comprehend the language in which it is written. And the same authority has settled that the witnesses should understand the language of the testator.

16 *Dalloz. jur. gen. tit. disposi. entre vifs. et test.*, No. 3126.

3 *Trop. don. & test.*, No. 1526.

2 *Marcad. Exp.*, 15.

Escrive dice. verb. interprete.

The instruction of the presiding judge to the jury, that the testator and witnesses should alike hear and understand the testament, and that, under these conditions, its publication as the will of the testator should be made, embraced all that it was necessary to be said upon this part of the case.

The last inquiry to be made refers to the weight to be given to the testimony adduced in support of the factum of the codicil. This consists of the proof of the signatures of the deceased witnesses and of the testator, and of some declaration by him that he had made a will with a similar devise. We comprise, among the witnesses to the will, Ridley, the sindico. It does not appear that a sindico was charged with any function in the preparation or execution of testaments by the law or custom of California. Nor is it clear that the sindico in the present instance expected to give any sanction to the instrument by his official character. He attests the execution of the will, and we cannot perceive why the description of himself which he affixes to his signature should detract from the efficacy of that attestation.

The binding force and legal operation of this codicil are to be determined by the law, as it existed when the codicil was made. But the mode in which it should be submitted to the court and jury, and the effect to be given to the testimony that accompanied it, depend upon the law of the forum at the time of the trial. The evidence of the signatures of the testator and witnesses was competent; and it was a proper question to be submitted to the jury, whether, under the circumstances of the case, it was probable the formalities required by

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the law were complied with. As suppletory proof that the testator had made the codicil, and was acquainted with the contents of the instrument, the admission or declaration offered as evidence was competent testimony.

Upon a review of the whole case, our opinion is, there is no error in the record, and the judgment of the Circuit Court is affirmed.

WILLIAM WISEMAN, PLAINTIFF IN ERROR, v. ACHILLE CHIAPPELLA.

Where the notarial protest of a bill of exchange stated that the bill had been handed to him on the day it was due, that he went several times to the office of the acceptors of it in order to demand payment for the same, and that at each time he found the doors closed, and "no person there to answer my demand," this was a sufficient demand.

It was not necessary to call individually upon one of the partners of the firm who had a residence in the city, or to make any further inquiries for the acceptors, than the repeated calls at their office.

Cases can be found, and many of them, in which further inquiries than a call at the place of business of a merchant acceptor have been deemed proper; but the rulings in such cases will be found to have been made on account of some peculiar facts in them which do not exist in this case.

In making a demand for an acceptance, the party ought, if possible, to see the drawee personally, or some agent appointed by him, to accept; and diligent inquiry must be made for him, if he shall not be found at his house or place of business. But a demand for payment need not be personal, and it will be sufficient if it shall be made at one or the other place in business hours.

The cases upon these points examined.

When, upon presentment for acceptance, the drawee does not happen to be found at his house or counting-room, but is temporarily absent, and no one is authorized to give an answer, whether the bill will be accepted or not, in such case it would seem the holder is not bound to consider it as a refusal to accept, but he may wait a reasonable time for the return of the drawee.

He may present the bill on the next day, but this delay is not allowable in a presentment for payment. This must be made on the day the bill falls due; and if there be no one ready at the place to pay the bill, it should be treated as dishonored, and protested.

Presenting a bill, under such circumstances, at the place of business of the acceptor, will be *prima facie* evidence that it had been done at a proper time of the day. If that shall be denied, it must be shown by evidence.

Where a suit was brought against a notary in Louisiana for negligence in making a protest, he will be protected from responsibility by showing that the protest was made in conformity with the practice and law of Louisiana, where the bill was payable.

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

It was an action brought by Wiseman against Chiappella, who was a notary public in New Orleans, upon the ground that he had been negligent in protesting a bill of exchange, and in consequence of such negligence Wiseman had lost the money. The question therefore was, whether or not he had been guilty of negligence. The question of prescription was also decided by the Circuit Court, and argued here, but it will not be further noticed.

The facts of the case are stated in the opinion of the court. The Circuit Court decided in favor of the defendant upon two grounds: 1st, that the protest was sufficient; 2d, that the action was prescribed.

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

Upon the first ground, *Mr. Benjamin* said:

I. The protest was insufficient. Calling at the office of the acceptors of a bill, and finding it closed, is not such due diligence as will excuse the want of presentment and demand. There should have been inquiry, and effort should have been used to discover the dwelling, and demand made there, if found.

The necessity for due diligence is not questioned, but cases are cited, in the opinion of the court, to show that the action of the notary was sufficient to constitute due diligence. These cases seem to us not to warrant the inference drawn by the court, but rather to establish the reverse.

In the case of the Union Bank *v. Foulkes*, 2 *Sneed Tenn. Rep.*, the court held, that want of presentment and demand was excused, because the place of business was open, but no one had been left there to answer; the court expressly stating that if it had been closed, further diligence would have been necessary.

In the case of *Shed v. Brett*, 1 *Pick.*, 418, the court held that plaintiff must be nonsuited, if the demand at the place

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of business was not proven to have been made in business hours; the protest in the present case does not allege any visit in business hours.

In the case of the Branch Bank at Decatur *v. Hodges*, 17 Ala. Rep., 42, there was actual presentment and demand of the book-keeper of the acceptors at their counting-room.

In the case of *Brown v. Turner*, 15 Ala. Rep., 832, there was actual demand of the agent of one partner, both partners being absent.

In *Watson v. Templeton*, 11 Annual Rep., 137, the court held, that as against a partnership, the want of demand was excused where the bill was presented at the commercial domicil, within the usual business hours, but reserved its opinion as to cases where a person does business alone, and has a dwelling as well as a place of business which is found closed. In support of this distinction between bills accepted by a firm and those accepted by individuals, the court cites *Story on Promissory Notes*, sec. 235; but we have sought in vain in the authority referred to, and elsewhere, for anything to sustain this distinction, which seems to be quite a novel doctrine in the law of bills and notes.

In *Williams v. Bank of United States*, 2 Peters, 96, and the case of *Goldsmith and Bland* therein cited and approved, there was, in the former case, further inquiry and information received, that the party and his family had left town on a visit; and in the latter there was no person in the counting-house in the ordinary hours of business, but the counting-house is not stated to have been closed, the implication being, on the contrary, that it was open.

The foregoing are all the authorities cited in the opinion of the Circuit Court, no one of which goes the length required to sustain the validity of the protest now in dispute.

The authorities to show its insufficiency are very numerous.

In *McGruder v. Bank of Washington*, 9 Wheaton, 601, there was no decision directly on the point; but the court said, in its reasoning, that the notary might, "had the house been shut up, with equal correctness have returned that he

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had not found him, (the drawer,) and yet that clearly would not have excused the demand, unless followed by reasonable inquiries.

In *Granite Bank v. Ayres*, 16 Pick., 392, demand was made at the last place of business, and notary was informed that the parties had failed and gone out of town. They had in fact failed, and given up their place of business, but one of them lived in town. Held, diligence insufficient, no further inquiry having been made by notary.

In *Ellis v. Commercial Bank of Natchez*, 7 Howard's Mississippi Rep., 294, held, that further inquiry must be made when the place of business is found shut, in order to excuse want of presentment and demand.

In *Follain v. Dupre*, 11 Rob., 470, held, that going to the counting-house during the usual business hours, waiting a short time, and, no one being there, coming away, is not sufficient to excuse presentment for acceptance, and doubtful if sufficient to excuse want of presentment for payment.

In *Collins v. Butler*, 2 Strange, 1087, held, that when place of business is found closed, further inquiry for the drawer of a note or an attempt to find him must be shown, in order to excuse want of demand.

The rule as laid down by all the text writers is, that if the acceptors have absconded, and cannot be found, presentment and demand being impossible, the want of them is excused; but even where the acceptor has become bankrupt, or has removed to another place within the same State, or is absent on a journey, yet, if he has a dwelling, demand must be made there, in order to hold the other parties.

Story on Promissory Notes, secs. 237, 238.

Story on Bills, secs. 351, 352.

Byles on Bills, pp. 141, 159.

Chitty on Bills, pp. 355, 383.

The only cases where want of inquiry and effort to find party have been excused, are those where a place of payment is designated in the bill or note.

Hine v. Alleby, 4 B. and Ad., 624.

Buxton v. Jones, 1 Man. and Gran., 83.

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Mr. Janin referred to the following cases quoted by the Circuit Court, namely:

Union Bank v. Foulkes, 2 Smead Tenn., 555.

Shed v. Brett Trustees, 1 Pick., 413.

Br. Bank at Decatur v. Hodges, 17 Ala. Rep., 42.

Brown v. Turner, 15 Ala. Rep., 832.

Burbank v. Beach, 15 Bak., 326.

The Louisiana case referred to by the Circuit Court, but not quoted, is the case of *Watson v. Templeton*, 11 Ann. Rep., 137.

Again, in *Nott's Ex'r v. Beard*, La. Rep., 308, the notary certified, that "at the request of the holder of the original draft, whereof a true copy is on the reverse hereof written, I demanded payment of said draft at the counting-house," &c. The counsel for the defendant contended that the protest should say that the bill was presented, and payment thereof demanded. The court held that this was not necessary, and said: "We are disposed to give such meaning to terms used by public officers as will be understood by the mass of mankind."

"The act of the Legislature, passed in 1827, vests notaries with certain powers in relation to these matters, and gives more authenticity to their acts than to private individuals. They are public officers, and the presumption of law is that they do their duty."

The following English cases support the same doctrine:

In Burton v. Jones, 1 Man. and Gr., 89, C. J. Tindal said:

"This bill drawn upon Epworth is addressed to him as Mr. Frederick Epworth, Illico St., Baal-Zephern St. Bennondsey. The drawee accepts generally, thereby adopting the description of his residence, as stated at the foot of the bill. When the bill becomes due, a messenger is sent to demand payment. The messenger inquires for Epworth of a person who must be taken to be an inmate, and from that person he receives an answer, which is true. It was not necessary to present the bill to Epworth personally. If he chose to remove from the house pointed out by the bill as his place of residence, he was bound to leave sufficient funds on the premises. In *Hine v.*

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Alleby, (4 B. and Adol., 624,) the holder went to the place at which the bill was addressed, and found the house shut up. This was held to be sufficient evidence of presentment."

In *Hine v. Alleby*, (4 B. and Adol., 627, and 24 Engl. Common Law Rep., 127,) it was shown that on the day when the bill became due, it was taken to the place of payment, but the house was shut up, and no further presentment could be made. The court held that there was a presentment. The case of *Burbridge v. Marmers*, 3 Campbell, 183, was cited, and it was urged that there Lord Ellenborough said: "I think the note was dishonored as soon as the maker had refused payment on the day when it became due;" and that here (that is, in *Hine v. Alleby*) the holder only concluded that the bill would not be paid, from finding no one at the house, and that there had been no refusal."

But, per curiam: "It is the same if the house is shut up and no one there. The case is in point."

The counsel for the plaintiff, indeed, endeavors to distinguish these cases from the one before the court, because the number of the acceptor's residence was there stated on the face of the bill. But while the courts evidently speak of well-known places where the presentment is to be made, they lay no stress upon the manner in which they became known. The proper place to present a bill to a firm is, undoubtedly, their counting-house; and whether that be known to the notary by the number of the house stated in the bill, or in any other positive manner, the reason of the thing and the conclusion must be the same. Here the notary knew the counting-house so well, and so positively, that he went to it several times.

Mr. Justice WAYNE delivered the opinion of the court.

The plaintiff in this action alleges that he is the holder and owner of a certain bill of exchange for two thousand and forty-five dollars forty-five cents, dated at Vicksburg, in the State of Mississippi, May 13th, 1855, and payable on the 23d November, 1855, which had been drawn by John A. Durden and A. Durden on William Langton & Co., of New Orleans, and accepted by them, payable to the order of Langton, Sears, &

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Co., and by that firm endorsed in blank. He further declares that the bill, when it became due, was intrusted to the defendant, Achille Chiappella, a commissioned notary public for the city of New Orleans, to demand payment of it from the acceptors, and to protest the same for non-payment, should the acceptors dishonor it; and that, from his carelessness in not making a legal demand of the acceptors, and from not having expressed it in the protest, that the endorsers of the bill had been discharged from their obligation to pay it, by a judgment of the Circuit Court of the United States for the southern district of Mississippi. He further alleges that the acceptors, payees, and endorsers, were insolvent, and that, from the insufficiency of the demand for payment to bind the drawers of the bill, the defendant had become indebted to him for its amount, with interest at the rate of five per cent. from the day that it became due, the 23d November, 1855.

The defendant certifies in his notarial protest that the bill had been handed to him on the day it was due; that he went several times to the office of the acceptors of it, in Gravier street, in order to demand payment for the same, and he found the doors closed, and "no person there to answer my demand." It also appeared that one of the firm by which the bill had been accepted had a residence in New Orleans; that no demand for payment had been made individually upon him; and that no further inquiry had been made for the acceptors than the repeated calls which the notary states he had made at their office.

We think, under the circumstances, that such repeated calls at the office of the acceptors was a sufficient demand; that further inquiry for them was not required by the custom of merchants; and that the protest, extended as it had been, is in conformity with what is now generally considered to be the established practice in such matters in England and the United States. We say, under the circumstances, for, as there is no fixed mode for making such a demand in all cases, each case as it occurs must be decided on its own facts.

We have not been able to find a case, either in our own or in the English reports, in which it has been expressly ruled

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that a merchant, acceptor of a foreign bill of exchange, having a notorious place of business, has been permitted to close it up during the business hours of the day, thus avoiding the obligation of his acceptance on the day of its maturity, and then that he was allowed to claim that the bill ought to have been presented to him for payment elsewhere than at his place of business. Though such conduct is not absconding, in the legal sense of that word, to avoid the payment of creditors, it must appear, when unexplained, to be an artifice inconsistent with the obligations of an acceptor, from which the law will presume that he does not intend to pay the bill on the day when it has become due.

The plaintiff in this case does not deny that the office of the acceptors was closed, as the notary states it to have been. The only fact upon which he relies to charge the defendant with neglect is, that one of the firm of Langton, Sears, & Co. resided in New Orleans, and that it was the duty of the notary to have made inquiry for him at his residence. No presumption, under such circumstances, can be made, that the acceptors had removed to another place of business, or that they were not intentionally absent from it on the day that they knew the bill was payable. This case, then, must be determined on the fact of the designed absence of the acceptors on that day; and that inference is strengthened by no one having been left there to represent them.

All merchants register their acceptances in a bill book. It cannot be presumed that they will be unmindful of the days when they are matured. Should their counting-rooms be closed on such days, the law will presume that it has been done intentionally, to avoid payment, and, on that account, that further inquiries need not be made for them before a protest can be made for non-payment.

Cases can be found, and many of them, in which further inquiries than a call at the place of business of a merchant acceptor has been deemed proper, and in which such inquiries not having been made, has been declared to be a want of due diligence in making a demand for payment; but the rulings in such cases will be found to have been made on account of

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some peculiar facts in them which do not exist in this case. And in the same class of cases it has been ruled that the protest should contain a declaration by the notary that his call to present a bill for payment had been made in the business hours of the day; but in no case has the latter ever been presumed in favor of an acceptor, whose place of business has been so closed that a demand for payment could not be made there upon himself or upon some one left there to attend to his business.

Lord Ellenborough said, in the case of *Cross v. Smith*, 1 M. and S., 545: "The counting-house is a place where all appointments respecting business and all notices should be addressed; and it is the duty of the merchant to take care that proper persons shall be in attendance." It was also ruled in that case, that a verbal message, imparting the dishonor of a bill, sent to the counting-house of the drawer during the hours of business, on two successive days, the messenger knocking there, and making a noise sufficient to be heard within, and no one coming, was sufficient notice.

In this case the facts were, that Fea & Co. had a counting-house at Hull, where they were merchants, and one lived within one mile and the other within ten miles of Hull. The Monday after Smith & Co. received the bill, their clerk went to give notice, and called at the counting-house of Fea & Co. about half after ten o'clock. He found the outer door open; the inner one locked. He knocked so that he must have been heard, had any one been there, waited two or three minutes, and went away; and on his return from the counting-room he saw Fea & Co.'s attorney, and told him. The next Monday he went again at the same hour, but with no better success. No written notice was left, nor was any notice sent to the residence of either of the parties. The court took time to consider, and then held, without any reference to the clerk having called at the counting-house two successive days, that going to the counting-house at a time it should have been open was sufficient, and that it was not necessary to leave a written notice, or to send to the residence of either of the parties.

In Bancroft and Hall, Holt, 476, the plaintiff received notice

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of the bill's dishonor at Manchester, 24th May. The same day he sent a letter by a private hand to his agent at Liverpool, to give defendant notice. The agent called at the defendant's counting-house about six or seven P. M.; but the counting-house was shut up, and the defendant did not receive notice of the dishonor of the bill until the morning of the 27th—Monday. Two points were ruled: 1st. That sending by a private hand to an agent to give notice was sufficient; 2d. That it was sufficient for the agent to take the ordinary mode to give notice—the ordinary time of shutting up was eight or nine. Where the endorser of a note shut up his house in town soon after the note was made, and before it became due, and retired to his house in the country, intending, however, only a temporary residence in the country, it was held that a notice left at his house, by having been put into the key-hole, was sufficient to charge him. *Stewart v. Eden*, 2 Can. R., 121.

This court held, in *Williams v. the Bank of the United States*, 2 Peters, that sufficient diligence had been shown on the part of the holder of a note to charge the endorser, under the following circumstances: A notary public employed for the purpose called at the house of the endorser of a note, to give him notice of its dishonor; and finding the house shut and locked, ascertained from the nearest resident that the endorser and his family had left town on a visit. He made no further inquiry where the endorser had gone, or how long he was expected to be absent, and made no attempt to ascertain whether he had left any person in town to attend to his business, but he left a notice of the dishonor of the note at an adjoining house, requesting the occupant to give it to the endorser upon his return.

In making a demand for an *acceptance*, the party ought, if possible, to see the drawee personally, or some agent appointed by him to accept; and diligent inquiry must be made for him, if he shall not be found at his house or place of business; but a demand for payment need not be personal, and it will be sufficient if it shall be made *at one or the other place, in business hours*. *Chitty*, 274, 367.

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It was formerly the practice, if the house of the acceptor was shut up when the holder called there to present the bill for payment, and no person was there to represent him, and it appeared that he had removed, that the holder was bound to make efforts to find out to what place he had removed, and there make a payment. Such, however, is no longer the practice either in England or in the United States, nor has it been in the United States for many years. It is now sufficient if the bill shall be taken to the residence of the acceptors, as that may be stated in the bill, for the purpose of demanding payment, and to show that the house was shut up, and that no one was there. *Hine v. Alleby*, 4 B. and Adol., 624. It has been decided by the Supreme Court in Tennessee, that the protest of a foreign bill of exchange, drawn upon a firm in New Orleans, with no place of payment designated, where it appeared that the deputy of a regularly commissioned notary had called several times at the office of the acceptors to make demand of payment, but found no one there of whom the demand could be made, was sufficient to excuse a demand, and to fix the liability of the endorsers to whom notice had been given. *Union Bank v. Jeptha Fowlkes et al.*, 555. The Supreme Court of Louisiana, in *Watson v. Templeton*, 11 Annual, 137, declares "that a demand made within the usual hours of business, at the commercial domicil of a partnership, for the payment of a note or bill due by the firm, is a sufficient presentment; that it was not necessary to make a further demand at the private residences of individual persons. The place of business is the domicil of *the firm*, and it is their duty to have suitable persons there to receive and answer all demands of business made at that place." Going with a promissory note, to demand payment, to the place of business of the notary, in business hours, and finding it shut, is using due diligence. *1 Pick., Shed v. Brett*, 413.

In the case of the *B. B. at Decatur v. Hodges*, the Supreme Court of Alabama say: "The court below excluded the protest for non-payment, because the presentment is stated thereon to have been made of the book-keeper of the drawees in their counting-room, they being absent. This was erroneous.

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The bill was presented at the place of business of the firm, at their counting-room. If they had intended to pay the bill, it was their duty to have been present on the day of payment, or to have left means for making such payment in charge of some one authorized to make it. The notary finding them absent from their place of business, and their book-keeper there, might well make protest of the dishonor of the bill for non-payment upon presentment to and refusal by him." When, upon presentment for acceptance, the drawee does not happen to be found at his house or counting-room, but is temporarily absent, and no one is authorized to give an answer whether the bill will be accepted or not, in such case it would seem the holder is not bound to consider it as a refusal to accept, but he may wait a reasonable time for the return of the drawee. He may present the bill on the next day, but this delay is not allowable in a presentment for payment. This must be made on the day the bill falls due; and if there be no one ready at the place to pay the bill, it should be treated as dishonored, and protested. Story on Bills, sec. 250; Chitty on Bills, 9 Ed., 400. The Supreme Court of New York has ruled that where a notary's entry case states that presentment and demand were made at the maturity of a bill, at the office of C. & S., the acceptors, this language imports that the office was their place of business, and it will be presumed in favor of the notary, that the time in the day was proper. Burbank, President of Eagle Bank of Rochester, *v.* Beach and others, 15 Barbour, 326.

The preceding citation is in conformity with what the Supreme Court of New York had ruled thirteen years before, in the case of the Cayuga Bank *v.* Hart, 2 Hill, 635. Its language is, that where a notarial certificate of a protest of a bill of exchange stated a presentment for payment at the office of an acceptor, on the proper day, and that the office was closed, but was silent as to the hour of the day of doing the act, that it was sufficient, and that regularity in that particular should be presumed.

We infer, from all the cases in our books, notwithstanding many of them are contradictory to subsequent decisions, that the practice now, both in England and the United States, does

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not require more to be done, in the presentment of a bill of exchange to an acceptor for payment, than that the demand should be made of a merchant acceptor at his counting-room or place of business; and if that be closed, so in fact that a demand cannot be made, or that the acceptor is not to be found at his place of business, and has left no one there to pay it, that further inquiry for him is not necessary, and will be considered as due diligence; and that presenting a bill under such circumstances at the place of business of the acceptor will be *prima facie* evidence that it had been done at a proper time of the day. If that shall be denied, it must be shown by evidence.

But whatever may have been the differences between cases upon this subject, both in England and the United States, there has always been a requirement in both countries, and everywhere acknowledged in the United States, which protects the defendant in this suit from any responsibility to the plaintiff. The requirement is this: that the protest was made in this case in conformity with the practice and law of Louisiana, where the bill was payable. *Rothschild v. Caine*, 1 *Adol. and Ell.*, 43; 11 *Smedes and Marshall*, 182.

We are aware of the contrariety of opinion which prevailed for many years in regard to what should be considered due diligence in making a presentment of a bill of exchange for payment to an acceptor of it, under such circumstances as are certified to by the notary in this case. We have carefully examined most of them, from the case of *Cotton v. Butler*, in *Strange*, 1086, to the year 1856, and we have adopted those of later years as our best guide, and as having a better foundation in reason for the practice and the commercial law of the present day, and because we think it has mostly prevailed in the United States for thirty years.

As the view which we have taken of this case disposes of it in favor of the defendant, we shall not notice another point made in the argument in his behalf, which was, that the plaintiff's right of action, if he ever had one against the defendant, was excluded by the Louisiana law of prescription.

We direct the affirmance of the judgment of the Circuit Court.

Zabriskie v. Cleveland, Columbus, and Cincinnati Railroad Co. et al.

CHRISTIAN A. ZABRISKIE, APPELLANT, v. THE CLEVELAND, COLUMBUS, AND CINCINNATI RAILROAD COMPANY, AND JOHN A. BUTLER, AND OTHERS.

In 1851, the Legislature of Ohio passed a general law relating to railway companies, which empowered them at any time, by means of their subscription to the capital stock of any other company or otherwise, to aid such other railroad company, provided no such aid shall be furnished until, at a called meeting of the stockholders, two-thirds of the stock represented shall have assented thereto.

In 1852, another act was passed for the creation and regulation of incorporated companies in Ohio, re-enacting the above section, and providing further, that any existing company might accept any of its provisions, and when so accepted, and a certified copy of their acceptance filed with the Secretary of State, that portion of their charters inconsistent with the provisions of this act shall be repealed.

The Cleveland, Columbus, and Cincinnati Railroad Company, when they endorsed the bonds hereafter mentioned, had not formally complied with either of these requirements; had neither convoked a meeting of the stockholders, nor signified their acceptance to the Secretary of State.

In April, 1854, the Cleveland, Columbus, and Cincinnati Railroad Company endorsed a guaranty upon four hundred bonds of one thousand dollars each, with interest coupons at seven per cent. interest, issued by the Columbus, Piqua, and Indiana Railroad Company.

A stockholder in the Cleveland, &c., Company filed a bill to enjoin the directors from paying the interest upon the bonds which they had thus guarantied, upon the ground that these directors had exceeded their legal authority in making the guaranty. Some of the bondholders came in as defendants with the corporation.

As between the parties to this suit, the acceptance of the acts of 1851 and 1852 may be inferred from the conduct of the corporators themselves. The corporation have executed the powers and claimed the privileges conferred by them, and they cannot exonerate themselves from the responsibility by asserting that they have not filed the evidence required by the statute to evince their decision.

Amongst the acts of the corporators was this—that at a meeting of the stockholders of the Cleveland Company, in July, 1854, the endorsement of the bonds was approved, adopted, and sanctioned, and this resolution has never been rescinded at any subsequent annual meetings, of which there have been several, at which the complainant was represented. His proxy was also present at the meeting of July, 1854, but declined to vote, when his vote would have controlled the action of the meeting.

These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence; and a cor-

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poration cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced.

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

Zabriskie was a citizen of the State of New York, and a stockholder in the Cleveland, Columbus, and Cincinnati Railroad Company. He filed a bill against the company, and obtained an injunction to restrain them from paying any money in discharge of the interest to become due on four hundred bonds of the Columbus, Piqua, and Indiana Railroad Company, which said bonds had been endorsed by the former company conjointly with the Bellefontaine and Indiana Railroad Company, and the Indianapolis, Cleveland, and Pittsburgh Railroad Company. Butler, Belknap, and Callender, citizens of Connecticut, obtained leave to become parties to the suit, as defendants, upon the allegation that each of them was the holder of a bond or bonds which had been thus endorsed.

After much testimony was taken, and other proceedings had, the Circuit Court, in March, 1858, dissolved the injunction and dismissed the bill. The complainant appealed to this court.

It was argued by *Mr. Otis* and *Mr. Benjamin* for the complainant, and by *Mr. Stanberry* and *Mr. Ewing* for the defendants, *Mr. Ewing* being the solicitor for the bondholders.

The history of the case is given in the opinion of the court, and it will be perceived, by the syllabus prefixed to this report, how many points were raised in the argument and decided by the court. The examination of the laws of Ohio was very extensive; too much so to be followed by the reporter. All that he can do is to state the points made, from which the line of argument can be easily deduced.

Mr. Otis said:

The record presents the following questions for the decision of the court:

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I. Had the directors of the Cleveland, Columbus, and Cincinnati Railroad Company the power to endorse the bonds of the Columbus, Piqua, and Indiana Railroad Company?

II. Were said bonds and the endorsement thereon void in the hands of Neil & Dennison, and of those claiming under them?

III. Are the defendants, Butler, Belknap, and Callender, bona fide holders of said endorsements, without any notice, actual or constructive, of the circumstances under which the endorsements were made, or of the want of power on the part of the directors of the Cleveland, Columbus, and Cincinnati Railroad Company to make the same?

IV. Has the complainant forfeited his right to the relief which he seeks by any neglect on his part?

Upon the first point, the following positions were maintained:

The company had no power to endorse under their charter. They had no power to endorse under the act of March 30, 1851:

First. Because said act had been repealed.

Second. Because the General Assembly intended to repeal said act.

Third. Because the endorsement was not made for any of the objects authorized by said act.

Fourth. Because the endorsement was not made with reference to said act of March 3d, 1851, as the source of power, but with reference to the charter.

Fifth. Because, in making said endorsement, there was no compliance with the imperative prerequisite conditions of said act.

Sixth. Because neither the complainant nor any considerable number of the stockholders of said company ever consented to said endorsement, either directly or by implication.

Seventh. Because said act of March 3d, 1851, is unconstitutional.

Upon the last point, the following brief extract from the argument of *Mr. Otis* will serve to illustrate his views:

A brief inquiry into the nature and extent of the authority

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which the Legislature may lawfully exercise over railroad companies, and also into the nature and extent of the changes which the Legislature may make in the charters of such companies, with the consent of the organized bodies respectively, without any well-founded legal objection on the part of any individual stockholder, will throw much light upon the particular subject now under consideration, and tend to confirm the conclusion that the act of March 3d, 1851, was an unconstitutional enactment.

The first branch of this inquiry is not altogether free from difficulty. But this difficulty does not so much consist in laying down a general rule, as in applying the rule to each particular case which may arise. It is sufficient, however, for the present purpose, to say that grants to railroad companies are strictly construed, and that the corporations take no rights from the public beyond what the natural import of the words used in their acts of incorporation rationally and properly conveys. These grants are never construed to embrace public rights and duties; nor can it be presumed that the Legislature intended to part with the power of accomplishing the very object for which railroad companies are created. This object is the comfort and convenience of the public; and whatever regulations will tend to secure or promote that object the Legislature may enact, even though these regulations may abridge the value of the rights previously granted. It is upon this ground that railroad companies may be lawfully required to fence their roads, construct cattle guards, diminish the speed of their trains, and generally submit to such police regulations in respect to the management of their respective roads as will most effectually secure the safety of the persons and property transported over the same; and so long as the Legislature shall confine its action to the due exercise of the rights granted, no question can arise as to the lawfulness of such legislation.

The second branch of the inquiry depends upon a very different principle; and although I cannot describe by general definition all the particular changes which may be made in the charters of railroad companies, with the consent of such

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companies, without any well-founded legal objection on the part of any individual stockholder, a recurrence to the nature of these charters will enable us to attain all that certainty in this particular which the argument demands. A railroad charter once accepted becomes a contract; and though the charter is an entirety, it is in fact a two-fold instrument both in regard to its subject matter and the parties thereto. So far as the charter relates to the object of the grant, the mode of carrying the same into execution, or the organs through which the company may act, it constitutes a contract between the State and the organized body; and it is competent for the company, acting in the manner prescribed in its charter, to accept of any amendments touching these subjects which the Legislature may propose, even though these amendments are evidently less beneficial to the company than the original act. To this contract the individual stockholder is not a party except as a member of the organized body. And as it is a fundamental principle of all associations of this kind, that the act of the majority is the act of all, the organized body will be bound by the action of the majority, however vehemently a minority of individual stockholders may dissent therefrom. It is upon the ground that the contract is one between the State and the corporation as the sole parties thereto, and not upon any implied assent, on the part of individual stockholders on becoming members of the corporation, to such changes as shall be auxiliary to the object of the grant, that all the stockholders are bound by such legislation. But so far as the charter relates to the obligation of the company to expend all its subscriptions solely for the specified purposes of the grant, or, in other words, in the construction and equipment of its road, or to the right of each individual stockholder to his ratable share of the net earnings of the company in the shape of dividends, or to his right to vote upon each share of stock owned by him in the election of a board of directors, it is a contract between each individual stockholder and the organized body, made in pursuance of the authority conferred by the State. To this contract the State is not a party; but the individual stockholder on the one hand, and all the other stockholders forming

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the organized body on the other, are the sole parties to the contract. And although the nature of this contract is such that it cannot be changed, even by the consent of the parties to it, without legislative permission, such permission does not confer upon either party the authority to make such change without the consent of the other party. This contract between the individual stockholder and the corporation is essentially like a contract of copartnership, and can no more be changed than any other private contract without the consent of the parties thereto.

Natusch v. Irving et al., Gow. on Part., Appendix, 576.

Livingston v. Lynch, 4 Johns. Chy., 573.

Angell and Ames on Cor., secs. 536, 537, 538.

The fact that no individual stockholder can maintain a suit in regard to his individual rights or interests until after the company, upon request made, shall have neglected or refused to protect the same, does not militate against this view of the duality of all such contracts, for the corporation is the legally constituted trustee of every individual stockholder, through which alone he must in the first instance seek redress. There are no difficulties connected with this question in its relation to this case except those which have arisen from the illogical mode of treating it. If the act of March 3d, 1851, was intended to confer upon a majority of the stockholders of the Cleveland, Columbus, and Cincinnati Railroad Company authority to take the money due to the stockholders as dividends, and to appropriate it to any of the purposes mentioned in the fourth section of said act, against the consent of a single stockholder, though owning but a single share of stock, the enactment transcended the constitutional power of the Legislature, and was void. The Legislature cannot authorize any number of the stockholders of a railroad company, under any pretext whatever, to seize the money due to a co-stockholder as dividends, and appropriate it to any purpose not specified in its charter, or to confiscate his property, or compel him to sell out his capital stock at any price, and abandon the company, unless such power is reserved in the act of incorporation. The obligation of the contract, which relates to a single share of

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the capital stock of a railroad company, can no more be impaired by legislative interference, than the obligation of the contract which relates to the entire capital stock. The protecting power of the Constitution extends to both alike.

As before stated, a railroad charter once accepted becomes a contract. Until such charter shall be accepted, it is not a contract; it is nothing more than a proposition, on the part of the State, to the corporators named in the act, to enter into the contract specified therein. It has no binding force until accepted; and in this respect a charter does not differ at all from a proposition to enter into a private contract proceeding from one individual to another. So where a charter has been accepted, a subsequent amendment is also nothing more than a proposition to change the original contract in that particular. If the proposed change relates to the contract between the State and the organized body, it must be accepted by the organized body before it will have any binding force; but if the proposed change relates to the contract between the individual stockholder and the organized body, it must be accepted by both the parties thereto before it will have any binding force. If the proposed change be clearly beneficial either to the individual stockholder or to the company, as the case may be, and be auxiliary to the specified purposes for which the company was created, the law will presume the acceptance of such amendment by the party to be benefited thereby upon very slight grounds. But if the proposed change be not clearly beneficial to the individual stockholder, or to the company, or if it extends the objects or increases the liabilities of the company, or enlarges the powers of the company over the stockholders, as in the present case, the acceptance of such amendment, by the party to be affected thereby, must be clearly made out by the party seeking to establish the same. In cases of railroad companies, where a majority of the stockholders are residents without the State and country, as in this case, and are not expected to attend the meetings of the company, and who have a right to suppose that the directors will confine themselves to the exercise of their legitimate powers, silence on the part of the stockholders

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should not be regarded as an assent to, or an acquiescence in, any changes in the contract between the corporation and the stockholders affecting their individual interest; but it should be established by clear affirmative proof that knowledge of such change, and of its effects upon their interest, was brought to the stockholders, and with such knowledge they deliberately assented thereto. Any rule short of this will expose to imminent hazard the property invested in the railroads in this State, and seriously impair the character of our legislation.

The argument upon the other points must be omitted for want of room. All these points were sustained by *Mr. Benjamin* also.

Mr. Ewing, for the bondholders, made the following points, namely:

1. The guaranty is valid in the hands of the present holders, independently of the act of March 4th, 1851.
2. The end and aim, the object and purposes, to be effected by this contract, were legitimately within the power of the corporation, under and by virtue of the act of March 3d, 1851.
3. The fourth section of the act of 1851, and its re-enactment in 1852, so far as it applies to pre-existing corporations, does not impair the validity of the contract of subscription, and is not unconstitutional and void.
4. The transaction out of which the guaranty arises comes within the provisions of the fourth section of the act of March 4th, 1851.
5. The transaction is not void, as contended for by the opposite counsel, under the fourth section of the act of March 3d, 1851, because the directors of the company acted in the matter before they convened the stockholders to vote upon it.
6. The contract has been complied with by the other two companies, and performance is, in equity, equivalent to consent.

Upon the third point, *Mr. Ewing's* views were as follows:

But it is contended, on the other side, that the fourth section of the act of 1851, and its re-enactment in 1852, so far as it applies to pre-existing corporations, impairs the validity

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of the contract of subscription, and is therefore, as to them, unconstitutional and void.

I do not readily perceive how a law, permissive merely, not compulsory, authorizing this corporation to do an act which we admit, *argumenti gratia*, it was not authorized to do before, violates the contract of incorporation, or the contract between corporation and corporators. It has been well adjudged that the mere extension of privileges by law is not a violation of the contract of incorporation.

Grey v. the Monongahela Navigation Company, 2 Watts and Sug., 159.

The decision in the case of the Hartford and New Haven Railroad Company *v. Croswell*, relied on by complainant's counsel, bears strongly on this case. It involves these propositions:

1. That the directors of the original corporation could lawfully accept and exercise the additional powers conferred on them, and consequently that their acts, in pursuance of such new powers, were valid. For if not so, the old corporation remained unchanged, and the stockholder must have paid his subscription to it.

2. That a stockholder who did not consent to the change could not, against his will, be held a corporator in the modified corporation.

3. And I have no doubt that such stockholder might, by bill in chancery, presented in due time, have enjoined and prevented the acceptance of the new power, and the action under it. But he could not lie by, suffer the directors to accept the newly-conferred privileges, employ workmen and build boats, and then enjoin the corporation from paying for them. That would be this case, to which both of the above cases are alike opposed in principle; for there are cases, and this possibly one of them, in which a corporator may enjoin the corporation from doing an act, or making a contract, not within its powers at the time of its creation, but brought within them by a subsequent law. But if he consent to the contract, or acquiesce in it, until third persons have become involved, his remedy is gone. It is of that class of cases in which

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equity requires the utmost vigilance and promptitude. The powers granted by the act of 1851 do not extend to a new undertaking, but to a more full and perfect means of executing the original purpose of the charter, and it is the business of the corporators to see that the additional powers are not exercised to their injury. If they neglect this, they, and not innocent third persons, must suffer the consequence of their laches.

Moss v. the Rosalia Lead Mining Company, 5 Hill, 141.

Jackson v. Lumpkin, 3 Peters, 291.

Mumma v. the Potomac Company, 8 Peters, 286.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellant is a stockholder of the Cleveland, Columbus, and Cincinnati Railroad Company, a corporation existing by the law of Ohio, and empowered to construct a railroad from Cleveland south, and having a capital of more than \$4,300,000 distributed among above nine hundred stockholders. The appellant complains, that this corporation, in April, 1854, illegally endorsed a guaranty upon four hundred bonds of one thousand dollars each, with interest coupons at the rate of seven per cent. per annum, payable to Elias Fossett or bearer in New York, in 1869, that had been issued in that month by the Columbus, Piqua, and Indiana Railroad Company, and which were also endorsed by the Bellefontaine and Indiana Railroad Company, and the Indianapolis and Bellefontaine Railroad Company, to the prejudice of the stockholders, and the burden of the resources of the said Cleveland corporation. The object of the bill was to obtain a decree to restrain the company, pending the suit, from paying the interest, and upon a declaration of the illegality of the bonds, to enjoin the corporation from applying any of its effects to their redemption.

The three defendants are holders of five of the bonds, who have availed themselves of the invitation of the bill to all their class to become defendants, and who assert that they are bona fide holders, and that their securities are valid obligations of the company. This issue of the obligations of these four corporations originated in a negotiation among their officers, in

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1854, to determine upon a uniform gauge for all their roads, and to promote intimate connections in their transit operations.

The Piqua road and the Indianapolis road were projected to extend from Columbus to Indianapolis, (one hundred and eighty-five miles,) and were partially finished at a gauge of four feet eight and one-half inches, and had agreed to maintain this gauge for their common interest. At Columbus they were to connect with roads of the same gauge, leading through Ohio and Pennsylvania to Philadelphia.

The Cleveland and the Bellefontaine railroads were constructed upon the Ohio gauge, of four feet ten inches, and the companies were interested to detach the other corporations from their Pennsylvania connection, and to combine them with their own and other companies, whose roads passed through Cleveland, along the shores of the lakes into New York, and connected there with the railroad and canal communications of that State. The Piqua road was at this time finished only forty-six miles, and the company was embarrassed, and their work suspended for want of money. The Indianapolis company were willing to change the gauge of their road to the Ohio pattern, but were withheld by their contract with the Piqua Company. In January, 1854, the Piqua Company appointed a committee from their board of directors to negotiate for money or securities sufficient to complete their road, and to discharge their debts, other than bond debts, and were authorized to prepare six hundred bonds of one thousand dollars each, of the usual form, to be secured by a mortgage, being the third mortgage of their franchises and road. They were also empowered to determine the gauge of the road, and either to maintain their existing connections, or to consent to the adoption of the Ohio gauge in conjunction with the Indianapolis Company.

This committee opened their negotiations in Philadelphia, but pending these the vice president of the company (Dennison) "sounded the inclinations" of the Cleveland Company, by intimating that if that company would endorse a portion of the bonds, and take some of the stock of the Piqua Company, the Pennsylvania connection would be abandoned. Some assurance having been given by the president of the Cleveland

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Company to him, he, with the financial agent of the company (Niel) arranged a contract with the committee of the Piqua Company to purchase the six hundred bonds, to guaranty a subscription for \$50,000 of their stock at par, and to assume the control of the settlement of all controversies and questions concerning the gauge of the road. These negotiations were pending from the first week in February until the 25th of the month, when the contract was reduced to writing, and the price to be paid settled at \$305,000. On the 7th of March, 1854, Dennison and Niel concluded a contract with the three corporations, Cleveland, Indianapolis, and Bellefontaine, by which they consented to the permanent adoption of the Ohio gauge for the Piqua and Indianapolis roads, and those corporations agreed to guaranty four hundred of the bonds of the Piqua Company before mentioned, and to subscribe for thirty thousand dollars of their stock. This contract was reported shortly after to the boards of the several corporations, and approved, and the bonds were issued and endorsed, and the stock subscribed for in April, 1854. The tracks of the several roads were altered to conform to this arrangement shortly after. The negotiations and contracts of Dennison and Niel were for their own account and benefit. The testimony is conclusive of the fact that the members of the Piqua board were ignorant of the assurances they had received of the disposition of the Cleveland and other companies to enter into such engagements. Dennison had been a director of this company from its organization; but before signing the contract of the 25th February, with the Piqua Company, he exhibited a written resignation, and that resignation was entered upon the minutes of the board before the approval of the contract or the issue of the bonds to him and his associate.

This transaction was reported to the stockholders of the endorsing corporations in July, 1854, and accepted by them as the act of the company. The board of directors of the Cleveland Company, on the 16th June, resolved, that there should be submitted to a vote of the stockholders, at a meeting on the 1st July proximo, four propositions for the aid of other roads desiring to form a connection with that company, under the

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4th section of a statute of Ohio, passed 3d March, 1851. Among these was the endorsement of four hundred bonds of the Piqua Company. Notice was given of this meeting by advertisement in the daily papers of Cleveland and Columbus, and a daily paper in New York, but it did not disclose the object of the meeting. Above eighteen thousand shares of stock were represented, and the following resolution was adopted without a dissenting vote:

Resolved, "That the endorsement jointly and severally with the Bellefontaine and Indiana Railroad Company, and the Indianapolis and Bellefontaine Railroad Company, of four hundred thousand dollars of the third mortgage bonds of the Columbus, Piqua, and Indianapolis Railroad Company, by order of the board, March 6th, 1854, be and the same is approved, adopted, and sanctioned, by this meeting, as the proper act of this company." But, although there was no dissent in the vote, there was dissatisfaction openly expressed by the proxy of the appellant, and of a majority of the stockholders represented at the meeting, and who declined to vote on the resolution. The bonds were offered for sale in the city of New York in the summer of 1854 and the spring of 1855, under an uncontradicted representation of their validity through the votes above mentioned, and were freely purchased at fair prices. The interest was paid by the Piqua Company until October, 1855, when the instalment due in that month was discharged by the endorsers in equal proportions. In the spring of 1856, the Piqua Company having become insolvent, the appellant served a notice upon the Cleveland Company not to pay any portion of the principal and interest that might become due on the bonds, and required them to sue for the cancellation of their guaranty, and demanded his share of the profits of the company, without the reservation of any part for the payment of the bonds, and immediately after filed the bill in this cause.

He contends, that the sale by the Piqua Company to Dennison and Niel is void, under a statute of Ohio that prohibits any director of a railroad company to purchase, either directly or indirectly, any shares of the capital stock, or any of the

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bonds, notes, or other securities, of any railroad company of which he may be a director, for less than the par value thereof; and it declares: "That all such stocks, bonds, and notes, or other securities, that may be purchased by any such directors for less than the par value thereof, shall be null and void."

He insists that the endorsement of the bonds of the Piqua Company was of no advantage to the Cleveland Company, but was merely to consummate the success of a speculation of Dennison and Niel—a speculation reprobated by the law of Ohio; that the Cleveland Company were not empowered by their charter to guaranty the contracts of corporations or individuals; that this endorsement was not required for the construction of the road, or in the course of the business of the company, or to promote an end of the incorporation; and that none of the acts of the General Assembly of Ohio authorize it.

He denies any efficacy to the vote of the stockholders in July, 1854, because the notice was insufficient, in the length of the time and in the failure to disclose the purpose of the call; that more than one-half of the stock of the company was not represented, and two-thirds of that present did not vote, for the want of proper information and counsel on the subject. That the meeting were ignorant of material facts; they were not advised of the relations of Dennison and Niel to the Piqua Company, and their connection with the bonds, when the vote was taken; and were deceived as to the condition of the Piqua Company. He avers that the bondholders are chargeable with notice of the fact that the endorsement was made before the meeting of the stockholders, and by the authority of the directors only.

The testimony does not convict the defendants—the bondholders—of complicity in the negotiations or contracts that preceded the issue of the bonds, nor does any equivocal circumstance appear in their purchase of those securities. It is proved that it is a common practice for railroad corporations to make similar arrangements to enlarge their connections and increase their business. The Cleveland Company had encouraged this practice by precept and example. In a report of their board of directors, in January, 1854, the company

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were informed of their establishment of a line of first-class steamboats between Cleveland and Buffalo, and of their guaranty of the bonds of other companies for three hundred thousand dollars; of subscriptions for stock to the extent of one hundred thousand dollars, and of promised aid to still another company. They say: "These companies may need additional assistance, and others proposing to intersect ours may, by a moderate loan of money or credit, be enabled to finish their roads, and establish with us business relations, for the mutual benefit of both parties, while the advances on our part may be made safe and remunerative. Unless advised of your disapprobation, the board will continue to pursue this policy."

No such disapprobation was expressed as to check the board of directors until the guaranty of these bonds had been sanctioned, in July, 1854, at a meeting of the stockholders. The discussion was confined to the circle of the corporation, until after the failure of the Piqua Company to pay a second instalment of interest. Then the appellant filed this bill.

The frame of the bill implies that this contract exceeds the power of the corporation, and cannot be confirmed against a dissenting stockholder. His authority to file such a bill is supported upon this ground alone. *Dodge v. Walsey*, 18 How., 331; *Mott v. Penn. R. R. Co.*, 30 Penn., 1; *Manderson v. Commercial Bank*, 28 Penn., 379.

The usual and more approved form of such a suit being that of one or more stockholders to sue in behalf of the others. *Bemon v. Rufford*, 1 Simon, N. S., 550; *Winch v. Birkenhead H. Railway Co.*, 5 De G. and S., 562; *Mosley v. Alston*, 1 Phil., 790; *Wood v. Draper*, 24 Barb. N. Y. R.

A court of equity will not hear a stockholder assert that he is not interested in preventing the law of the corporation from being broken, and assumes that none contemplate advantages from an application of the common property that the constitution of the company does not authorize.

The powers of the Cleveland Company are vested in a board of directors chosen from the company. They are authorized to construct and maintain their road, and for that purpose can employ the resources and credit of the company, and execute

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the requisite securities, and are required to exhibit annually a clear and distinct statement of their affairs to a meeting of the stockholders. In the year 1851 a general law relating to railway companies empowered them "at any time, by means of their subscription to the capital stock of any other company, or otherwise, to aid such company in the construction of its railroad, for the purpose of forming a connection of said last-mentioned road with the road owned by the company furnishing such aid; * * * and empowered any two or more railroad companies whose lines are so connected to enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created: Provided, that no such aid shall be furnished nor any * * * arrangement perfected until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place and in such manner as they shall designate; and the holders of at least two-thirds of the stock of such company represented at such meeting in person or by proxy, and voting thereat, shall have assented thereto."

This section was re-enacted in the following year, in a general act for "the creation and regulation of incorporated companies in Ohio," which last act provides that "any existing company might accept any of its provisions, and when so accepted, and a certified copy of their acceptance filed with the Secretary of State, that portion of their charters inconsistent with the provisions of this act shall be repealed." Curwen's Ohio Laws, 949, 1110.

It is contended, that neither of these acts was accepted by the Cleveland Company; that the act of 1852 superseded that of 1851, and that the former could be accepted and become obligatory upon the company only in the mode it prescribed. Both of these are general acts, and were designed to enlarge the faculties of these corporations, so as to promote their utility, and to enable them to accomplish with more convenience the objects of their incorporation. This act of 1851 does not divest any estate of the company, or make such a radical change in their constitution as to authorize the mem-

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bers to say that its adoption without their consent is a dissolution of the body. But for an intimation in an opinion of the Supreme Court of Ohio (*Chapman & Harkness v. M. R. and L. E. R. R. Co.*, 6 Ohio R., N. S., 119) to the contrary, we should have been inclined to adopt the conclusion that the act of March, 1851, might be operative without the specific or formal assent of the corporations to which it refers, and was not superseded by the act of 1852, as to pre-existing corporations. *Everhart v. P. and U. C. R. R. Co.*, 28 Penn. R., 340; *Gray v. Monongahela N. Co.*, 2 W. and S., 156; *Great W. R. W. Co. v. Rushant*, 5 De G. and S., 290.

The jurisprudence of Ohio is averse to the repeal of statutes by implication; and in the instance of two affirmative statutes, one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation. *Cass v. Dillon*, 1 Ohio R., N. S., 607.

The learned compiler of the laws of Ohio retains the act of 1851 as valid, in respect to the corporations then existing. But as between the parties on this record, the acceptance of those acts may be inferred from the conduct of the corporators themselves. The corporation have executed the powers and claimed the privileges conferred by them, and they cannot exonerate themselves from the responsibility, by asserting that they have not filed the evidence required by the statute to evince their decision. The observations of Lord St. Leonards in the House of Lords, (*Bargate v. Shortridge*, 5 H. L. Ca., 297,) in reference to the effect of the conduct of a board of directors as determining the liability of a corporation, are applicable to this corporation, under the facts of this case. "It does appear to me," he says, "that if, by a course of action, the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and to embark money or credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn round, and themselves raise the objection that they have not taken these precautions, and that the shareholders ought to have inquired and ascertained the matter. * * * The way, therefore, in which I

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propose to put it to your lordships, in point of law, is this: the question is not whether that irregularity can be considered as unimportant, or as being different in equity from what it is in law, but the question simply is, whether, by that continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard in a court of justice to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have neglected to do."

This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of their organization. This doctrine has been constantly affirmed in this court, and has been engrafted upon the common law of Ohio. *Pearce v. M. and I. R. R. Co.*, 21 How., 441; *Strauss v. Eagle Ins. Co.*, 5 Ohio, N. S., 59. But the principle includes those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard.

The instances already cited of the course of dealing of this corporation, and others of a similar nature, of which there is evidence in the record, sufficiently attest that the corporation accepted the acts of 1851 and 1852 as valid grants of power; and it would be manifestly unjust to allow it to repudiate the contracts which it has made, because their acceptance of these grants has not been clothed in an authentic form. The Supreme Court of Ohio have recognised the obligation of corporators to be prompt and vigilant in the exposure of illegality or abuse in the employment of their corporate powers, and have denied assistance to those who have waited till the evil has been done, and the interest of innocent parties has become involved. *Chapman v. Mad River R. R. Co.*, 6 Ohio, N. S., 119; *The State v. Van Horne*, 7 Ohio, N. S., 327.

We conclude, that the validity of the contract of the Cleveland corporation, under the circumstances, must be determined on the assumption that it was authorized to exert the

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power conferred in the fourth section of the act of March, 1851, and 24th section of the act of May, 1852.

In deciding upon the validity of this contract, we deem it unimportant to settle whether Dennison was a director of the Piqua Company the 25th February, 1854, when he signed the contract with the committee of the Piqua board of directors; or whether that contract was affected by its ratification by the board after his resignation was entered upon the minutes, or by the subsequent consummation of the contract, in the reciprocal transfer of the securities and payment of the consideration; or whether, as matter of law, the bonds of the Piqua Company, commercial in their form, payable to another party, and issued after his resignation, are null and void.

The contract of the guarantors endorsing the bonds is a distinct contract, and may impose an obligation upon them independently of the Piqua Company. In the absence of a personal incapacity of Dennison to deal with his principal, the issue of the bonds by the directors of the Piqua Company is an ordinary act of administration; and bonds in such form, it is admitted, "challenge confidence wherever they go." We perceive no illegality in their delegation to them of the power to determine whether the Ohio or Pennsylvania gauge should be adopted, or their sale of the privilege to adjust the controversies and questions relating to it. Their adoption of the Ohio gauge was a solution of all the difficulties; it enabled the Indianapolis Company to adopt it; it superinduced the resulting consequence of running connections among the four corporations; it secured profits to the guarantors; it imposed the burden of relaying their track upon the Piqua Company. Their contract to adopt this gauge and to form the corresponding connections is a valuable consideration, and the Piqua Company have fulfilled the engagements that Dennison and Niel were authorized to stipulate on their behalf. There is testimony that the bargain was a hard one for the guarantors, and argument that it was probably an unjust one, and possibly fraudulent in reference to the stockholders of the Cleveland Company. But the bill is framed, not to obtain relief from error or fraud in the administration of the powers of the com-

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pany by their trustees, but against the exercise of powers that did not belong to the corporation, and which the body could not confirm, except by a unanimous vote. *Foss v. Harbottle*, 2 How., 461; 2 Phil. Ch. R., 740.

We proceed to consider of the effect of the sanction given to the arrangements of the Cleveland Company, through Dennison and Niel, with the Piqua Company, by the vote of the meeting in July, 1854. It is objected that the notice of this meeting was insufficient, and that, unprepared as the corporators were, the proxy appointed by the non-resident stockholders was overpowered by the heat and passion of the directors and their adherents. There is some force in the complaint that this meeting was not conducted with a due respect for the social rights of a portion of the stockholders. But the time, place, and manner of the meeting were appointed by the directors, as the act of 1851 permits. The proxy of the appellant was there, exhibited his instructions, discussed the propositions submitted, and declined to vote, when his vote would have controlled the action of the meeting. Since that time, several annual meetings have been held, at which the appellant was represented. The circumstances of the contract and its effects have been developed, and yet the resolution sanctioning this contract has not been rescinded. It may be that among the stockholders, and within the corporation, the cause of this procrastination and hesitancy to act upon the subject may be estimated properly. But we are to regard the conduct of the corporation from an external position. The community at large must form their judgment of it from the acts and resolutions adopted by the authorities of the corporation and the meeting of the stockholders, and by their acquiescence in them. These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence. They have circulated without an effort on the part of the corporation or corporators to restrain them, or to disabuse those who were influenced by these apparently official acts. Men have invested their money on the assurance they have afforded.

A corporation, quite as much as an individual, is held to a

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careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced. The opinion of the court is, that the injunction granted upon the bill of the appellant was improvidently granted, and that he is not entitled to the relief he has sought; and that the decree of the Circuit Court dissolving the injunction and dismissing the bill is correct, and must be affirmed.

THE ORIENT MUTUAL INSURANCE COMPANY, PLAINTIFF IN ERROR,
v. JOHN S. WRIGHT, USE OF MAXWELL, WRIGHT, & COMPANY.

An open or running policy of insurance upon "coffee laden or to be laden on board the good vessel or vessels from Rio Janeiro to any port in the United States, to add an additional premium if by vessels lower than A 2, or by foreign vessels," contained also the following clause, viz: "Having been paid the consideration for this insurance by the assured or his assigns, at and after the rate of one and one-half per cent., the premiums on risks to be fixed at the time of endorsement, and such clauses to apply as the company may insert, as the risks are successively reported."

This is different from an ordinary running policy, in which the rate of premium to be paid is ascertained and inserted in the body of the policy at its execution, and in which species of policy the contract becomes complete, and the policy attaches upon the goods from the time they are laden on board the vessel, as soon as the ship is declared or reported, provided the shipment comes within the description in the policy.

The rules explained which govern this class of policies.

But in the policy in question there is something more to be done, in order to make the contract complete, than merely to declare the ship. The assured must pay or secure the additional premium, which the underwriter has reserved the right to fix at the time of the declaration of the risk in case the vessel rates lower than A 2.

Unless the assured paid or secured this additional premium fixed by the underwriter, the contract of insurance, in respect to the particular shipment, did not become complete or binding.

Hence, the instruction of the court below was erroneous, which held that the contract was complete and binding as soon as the vessel was reported; and that, if the parties could not agree as to the additional premium, the question was one for the courts to settle.

The parties stipulated that the additional premium should be fixed when the risk was made known.

The cases upon this point cited.

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

The facts are stated in the opinion of the court.

It was argued by *Mr. Hamilton* and *Mr. Cutting* for the plaintiff in error, and by *Mr. Brent* and *Mr. May* for the defendant.

The arguments chiefly turned upon the point when under this policy the risk commenced. The counsel for the plaintiff in error contended, that it did not attach until the assured paid such premium as should be in good faith named by the insurer as an adequate compensation for the risk to be assumed. The counsel for the defendant in error contended, that the contract was irrevocable the moment the premium and extension was reported and approved.

1 Parsons Contracts, 406, 407, note K.

Tayloe v. Merchants' Insurance Company, 9 How., 390.

The contract is not the less complete, because an increased premium was left open for subsequent agreement.

This was decided in *United States v. Wilkins*, 6 Wheat., 135, and not overruled, as supposed, in 17 Ohio, 192.

But here is an express obligation to pay an increased premium, and that is itself as good as if the increased premium had been paid at the time—promise for promise is a good consideration.

1 Parsons Contracts, 373—376.

19 Howard, 323.

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 by the plaintiff below upon a policy of insurance covering a quantity of coffee laden or to be laden on board the "good vessel or vessels" from Rio de Janeiro to any port in the United States, "to add an additional premium, if by vessels lower than A 2, or by foreign vessels."

The policy contained the following clause in respect to pre-

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miums: "Having been paid the consideration for this insurance by the assured, or his assigns, at and after the rate of one and one-half per cent., the premiums on risks to be fixed at the time of endorsement, and such clauses to apply as the company may insert, as the risks are successively reported." The policy bears date 27th July, 1855. The company subscribed at the execution \$22,500 as the amount insured.

On the 30th July, 1855, the policy was altered by agreement of parties by striking out the words, "vessels not rating lower than A 2," as it originally stood, and inserting the words now in the instrument, namely, "an additional premium, if by vessels lower than A 2, or by foreign vessels."

On the 4th January, 1856, the company subscribed an additional sum of \$15,000, and on the 19th April following the sum of \$25,000.

Premium notes were given at the time the different sums were subscribed, at the rate of premium mentioned in the body of the policy.

The agent of the company at Baltimore, who negotiated this insurance, the defendants being a New York company, states that when applications are made to enter risks on running policies, they are endorsed at once by him, and the report of such endorsement transmitted to the company in New York, which names the premium, and this is communicated to the assured; that the premiums specified in the body of the policies are nominal, and the true premiums to be charged are fixed by increasing or reducing the nominal premiums when the risks are reported; and that the nominal premiums taken on the delivery of a running policy are returned, if no risks are reported.

In the latter part of August, 1856, the plaintiff applied to the agent at Baltimore for an endorsement on the policy of the coffee in question, laden or to be laden on board a vessel called the Mary W., from Rio de Janeiro to New Orleans, which application was communicated to the company, in order that they might fix the premium. The company at first declined to acknowledge the vessel as coming within the description in the policy, on account of her alleged inferior character

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and unfitness for the voyage; but the plaintiff insisting upon the seaworthiness of the vessel, and his right to the insurance within the terms of the policy, the company fixed the premium at ten per cent., subject to the conditions of the policy, or two and one-half per cent., as against a total loss. This rate of premium the plaintiff refused to pay.

The coffee was shipped on the Mary W. at Rio de Janeiro for New Orleans, on the 12th July, 1856, at which period she started on her voyage, and was lost on the 29th of the month upon rocks, the master being some seventy miles out of his reckoning at the time.

Evidence was given on the trial, on the part of the company, tending to prove that the Mary W. was rated below A 2, and even that she was unfit for a sea voyage, being originally intended, when built, in 1846, as a coasting vessel, and prayed the court to instruct the jury, that if they find from the evidence the vessel, at the time of the application for the endorsement of her cargo upon the policy, was rated in the office of the company and other offices of underwriters in New York lower than A 2, and being so rated, the company offered to make the endorsement at the premium fixed by them, and that on the premium being communicated to the plaintiff, he refused to pay it or assent thereto, then he is not entitled to recover, which prayer was refused; and the court thereupon instructed the jury, substantially, that the plaintiff was entitled to recover for the loss, so far as the rate of premium was concerned, upon deducting such additional premium to the one and one-half per cent., as in the opinion of underwriters may be deemed adequate to the increased risk of the coffee shipped in a vessel rating below A 2.

The jury rendered a verdict for the plaintiff.

The material question presented in the case is, whether or not the company were under a contract, within any of the terms and conditions of the policy, to insure this particular cargo of coffee on board of the vessel Mary W. at the time the loss occurred; for, unless the contract is found there, none existed between the parties, as it is admitted none was entered into at the time the vessel was reported and the risk declared.

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The plaintiff has assumed the affirmative of this question, and insists that the company was bound by the terms of the policy to cover the coffee from the time it was laden on board the vessel at Rio as soon as the risk was declared, and this whether the vessel rated below A 2 or not. This is necessarily the result of the position claimed, as it denies to the company the right to fix an additional premium, even if it should happen that the vessel rated below A 2; that then, or in that event, it is contended, the additional premium becomes a question of mutual adjustment between the parties, and if they disagree, to be determined by the courts. On the part of the company, it is insisted that, according to the special provisions in the policy, in case the vessel reported rates below A 2, the contract is inchoate and incomplete until the payment or security by the assured of the additional premium to be fixed at the time by the company.

The contract of insurance in this case arises out of an open or running policy, which enables the merchant to insure his goods shipped at a distant port when it is impossible for him to be advised of the particular ship upon which the goods are laden, and therefore cannot name it in the policy.

A relaxation in this respect has been permitted by the laws and practice of commercial countries; and the party effecting the insurance is allowed to insure the cargo "on board ship or ships," on condition of declaring the ship upon the policy and giving notice to the underwriter as soon as known, and if possible before the loss on board of which the goods have been laden. The underwriter, who consents to insure upon policies of this description, of course, has no opportunity to inquire into the character or condition of the vessel, and agrees that the policy shall attach, if she be seaworthy, however low may be her relative capacity to perform the voyage; and for the additional risks he may thus incur, he finds his compensation in an increase of the premium. A higher premium is always demanded where the vessels to which the insurance relates are not known.

The ship, indeed, must be seaworthy, or the policy will not attach; but the degrees of seaworthiness or of the capacity of

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a ship to perform a given voyage are exceedingly various; and it is well known that the rates of premium are varied by the underwriters according to the different estimate they form of the character and qualities of the vessels to which they relate.

In the case of an insurance of goods shipped from and to port or ports designated, or on a voyage particularly specified, the ship to be afterwards declared, and the rate of premium to be paid is ascertained, and inserted in the body of the policy at its execution, the contract becomes complete, and the policy attaches upon the goods from the time they are laden on board the vessel, as soon as the ship is declared or reported, provided the shipment comes within the description in the policy. But until the declaration is made by the assured, it is inchoate and incomplete; and, if not made at all, the risk is regarded as not having commenced, and the assured is entitled to a return of his premium.

The principles of law and rules of construction governing policies of this description appear to be well settled, as may be seen by a reference to the authorities collected in the text-writers. (1 Arnould, ch. 7, sec. 2, pp. 174—179, Perkins's ed.; 1 Phillips, ch. 5, sec. 2, pp. 174—177; 2 Parsons, ch. 1, sec. 2 pp. 34, 35, and ch. 6, pp. 198, 199; 3 Kent's C., p. 256; Hurlst. and Normand R., 2 Exch., p. 549; Entwistle *v.* Ellis, 1857; 4 Taunton, 329; Langhorn *v.* Cologan, 6 Gray, 214; E. Carver Co. *v.* Manf. Ins. Co.)

But the policy before us is materially different from the class of open or running policies adopted in England and upon the continent at an early day, and which appear to be generally if not universally in use at the present time. Instead of determining the amount of premium, and inserting it in the policy at the time of its execution upon the shipments to be afterwards declared, as in the case of the policies we have been considering, the parties here agree, that in respect to a certain class of vessels, namely, those rating lower than A 2, the premiums on the risks shall be fixed at the time they are declared or reported; when thus fixed, and the premium paid or secured, the policy attaches upon the goods from the time they are laden on board the vessel. The mere declaration of the

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ship on board of which the goods are laden is not sufficient to complete the contract, as something more is to be done by the assured to bring the subject within the special stipulations in the policy: he must pay or secure the additional premium which the underwriter has reserved the right to fix, at the time of the declaration of the risk.

The premiums specified in the body of the policy are nominal; and the true premiums to be charged are fixed by increasing or reducing the nominal premiums when the risks are reported. This, it was proved, was the established custom of this company, and of which the assured is chargeable with notice. Indeed, this custom appears to have been acted upon in connection with this policy, and with the dealings of the parties under it.

On the 13th August is endorsed on it: Brig Windward, from Rio de Janeiro to Baltimore—value of shipment \$4,750, at $1\frac{1}{4}$ per cent. premium; and on the 20th November: Brig T. Walters, from same place to Philadelphia—value of shipment \$2,375, at $1\frac{1}{4}$ per cent. premium. The premiums for insurance of these two shipments are $\frac{1}{4}$ per cent. less than the rate in the body of the policy.

We have said, that where the vessels to which the insurance relates are not known to the underwriter, a higher premium is always demanded, as he has no opportunity to inquire into the character or capacity of the vessel for the voyage; which information is readily accessible where the ship is known, by reference to the book of the register of vessels kept by the underwriters, in which the name, master, rate, and present condition, are entered.

Now, the change made in this policy, and in others of the class, in the time of fixing the premium, from that of the execution of the policy to the time when the risk is reported, places the underwriters, in respect to fixing the premiums, on the footing of insurance of goods to be shipped on board a vessel named, the underwriters possessing all the information possessed in that case, in respect to the character of the vessel. As the effect, therefore, of this change in the terms of the policy is to reduce the rate of premium, it is as beneficial to

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the assured as to the underwriter—which, doubtless, led to his assent to this mode of insurance. It is true, that in respect to vessels to be afterwards declared, and the premiums on the risks to be fixed at the time declared or reported, the parties stand on the footing of original contractors, the underwriter having the right to fix the premium, and the applicant the right to assent or not, as he sees fit; and, undoubtedly, mutual confidence must exist, in order to the successful working of the system. On the one side, the underwriter might be unreasonable in the amount of the premium claimed; and on the other, the applicant, who is presumed to have the earliest advices of the ship on which his goods are laden, might conceal her condition when reported, and impose upon the underwriter. Injustice might be practiced in this way by both parties, if this mode of dealing with each other may be assumed.

But this would hardly be just as to either party, and especially when the interest of both is concerned to deal justly and honorably with each other. The business of the underwriter depends essentially upon the good faith with which he deals with his customers; and this motive, as well as the great competition that exists in the business, may be well relied on to prevent any unreasonable advantage. But, at worst, the applicant is not bound to pay the premium, if unreasonable; and may at once be insured in any other office, and claim a return of premium, if any, advanced. The evidence in the present case furnishes no ground for apprehension, as the premium charged was not unreasonable, but the contrary.

But, be the argument ever so strong in respect to the opportunities to deal unjustly with each other, it is quite clear, upon the fair if not necessary construction of the terms of the policy, both parties have agreed to submit to them, for the sake of the better means furnished to ascertain the true character of the risks, and thus reduce the rate of premium below that which was charged under the old system, where it was fixed in the absence of knowledge on the subject; and the period of time these policies with this change of the terms has been in use, for aught that appears, without complaint or dis-

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satisfaction, affords evidence that all apprehensions of unfair dealing are imaginary.

We have said that, according to the true construction of the terms of this policy, where the vessel declared or reported by the assured was rated below A 2, the company had reserved the right to fix at the time the additional premium; and unless assented to by the assured, and the premium paid or secured, the contract of insurance, in respect to the particular shipment, did not become complete or binding. The court below held the contrary, the instruction to the jury maintaining that the contract was complete and binding as soon as the vessel was reported; and that, if the parties could not agree as to the additional premium, the question was one for the courts to settle; thus placing this policy upon the footing of those where the full premium was fixed, and paid or secured, at the time of the execution, and in which no special provisions concerning the premium are inserted.

These special clauses are very explicit, and are inserted in this policy for the benefit of the company. We think, independently of the usage and practice of the company under these policies, the import of the language used cannot well be mistaken.

The right is expressly reserved to charge an additional premium upon all vessels reported rating below A 2; and, again, the premiums on risks are to be fixed at the time of endorsement—that is, when the vessels are reported to be noted on the policy. If the construction rested alone upon the right to add additional premiums upon a given rate of vessels, there might be some ground for the argument that the time for fixing them was open; and if the parties could not agree, the law must determine the question. But when the parties themselves stipulated, not only that in the particular case additional premium shall be charged, but that it shall be fixed at the time the risk is made known, there would seem to be no room for doubt or dispute in the matter. In the present case, there is also the additional special provision, namely, “and such clauses to apply as the company may insert as the risks are successively reported,” thus providing for any un-

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foreseen or extraordinay risks that might be claimed under the policy.

Even if an arbitrator had been agreed upon to fix the additional premium, and he had refused, the contract would have been at an end, as the courts could not appoint one. (3 Mer. R., p. 507, *Wilks v. Davis*; 14 Ves., 400, *Milner v. Geary*; Code Napoleon, 1591, 1592; 1 *Troplong de vente*, nos. 146, 160;) and certainly they could not fix the premium in this case, on the disagreement of the parties, without assuming the right to make a contract for them. The premiums were to be settled when the risks were reported, not at any other period.

In the case of policies on goods "in ship or ships," to be afterwards declared, and where the full premium is paid or secured at the execution, the policy, even in that case, is a mere outline of the contract, to be completed on making the declaration; but if not made within the terms of the policy, the contract is at an end as respects the particular shipment.

In *Entwistle v. Ellis*, (2 Hurlst. and Norm., Exch. R. P., 549, 556, 1857,) Channell, B., observed, speaking of a policy of this description, at the time of the making of the policy, certain particulars were agreed upon—others were left to be settled. The policy was to be on rice, to be warranted free from particular average, to be sent "in ship or ships." Something more was wanting to make a binding contract. The parties can only fill up such particulars as are left in blank so as to be consistent with the policy.

Applying this principle to the policy in the present case regarding the special clauses therein, something more is required to make a binding contract than the declaration of a ship rating lower than A 2 to bring the subject within the policy; the additional premium fixed by the company was to be paid or secured.

We have found very few cases in the books upon the peculiar class of policies before us, and no mention of them in the text-writers on the subject of insurance. The case bearing more directly than any other upon the point in question is *Dounville v. the Sun Insurance Company*. (12 Louis. Ann. R. P., 259.)

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The contract of insurance there was in an open or running policy of the class in which the full premium was paid or secured at the execution. But a modification was afterwards made, by which "it was agreed that this policy shall cover merchandise to the address of the assured from European ports to New Orleans, *via* Boston or New York, *subject to additional premium as per tariff.*"

The court held that by the terms of the policy, the party desiring to be insured upon any particular shipment of merchandise was bound to present to the company an invoice of the goods, (this had been provided for in the policy,) and pay or secure the premium; that the party was not bound to report any shipment except at his election, nor could the company demand premium on the same, unless presented for insurance; and that, on a policy of the class before the court, there must necessarily exist as many contracts of insurance as there are endorsements on the policy of separate shipments.

We have examined this case more at large, from the novelty of the questions involved, as they do not seem to have been the subject of consideration by the courts or text-writers, than from any difficulty we have felt in the view to be taken of them; and from the examination we have given to the peculiar features of the policy, we entertain no doubt but that the changes made, and which have been particularly referred to, will be found in practice beneficial both to the insured and insurer.

The only defect, perhaps, existing, is the want of a provision for the case, which may happen, where the declaration or report of the ship is not made until the loss is known—that is, where the ship and the loss are reported together. According to the old form of the policy, the full premium being ascertained and fixed at the date of it, it is well settled that, though the declaration is not made till the loss is known, if made with due diligence after advices of the ship, the underwriter is liable. There may be some difficulty in applying that rule to the class of policies before us. It was rejected in the case of *Dounville v. the Sun Insurance Company*, above referred to.

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Upon the whole, after the best consideration we have been able to give to the case, we are satisfied the ruling of the court below was erroneous, and the judgment must be reversed, and a *venire de novo*.

Mr. Justice CLIFFORD dissented. For his dissenting opinion, see the succeeding case of the Sun Mutual Insurance Company against Wright—a case similar to the present one.

THE SUN MUTUAL INSURANCE COMPANY, PLAINTIFF IN ERROR,
v. JOHN S. WRIGHT, USE OF MAXWELL, WRIGHT, & Co.

The principles with respect to a policy of insurance in the preceding case of the Orient Mutual Insurance Company against Wright, reaffirmed in the present case.

In the correspondence which took place between the insurer and the insured, there was no waiver by the former of the right of fixing the premium, nor was it claimed or suggested in the communications between the parties at the time.

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

It was entirely similar to the preceding case, except that it was contended that the insurance company had waived the right of fixing the premium by the conduct of the agent and correspondence between the parties.

It was argued by *Mr. Cutting* for the plaintiff in error, and by *Mr. May* and *Mr. Brent* 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 below was upon a policy of insurance brought by the plaintiff to recover a loss upon coffee on board the vessel Mary W. on a voyage from Rio de Janeiro to a port in the United States. The questions involved are substantially the

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same as have been examined in the case of the same plaintiff against the Orient Mutual Insurance Company, and the decision in that governs the present one.

It was insisted in this case, on the part of the plaintiff below, that the company had waived the question as to the premium on the declaration or report of the *Mary W.*, as it was bound by the act of the agent in making the endorsement on the policy, who added simply the words, "not to attach if the vessel proved unseaworthy."

The company were advised, by a letter of their agent, dated August 23, 1856, of the application of the plaintiff to have the coffee in question on the *Mary W.* entered on his policy; and on the 25th of the month they answered, directing the agent to inform the plaintiff of the facts the company had previously communicated to R. C. Wright, a brother, in relation to the vessel, and that they regarded her an entirely unfit vessel for a cargo of coffee, and should not consider the policy as attaching to the cargo.

The correspondence with R. C. Wright on the subject was under date of the 14th August, same year, and which related to a different shipment of coffee on the same vessel.

The plaintiff, notwithstanding the objections of the company, insisted upon his right to have the coffee covered by the policy, and so advised the agent, who communicated the information to the company. On the 26th of the month, they, still insisting that the vessel was unfit for such a cargo, instructed the agent to inform the plaintiff that if he claimed the property to be covered by the policy, he must consider it subject to the risk of the policy not attaching from the unseaworthiness of the vessel. Upon this, the agent entered the coffee upon the policy, with the words, "not to attach if vessel be proved unseaworthy," and so advised the company. They, on receiving this advice, immediately informed the agent that the endorsement was a practical nullity, and directed him to inform the plaintiff that they conceded his right to be covered by the policy, and that they had no other remedy but to name a premium commensurate to the risk, and fixed the premium at ten per cent., subject to the conditions of the policy, or two

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and a half per cent. upon a total loss. In answer to this, the plaintiff objected to the premium, insisting, if the Mary W. rated below A 2, the company were only entitled to an equitable rate of premium; and if they and he could not agree, it was a proper case for a reference.

The company, in answer to this, respond, that they had reserved the right in the policy to fix the premium in case of vessels rating below A 2, and that they could not consent to its determination by a third person. The plaintiff again denied the right of the company to fix the premium, and thus the correspondence terminated.

It is quite apparent that there was no waiver of this right of fixing the premium on the part of the company, nor was it claimed or suggested in the communications between the parties at the time.

Judgment reversed, and a *venire de novo* awarded.

Mr. Justice CLIFFORD dissenting.

I dissent from the opinion of the court in this case; and inasmuch as the question presented is one of considerable importance, I think it proper to state the reasons of my dissent.

John S. Wright, the present defendant, sued the plaintiffs in error on a policy of insurance, to recover for a total loss of a cargo of coffee, shipped from Rio de Janeiro to New Orleans on the schooner Mary W. As appears by the bill of lading, the goods were shipped at the port of departure as early as the twelfth day of July, 1856, and the vessel sailed for New Orleans on the same day. She had stormy weather after her departure; and on the twenty-ninth day of August following she was wrecked upon the rocks, and all her cargo was lost. Notice of the shipment was received by the plaintiff on the twenty-third day of August, 1856, and on that day he notified the agent of the defendants, residing in Baltimore, of the same, and requested him to enter under his policy the cargo of the vessel, which consisted of coffee, valued at eighteen dollars per bag.

By the terms of the policy the plaintiff was insured, "on account of whom it may concern—loss payable to them,

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lost or not lost—at and from Rio de Janeiro to a port of the United States, on one-half of five thousand bags of coffee, each two hundred bags in running marks and numbers, in order of invoice, subject to separate average, upon all kinds of lawful goods and merchandise laden on board of the good vessel or vessels, beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof on board the said vessel at the place of shipment as aforesaid, and so shall continue until the said goods and merchandise shall be safely landed at the place of destination, as aforesaid."

Another clause was, that "the said goods and merchandise hereby insured are valued at eighteen dollars per bag, as interest may appear."

Payment of the consideration by the assured is expressly acknowledged by the terms of the policy, at and after the rate of one and one-half per cent.—to return one-fourth per cent., if direct to an Atlantic port; to add an additional premium, if by vessels rating lower than A 2, or by foreign vessels, subject to such addition or deduction as shall make the premiums *conform to the established rate at the time the return is made to the company.*

Some reference to the correspondence between the parties becomes necessary, in order that the true nature of the controversy may be fully and clearly understood.

Defendants are a corporation, doing business in the city of New York; but they have an authorized agent in Baltimore, where the defendant resides. Their agent informed them by letter, under date of the twenty-third of August, 1856, that the plaintiff on that day had requested him to enter this cargo under his policy; and in the same letter stated the amount of the goods and the name of the vessel. To that letter the defendants replied three days afterwards, saying that they considered the vessel entirely unfit for a cargo of coffee, and should not consider their policy as attaching thereto.

That information was communicated to the plaintiff by the agent on the following day; but the plaintiff insisted that the goods were covered by the policy; and on the same day the

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defendants were informed by their agent that the plaintiff did so insist. They were also furnished by their agent at the same time with a letter from the plaintiff, giving his reasons for insisting that the cargo should be entered under the policy. In that letter he stated that the sole object of open or running policies would be defeated, if the underwriters were at liberty to decline any risk that might arise under them; and repeated, that he considered the defendants bound, by the spirit as well as the letter of their policy, to cover the goods at risk on this vessel.

Each party was thus fully possessed of the views of the other, and of all the circumstances of the case. Neither appears to have entertained a doubt as to the validity of the contract, and the only matter in dispute between them was the fitness of the vessel for such a cargo. But they had further correspondence, which it is important to notice, in order to understand the real nature of the controversy between the parties. Following the order of events, the next letter is the reply of the defendants to their agent, which is dated the twenty-sixth day of August, 1856, three days before the loss, and more than forty days after the vessel had departed on her voyage. In that letter they say, after acknowledging the receipt of the one to which it was a reply, that, with regard to the case of the schooner under the policy of the plaintiff, they can only repeat their belief that she is an unfit vessel for such a cargo, which makes her an unseaworthy risk, and request their agent to say to the plaintiffs, that if he deems the property covered by the policy, *he must so consider it subject to the risk of the policy not attaching from the unseaworthiness of the vessel.*

Pursuant to that letter, the agent of the defendants two days afterwards wrote to the plaintiff, that the president of the company "has requested me to say to you, that he will cover for the schooner Mary W., but you must consider it subject to the risk of the policy not attaching from the unseaworthiness of the vessel," and made the endorsement on the policy as follows, dating it on the preceding day:

"August 27, 1856. Schooner Mary W., Rio de Janeiro to

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New Orleans, on $\frac{1}{2}$ cargo, 1,830 bags of coffee, at \$18 per bag—not to attach if vessel be proved unseaworthy—\$16,470."

When that endorsement was made, in my judgment the contract became complete, leaving the additional premium to be equitably adjusted between the parties, according to established rate of vessels rating under A 2; or, in case of dispute, to be settled, like any other controversies, by the judicial tribunals. *E. Carver Co. v. Manf. Ins. Co.*, 6 Gray, 214.

On the following day the agent informed the defendants that he had made the endorsement. To that letter they replied on the twenty-ninth day of the same month, saying, in effect, that the condition inserted in the endorsement was practically a nullity; and as a reason for that conclusion, they add, that no risk attaches if the vessel is proven to be unseaworthy, but the difficulty is, so to prove them. After some other remarks, which it is not important to notice, they go on to say, that no other remedy remains except to name a premium commensurate with the risk, which they therein insist it is their right to do. Accordingly, they fix ten per cent., subject to the conditions of the policy, or two and a half per cent. against a total loss, and direct their agent to notify the plaintiff of their action in the premises, that he may determine on which rate he wanted the risk entered. That notice was given to the plaintiff by the agent on the second day of September following. He objected to the rates named as exorbitant, but admitted the right of the company to an equitable rate, and insisted that the cargo was covered by the policy. His views were communicated by the agent to the defendants on the third day of September, 1856, and on the following day they struck the risk from their books.

Evidence was introduced by the plaintiff that the premiums specified in the body of running policies are nominal, and that the true premiums to be charged are fixed by increasing or reducing the nominal premium when the risks are reported. Premium notes were given by the plaintiff in this case at the policy rate of one and one-half per cent., and were paid by him to the defendants at their maturity, long before the loss in this case. Sums paid for premiums on running policies,

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according to the custom of this company, are returned if no risks are reported, but with a deduction of half per cent., which is retained by the company for their services. According to the testimony of the agent, he had no power to bind the company from the time of the application for insurance until the answer thereto was received from the company.

On this state of the case, the presiding justice instructed the jury as follows: "If the jury shall find from the evidence that the defendants executed the policy of the 27th of July, 1855, and received from the plaintiff the premium therein mentioned, and that their duly-authorized agent in this city made the endorsements on the policy which have been offered in evidence; and shall further find that 1,830 bags of coffee belonging to the plaintiff were shipped on the 12th day of July, 1856, at Rio, on board of the schooner Mary W., to be carried to New Orleans, and that when the schooner left Rio she was seaworthy and in good condition; and shall further find that the vessel and cargo were subsequently on the voyage totally lost by one of the perils insured against, and that the schooner was rated lower in New York than A 2, then the plaintiff is entitled to recover for one-half the value of the coffee so lost, at \$18 per bag, *less such additional premium* beyond the $1\frac{1}{2}$ per cent., as in the opinion of underwriters may be deemed adequate for the increased risk to a cargo of coffee shipped in a vessel rating below A 2, with interest from thirty days after such time as the jury may find the defendants were furnished by plaintiff with the preliminary proofs of his loss."

Under the instructions of the court, the jury returned their verdict for the plaintiff, and the defendants excepted. That instruction, so far as it is necessary to consider it at the present time, affirms that, by the true construction of the policy, the contract between the parties under the circumstances of this case, as disclosed in the evidence, was complete when the shipment of the goods was reported by the plaintiff, and the endorsement was made upon the policy by the authorized agent of the defendants. In that view of the case I entirely concur. When the report was forwarded by the agent, the only objection made to the risk was, that the vessel was un-

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suitable, or that she was unseaworthy. That objection was repealed, and finally the plaintiff was told, that if he insisted upon the endorsement, it would only be made upon the condition that the policy should not attach if it turned out that the objection of the defendants was well founded. He accepted the condition, and the endorsement was so made. After the endorsement was made, it was too late for the defendants to reconsider the position they had voluntarily assumed. *E. Carver Co. v. Manf. Ins. Co.*, 6 Gray, 214.

Suppose they had a right, as a condition precedent, to demand the payment of the additional premium before making the endorsement; they did not insist upon the right, but voluntarily waived it. They had already received the policy rate of one and one-half per cent., and to the present time have neglected to refund the same. Pre-payment of the policy rate was a sufficient consideration to uphold the contract; and certainly it will not be denied that they might waive the right to claim pre-payment of whatever might be due to them for the additional premium contemplated by the policy. But their right to demand the additional premium as a condition precedent to the endorsement cannot be admitted. Such a construction would defeat the policy, and therefore must be rejected, unless the language of the instrument is imperative to that effect. 1 Phil. Ins., sec. 438, and *Kewley v. Ryan*, 2 H. Black, 343. Policy rate is not the actual rate of adjustment between the parties in any case under this instrument, unless, perchance, it happens to be the established rate at the time the return is made to the company. *Crawford v. Hunter*, 8 Term, 16, note.

Addition or deduction from policy rate is to be made in all cases so as to make the sum paid and received conform to the established rate. Something, therefore, remains to be done in respect to every risk, irrespective of the character of the vessel. In case the shipment is by a vessel rating under A 2, or by a foreign vessel, an additional premium may be added; but there is no stipulation in the instrument that it shall be paid in advance of the endorsement; and there is nothing in the language of the instrument from which to infer that such was

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the intention of the parties. That inference is wholly gratuitous, and, in my judgment, unfounded. When adjusted, the sum to be paid must conform to the established rate at the time the return was made to the company.

If the parties cannot agree what the established rate was at that time, like other matters of controversy, it must be settled by the judicial tribunals. *Harman v. Kenyston*, 3 Camp., 150; 1 Arnold on Ins., 175, 177; *Smith's Mer. L.*, 208; *U. S. v. Wilkins*, 6 Whea., p. 144. Unless this be the true construction of the policy, then it is a delusion which ought to be shunned by every business man. Loss often occurs before the notice of the shipment. The insured cannot adjust the additional premium until he knows by what vessel the shipment has been made, so that, if it be true that the contract is incomplete until the additional premium is adjusted and paid, then open or running policies for the insurance of goods from distant ports are valueless. They are worse than valueless, as generally understood, because they have the effect to delude and deceive.

For these reasons, I am of the opinion that the judgment of the Circuit Court ought to be affirmed.

CHARLES BLIVEN AND EDWARD B. MEAD, PLAINTIFFS IN ERROR,
v. THE NEW ENGLAND SCREW COMPANY.

Where there was a company incorporated for the purpose of making screws, and they were sued by certain persons with whom they had been in the habit of dealing, for not supplying a sufficient quantity of the manufactured article, according to orders which had been given and received, the defence was, that the supply manufactured was not equal to the demand, and that the plaintiffs knew that the articles were furnished to customers in regular order, according to date.

Such custom was not a sufficient defence, unless it was known to the other contracting party, and formed a part of the contract.

Parol evidence of usage is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage.

But parol evidence of custom and usage is not admitted to contradict or vary express stipulations or provisions restricting or enlarging the exercise and enjoyment of the customary right.

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The evidence in this case proved that the plaintiffs knew of the usage of the defendants to supply orders as fast as the articles could be made, and according to a list kept in a book.

It was correct in the court to construe this evidence, and to instruct the jury that if they believed the evidence, it showed that the plaintiffs were chargeable with notice of the defendants' custom to fill their contracts only in the order in which they were accepted and in proportion with each other, and not in full, according to the strict terms thereof.

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

Bliven was of Westchester county, and Mead of Brooklyn, in the State of New York, and the New England Screw Company were a corporation created by Rhode Island. The suit was brought by Bliven & Mead in the Supreme Court of the State of New York, and removed by the defendants into the Circuit Court of the United States. The Screw Company brought an action against Bliven & Mead in the Circuit Court, which will be the subject of the case next reported. The suit by Bliven & Mead was against the company for not furnishing them with screws enough; and the suit by the company against Bliven & Mead was to make them pay for what had been furnished. Both suits grew out of the same series of transactions, which are fully stated in the opinion of the court. The judgment of the court below, in both cases, was against Bliven & Mead, and hence both were brought up to this court.

They were submitted on printed arguments by *Mr. Wright* for the plaintiffs in error, and by *Mr. Stoughton* and *Mr. Jenckes* for the defendants in error.

The following were the points made by the counsel, respectively:

Points for Plaintiffs in Error.

I. The specific contracts on which the screws for the recovery of the value of which suit was brought, neither of them having been fulfilled, no recovery can be had for the partial performance.

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2 Kent's Commentaries, 509.

See Note *a*, and cases cited.

II. The delivery of the full quantity of goods agreed upon cannot be excused by any custom to deliver only a part.

Linsley v. Lovely, 26 Vt., (3 Deane,) 123.

Schooner Reeside, 2 Sumner, 567.

III. The custom (as well as the contract) must be mutual. Bliven & Mead might with equal propriety set up a custom, when they order 10,000 gross of screws, to receive but 1,000, as the New England Screw Company, on accepting such order unconditionally, to deliver only the smaller quantity.

Here the custom alleged was all on one side. If screws fell in price, Bliven & Mead were obliged to receive the whole. If the screws rose in value, Bliven & Mead could only claim what the company, in its discretion, saw fit to deliver them. Such rise took place.

See *Holford v. Adams*, 2 Duer, (N. Y.,) 471.

IV. The custom proved was illegal as dangerous, and contrary to the policy of the law.

1. It varied express and written contracts.

Hone v. Mutual Safety Ins. Co., 1 Sanford's Superior Court Rep., 137.

The Reeside, 2 Sumner, 569.

2. The delivery of goods at the time and in the quantity expressly agreed on is as obligatory as the payment of money. A debtor's custom to pay his debts "in course, and as far as he consistently can in view of his obligations to his other creditors," will not excuse him from paying his notes given without any such limitation.

V. 1. Custom, to be legal, must be the general custom of the trade, and not, as was this case, the custom of the party only.

2. What was proved was not properly a custom, but was a habit of the defendants in error, to fulfil their obligations only so far as they found it convenient.

VI. If such custom (or habit) could legally be proved, the extent and effect thereof should have been submitted as a

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question of fact to the jury under the evidence, and not determined by the court.

The points on behalf of the defendants in error were the following, as taken from the brief of *Mr. Jenckes*:

I. The evidence of the custom of the New England Screw Company to fill orders in part only was properly admitted under the general rules as to the admissibility of evidence of customs and usages.

These rules have been fully established in this court.

“Evidence of this character is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference to such usage or custom, for the custom then becomes a part of the contract, and may not improperly be considered the law of the contract,” &c.

Renner v. Bank of Columbia, 9 Wheaton, 581, citing

Yeaton v. Bk. Alexandria, 5 Cranch, 49.

Mills v. Bank of U. S., 11 Wheaton, 431.

Bank of Washington v. Triplet et al., 1 Pet., 25.

Van Ness v. Packard, 2 Pet., 137.

Cookendorfer v. Preston, 4 How., 324.

Bowling v. Harrison, 6 How., 258.

Adams v. Otterback, 15 How., 544.

And in the Circuit Courts of the United States—

Trott v. Wood, 1 Gallison, 442.

The Reeside, 2 Sumner, 569.

See, also, the following text-writers:

1 Black. Com., 75.

2 Stark. on Evidence, 258.

1 Phill. on Evidence, 556.

2 Greenleaf on Evidence, secs. 251, 252.

Smith's Merc. Law, 29, 30, and note.

And the following cases:

Gabbay v. Lloyd, 3 Barn. and Cres., 793.

Stewart v. Cauty, 8 Mees. and Wels., 160, citing *Perly v. Royal Exch. Co.*, 1 Burr, 341.

Ougier v. Jennings, 1 Camp., 505.

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Palmer *v.* Blackburn, 1 Bing., 61.

Yeates et al. *v.* Pim et al., 1 Holt., 92.

Noble *v.* Kennoway, Doug., 510.

Loring *v.* Gurney, 5 Pick., 15.

Naylor *v.* Semmes, 4 G. and J., 274.

II. The contracts for the sale of screws by the defendant company were subject to the custom of the defendant company, to fill the same in part only.

1. Because it was a usage of trade.

The defendant company were the only manufacturers of gimlet or sharp-pointed screws in the world, at the time of making the contract. Any usage or custom, therefore, which they had established, which was "known, certain, uniform, reasonable, and not contrary to law," was the usage and custom of the trade. This usage was, and was well known to be, to fill orders in part only; and the contract with the plaintiffs was made subject to and controlled by this custom.

See the following authorities:

Renner *v.* Bank of Columbia.

Mills *v.* Bank of United States.

Van Ness *v.* Packard.

Cookendorfer *v.* Preston.

Bowling *v.* Harris.

Adams *v.* Otterback, as cited above.

2 Greenleaf on Evidence, secs. 251, 252, and notes.

Stewart *v.* Cautty, *ubi sup.*

2. Because it was the usage of an individual, and the plaintiffs, having dealt with the defendant company, and corresponded with them, were chargeable with notice; and in this case, the evidence showed that they had actual notice.

See, also, as to the law governing the usage and habit of trade of an individual, the following authorities:

2 Greenleaf on Evidence, secs. 251, 252.

Loring *v.* Gurney, 5 Pick., 15.

Naylor *v.* Semmes, 4 G. and J., 274.

Noble *v.* Kennoway, Doug., 510.

Mr. Justice CLIFFORD delivered the opinion of the court.

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This is a writ of error to the Circuit Court of the United States for the southern district of New York.

According to the transcript, the suit was originally instituted in the Supreme Court of the State of New York by the present plaintiffs, who were citizens of that State; but was afterwards regularly removed, under the twelfth section of the judiciary act, into the Circuit Court of the United States, because the corporation defendants were citizens of the State of Rhode Island.

It was an action of assumpsit, brought to recover damages for the supposed breach of six separate and distinct contracts, in which the defendants, as was alleged in the declaration, stipulated to deliver to the plaintiffs, pursuant to their written orders given at sundry times, certain quantities of screws, usually denominated wood screws, of various sizes and descriptions, as were therein specified. Readiness to perform on the part of the plaintiffs, and neglect and refusal on the part of the defendants to deliver the goods, after seasonable demand, constituted the foundation of the respective claims for damages, as alleged in the declaration. Those claims are set forth in eighteen special counts; to which are also added the common counts, as in actions of indebitatus assumpsit. Of the several contracts, the first is alleged to have been made on the seventh day of October, 1852, and the last on the nineteenth day of April, 1853.

At the May term, 1855, the parties went to trial upon the general issue. To prove the several agreements, the plaintiffs relied on certain correspondence which had taken place between the parties upon this subject, consisting of letters written by the plaintiffs to the defendants, in the nature of orders or requests for the goods, and the replies thereto written by the defendants.

As appeared by the proofs, the plaintiffs were merchants, engaged in buying and selling hardware, and the defendants were engaged in manufacturing the description of goods specified in the declaration. They were in point of fact the sole manufacturers of the article in the United States, and were constantly receiving orders for the article from their customers

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faster than they could fill them, and for larger quantities than they were able to produce.

Orders had been given for this article by the plaintiffs prior to the date of this controversy; but the evidence in the case does not show when their dealings commenced. Six orders of like import were given by the plaintiffs, during the fall of 1852 and the early part of the year 1853, for large quantities of the article, of various sizes and description. This suit was brought to recover damages for not filling those orders, which, it is insisted by the plaintiffs, had been accepted without any reservation. Some of them had been filled in part only, and others had not been filled for any amount, when the suit was commenced.

It was denied by the defendants that the orders had been accepted without condition. On the contrary, they insisted that the plaintiffs well knew that the supply was greatly less than the demand, and that the orders were only accepted to be filled in their turn, as the defendants were able to produce the article.

To support the first three counts of the declaration, the plaintiffs, among other things not necessary to be noticed, introduced three letters—two from themselves to the defendants, and the reply of the defendants to the same. Reference will only be made to such brief portions of the correspondence as appear to be essential to a proper understanding of the legal questions presented in the bill of exceptions.

Dissatisfaction was first expressed by the plaintiffs in their letter dated on the 30th day of September, 1852. In that communication, they simply refer to the long delay that has occurred in filling their orders, and furnish a memorandum of the amount and sizes of the article claimed by them to be due and not delivered, under their order of the 29th of June of the same year. They state, that after three months' delay, only about one and one-fourth per cent. of the same has been filled, and that they have not a gross of screws under an inch in their stock. Request was also made in the same communication that the plaintiffs would send at once all they could of the article, and the balance of the same as soon thereafter as

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it was possible. That request was, in effect, repeated in another letter, written on the 5th day of October, 1852; and on the 17th day of the same month, the defendants replied, saying that the order referred to would be taken up at the earliest possible day.

No further correspondence applicable to the first three counts was introduced by the plaintiffs in the opening of the case.

They then gave evidence to prove the second agreement, as alleged in the fourth, fifth, and sixth counts of the declaration. For that purpose, they introduced two letters—one from themselves to the defendants, dated on the 15th day of October, 1852; and the other from the defendants to them in reply, dated on the following day. Their letter to the defendants contained an order for three thousand seven hundred and fifty gross of screws, half to be delivered by the 15th day of March then next, and the other half a month later, subject to the regular discount at the time of delivery. That order was given thus early, as the plaintiffs stated, with a view to avoid thereafter the inconvenience they had suffered from not having their orders filled, and because they anticipated a short supply of the article the next season. In the same letter, they informed the defendants that it was given as an additional order, and requested that those previously sent might be filled without further delay.

To that communication the defendants replied, acknowledging its receipt, and saying that the order had been entered in their books, to be executed at the times named. They also referred to the previous orders, saying they would do what they could to fill them before navigation closed on the canals; but added, that they could only take them up in course, as they had a great many orders from other parties in the same condition.

Evidence was then offered by the plaintiffs to prove the third agreement, as alleged in the seventh, eighth, and ninth counts of the declaration. To support those counts, two letters were introduced—one from the plaintiffs to the defendants, dated the 4th day of November, 1852; and the reply of

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the defendants to the same, which was dated on the sixth day of the same month. By the letter first named, the defendants were furnished with another order of the plaintiffs for an additional quantity of screws, and were requested to place the order in their books, to be filled as fast as possible, at a given rate. Previous orders were also referred to in the same letter, and the plaintiffs complain that they have not been filled in their turn; adding, that they have not a gross of gimlet-point screws in their store, and earnestly requested the defendants to send them a lot by steamboat on the following day. Two days afterwards, the defendants acknowledged the receipt of the order, and informed the plaintiffs that it had been entered in their books, to be taken up in course.

Those letters constitute the only evidence offered by the plaintiffs in the opening to prove the third agreement.

They then gave in evidence another order from themselves to the defendants, to prove the fourth agreement, as alleged in the tenth, eleventh, and twelfth counts of the declaration. It was dated on the 7th day of November, 1852. In the same communication, they stated that they were in great want of a certain description of screws, and expressed the hope that the plaintiffs would send what they could of the article by steam-boat without delay, adding: "We have always said, send what you can of our orders as fast as you get a case or two ready, or to that effect." To that letter the defendants replied, under date of the 19th of the same month, saying that the best they could do was to enter the order, to be taken up in course, intimating that perhaps it might be accomplished in about two months.

Similar evidence was given to prove both the fifth and the sixth agreements, as alleged in the six remaining counts of the declaration. Two orders given by the plaintiffs were introduced for that purpose. One was dated on the 10th day of February, 1853, and the other on the 19th day of April, of the same year. They were each for twenty thousand gross of screws; and the defendants were requested to enter the orders in their books, to be filled as soon as possible after they should have completed those previously given. Separate

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answers were given by the defendants to each of these orders, to the effect that they would be entered in the books of the defendants, to be taken up in course or in their turn, and be filled when they reached them, as far as they should be able to do so, consistently with their obligations to other customers.

No part of the two orders last named had been filled when this suit was commenced. Demand was made of the defendants, on the 30th day of September, 1853, for the delivery of such proportions of the several orders as had not been previously filled. At the same time, the plaintiffs rendered their account, and tendered to the defendants their promissory notes for the respective sums which would become due to the defendants on making such delivery.

Such was the substance and effect of the evidence introduced by the plaintiffs in the opening, so far as it is necessary to consider it at the present time. Many other matters were stated in the correspondence; but as they are not material to this investigation, they are omitted.

To maintain the issue on their part, the defendants, among other things, introduced a letter from the plaintiffs, addressed to them, dated on the 3d day of September, 1852, in which inquiry was made of the defendants why they did not fill the orders given by the plaintiffs. They also stated in the same letter that not a week passed without their hearing of the defendants taking and executing orders from other customers; but admitted in effect that they had long since been given to understand the rule of business adopted by the defendants in that behalf, and only complained that precedence was given to the first orders from other customers.

Testimony was also introduced by the defendants, that they had some five hundred customers, and that the orders of the plaintiffs had been taken up and filled in proportion to the orders given by other customers, as the defendants manufactured the article and were able to deliver the goods. To that testimony the plaintiffs objected; but the court overruled the objection, and it was admitted, and the plaintiffs excepted.

All of the orders given by the plaintiffs, except the two last named, were filled in part, and, as the defendants proved, in

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due proportions to the orders of other customers, as the article was produced. They also proved, that when orders were given and accepted without the price of the article being agreed, it was their custom, and according to the usage of their business, to charge at the rates ruling at the time of the delivery; and if during the interval the discount from fixed rates had increased, the purchaser had the benefit of the allowance; but if prices had risen, and the discount was less, then the purchaser paid according to the increased price. To this testimony, as to the usage of the defendants' business, the plaintiffs objected, but the court overruled the objection; and the testimony having been admitted, the plaintiffs excepted. That practice, however, was not applicable to customers who were not duly notified of the usage, but all such had their orders filled at former rates. Orders from other customers were received by the defendants throughout the period of these transactions, but they refused to accept orders from new parties.

Proof was also offered by the defendants, tending to show that the profit to the manufacturer was less upon the small sizes of the article than upon the large, and it was admitted by their counsel that the market price of the goods advanced after the orders of the plaintiffs were given. Much additional testimony was introduced on the one side and the other, to which it is not necessary to refer, for the reason that it presents no question for the decision of this court. On this state of facts, the presiding justice instructed the jury to the effect that the several contracts for the sale of the goods by the defendants to the plaintiffs were subject to the custom of the defendants to fill the same in part only, and that the plaintiffs, from having been dealers with the defendants, and from the correspondence between them, were chargeable with notice of the defendants' custom to fill their contracts only in the order they were accepted, and in proportion with each other, and not in full, according to the strict terms thereof. Under the rulings and instructions of the court, the jury returned their verdict for the defendants, and the plaintiffs excepted to the instructions. Exception was taken to two of the rulings of

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the court and to each of the instructions to the jury, but they present only one question for decision, and therefore may well be considered together. No evidence of general usage or custom in the ordinary sense of those terms was offered in this case, and no question touching the general rules of law upon that subject is presented for the decision of this court. It may also be safely admitted that the custom of a party to deliver a part of a quantity of goods contracted to be delivered, though invariable, cannot excuse such party from a full compliance with his contract, unless such custom is known to the other contracting party, and actually enters into and forms a part of the contract. Mere knowledge of such a usage would not be sufficient, but it must appear that the custom actually constituted a part of the contract. But when it appears that such custom was well known to the other contracting party as necessarily incident to the business, and actually formed a part of the contract, then it may furnish a legal excuse for the non-delivery of such a proportion of the goods as the general course of the business and the usage of the seller authorize, for the reason that such general usage, being a part of the contract, has the effect to limit and qualify its terms. *Linsley v. Lovely*, 26 Vt., 137. Customary rights and incidents, universally attaching to the subject matter of the contract in the place where it was made, are impliedly annexed to the language and terms of the contract, unless the custom is particularly and expressly excluded. Parol evidence of custom, consequently, is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage. But parol evidence of custom and usage is not admitted to contradict or vary express stipulations or provisions restricting or enlarging the exercise and enjoyment of the customary right. Omissions may be supplied, in some cases, by the introduction of the custom, but the custom cannot prevail over or nullify the express provisions and stipulations of the contract. 2 Add. on Con., 970. Proof of usage, says Mr. Greenleaf, is admitted either to interpret the meaning of the language of the contract, or to ascertain the

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nature and extent of the contract, in the absence of express stipulations, and where the meaning is equivocal or obscure. 1 Greenl. Ev., sec. 292. Its true and appropriate office is to interpret the otherwise indeterminate intention of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. The Reeside, 2 Sum., 564. Nothing can be plainer than the proposition, that the evidence in the case proved that the supply with the defendants was much less than the demand of their customers. To avoid dissatisfaction, therefore, they were obliged to devise some system which would enable them to do equal justice among those who were properly competing for the article. Accordingly, they adopted a rule to accept all such requests, and to enter the list in a book kept for the purpose, and to fill them as far as possible in the order they were received. They had been in business for some time, and that rule had become the custom of their trade, and, as such, was well known to the plaintiffs during all the time of these transactions. Many of their orders thus given at short intervals had been expressly accepted to be filled in turn or in course, and the correspondence plainly showed that the plaintiffs well knew what was meant by those terms. Evidence to prove that the orders had been taken up in turn, and filled in proportion to the orders given by other customers, was therefore admissible, in order to show that the defendants had fulfilled their contract, and done no injustice to the plaintiffs; and it is equally clear that evidence to show what had been the usage of the defendants' business was also admissible, because that usage constituted an essential part of the several contracts which were the subjects in controversy. Renner v. Bank of Columbia, 9 Wheat., 588. After what has been remarked, one or two additional observations respecting the instructions given to the jury will be sufficient. Written evidence, as a general rule, must be construed by the court, and the first instruction was confined to that purpose. It gives the true exposition of the correspondence, and therefore is not the subject of error. It is insisted by the counsel of the plain-

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tiffs that the second instruction withdrew the evidence of notice from the consideration of the jury.

We think not, and for two reasons. In the first place, it was the proper duty of the court to construe the correspondence, and that of itself was sufficient to justify the charge. But the charge must receive a reasonable interpretation. In effect, the jury were told that the evidence, if true, showed that the plaintiffs had notice of the custom of the defendants in regard to the filling of the orders. It did not withdraw the question as to the credibility of the witnesses from the consideration of the jury, and that was all that could properly be submitted to their determination. In view of all the circumstances, we think the exceptions must be overruled. The judgment of the Circuit Court is therefore affirmed, with costs.

CHARLES BLIVEN AND EDWARD B. MEAD, PLAINTIFFS IN ERROR,
v. THE NEW ENGLAND SCREW COMPANY.

Where the screw company sued persons who had received the manufactured articles, and the defence was, that the whole amount which had been ordered had not been delivered, the contracts for the sale and delivery of the screws were subject to the custom of the plaintiffs to fill the same in part only.
See the report of the preceding 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.

It was the case mentioned in the preceding report, as the one in which the screw company sued Bliven & Mead for the articles which had been furnished; and in which the defence was, that the amount contracted for had not been supplied, and consequently the contract had been broken.

See the report of the preceding case.

Mr. Justice CLIFFORD 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 southern district of

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New York. It was an action of *indebitatus assumpsit*, brought by the present defendants to recover the amount due them for certain goods sold by them to the plaintiffs in error, who were the original defendants. At the May term, 1855, the parties went to trial upon the general issue. To prove the issue on their part, the plaintiffs introduced a letter from the defendants, dated on the seventeenth of May, 1853, and addressed to the plaintiffs. In that letter the defendants acknowledged the receipt of the plaintiffs' account, but claimed a small deduction for an alleged error. Evidence was then introduced by the plaintiffs, tending to show that account was correct.

Having proved their account, the plaintiffs rested their case.

To maintain the issue on their part, the defendants set up that the goods charged in the account had been delivered to them in pursuance of certain contracts made between the parties, in which the plaintiffs had agreed to sell and deliver to them large quantities of screws usually denominated wood screws, of various sizes and descriptions, but that they had failed to fulfil their contracts. They admitted that a part of the goods had been delivered; but, inasmuch as no one of the contracts had been completed, they insisted that a recovery could not be had for a partial performance.

Their defence was sustained by the same evidence as that introduced by them in the preceding case, and the plaintiffs offered the same evidence in reply as they had in the other case, to make out their defence. Similar exceptions were taken by the defendants to the rulings of the court in admitting their testimony as to the course of business, and the usage of the plaintiffs' trade. After the evidence was closed, the court instructed the jury that the several contracts for the sale and delivery of the screws by the plaintiffs to the defendants were subject to the custom of the plaintiffs to fill the same in part only. Under that instruction, the jury returned their verdict in favor of the plaintiffs for the amount of the account, together with interest, and the defendants excepted. No question is presented in the bill of exceptions that has not already been considered and decided by this court in the preceding case. For the reasons there given, we think the rulings and instruc-

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tions of the Circuit Court were correct, and refer to those reasons for the grounds on which the conclusion in this case rests. The judgment of the Circuit Court is therefore affirmed, with costs.

EDWARD MINTURN, COMPLAINANT AND APPELLANT, *v.* JAMES B. LARUE, CARLISLE P. PATTERSON, AND JOHN R. FOURATT.

The charter of the town (now city) of Oakland, in California, which conferred upon the corporation power to regulate ferries, did not give an exclusive power, and therefore the corporation did not possess the power to confer upon others an exclusive privilege to establish them.

The difference pointed out between this charter and those grants which are exclusive.

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

Minturn filed his bill against the defendants, claiming a right, under the authorities of the town of Oakland, to establish a ferry, exclusively, between the city of San Francisco and the city of Oakland. The bill prayed for a perpetual injunction to restrain the defendants from running the steamboat San Antonio or any other steamboat or vessel between the two places. The defendants demurred to the bill, and the Circuit Court sustained the demurrer. The complainant appealed to this court.

The case was argued by *Mr. Johnson* for the appellant, and by *Mr. Stanton* for the appellees.

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 district of California.

The bill was filed by the complainant in the court below to restrain the defendants from running a ferry between the city of San Francisco and the city of Oakland, on the opposite side of the bay, and which, it is claimed, is in violation of the ex-

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clusive privileges belonging to him under the authority of law. The authority, as set forth in the bill, is derived from the charter of the town (now city) of Oakland. The 3d section of the charter (passed May 4, 1852) provided that "the board of trustees shall have power to make such by-laws and ordinances as they may deem proper and necessary;" among other things, "to lay out, make, open, widen, regulate, and keep in repair, all streets, roads, bridges, ferries," &c., "wharves, docks, piers, slips," &c.; "and to authorize the construction of the same;" "and with a view to facilitate the construction of wharves and other improvements, the lands lying within the limits aforesaid, (that is, of the corporation,) between high tide and ship channel, are hereby granted and released to said town."

It is admitted, if the authorities of the town of Oakland possessed the power under the charter to grant an exclusive right of ferries between that place and the city of San Francisco, the complainant has become vested with it. The question in the case, therefore, is, whether or not the power was conferred by this 3d section of the charter.

It is a well-settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers, that we need not stop to refer to authorities.

Now, looking at the terms of the grant in this case, and giving to them their widest meaning either separately or in the connection in which they are found, or with the object for which the power was conferred, we find, indeed, a power to establish and regulate ferries within the corporate limits of the town, but not an exclusive power. Full effect is given to the words in which the power is granted, when the simple right is conceded to establish and regulate ferries. If the

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grant had been made to an individual in the terms here used, the question would have been too plain for argument. In our judgment, it can have no wider interpretation, though made to a corporation. It must be remembered that this is not the case where the Crown or the Legislature has aliened to a municipal corporation its whole power to establish and regulate ferries within its limits, as may be found in some of the ancient charters of cities in England and in this country. In those cases, the municipal body, in respect to this legislative or public trust, represents the sovereign power, and may make grants of ferry rights in as ample a manner as the sovereign. The error, we think, in the argument for the appellant is, in confounding this grant with these ancient charters, or those of a like character. But on referring to them, it will be seen that the form of the grant is very different, much more particular and comprehensive, leaving no doubt as to the extent of the power. (25 Wend. R., 631, *Costar v. Brush*.) So here: if the Legislature had intended to confer their whole power upon this corporation to establish and regulate ferries within its limits, or a power to grant exclusive ferry rights therein, a very different form of grant would have been used—one that would have expressed the intent of the law maker to part with the exclusive power over the subject, and vest it in the grantee. In the form used, no such intent appears or can be reached, except by a very forced interpretation, which we are not at liberty to give, according to well-settled authority. (11 Pet., 422; 8 How., 569; *Mills et al. v. St. Clair Co. et al.*, 16 ib., 524, 534; *Fanning v. Gregoire*.)

In *Mills v. St. Clair Co.*, the court, speaking of a ferry grant, said that in a grant like this by the sovereign power, the rule of construction is, that if the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the Government, and therefore should not be extended by implication beyond the natural and obvious meaning of the words; and if these do not support the claim, it must fall. And again, in *Fanning v. Gregoire*, speaking on the same subject, the court say: The exclusive right set up must be clearly expressed or necessarily inferred, and the court think

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that neither the one nor the other is found in the grant to the plaintiff, nor in the circumstances connected with it.

As the town of Oakland had no power, according to the above construction of the charter, to establish an exclusive right of ferries within its limits, it follows that it did not possess the power to confer upon others an exclusive privilege to establish them.

The power conferred is to make (meaning to establish) and regulate ferries, or to authorize the construction (meaning the establishment) of the same.

We think the court below was right, and that the decree must be affirmed.

SALVADOR CASTRO, APPELLANT, *v.* THOMAS A. HENDRICKS, COMMISSIONER OF THE GENERAL LAND OFFICE.

Where there were two separate claimants of land in California, both claiming under one original grant, and the surveyor, in running out their lines, disregarded the limits of the original grant, and included within one of the surveys a large portion of Government land, the Commissioner of the General Land Office was right in refusing to issue a patent founded on such erroneous survey.

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

It was a petition to the Circuit Court for a mandamus to Hendricks, commanding him to prepare a patent for some land in California; secondly, to cause said patent, when ready for the requisite signatures of the appropriate officers, to be presented to the recorder of the land office and the President of the United States, or other proper officers of the Government, for their respective signatures; thirdly, to deliver the patent so prepared and duly subscribed to the petitioner.

A rule was laid upon the Commissioner to show cause why a mandamus should not issue as prayed. On the 10th of June, 1858, he filed his answer and exhibits. Whereupon the court adjudged that the cause shown was sufficient, and dismissed the petition. The petitioner appealed to this court.

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In 1839, there was a grant of land to Antonio Buelna, of the extent of four square leagues, a little more or less. In 1849, the widow of Buelna and her then husband sold to Castro one league of land in the location known by the name of San Gregorio, situated on the coast to the north of Santa Cruz, and which land, consisting of four leagues, was the property of Antonio Buelna.

In 1852, another deed was made for more definite boundaries, which contained certain courses and distances. Three leagues of this land were confirmed to the widow of Buelna, (then Madame Rodrigues,) and surveyed for her, giving her that quantity. About this there was no controversy.

Castro petitioned for his confirmation, and in January, 1856, the District Court decreed in his favor, referring to the description substantially the same as that contained in the second deed, above mentioned, adding these words: "The tract hereby confirmed, containing by estimation one square league, and being the same land described in the conveyance to claimant, filed before said board, and constituting a part of the record in this cause."

After the confirmation, a survey was made on behalf of the petitioner, under the authority of the surveyor general of California, who signed it on the 19th of November, 1857. Being approved by him, it was returned to the General Land Office.

The Commissioner examined the survey in connection with the grant to Buelna, the two deeds, and the decree of confirmation, and came to the conclusion that the lines of the survey ran out of the grant to Buelna into the Government land, and gave to Castro two leagues and a half more land than he ought to have, the surplus being taken from the lands of the United States.

On the 3d of February, 1858, the Commissioner signed, with a view to transmission, instructions to the surveyor general to the effect that he should cause a further and careful examination to be made in the whole matter, and report the result, with his decision as to the true boundaries of the league confirmed to Castro, and the three leagues to Madame Rodrigues.

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The petitioner appealed to the Secretary of the Interior, who affirmed the decision of the Commissioner of the Land Office, who refused to issue a patent founded upon what he considered to be an erroneous survey.

In May, 1858, the petitioner applied to the Circuit Court for a mandamus, as before stated.

The case was argued in this court by *Mr. Hepburn*, upon a brief filed by himself and *Mr. Brent*, for the appellant, and by *Mr. Black* (Attorney General) for the appellee.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellant petitioned the Circuit Court for a writ of mandamus, to be directed to the Hon. Thomas A. Hendricks, Commissioner of the Land Office, commanding him to prepare and provide a patent to the appellant for a parcel of land in California, which had been confirmed to him by the decree of the District Court for the northern district of California, and is described in a survey approved by the surveyor general of that State.

It appears from the petition and answer, and the papers filed in the Circuit Court, and forming a part of the record, that in the year 1839 the Governor of California granted to Antonio Buelna a tract of land known as San Gregorio, of the extent of four square leagues, a little more or less, as is shown in the sketch attached to the expediente. In 1849, the representatives of Buelna (his widow and her husband) sold to the appellant one league of land in the location of San Gregorio; and in 1852 they executed a deed, conveying the same land, by the description of one league of land, in the place known by the name of San Gregorio, on the coast north of Santa Cruz, being part of a tract of land of four leagues, granted by the Government to Antonio Buelna, and the same is declared to be situate and bounded as follows, and containing one league, more or less: commencing at a stake marked A, in the Canada de los Tunis, where the Arroyo de los Tunis comes out of the mountains; thence running southerly with the ridge of the mountains to the stake marked B, in the Arroyo

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Hondo; thence following said Arroyo Hondo until it meets the Arroyo de San Gregorio; thence, following the Arroyo de San Gregorio, to a stake marked C on a white rock in the mountain, situate on the west side of said arroyo; thence northwardly, about two miles, to a high conical peak of the mountain, on which is placed stake marked D; thence easterly to the place of beginning.

Separate claims were presented by the widow of Buelna and Salvador Castro for their respective portions of the rancho San Gregorio, and separate decrees of confirmation were made in the District Court. The decree in favor of Madame Buelna is for three square leagues of the land within the boundaries described in the plan attached to the expediente, and referred to in the original grant, copies of which are on file in the cause. Salvador Castro was confirmed to the tract of land described in the deed by the metes and bounds before mentioned, with the addition, "being portion of the four leagues granted April 16, 1839, by J. B. Alvarado to Antonio Buelna, and known as San Gregorio, the tract hereby confirmed containing, by estimate, one square league, and being the same land described in the conveyance to the claimant." The two decrees were communicated to the surveyor general of California in 1857, and his returns are filed as testimony in the cause. He has laid off to Madame Buelna the three square leagues confirmed to her, and has surveyed for the appellant a tract within the specific calls of the deed and decree of fifteen thousand seven hundred and 54-100 acres. It is apparent, from this statement, that the surveyor general has entirely disregarded the limits of the rancho San Gregorio, and the restrictions as to quantity in the grant of Alvarado, Governor of California, of April, 1839. But these, for the object before the court, were the controlling calls in the deed, as well as in the decree. The primary object of the act, "To ascertain and settle the private land claims in the State of California," approved 3d March, 1851, was to distinguish the vacant and public lands from those that were private property; and for this purpose, an inquiry into pre-existing titles became necessary. To accomplish this, every person claiming lands

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in California, by virtue of any right or title derived from the Spanish or Mexican Government, was required to present the same to a board of commissioners. The mesne conveyances were also required, but not for any aim of submitting their operation and validity to the board, but simply to enable the board to determine if there was a bona fide claimant before it under a Mexican grant; and so this court have repeatedly declared that the Government had no interest in the contests between persons claiming *ex post facto* the grant. *United States v. Sutter*, 21 How. S. C. R., 170.

The authentic evidence of what is private property is to be found in the grants of the Government of California, and not in the mesne conveyances. Nor is this Government charged to decide between claimants in the condition of those interested in the rancho San Gregorio. It was entirely competent for the District Court to connect the claims arising under the same grant, and it will be its duty, in superintending the execution of the decrees of that court in such cases, to look to the evidence furnished by the grant itself as overruling in determining questions of boundary and location.

In the case of the *United States v. Fossatt*, 21 How., 445, this court had occasion to refer to the limits of the authority of the courts of the United States under the act of the 3d March, 1851, before cited. We stated in that case, that if questions of a judicial nature arose in the settlement of the location and boundary of the grants confirmed to individuals, the District Court was empowered to settle those questions upon a proper case being submitted to it before the issue of the patent; and in such a case, the judgment may properly extend to the confirmation of the survey, and an order for a patent to issue. But it was not the expectation of this court that the surveyor general should make returns to the District Court in every case, nor did they imply that the validity of a survey depended on the recognition of that court, or its incorporation into a decree of the court. The surveyor general of California was charged with the duty to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats for the same; and in the location

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of the said claims, he was invested with such power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, in the sixth section of the "Act to create the office of surveyor of the public lands for the State of Louisiana," approved 3d March, 1831. 4 Statutes at Large, 492. Under this act, the surveyor general exercises a quasi judicial power; and the claimant, with an authentic certificate of the decree of confirmation, and a plat or survey of the land, duly certified and approved by the surveyor general, is entitled to a patent. But, then, the Commissioner of the Land Office, by virtue of enabling acts of Congress, exercises a supervision and control over the acts of the subordinate officers charged with making surveys; and it is his duty to see that the location and survey made by that officer under the decree of the court, and which has not had the final sanction of the judicial tribunals, is in accordance with the decree. The refusal of the Commissioner of the Land Office to issue a patent upon this survey was an appropriate exercise of the functions of his office, and the decree of the Circuit Court refusing a mandamus is affirmed with costs.

THOMAS BELL, PLAINTIFF IN ERROR, *v.* THE MAYOR AND COUNCIL OF THE CITY OF VICKSBURG

The statutes of Mississippi provide that no plea of non est factum shall be admitted or received, unless the truth thereof shall be proved by oath or affirmation.

A plea of that kind was filed without the affidavit, and demurred to by the plaintiff.

Although, upon the general principles of pleading, a demurrer only calls in question the sufficiency of what appears on the face of the pleading, and does not reach the preliminary steps necessary to be taken to put it upon file, yet, as the State courts where such a statute exists have held that the plea of non est factum is demurrable if there be no affidavit, and the course of practice in the Circuit Court conforms to the State practice, this court also holds that such a plea is demurrable.

This case was brought up by writ of error from the Circuit

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Court of the United States for the southern district of Mississippi.

The nature of the suit and the various defences made are stated in the opinion of the court.

It was argued by *Mr. Benjamin* for the plaintiff in error, and submitted by *Mr. Badger* and *Mr. Carlisle* upon a printed argument for the defendants in error.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff instituted this suit upon a sealed instrument, made in the name of the city of Vicksburg, payable to bearer. The defendant pleaded fifteen pleas; to ten of which the plaintiff demurred, and judgment was rendered for the defendant on the demurrer. Some of these pleas involved important questions touching the validity of the instrument, which have, since the decision of the Circuit Court, been the subject of discussion in the Supreme Court of Mississippi and in this court. It is conceded that nine of the pleas were insufficient, and that the demurrers should have been sustained to them. The remaining plea is the ordinary *non est factum*. This was filed without an affidavit of its truth, and this is required by a statute of Mississippi to authorize its reception. But the defendant contends that it is the office of a demurrer to call in question the sufficiency of a declaration or other pleading upon what appears upon its face, without reference to any extrinsic matter; that the affidavit is not a part of the plea; it is only that which is necessary to authorize the plea to be placed on file, and it may be waived either expressly or by implication. The filing of the plea is only irregular, and a demurrer or replication to it is a waiver. Upon the general principles of pleading, we assent to the accuracy of this argument.

Commercial and R. R. Bank of Vicksburg, 13 Pet., 60.

Nicholl v. Mason, 21 Wend., 339.

But in courts of States in which this statute exists, a plea of *non est factum*, without the affidavit required by it, is demurable. Such is the practice in Mississippi.

Smith v. Com. Bank of Rodney, 6 S. and M., 83.

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Johnston v. Beard, 7 S. and M., 214.

Bancroft v. Paine, 15 Ala., 834; 4 Ala., 198.

We do not question the power of the Circuit Court to maintain the rules of pleading in the manner of applying the statutes of a State, or it may adopt the usual practice in the State, if not contrary to an act of Congress.

We learn that the course of practice in the Circuit Court conforms to the State practice. We suppose that it would be a surprise upon the plaintiff, and might work injustice, if we were to sustain the plea under such circumstances.

Judgment reversed and cause remanded.

FREDERICK FREDERICKSON, AGENT FOR CAROLINE, WIDOW
PLAEFFLIN, AND OTHERS, PLAINTIFFS IN ERROR, v. THE STATE
OF LOUISIANA.

The following is an article of a treaty concluded between the King of Wurtemberg and the United States in 1844, (8 Stat. at L., 588.)

"The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where said property lies shall be liable to pay in like cases."

This article does not include the case of a citizen of the United States dying at home, and disposing of property within the State of which he was a citizen, and in which he died.

Consequently, where the State of Louisiana claimed, under a statute, a tax of ten per cent. on the amount of certain legacies left by one of her citizens to certain subjects of the King of Wurtemberg, the statute was not in conflict with the treaty, and the claim must be allowed.

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.

It involved the construction of an article of a treaty between the United States and the Kingdom of Wurtemberg, concluded

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on the 10th of April, 1844, (8 Stat. at L., page 588.) The article is quoted in the syllabus, and need not be repeated. It was admitted upon the record that Fink was a naturalized citizen of the United States at the time of his death, and residing in the city of New Orleans; also, that the legatees reside in the Kingdom of Wurtemberg, and are subjects of the King of Wurtemberg.

The Supreme Court of Louisiana decided in favor of the validity of the tax, and the legatees brought the case up to this court.

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

Mr. Justice CAMPBELL delivered the opinion of the court. The defendant in error made opposition to the account filed in the settlement of the succession of John David Fink, deceased, in the second District Court of New Orleans, because the executor did not place on the tableau ten per cent. upon the amounts respectively allowed to certain legatees, who are subjects of the King of Wurtemberg. By a statute of Louisiana, it is provided that "each and every person, not being domiciliated in this State, and not being a citizen of any other State or Territory in the Union, who shall be entitled, whether as heirs, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this State, or elsewhere, shall pay a tax of ten per cent. on all sums, or on the value of all property which he may have actually received from said succession, or so much thereof as is situated in this State, after deducting all debts due by the succession." The claim of the State of Louisiana was resisted in the District Court, on the ground that it is contrary to the provisions of the third article of the convention between the United States of America and his Majesty the King of Wurtemberg, of the 10th April, 1844. That article is, that "The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise; and

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their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases." This court, in *Mager v. Grima*, 8 How. S. C. R., 490, decided that the act of the Legislature of Louisiana was nothing more than the exercise of the power which every State or sovereignty possesses of regulating the manner and terms upon which property, real and personal, within its dominion, may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. The case before the District Court in Louisiana concerned the distribution of the succession of a citizen of that State, and of property situated there. The act of the Legislature under review does not make any discrimination between citizens of the State and aliens in the same circumstances. A citizen of Louisiana domiciliated abroad is subject to this tax. *The State v. Poydras*, 9 La. Ann. R., 165; therefore, if this article of the treaty comprised the succession of a citizen of Louisiana, the complaint of the foreign legatees would not be justified. They are subject to "only such duties as are exacted from citizens of Louisiana under the same circumstances." But we concur with the Supreme Court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting Powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was, that the citizens and subjects of each of the contracting Powers were or might be subject to onerous taxes upon property possessed by them within the States of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in

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the contemplation of the contracting Powers, and is not embraced in this article of the treaty. This view of the treaty disposes of this cause upon the grounds on which it was determined in the Supreme Court of Louisiana. It has been suggested in the argument of this case, that the Government of the United States is incompetent to regulate testamentary dispositions or laws of inheritance of foreigners, in reference to property within the States.

The question is one of great magnitude, but it is not important in the decision of this cause, and we consequently abstain from entering upon its consideration.

The judgment of the Supreme Court of Louisiana is affirmed.

THOMAS WHITRIDGE AND OTHERS, CLAIMANTS OF THE SCHOONER FANNIE CROCKER, APPELLANTS, *v.* JOSHUA DILL AND OTHERS.

In a collision which took place between two schooners in the Chesapeake bay, the colliding vessel, being the larger, and fastest sailer, and attempting to pass the smaller to windward, was in fault, because there was not a sufficient lookout.

The absence of a lookout is not excusable, because of an accident which had happened, and which required all hands to be called to haul in the damaged mainsail.

She was also in fault, because, being not sufficiently to the windward to have passed the other vessel in safety, she did not seasonably give way and pass to the right, the wind being from the northwest, and both vessels directing their course north by east, the smaller vessel laying one point closer to the wind than the larger.

Where a vessel astern, in an open sea and in good weather, is sailing faster than the one ahead, and pursuing the same general direction, if both vessels are close hauled on the wind, the vessel astern, as a general rule, is bound to give way, or to adopt the necessary precautions to avoid a collision.

Cases cited to illustrate this principle.

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 Joshua Dill and ten others, owners of the schooner Henry R. Smith, against the schooner Fannie Crocker, for running down and sinking the schooner Henry R. Smith.

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

The District Court decreed against the Fannie Crocker, and this decree was affirmed by the Circuit Court. Whitridge and the other owners appealed to this court.

It was argued by *Mr. Brune*, upon a brief filed by *Brown* and *Brune*, for the appellants, and by *Mr. Latrobe* for the appellees.

Mr. Justice CLIFFORD 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. The libel was filed in the District Court on the thirty-first day of March, 1855. It was a proceeding *in rem* against the schooner Fannie Crocker, and was instituted by the libellants, as the owners of the schooner Henry R. Smith, to recover damages on account of a collision which took place between those vessels on the ninth day of March, 1855, in the Chesapeake bay, whereby the latter vessel was run down and totally lost. As alleged by the libellants, their vessel sailed the day previous to the collision, from Hampton roads, in the State of Virginia, laden with a valuable cargo of oysters, and bound on a voyage to New Haven, in the State of Connecticut.

They also allege, that at half past eight o'clock, in the evening of the day of the collision, the wind being then from the northwest, and blowing a fresh breeze, and when their schooner was heading one point to the eastward of north, close hauled on the wind, another schooner was seen on their larboard quarter, about one-third of a mile distant; that the strange schooner sailed faster than the vessel of the libellants, and soon came up with and abeam of their vessel, when she put her helm up, bore away, and coming down on the vessel of the libellants, head on, struck her abreast the cabin, and so damaged her that she sunk in a few minutes, leaving the master and crew only time to escape on board the colliding vessel.

Many other facts and circumstances are stated in the libel to show that those on board the vessel of the libellants were

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not in fault, and that the collision was occasioned wholly through the unskilfulness and negligence of those in charge of the vessel of the claimants. In their answer, the claimants admit the collision, and that the vessel of the libellants was lost, but they deny that the circumstances attending the disaster are truly stated in the libel.

According to their account of the circumstances, it became necessary for the *Fannie Crocker*, between eight and nine o'clock in the evening of that day, and just before the collision, to tack, in order to alter her course. At that time, as they allege, she was heading towards the southern and western shore, but being under a double-reef mainsail, foresail, and jib, and in ballast trim, she failed to go round. Similar attempts, as they allege, were several times repeated, but without success. Finding that the vessel would not go round, the master then gave the order to wear ship, and in executing that order the main peak was lowered to enable the vessel to wear rapidly; but when the main boom passed over the deck, the wind caught the sail and threw it over the main gaff, and tore the sail from the leach-rope, rendering it perfectly useless. While assisting to execute this order, one of the seamen had his leg caught in the fore-sheet, and was severely injured, when all hands, except the master, who was at the wheel, went to relieve the seaman. After disengaging the seaman from his dangerous situation, the rest of the hands, as the claimants allege, were called to haul in the mainsail, which was then dragging in the water, and at this juncture another vessel, which subsequently proved to be the schooner of the libellants, was seen on the starboard quarter of the claimants' vessel, some three or four lengths off. In order to prevent the two vessels from coming in contact, the claimants allege that the helm of their vessel was put hard up, with a view to go to the stern of the strange vessel; but the effort was unavailing, and the two vessels came together, and, as the claimants allege, wholly through the carelessness and unskilful management of those in charge of the other vessel, in not altering their course in proper time to avoid a collision.

Some particularity has been observed in stating the defence,

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in order that the respondents may have the full benefit of the position they have assumed.

Two witnesses only were examined, on the part of the libellants, in respect to the circumstances of the disaster. In the District Court a decree was entered for the libellants, allowing them the full value of their vessel and cargo; and on appeal to the Circuit Court, that decree was affirmed. Whereupon the respondents appealed to this court.

From the pleadings and evidence, it satisfactorily appears that the Henry R. Smith was a schooner of one hundred and thirty-four tons, and that she was laden with oysters, and bound on a voyage to New Haven, in the State of Connecticut. She was a stanch vessel, well manned and equipped, showed a proper light at the time of the collision, and had a sufficient and competent lookout. On the other hand, the Fannie Crocker was a schooner of two hundred and twenty-two tons, sailing in ballast, and was bound on a voyage from Dighton, in the State of Massachusetts, to Baltimore, in the State of Maryland. Like the other vessel, she was stanch, and well manned and equipped, but failed to show a light at the time of the collision, and had no sufficient lookout stationed on any part of the vessel. All of the witnesses state that the night was clear, and that there was no difficulty in seeing objects without lights at considerable distance. They mention no circumstance tending to authorize the conclusion that the collision can be justified or excused on account of the character of the night or the difficulties of the navigation. Occurring, as it did, inside of the capes, in the open bay, of a clear night, with no difficulties to encounter, except a fresh breeze from the northwest, it is obvious that one or both of the vessels must be in fault. They were both sailing in the same general direction; but the vessel of the respondents, being in ballast, and the larger of the two, was moving through the water at the greater speed. She was astern of the other vessel, and somewhat to the windward, but was sailing on a line converging to the track of the other vessel; and both vessels were close hauled on the wind.

Terry, the mate of the libellant's vessel, says when he first

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saw the other schooner, she was half a mile distant on the weather quarter. At that time both vessels were on the wind and standing the same way—to the northward and eastward. According to his account, the vessel of the respondents sailed faster than the vessel of the libellants, and ran down until she got abreast of her to the windward, when she was about fifty rods distant. He also states, that when they first saw that she was coming down on them, they put the helm of their vessel up, and tried in every way to keep clear of her, but could not, as she had fallen off from her course, and was then before the wind.

Another witness (a seaman) was also examined by the libellants. His testimony substantially confirms the mate, and clearly shows that the vessel of the libellants was ahead, and that the other vessel was to the windward, and moving through the water much faster than the vessel of the libellants.

Both witnesses testify in effect that the approaching vessel, when she was nearly abreast of their vessel, fell off and struck the vessel of the libellants on the larboard quarter, as alleged in the answer. They both affirm that they had a sufficient and competent lookout and proper lights.

Several witnesses were also examined on the part of the respondents. Their account of the circumstances attending the disaster differs in several particulars from that given by the witnesses examined by the libellants. They all agree, however, that the vessel of the libellants was not seen by any one on board their vessel until she was so near that all efforts on their part to prevent a collision were unavailing.

In effect, they also admit that their vessel, at the time of the collision, had no lookout engaged in the performance of that duty. On this latter point, the master says that he had directed the steward, a colored man, to keep a lookout, and adds, that he was somewhere about the main deck. But all hands had been called to haul in the mainsail, and the second mate states that he first saw the vessel of the libellants while he was engaged with the other hands in endeavoring to accomplish that object. When he saw the vessel, he says she was only about three times the length of his vessel off.

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At that time, all the hands, except the steward, were aft the mainsail, where they could not see the other vessel without changing their position. She was first descried by the second mate as he stepped up on to the "lazy board," so called, in order to haul up the damaged sail. He then cried out to the master to put the helm down, but the mate at the same time sung out to put the helm up. In this confusion, the master adopted the suggestion of the mate; and he admits that the steward, when the alarm was given, came running aft, and assisted him in changing the helm.

Two other witnesses state that the steward assisted the master in putting up the helm; and one of them says that no particular person was keeping watch, and attempts to justify the neglect upon the ground that it is not customary to have a man forward when all hands are called to take in the sails.

Suffice it to say, without entering more into detail, that the testimony of the respondents shows conclusively that their vessel had no sufficient lookout at the time of the collision; and the second mate, who first discerned the vessel of the libellants, testifies, without qualification, that if they had seen her three or four minutes sooner, they could have cleared her and prevented a collision.

From these facts, which are proved beyond doubt, it necessarily follows that the vessel of the respondents was in fault. She had no lookout; and the neglect of that precaution contributed to the disaster, and in all probability was the sole cause that produced it.

2. Assuming that the vessel of the respondents was not sufficiently to the windward to have passed the other vessel in safety, then she was also in fault, because she did not seasonably give way, and pass to the right. Where a vessel astern, in an open sea and in good weather, is sailing faster than the one ahead, and pursuing the same general direction, if both vessels are close hauled on the wind, the vessel astern, as a general rule, is bound to give way, or to adopt the necessary precautions to avoid a collision. That rule rests upon the principle that the vessel ahead, on that state of facts, has the sea-way before her, and is entitled to hold her position;

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and consequently the vessel coming up must keep out of the way.

Speaking of steamers, Judge Betts said, in the case of the Governor, Abbott's *Adm. R.*, 110, that the fact that they were running in the same direction, the one astern of the other, imposed upon the rear boat an obligation to precaution and care, which was not chargeable, to the same extent, upon the other. He accordingly held, that a vessel in advance is not bound to give way, or to give facilities to a vessel in her rear, to enable such vessel to pass; but that the vessel ahead is bound to refrain from any manœuvres calculated to embarrass the latter vessel while attempting to accomplish that object. Similar views had previously been announced by the same learned judge, in the case of the steamboat *Rhode Island*, decided in 1847. In that case, it is said the approaching vessel, when she has command of her movements, takes upon herself the peril of determining whether a safe passage remains for her beside the vessel preceding her, and must bear the consequences of misjudgment in that respect. No immunity is extended by the law to the one possessing the greater speed; and so far from encouraging the exercise of the power to its utmost, the law cautiously warns and checks vessels propelled by steam against an improvident employment of speed, so as to involve danger to others, being stationary or moving with less velocity. *Olcott's Adm. R.*, p. 515.

That case was appealed to the Circuit Court, where it was affirmed. *The Rhode Island*, 1 *Blatch. C. C.*, 363.

Emerigon says, a ship going out of a port last is to take care to avoid the vessel that has gone out before her, and he mentions the case of a small vessel which went out of the port of Marseilles, and in tacking struck a boat that went out before her, which was also tacking. Claim for damages was made by the boat, and the judges were of opinion that the vessel going out last is to take care to avoid the one before it. *Emerigon*, chap. 12, sec. 14, p. 330. Other continental authorities may be cited to the same effect. Whether it be by night or day, says Valin, b. 2, p. 578, the ship that leaves after another, and follows her, should take care to avoid a collision,

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without which she will have to answer in damages. *Sibille de Abordage*, sec. 249.

We are not aware that the precise question presented in this case has been ruled by any of the Federal courts. Remarks are certainly to be found in the opinion of the court in the case of the Clement, 17 Law Rep., 444, which are inconsistent with the proposition here laid down. That case was appealed to the Circuit Court, and was there affirmed. But the remarks to which we refer were not necessary to the decision of the cause, and we think they must be received with some qualification. The Clement, 2 Cur. C. C., 368, sec. 1; Pars. Mar. Law, p. 197, note 2.

Without further discussion of the general principle at the present time, it will be sufficient to say, that we are satisfied that the rule assumed in this case is one well calculated to prevent collisions, and that it is one which ought to be constantly observed and enforced in all cases where it is applicable. That exceptional cases may arise is not at all improbable; but it will be the proper time to consider them when they are presented for decision. For these reasons, we are of the opinion that the vessel of the respondents was wholly in fault. Objection was made to the damages as excessive, on the ground that the vessel might have been raised from where she was sunk. After a careful examination of the testimony, we think the objection cannot be sustained.

The decree of the Circuit Court is therefore affirmed with costs

CHARLES E. JENKINS, MOSES KNEELAND, AND JACKSON HADLEY,
PLAINTIFFS IN ERROR, *v.* WILLIAM S. BANNING.

Where a case is brought up to this court, and the writ of error appears to have been sued out for delay, the judgment will be affirmed with costs and ten per cent. damages.

THIS case was brought up by writ of error from the District Court of the United States for the district of Wisconsin.

The case is stated in the opinion of the court.

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

Mr. Gillet said that the practice of an inferior court is not the subject of review upon a writ of error; and the amendments permitted to be made to the plaintiff's declaration were within the discretion of the court below, and cannot be reviewed or reversed on error.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the District Court of the United States for the district of Wisconsin. It was an action of debt upon a judgment recovered by the present defendant against the plaintiffs in error, in the District Court of the United States for the second judicial district of the Territory of Minnesota. As originally framed, the declaration did not contain any caption specifying the term of the court when it was filed, or the return day of the process on which it was founded. In point of fact, it was filed on the thirtieth day of December, 1857, and the process was regularly returnable to the succeeding January term of the District Court, to which this writ of error issued. Service of the summons upon the defendants was duly made on the following day, and the record shows that they subsequently appeared and demurred to the declaration, showing for cause the formal defects before mentioned. On the eighteenth day of January, 1858, the plaintiff, by leave of the court, amended his declaration, obviating the defects shown by the demurrer.

No exceptions were taken to the order of the court granting leave to amend, and, for aught that appears to the contrary, the amendment was made without objection.

After the amendment was allowed, the court overruled the demurrer, and the defendants refusing or neglecting to plead to the merits of the case, they were defaulted. Whereupon the plaintiff moved for judgment, and filed a duly-certified copy of the former judgment on which the suit was founded. Reference was then made of the cause to the clerk to compute the interest, and on his report being made in writing, judg-

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ment was given in favor of the plaintiff for the amount of the former judgment, together with interest on the same.

On this state of the record, the defendants sued out a writ of error, and removed the cause into this court, but have failed to appear and prosecute their writ of error. They did not except to the ruling of the District Court, and have not assigned error in this court, and it is obvious, from an inspection of the transcript, that there is no error in the proceeding. Motions to amend mere formal defects in the pleadings are always addressed to the discretion of the court, and are usually granted as a matter of course, and their allowance is never the subject of error. That point has been so frequently decided, that we do not think it necessary to cite authorities in its support.

Under these circumstances, the counsel for the defendant in error moves that the judgment be affirmed with ten per cent. damages. By the twenty-third rule of this court, it is provided that in all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out for delay, damages shall be awarded at the rate of ten per centum per annum on the amount of the judgment, and the said damages shall be calculated from the date of the judgment in the court below, until the money is paid.

That rule is applicable to this case, and the judgment is accordingly affirmed, with costs and ten per cent. damages.

JOHN DOE, EX DEM. CURTIS MANN AND DOLPHUS HANNAH,
PLAINTIFFS IN ERROR, *v.* WILLIAM WILSON.

In a treaty made with the Pottawatomie Indians in 1832, there were reservations to individual Indians, which should be selected under the direction of the President of the United States, "after the land shall have been surveyed, and the boundaries shall correspond with the public surveys."

Before this was done, one of these reservees made a conveyance by a deed in fee simple, with a clause of general warranty. In 1837, patents were issued for the reservations.

This deed vested the title of the reservee in the grantee. The former was a tenant in common with the United States, and could sell his reserved interest;

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and when the United States selected the lands reserved to him, and made partition, (of which the patent is conclusive evidence,) his grantee took the interest which the reservee would have taken if living.

A prayer to the court that the land patented was not the same as that reserved was properly refused, because the recital in the patent was conclusive evidence to the contrary.

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

It was an ejectment brought by Mann, a citizen of New York, and Hannah, a citizen of Iowa, against Wilson, to recover sections nine and ten, in township 35, range 4 west, in the county of Laporte, in Indiana.

The important question involved in the case may perhaps be more distinctly presented to the reader by a chronological order of events than by a recital of the titles offered upon the trial by the plaintiffs and defendant, respectively.

In October, 1832, treaties were made with the Pottawatomie Indians, by which the Indians ceded to the United States certain tracts of land therein described, except certain reservations to the Indians, amongst which was one to Pet-chi-co, of two sections. The language of the reservation was: "The United States agree to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent." To Pet-chi-co two sections, &c., &c.

Then followed this sentence: "The foregoing reservations shall be selected under the direction of the President of the United States, after the lands shall have been surveyed, and the boundaries to correspond with the public surveys."

7 Stat. at L., 394, 395.

In February, 1833, Pet-chi-co made a deed to Coquillard and Colerick, with a general warranty, conveying "all of those two sections of land lying and being in the State aforesaid," &c., &c.

Before the lands were selected or located by the President, and before any patent issued, Pet-chi-co died.

In January, 1837, patents were issued to Pet-chi-co and his heirs for the two sections mentioned in the treaty. They re-

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cited that, "whereas, by the third article of the treaty made in October, 1832, the United States agreed to grant to Pet-chi-co two sections; therefore," &c., &c.

In 1854, certain persons obtained a deed from the heirs of Pet-chi-co; and under this deed the plaintiffs below (who were also plaintiffs in error) claimed, upon the ground that the deed from Pet-chi-co in 1833 was invalid. Wilson claimed under the latter deed. The leading question in the case was, therefore, whether Pet-chi-co had a right to make the deed when it was made.

In the course of the trial below, many exceptions were taken respecting matters of evidence, and many prayers to the court made; in so much that the counsel for the plaintiffs in error, after many other points, enumerated twenty-six distinct causes of error. It is not necessary to mention these. The rulings of the Circuit Court upon the two following points are sufficient for the purpose of the present report:

4. If Pet-chi-co, between the ratification of the treaty and the issuing of the patents, sold and conveyed the land in controversy by a sufficient deed of conveyance, with covenants of warranty, to Coquillard and Colerick, and their assigns, then the patents when issued, as to the assignees, related back to and took effect from the ratification of the treaty.

5. If, before the issuing of the patents to Pet-chi-co, he had, by a legal and valid instrument, assigned to Coquillard and Colerick his interest in the lands which were to be granted to him under the treaty of October, 1832; and if Colerick had, in like manner, assigned his interest to Coquillard; and if Coquillard had, in like manner, assigned to Wilson, then, by virtue of the act of Congress of May 20, 1836, the patents when issued inured to the benefit of Wilson, and vested the legal title to the land in him, although Pet-chi-co may have died before its date.

The verdict being for the defendant, the plaintiffs brought the case up to this court.

It was argued by *Mr. Baxter* for the plaintiffs in error, and by *Mr. John B. Niles* for the defendant.

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Without following the counsel through the branches of the case or the effect of the act of 1836, we can only state the positions assumed upon the point decided by this court.

Mr. Baxter said :

I. The third article of the treaty of the 27th October, 1832, was a mere executory promise of the United States, to grant in future and by patent to Pet-chi-co two sections of land, to be thereafter selected by the President. This promise was to be performed by the political department, and before its performance could create no inchoate title or estate in Pet-chi-co to any lands.

Longlois v. Coffin, 1 Indiana Reports, 446.

Verden v. Coleman, 4 Ind., 457.

Haden v. Ware, 15 Ala., 158.

Fipp v. McGehee, 5 Porter, 413.

Johnson v. McGehee and Thomas, 1 Ala., 173, 174.

And this, being a mere executory promise, to be executed by the political department, was not assignable ; and the effort was against public policy, and could convey no estate to the assignee, or give him any right to the land.

Lampet Case, 10 Coke, 46 b, 48 a.

Cruise, vol. 4, p. 174, title 32, chap. 6, sec. 46.

Carleton v. Lughton, 3 Merivale, 670.

Doe d. Brun v. Martin, 8 Barn. and Cress. ; 15 Com. Law Rep., 283.

4th sec. act of July 22, 1790, 1 S. L., p. 138.

12th sec. act of 1802, 2 S. L., p. 143.

Opinion of Mr. Taney on Treaty of 20th October, 1852,
2 Opinions, 588.

Jackson v. Wood, 7 John., 294.

Goodell v. Jackson, 20 Johnson, 706, 708.

Mr. Niles said :

The fourth instruction given by the court was as follows:

“If Pet-chi-co, between the ratification of the treaty and the issuing of the patents, sold and conveyed the land in controversy, by a sufficient deed of conveyance, with covenants of warranty, to Coquillard and Colerick, and their assigns,

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then the patents, when issued, as to the assignees, related back to and took effect from the date of the ratification of the treaty."

This instruction announces a well-known principle, often affirmed by the Supreme Court, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation.

Cruise on Real Property, vol. 5, pp. 510, 511.

Jackson ex dem. Forrest v. Ramsay, 3 *Cow.*, 75.

Landes v. Brant, 10 *How.*, 348.

Ross v. Barland, 1 *Peters*, 655.

Lessee French v. Spencer, 21 *How.*, 228

The doctrine of this instruction is strengthened in its application to this case by the act of Congress of May 20, 1836, above referred to.

In *Landes v. Brant*, the court say, that "in every case in which this court has been called on to investigate titles where conveyances of lands had been made during the time that a claim was pending before a board of commissioners, and where the claim was ultimately confirmed in the name of the original claimant, the intermediate assignments have been upheld against the confirmee, and his heirs and devisees, in the same manner as if he had been vested with the legal title at the date of the conveyance."

10 *Howard*, 348

Mr. Justice CATRON delivered the opinion of the court.

By the treaty of October 27, 1832, made by the United States, through commissioners, with the Pottawatomie tribe of Indians of the State of Indiana and Michigan Territory, said nation ceded to the United States their title and interest in and to their lands in the States of Indiana and Illinois, and the Michigan Territory, south of Grand river.

Many reservations were made in favor of Indian villagers jointly, and to individual Pottawatomies. The reservations are by sections, amounting probably to a hundred, lying in various parts of the ceded country. As to these, the Indian

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title remained as it stood before the treaty was made; and to complete the title to the reserved lands; the United States agreed that they would issue patents to the respective owners. One of these reservees was the chief, Pet-chi-co, to whom was reserved two sections. The treaty also provides, that "the foregoing reservations shall be selected under the direction of the President of the United States, after the land shall have been surveyed, and the boundaries shall correspond with the public surveys."

In February, 1833, by a deed in fee simple, Pet-chi-co conveyed to Alexis Coquillard and David H. Colerick, of the State of Indiana, "all those two sections of land lying in the State aforesaid, in the region of country or territory ceded by the treaty of 27th October, 1832." The grantor covenants that he is lawful owner of the lands; hath good right and lawful authority to sell and convey the same. And he furthermore warrants the title against himself and his heirs. Under this deed, the defendant holds possession.

The lessors of the plaintiff took a deed from Pet-chi-co's heirs, dated in 1855, on the assumption that their ancestor's deed was void; he having died in 1833, before the lands were surveyed, or the reserved sections selected. And on the trial below, the court was asked to instruct the jury, "that Pet-chi-co held no interest under the treaty in the lands in question, up to the time of his death, that was assignable; he having died before the location of the land, and before the patents issued."

This instruction the court refused to give; but, on the contrary, charged the jury, that "The description of the land in the deeds from Pet-chi-co to Coquillard and Colerick, from Colerick to Coquillard, and from Coquillard to Wilson, are sufficient to identify the land thereby intended to be conveyed as the same two sections of land which are in controversy in this suit, and which are described in the patents which have been read in evidence."

It is assumed that the lands embraced by the patents to Pet-chi-co, made in 1837, do not lie within the section of country ceded by the treaty of 27th October, 1832; and therefore the

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court was asked to instruct the jury that the defendants cannot claim nor hold the land as assignees of Pet-chi-co, by virtue of the treaty. The demand for such instruction was also refused.

There is no evidence in the record showing where the land granted by the patents lies, except that which is furnished by the patents themselves. They recite the stipulation in the treaty in Pet-chi-co's behalf; that the selections for him, of sections nine and ten, had been made, "as being the sections to which the said Pet-chi-co is entitled," under the treaty. The recitals in the patents conclude all controversy on this point.

The only question presented by the record that we feel ourselves called on to decide is, whether Pet-chi-co's deed of February, 1833, vested his title in Coquillard and Colerick.

The Pottawatomie nation was the owner of the possessory right of the country ceded, and all the subjects of the nation were joint owners of it. The reservees took by the treaty, directly from the nation, the Indian title; and this was the right to occupy, use, and enjoy the lands, in common with the United States, until partition was made, in the manner prescribed. The treaty itself converted the reserved sections into individual property. The Indians as a nation reserved no interest in the territory ceded; but as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land, to which the United States title was either added or promised to be added; and it matters not which, for the purposes of this controversy for possession.

The United States held the ultimate title, charged with the right of undisturbed occupancy and perpetual possession, in the Indian nation, with the exclusive power in the Government of acquiring the right. *Johnson v. McIntosh*, 8 Whea., 603; *Comet v. Winton*, 2 *Yerger's R.*, 147.

Although the Government alone can purchase lands from an Indian nation, it does not follow, that when the rights of the nation are extinguished, an individual of the nation who takes as private owner cannot sell his interest. The Indian title is property, and alienable, unless the treaty had prohib-

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ited its sale. *Comet v. Winton*, 2 *Yerger's R.*, 148. *Blair and Johnson v. Pathkiller's Lessee*, 2 *Yerger*, 414. So far from this being the case in the instance before us, it is manifest that sales of the reserved sections were contemplated, as the lands ceded were forthwith to be surveyed, sold, and inhabited by a white population, among whom the Indians could not remain.

We hold that Pet-chi-co was a tenant in common with the United States, and could sell his reserved interest; and that when the United States selected the lands reserved to him, and made partition, (of which the patent is conclusive evidence,) his grantees took the interest he would have taken if living.

We order the judgment to be affirmed.

THE UNITED STATES, APPELLANTS, *v.* ANDRES CASTILLERO.

By a special dispatch from the Minister of the Interior, under the order of the Mexican President, dated 20th July, 1838, the Governor of California, with the concurrence of the Departmental Assembly, was authorized to grant the islands near the coast.

See the case of the *United States v. Osio*, reported in this volume.

On the same day, another special dispatch was sent, reserving out of the general grant such island as Castillero might select, and directing a grant to be made to him for it, which was done.

All the signatures being proved to be genuine, and the index of the concession being found in its proper place amongst the Mexican archives, the claim of the grantee must be confirmed.

There was no necessity, in this case, for the concurrence of the Departmental Assembly.

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.

The claim was confirmed by the board of commissioners, and likewise by the District Court. The United States appealed to this court, where it was argued by *Mr. Stanton* for the appellants.

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Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal from a decree of the District Court of the United States for the southern district of California, affirming a decree of the commissioners appointed under the act of the third of March, 1851, to ascertain and settle private land claims.

Pursuant to the eighth section of that act, the appellee in this case presented his petition to the commissioners, claiming title to the island of Santa Cruz, situated in the county of Santa Barbara, in the State of California, by virtue of an original grant from Governor Alvarado. All of the documentary evidences of title produced in the case are duly certified copies of originals found in the Mexican archives, as appears by the certificate of the surveyor general, which makes a part of the record. They consist of a special dispatch from the Minister of the Interior of the Republic of Mexico, addressed to Governor Alvarado; the petition of the claimant to the same, and the original grant to the petitioner, which purports to be signed by the Governor, and to be duly countersigned by the secretary of the Department. Certain other documents were also introduced, to which it will be necessary to refer, as a part of the proceedings that led to the grant.

Islands situated on the coast, it seems, were never granted by the Governors of California or any of her authorities, under the colonization law of 1824, or the regulations of 1828. From all that has been exhibited in cases of this description, the better opinion is, that the power to grant the lands of the islands was neither claimed nor exercised by the authorities of the Department prior to the twentieth day of July, 1838, as was satisfactorily shown in one or more cases heretofore considered and decided by this court.

On that day, the Minister of the Interior, by the order of the Mexican President, addressed a communication to Governor Alvarado, authorizing him, in concurrence with the Departmental Assembly, to grant and distribute the lands of the desert islands adjacent to that Department to the citizens of the nation who might solicit the same. That dispatch bears date at a period when the President was in the exercise of

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extraordinary powers, and was issued, as appears by its recitals, with a view to promote the settlement of the unoccupied islands on the coast, and to prevent those exposed positions from becoming places of rendezvous and shelter for foreign adventurers, who might desire to invade that remote Department. Grants made by the Governor, under the power conferred by that dispatch, without the concurrence of the Departmental Assembly, were simply void, for the reason that the power, being a special one, could only be exercised in the manner therein prescribed. It was so held by this court in *United States v. Osio*, decided at the present term, and we are satisfied that the decision was correct.

But the grant in this case was not made under the general authority conferred by that dispatch. In addition to what was exhibited in the former case, it now appears that another dispatch of a special character was addressed by the same Cabinet Minister to the Governor on the same day. Like the other, it bears date at the city of Mexico, on the twentieth day of July, 1838, and is signed by the Minister of the Interior. By the terms of the communication, the Governor is informed that the President, regarding the services rendered by this claimant to the nation and to that Department as worthy of great consideration and full recompense, has directed the Minister to recommend strongly to the Governor and the Departmental Assembly that one of the islands, such as the claimant might select, near where he ought to reside with the troops under his command, be assigned to him, before they proceed to grant and distribute such lands, under the general authority conferred by the previous dispatch.

Beyond question, the legal effect of that second communication was to withdraw such one of the islands as should thus be selected by the claimant from the operation of the previous order, and to direct that it be assigned to this claimant. His attorney, accordingly, on the fifth day of March, 1839, presented his petition to the Governor, asking for a grant of the island of Santa Catalina, which is situated in front of the roadstead of San Pedro, and requested that the expediente might pass through the usual forms.

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In conformity to the prayer of the petition, the Governor, on the same day, made a decree that a title of concession should issue, and that the expediente should be perfected in the usual way. Accompanying the order of concession there is also a form of a grant of the island to the claimant; but it is without any signatures, and does not appear ever to have been completed.

On the seventeenth day of March, 1839, his attorney in fact presented another petition to the Governor, asking for a grant of the island of Santa Cruz, which, as he represents, is situated in front of Santa Barbara, on the coast of that Department.

Both of these petitions are based upon the special dispatch addressed to the Governor; and in the one last presented, the claimant represents that the island previously offered is wholly unfit either for agricultural improvement or the raising of stock, and for that reason prays, in effect, that the order of concession may be so changed as to conform to his last-mentioned request. For aught that appears to the contrary, his request was acceded to without hesitation, for, on the twenty-second day of May, 1839, the Governor made the grant, basing it upon the special dispatch referred to in the petition.

To prove the authenticity of the dispatch and the genuineness of the grant, the petitioner called and examined Governor Alvarado. He testified that he was acquainted with the handwriting of Joaquin Pesado, the Minister of the Interior, and also with that of Manuel Jimeno, the secretary of the Department, who countersigned the grant. Both of these signatures, as well as his own, he testified were genuine; and he also stated that he recognised the document as a genuine instrument, and intended it at the time as a perfect and complete title in the claimant. His testimony finds support in this case, to some extent, by the fact that all the documentary evidences of title, including the grant, were found in the Mexican archives; but much stronger confirmation of his statements is derived from the record evidence which those archives are found to contain.

At the argument, we were very properly furnished by the counsel of the appellants with a copy of an index of conces-

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sions, prepared by the secretary of the Department. That index covers the period from the tenth day of May, 1833, to the twenty-fourth day of December, 1844. It contains a list of four hundred and forty-three concessions, and among the number is the one set up by the claimant in this case. Its description in the index corresponds in all particulars with the grant produced, except as to the date. As there given, it is dated the fifth day of March, 1839, which is the true date of the concession, under the first petition.

Considering that the name of the grantee and the description of the premises agree with the grant produced in the case, we think it a reasonable presumption that the error of date is in the index, and not in the grant. For these reasons, we think the genuineness of the documentary evidence of title is satisfactorily proved. Having come to this conclusion, the only remaining question is, whether the grant was made by competent authority. Direction was given to the Governor and the Departmental Assembly in the special dispatch on which this grant was issued, that one of the islands, situated along the coast of the Department, should be assigned to this claimant before they proceeded to grant and distribute such lands under the general order. Those communications were of the same date; but it is obvious, from the language of the special dispatch, that it was issued subsequently to the other communication, and must be regarded as qualifying the latter, so far as their terms are repugnant. Had the claimant petitioned for a grant of this description, under the general order, his application would have been addressed to the discretion of the Governor and of the Departmental Assembly; and unless both had concurred in granting the prayer, his application would have been defeated, for the reason that such a title could only be adjudicated by their concurrent action. Power to refuse such applications was vested in the Assembly as well as in the Governor; but when both concurred, and the adjudication had been made, the title papers were properly to be issued by the Governor as an executive act. As the Assembly was a constituent part of the granting power under the general order, it was doubtless thought proper that the withdrawal of

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one of the islands from its operation, and the disposal of it in another way, should be notified to the Assembly as well as to the Governor. They were accordingly directed not to proceed to make adjudications under that order until the assignment of the title to this claimant was perfected, but they were not required to make the assignment or to cause it to be made. To accomplish that purpose, and carry into effect the command of the President, two things only were necessary to be done: one was to be performed by the claimant, and the other was a mere ministerial act. It was the claimant who was to make the selection; and if it was a proper one, near the place where he was stationed with his troops, nothing remained to be done but to make the assignment as described in the dispatch. Emanating as the dispatch did from the supreme power of the nation, it operated of itself to adjudicate the title to the claimant, leaving no discretion to be exercised by the authorities of the Department. Neither the Governor nor the Assembly, nor both combined, could withhold the grant, after a proper selection, without disobeying the express command of the supreme Government. Nothing therefore remained to be done, after the selection by the claimant, but to issue the title papers, and that was the proper duty of the Governor, as the executive organ of the Department. No doubt appears to have been entertained of the justice of the claim, either by the commissioners or the District Court; and in view of all the circumstances, we think their respective decisions were correct. The decree of the District Court is therefore affirmed.

MARTIN VERY, PLAINTIFF IN ERROR, v. GEORGE C. WATKINS.

Where a surety upon a bond is sued, a conversation between his co-surety (now dead) and a third person is not admissible in evidence for the purpose of fixing a liability upon the defendant. The co-surety, if alive, would not himself have been a good witness.

A paper in the handwriting of the co-surety, offered to impeach the testimony of two witnesses, was not admissible.

Where a levy is made upon goods and chattels under a f. fa., the officer may confide them to another, for safe keeping, until there has been a settlement of the

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judgment and payment of all costs. He may, therefore, leave them in the hands of a receiver appointed by the court.

Where the receiver had the custody of goods, and the complainant was ordered to select such a portion of these goods as would pay his claim by a decree of the court below, which was affirmed by this court, and which he refused to do, and this portion was accordingly set apart, the receiver became from that time a trustee for the complainant.

The receiver was entitled to hold this property, as trustee, until a demand was made upon him in proper form by the complainant to surrender it. This proper form should have been under a certified copy of that part of the decree which permitted the complainant to demand the property, and which required the receiver to surrender it with the complainant's acknowledgment of its receipt. These papers should then be filed in court, for the protection of the trustee.

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

The case is stated in the opinion of the court.

It was submitted on printed arguments by *Mr. Stillwell* for the plaintiff in error, and by *Mr. Watkins* for the defendant.

The arguments of the counsel were so connected with the facts of the case, that it would be difficult to give a faithful account of them without an extensive statement of the facts.

Mr. Justice WAYNE delivered the opinion of the court.

On the 3d March, 1841, at Little Rock, Arkansas, one James Levy gave his obligation with a mortgage for \$4,000, with interest, due six years after date, to one Darwin Lindsley, who soon after assigned the obligation to Martin Very, the plaintiff in error. In March, 1843, Levy paid to Very \$2,000, and at the same time executed a promise, in writing, to pay the residue of the debt in jewelry and other wares, which Very agreed to receive in payment, to be selected within a year from that time, from Levy's stock of goods. Very refused to perform the agreement, and in 1848 brought an action on the original obligation, to which Levy pleaded the agreement by way of accord and satisfaction, with an offer to perform on his part. The Supreme Court of Arkansas, on an appeal, held it to be in equity

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a clear accord and satisfaction, upon a good consideration, because the creditor by that arrangement received payment of nearly half of the debt in advance, and because the residue was to be paid almost four years before the debt became due. In the mean time, Very brought a bill to foreclose the mortgage in the Circuit Court of the United States for the district of Arkansas, to which Levy set up the same defence by way of answer. In April term, 1850, the court sustained the defence of Levy, and decided that Very should select from the stock of goods in question a sufficient amount according to their value, on the 3d March, 1844, to satisfy the rest of the debt. It then became necessary to appoint a receiver in the cause. John M. Ross was appointed receiver, and gave a bond, with E. Cummins and George C. Watkins as securities, in the penal sum of \$5,000, with the condition that he would faithfully discharge his duties as receiver, with respect to such goods as might be brought into court, and that he would carefully keep and dispose of them in conformity with such order and decree as the court might make in that suit.

In consequence of Very's refusal to abide by his agreement, Levy was obliged to keep his stock of goods on hand to tender them to Very, according to the agreement. But Levy had other creditors, who seized upon the same goods in execution, and they were in possession of the sheriff when Ross was made receiver, and from the sheriff he received them. The next step was an order from the district judge, directing Very to select from a box of jewelry in the hands of the receiver such an amount, according to the value of the goods in March, 1843, as would be sufficient to discharge the balance of the debt due to him. This he refused to do, and then the clerk of the Supreme Court of Arkansas was directed, with the assistance of two skilful and disinterested persons, to make a selection from the goods for Very.

It was done. A report was made, that the value of the goods in March, 1844, had been \$5,777, and that according to that value a selection had been made to the amount of \$2,002.59, to pay Very's claim upon Levy, and that the goods had been set apart for that purpose, with an inventory. A

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final decree was then made, authorizing Levy to withdraw the remainder of the goods from the hands of the receiver, adjudging also that Very should take the selected goods in payment of the residue still due upon the bond and mortgage, and that Ross, the receiver, should deliver them to him on demand. Very refused to abide by that decree, and prosecuted an appeal to this court. Here the decree of the court below was affirmed. On its return, Very refused to pay the costs. Levy had to pay them in order to get a mandate from this court to carry its decree into execution. Under these circumstances, Levy sued out a writ of execution, and directed it to be levied on the goods belonging to Very, still in the hands of Ross. The receiver and the marshal returned it without further action on the writ. A venditioni exponas was then issued, and the goods were sold by the marshal for \$260, the full value of them at that time, in their then condition. Three years and six months passed, and then Very, having acquiesced all of that time in what had been done, commenced this suit to recover from Watkins, as the security of Ross, damages for a breach of his bond, alleging that he had carelessly kept the jewelry which had been in his possession as receiver, and for not having surrendered it to him when he demanded it, as under the decree of the court he had a right to do.

Watkins filed three pleas to this action. The first is a detailed narrative of the proceedings in the suit between Very and Levy to the appointment of Ross as receiver, and showing that, by the decree, Very had been required to receive, in satisfaction of the debt due to him by Levy, jewelry to the amount of \$2,002.59; and that from that decree they had appealed to the Supreme Court of the United States, where the decree of the court below had been affirmed with costs. *Very v. Levy*, 13 How., 345. And further stating, that Levy had paid the costs of the suit in the Supreme Court, and that the jewelry, still being in the hands of Ross, had been levied upon and sold by the marshal, and that the proceeds of it were applied to the repayment of Levy of the costs, which Very was bound to pay by the decree.

Watkins, in his second plea, denied that the jewelry had

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been injured from the careless keeping of Ross; and his third plea is a denial that Very had ever demanded it from Ross.

Upon the trial of the case, the plaintiff excepted to the rulings of the court, as well for excluding as for admitting testimony.

We have examined with some pains the plaintiff's assignments of error, without finding cause for sustaining either of them. The first is, that the court refused to permit a witness to testify to a conversation between himself and Cummins, the co-surety of Watkins, for the purpose of fixing upon the latter a liability in this action to the plaintiff. It seems that Watkins was not present at that conversation. Whatever it may have been, it was inadmissible; and had Cummins been alive, and had been called as a witness to narrate it, he would not have been a competent witness to fix upon his co-surety a separate liability for an alleged breach of the bond by their principal, for which they had made themselves mutually responsible. The argument of the counsel for the defendant in error is unanswerable upon this point.

The second, third, fourth, fifth, and sixth assignments of error are complaints because the court admitted evidence directly pertinent to the issues which had been made by the pleadings, and defensive as to the imputed negligence of Ross in keeping the goods committed to him as receiver, and as to their condition, quality, and value, when they were turned over to him under the order of the court; and as to their condition when it was levied upon by the marshal to pay the costs of the Supreme Court.

The seventh assignment of error was the refusal of the court to admit a paper in the handwriting of Cummins, the deceased co-surety of the defendant, to show that the testimony of the other witnesses, Dort and Kirk, was not consistent with the appraisement which they had made, pursuant to the order of the court. It was clearly inadmissible.

The eighth and ninth assignments of error relate to the levy upon the jewelry by the deputy marshal; and the court is asked to instruct the jury: "If the levy was made without seeing the jewelry and taking it into possession, they should

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disregard it as any evidence of any levy; as, in law, a levy upon personal property—which jewelry is—cannot be made without having a sight of it, and taking possession thereof."

The court refused the instruction as asked; but said to the jury, that to make a valid levy on goods and chattels on a writ of *fi. fa.*, if the officer charged with the duty has a view of them, and they are in his power, and he declares that he makes a levy or seizure of them in execution, such is a valid levy, without taking them into his possession.

The objection to this instruction seems to be, that there had been an insufficient seizure, because the officer did not take manual possession of the box containing the jewelry, but left it in the keeping of Ross, who had pointed it out to him when he came to make the levy. But the evidence establishes that a levy was made by the officer, and that he returned the execution to the marshal, for further proceedings upon it.

It cannot be implied that the levy was incomplete, on account of the box having been left where it was when the levy was made, where it had been kept by Ross whilst he continued to be receiver, and where it remained afterwards, from Very not having demanded it, as he had a right to do and should have done.

After a levy has been made with a *fi. fa.* upon goods and chattels, the officer may confide them to another person for safe keeping, until there has been a settlement of the judgment and payment of all costs.

The court, in giving this instruction to the jury, went further than it was necessary to do, without, however, having interfered with the right of the jury to find from the evidence whether or not a levy had been made.

The tenth assignment of error relates to the instruction of the court, that by the decree of the court below in August, 1850, and the affirmance of it by this court in 1851, Ross ceased to act as receiver, and from thenceforth held the jewelry in question only as the trustee of Very. That decree put an end to the controversy, excepting to what remained to be done under the mandate of the court for the execution of its decree. It is true that Ross, as receiver, had not been dis-

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charged by a formal order upon motion when the decree was made; but it is also true that the jewelry, by the decree, was made the property of Very, and that he could have demanded it from Ross, and that he could not justifiably have refused to deliver it. It was the property of Very for all purposes, as any other that he owned, or which could have been conveyed to him by any kind of title. It was, as such, liable for his debts. It seems to have been considered by the counsel of Very as liable for the costs of appeal in the Supreme Court, which Very had neglected to pay. Levy, however, paid them, and obtained an execution against Very for his reimbursement, which was as well leviable upon this property still in the possession of Ross as upon any other. It was allowed by him voluntarily to remain where the law had placed it, without having made any proper demand for it under the decree. We do not consider the application for it by Mr. Fowler, as the attorney of Very, a proper demand. Mr. Fowler's relation to him was not that special attorneyship which authorized him to demand it in the manner that he did. No doubt that both Mr. Cummins himself and Mr. Fowler thought themselves empowered, as attorneys in the suit, to withdraw it from Ross, to make a private sale of it for the payment of the costs due by Very.

But Ross had responsibilities in the matter under the decree, which gave him the right to withhold it from the counsel of one of the parties, until a demand was made upon him, according to what the course of equity practice requires to be done under such decrees. It matters not what causes he may have assigned to Mr. Fowler for not delivering the jewelry to him, for, in a controversy to make the security of Ross liable for an alleged breach of his bond, the former is entitled to have the benefit of any irregularity which his principal could have resisted. According to the practice in equity, under such a decree as this is, authorizing Very to demand the jewelry, the demand should have been made under a certified copy of that part of the decree, at least, permitting Very to demand the property, and requiring Ross to surrender it, with a receipt upon it, either by Very or by his attorney, that the

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goods were surrendered by Ross. Upon the return of such a certificate, the court would have directed it to be put on file with the other papers in the suit, as a voucher for the protection of Ross from further responsibility to the parties, and as evidence that its decree in that particular had been executed. Such a course is not merely a form, to be followed or not, as parties to such a decree may please, but it is a cautionary requirement, to prevent further litigation, by exactness in the performance of a decree in equity. Had it been observed in this instance, this suit would not have been brought.

The instruction as given is in conformity with the decree. Having examined every assignment of error, we shall direct the judgment of the court below to be affirmed.

THE UNITED STATES, APPELLANTS, *v.* JAMES MURPHY. THE
UNITED STATES, APPELLANTS, *v.* EMANUEL PRATT.

This court again decides that a claim to land in California, founded upon "Sutter's general title," is not valid.

THESE two cases were appeals from the District Court of the United States for the northern district of California.

The cases are stated in the opinion of the court.

They were argued by *Mr. Stanton* for the appellants.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellees in these suits were respectively confirmed in their claims to land in the valley of the Sacramento river.

Their applications were made to Micheltorena in 1844; and upon a reference, Captain Sutter reported that the land was vacant. Upon the advice of the secretary, further action was deferred until the Governor could visit that portion of the Department, and leave was given to the petitioner to occupy the land until that time.

In December of that year, the "general title" to Sutter was issued, and in 1845 or 1846, after the deposition of Michelto-

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rena as Governor, Sutter gave copies of that title to the petitioners. In the testimony of Sutter, in the case of Pratt, he says "that he applied for the paper a few weeks before the couriers arrived with it; that duplicates were sent to him, and that it was designed as a bounty to the soldiers who had served under him, for their services in the war."

We have already expressed our opinion upon the merits of this title in several cases, during this and the last term; and it remains only to say that the decrees of the District Court must be reversed, and the causes remanded, with directions to the District Court to dismiss the petition in each.

JOHN F. CALLAN AND MICHAEL P. CALLAN, APPELLANTS, v.
CHARLES W. STATHAM AND OTHERS.

Where a bill in chancery was filed to set aside a deed as being fraudulent against creditors, and it is charged in the bill that the consideration mentioned in the deed was not paid, it is not satisfactory that the defendant relies upon the answer that it was paid, considering the answer, which is responsive to the bill, as evidence of the payment, when the execution of the deed is surrounded by circumstances of suspicion.

In the present case, the payment of the purchase money was alleged to be a secret transaction between the vendor and vendee, and there were other circumstances attending the deed which surrounded it with suspicion. The evidence of payment must have been in the possession of the defendants, and they ought to have produced it.

The title of the defendant, although encumbered, could have been made clear; the price alleged to have been paid was inadequate; the vendor remained in possession and collected all the rents without accounting to the vendee; the circumstance that the vendor was heavily in debt, and suits pending and maturing to judgment when he made the deed—all these things induce this court not to disturb the decree of the court below, which directed the property to be sold for the satisfaction of creditors.

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

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

It was argued by *Mr. Walter S. Cox* and *Mr. Davis* for the

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appellants, and by *Mr. Chilton* and *Mr. Davidge* for the appellees.

The arguments and points of law were very dependent upon the facts of the case, and are therefore omitted.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the District of Columbia.

The suit below was a creditor's bill, filed by Statham and others, the appellees, to set aside a deed made by J. F. Callan and wife to M. P. Callan, on the 16th October, 1854, conveying lot No. 8, in square No. 456, with the improvements, in the city of Washington, and to subject it to the payment of the plaintiffs' judgments.

Judgments to an amount exceeding \$3,000 were recorded against J. F. Callan, 5th May, 1855. The deed was recorded 14th April, 1855.

A second bill was filed against the same parties and others, on the 9th August, 1856, by Austin Sherman, a judgment creditor of J. F. Callan, for the purpose of setting aside the same deed, and subjecting the property to the payment of his judgments recovered 2d April, 1855, and exceeding in amount \$9,000.

The two suits were consolidated, as the same proofs were equally applicable in respect to the charge of fraud in the execution of the conveyance sought to be set aside. The court below decreed that the deed was fraudulent as against creditors, and directed the property to be sold, and the proceeds brought into court for distribution. The case is here on an appeal from that decree.

At the date of the deed of October, 1854, Callan was heavily in debt—several suits impending over him and maturing to judgments, to which the property in question would have been subject. The conveyance was made to a brother, for the consideration, as stated in the deed, of \$4,900. The premises conveyed, according to the estimate of witnesses who were well acquainted with them, were worth at the time exceeding

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\$15,000, assuming the title to be good, which will be noticed hereafter. The vendor continued to possess and occupy the property after the conveyance the same as before, leasing the buildings and collecting the rents in his own name, and not accounting to the vendee for the same. Indeed, the vendee seems to have taken no part in the management of the property; nor does it appear that he has exercised any act of ownership over it since the purchase, and down to the taking of the proofs in these cases.

In the answer of Callan, the vendor, to the bill of Statham and others, to the charge that the consideration mentioned in the deed was not paid, he simply states that it had been fully paid by his brother, the vendee. The vendee, for his answer, adopts the answer of his co-defendant.

In their answer to the bill of Sherman, they concur in stating that \$4,000 of the consideration were paid by the surrender of a note the vendee held against the other party, and \$900 in cash, and that the payment was not made in presence of any third person.

No proof was given by the defendants in respect to the payment of the consideration, with a view of sustaining the allegation in the answers. They rely entirely upon the rule of pleading, that the answers are responsible to the bill, and to be taken as true till overthrown by proof on the other side. As they aver the payment was a transaction between themselves, and the principal part a note held by the vendee, which he surrendered, the evidence in respect to which is therefore exclusively within their own knowledge, it would have been more satisfactory if they had given some proof in support of the answers, especially when there were other accompanying circumstances, tending to excite distrust and suspicion as to the bona fides of the deed.

As it respects the defect in the title relied on to reduce the value of the property, it appears that J. F. Callan, in November, 1840, took a lease of this property from one W. Robinson, trustee of Alice Jennings, Alice joining in the lease for the term of her natural life, for the annual rent of \$200; and in which lease it is agreed that, upon the death of the said

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Alice, the lessee shall have the right to purchase the estate for the price of \$3,000; upon the payment of which, Robinson binds himself and his heirs to convey the title. Alice died in May, 1851, and Robinson some years earlier.

It is insisted, on the part of the defendants, that the heirs of Robinson, and also of Alice, refuse to carry into execution this contract, and have refused to accept the \$3,000. There is some obscurity upon the evidence, as it respects the precise state of this question at the time of the deed from Callan to his brother, in October, 1854. It is claimed on the part of the judgment creditors that this money had been paid, and that the deed from the heirs was kept back, in fraud of their rights. Perhaps the better opinion is, upon the facts, that the money has not been paid, and that the property is subject to this encumbrance. It is clear, however, that there is no serious embarrassment in the way of clearing the title on payment of the money.

It appears, by some arrangement, not particularly explained, with the heirs, after the death of Alice, Callan agreed to pay the interest on the \$3,000, and which has been paid down to the month of July, 1854; and the case shows that, upon the payment of the purchase money, with the interest, from the period last mentioned, the title can be obtained. It would have been remarkable if this right of purchase had not been preserved, as it appears Callan has put on the property improvements to the amount of from \$7,000 to \$10,000.

The question as to the title is only important as entering into the estimate of the value of the property, and as tending to rebut the undervaluation of the price, as charged in the bill. It is clear, however, admitting the property to be subject to the payment of \$3,000, that the price was considerably below its true value.

But, independently of this consideration, there are other facts in the case that may well justify the decree below—the most important, perhaps, the unsatisfactory evidence on the part of the Callans in respect to the payment of the consideration stated in the deed. This proof was vital, in order to uphold a deed in other respects surrounded with suspicion. The

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evidence was in their possession; and their admission that the transaction was secret made the proof still more indispensable on their part. The want of it, under the circumstances, is nearly if not quite fatal to the validity of the deed as against creditors.

The continuance of the vendor in the possession and occupation and full enjoyment of the premises, the same after the deed as before, and absence of interest in the subject manifested by the vendee, are circumstances not satisfactorily explained; also, the heavy indebtedness of J. F. Callan, and suits pending and maturing to judgment—all well known to the vendee.

We are satisfied the decree of the court below is right, and should be affirmed.

JOHN CLIFTON, CLAIMANT OF THE BRIG WATER WITCH, HER
TACKLE, &c., APPELLANT, *v.* WILLIAM H. SHELDON.

Where a decree was made by the Circuit Court, sitting in admiralty, that two persons should pay freight, one in the sum of \$583.84, and the other in the sum of \$1,754.22, and the latter only appealed to this court, the appeal must be dismissed, as the amount in controversy is less than \$2,000.

The rights of the two were distinct and independent; but if the freight be considered a joint matter, both should have joined in the appeal.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York.

The facts are stated in the opinion of the court.

The motion to dismiss the appeal was argued by *Mr. Donohue* in support of it, and by *Mr. Owen* against it.

Mr. Donohue's points were the following:

I. The record shows that Mr. Sheldon is ordered and decreed to pay between \$1,800 and \$1,900, besides costs, and that Mr. Brower does not complain of the decree below.

II. As a matter of law, no appeal lies, unless the matter in dispute, exclusive of costs, exceeds the sum of \$2,000.

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Udall v. the Ohio, 17 How., 17.

Olney v. the Falcon, 17 How., 19.

Allen v. Newbury, 21 How., 248.

III. In this case, the amount in dispute is less than \$1,900 and costs; the only judgment or decree against Sheldon is that, and Brower not appealing, Sheldon cannot appeal for him.

Where the property is bonded, that bond takes the place of the thing, and the judgment goes against the claimant, there Sheldon's cotton could not be held for Brower's freight.

IV. As a matter of equity, the record shows that the appellant has a judgment against Clifton for the very amount he defends against here.

Mr. Owen opposed the motion, on the following grounds:

The right of appeal is given when the "matter in dispute" exceeds the sum of \$2,000, exclusive of costs.

I. The "matter in dispute" in this action was the freight upon the entire cargo, and which, according to the decree, amounted to \$2,338.06, exclusive of costs. Unless, therefore, the apportionment of this sum between the claimants, which the Circuit Court, by its decree, assumed to make, operates as a severance of the action, giving the libellant independent rights against the respective claimants for their particular portion of freight, and no more, the motion must be denied.

II. But the decree did not so operate, and the respective claimants, as to the libellant, were liable for the entire amount.

1. The stipulation or bond given by the claimants, claiming the property, was joint, and the summary judgment thereon, against the stipulators, must be a joint judgment for the entire amount of freight. The court could not order otherwise; certainly not without the consent of the stipulators and of the libellant.

2. The decree was irregular and erroneous in attempting so to sever the liability of the claimants. There was no allegation in the pleadings upon which to found such a decree. The decree should have been *secundum allegata*.

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III. But if the decree apportioning the liability be regular and proper, still the claimant, Sheldon, has a right of appeal, for, as to him, the matter in dispute exceeds \$2,000.

1. The decree of the Circuit Court directs Sheldon to pay \$1,754.22, together with the costs, taxed at \$586.79, amounting, in the aggregate, to \$2,341.01. Even if it be considered that he is not to pay the whole, but only his proportion of the costs, still the amount which he is decreed to pay will exceed \$2,000.

2. The "matter in dispute" on this appeal is therefore the sum so decreed to be paid for damages and costs. The costs are as much a part of the judgment debt as the damages; both are merged in one judgment.

3. The costs referred to in the judiciary act are not those which have entered into and become part of the judgment appealed from, but those which may accrue on the appeal.

Such appears to have been the views of this court in the case of *Olney v. the Falcon*, (17 How. Rep., 19,) where it is said that "the defendant can appeal when the judgment or decree against him exceeds the sum or value of \$2,000.

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, in admiralty. A motion has been made, on the part of the appellee, to dismiss the appeal, for the want of jurisdiction.

A libel was filed by Clifton, in the District Court, to recover freight on the two hundred and sixty-nine bales of cotton and nine bags of wool. Brower and Sheldon appeared as claimants, and contested the claim for the freight. Brower claimed sixty-seven of the two hundred and sixty-nine bales, and Sheldon two hundred and two bales. The District Court dismissed the libel.

On appeal to the Circuit Court, this decree was reversed, and decree rendered in favor of the libellant for the amount of the freight, \$2,338.06; that J. W. Brower, claimant of a portion of the cotton, pay to the libellant the sum of \$583.84, being the freight on the cotton claimed by him in the suit, and that the

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claimant, W. H. Sheldon, pay for the portion claimed by him the sum of \$1,754.22. Sheldon appealed from the decree to this court.

The motion is now made to dismiss the appeal, on the ground that the decree against Sheldon is less than \$2,000, and which is apparent from a perusal of the decree. The sum decreed against him is only \$1,754.22.

The freight was separately awarded against the claimants, in proportion to the cotton shipped by each one. The rights of each were distinct and independent.

But if it were otherwise, and the whole of the freight jointly against the claimants, the appeal must still be dismissed, as then the claimants should have joined in it.

Motion to dismiss granted.

THOMAS J. GREEN, PLAINTIFF IN ERROR, *v.* WILLIAM CUSTARD.

Where the Circuit Court of the United States has jurisdiction over the parties and cause of action, by virtue of the 12th section of the judiciary act, it cannot be affected by any amendment of the pleadings, changing the cause of action, or by the proviso to the 11th section.

The evils commented upon, arising from the courts of the United States permitting the hybrid system of pleading from the State codes to be introduced on their records.

THIS case was brought up by writ of error from the District Court of the United States for the western district of Texas.

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

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

Upon the principal point involved in the case, *Mr. Stanton* said:

The court below properly acquired jurisdiction of the case as made by the original petition, which alleged that Custard was a citizen of Texas, and Green a citizen of Massachusetts.

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Act of 1789, ch. 20, sec. 12.

But it had no authority to remand the case to the State court; the only alternative was, to dismiss it altogether.

The right to have his case tried in the Federal court, in a proper case for removal, is an absolute legal right in the party so removing it.

Ward v. Arredondo, Paine's C. C. R., 410.

Beardsley v. Torre, 4 Wash., 286.

Gibson v. Johnson, Peters C. C. R., 44.

Gordon v. Longest, 16 Pet., 97.

It is only causes improperly removed which will be remanded.

Laws U. S. Courts, 147, which quotes *Pollard v. Dwight*, 4 Cranch, 421.

Wright v. Wells, 1 Pet. C. C. R., 220, is an authority to show that a party, after a removal of the cause, cannot amend so as to oust the jurisdiction of the Federal court. And the rule is just; for otherwise a party would only have to exercise his ingenuity to suggest matters of amendment, either true or false, in order to send the case back to the State court. Of these amendments, the Federal court, having no jurisdiction, could not inquire at all.

Mr. Justice GRIER delivered the opinion of the court.

This case originated in the District Court for the county of McLennan, in the State of Texas, where Custard had instituted his suit against Green by attachment, claiming to recover from him the balance due on a judgment entered on a mortgage given by Green to one Arthur, on lands in California. Green appeared, and moved to have his cause removed to the District Court of the United States, he being a citizen of Massachusetts, and Custard a citizen of Texas—the case coming clearly within the provisions of the 12th section of the judiciary act of 1789.

It is probably because this case originated in a State court, that the court below permitted the counsel to turn the case into a written wrangle, instead of requiring them to plead as lawyers, in a court of common law. We had occasion already to notice

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the consequences resulting from the introduction of this hybrid system of pleading (so called) into the administration of justice in Texas. (See *Toby v. Randon*, 11 How., 517, and *Bennet v. Butterworth*, 11 How., 667, with remarks on the same in *McFaul v. Ramsey*, 20 How., 525.) This case adds another to the examples of the utter perplexity and confusion of mind introduced into the administration of justice, by practice under such codes.

Without attempting to trace the devious course of demurrs, replications, amendments, &c., &c., which disfigure this record, it may suffice to say that the plaintiff, beginning, after some time, to discover that he could not recover on his original cause of action, among other amendments set forth an entirely new cause of action, to wit, a note given by Green, payable to "Arthur or order," for \$5,000, without any endorsement or assignment by Arthur to plaintiff, but which Custard alleged he had obtained "*in due course of trade.*"

After further demurrs, exceptions, &c., &c., and after taking testimony in California, wholly irrelevant to any possible issue in the case, the record exhibits the following judgment:

"And now on this day came the parties by their attorneys, and the court being now sufficiently advised upon the questions submitted, is of opinion that the judgment, the original cause of action in this case, is not conclusive—in fact, is a nullity; but because the parties plaintiff have amended their petition herein, setting forth the note the base of said judgment, and as it has become a part of the pleadings in this case, and the court being of the opinion that, upon the note, the court is debarred from entertaining the case further in this court, for want of jurisdiction, it is therefore considered by the court that the cause ought to be remanded. It is therefore ordered and decreed that this case, with all the papers belonging to the same, be and is hereby remanded to the District Court of McLennan county for further action."

So far as this judgment treats the original cause of action "as a nullity," it could not be objected to; and perhaps the same remark might have equally applied to the amended por-

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tion. But the conclusion, that the court had no jurisdiction to proceed further, and the order to remand the case to the State court to try the other half of it, is a clear mistake, for which the judgment must be reversed.

If Green had been a citizen of Texas, and Custard had claimed a right, as endorsee of a citizen of Texas, to bring his suit in the courts of the United States, because he (Custard) was a citizen of another State, the case would have occurred which is included in the proviso to the 11th section of the act which restrains the jurisdiction of the court. But the United States court had jurisdiction of this case, by virtue of the 12th section. It is a right plainly conferred on Green, a citizen of Massachusetts, when sued by a citizen of Texas, in a State court of Texas, no matter what the cause of action may be, provided it demand over five hundred dollars. The exception of the 11th section could have no possible application to the case.

Let the judgment be reversed, and the case remanded for further proceedings.

THE MAYOR, ALDERMEN, AND COMMONALTY, OF THE CITY OF NEW YORK, PLAINTIFFS IN ERROR, v. FRANKLIN RANSOM AND UZZIAH WENMAN.

In an action for damages for the infringement of a patent right, the plaintiff must furnish some data by which the jury may estimate the actual damage. If he rests his case after merely proving an infringement of his patent, he may be entitled to nominal damages, but no more.

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

The case is stated in the opinion of the court.

It was submitted on a printed argument by *Mr. Keller* for the defendants in error, no counsel appearing for the plaintiffs in error.

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Mr. Justice GRIER delivered the opinion of the court.

The plaintiffs in error were defendants in an action for infringement of a patent, "for a new and useful improvement in the mode of applying water to fire-engines so as to render their operation more efficient."

On the trial, they took some twenty-four exceptions to the rulings of the court in their charge to the jury; but they have not seen fit to appear in this court, and point out to us on which of these numerous exceptions they principally rely for the reversal of the judgment. The defendants in error have not elected to have the writ of error dismissed for want of prosecution, but have filed a printed argument praying for an affirmance of the judgment.

On examination of the record, we find that the bill of exceptions contains no copy of the specification of the letters patent. Without this, we are unable to test the correctness of the construction of the patent by the court below.

But there is one exception which the record enables us to examine, and in which we think there is error.

The defendants' fourteenth prayer for instruction is as follows:

"The plaintiffs have furnished no data to estimate actual damage, and therefore in no aspect of the case can they recover more than nominal damages."

If the predicate of this proposition be true, the conclusion was correct, and the instruction should have been given by the court.

Where a plaintiff is allowed to recover only "actual damages," he is bound to furnish evidence by which the jury may assess them. If he rest his case, after merely proving an infringement of his patent, he may be entitled to nominal damages, but no more. He cannot call on a jury to guess out his case without evidence. Actual damages must be calculated, not imagined, and an arithmetical calculation cannot be made without *certain* data on which to make it.

The invention in this case was not one which enabled the patentee to make a profit by a monopoly of its use. Nor was it a separate and distinct machine, by the sale of which he

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could make a profit. The patent is for an improvement in the apparatus of the common fire-engine, by which the hydrostatic pressure of the water from the hydrant may be combined with the hydraulic pressure of the engine, and thus add to its power and efficiency. There was evidence tending to show the invention to be valuable, and that it could be applied to the engines in use at an expense of twenty-five dollars, thereby greatly increasing the power of the machine. It was proved that the city had applied this invention to fifty engines, but no information whatever of the price or value of a single license is given in the bill; fifty is the coefficient by which an unknown number is to be multiplied, and without further data the result is still an unknown quantity. If there had been any proof that the selling price of a single license for a single engine was four hundred dollars, the jury would have had something to support their verdict for \$20,000.

In the case of *Seymour v. McConnel*, (16 Howard, 485,) it was decided by this court, that where the profit of the patentee is derived neither from an exclusive use of the thing patented, nor from a monopoly of making it for others to use, the actual damage which he suffers by the use of his improvement without his license, is the price of it, with interest, and no more. It is to his advantage that every one should use his invention, provided he pays for a license. The only damage to the patentee is the non-payment of that sum when the infringer commences the use of the invention.

As the plaintiffs in this case did not furnish any evidence upon which to found a calculation of actual damages, the court should have instructed the jury as requested by the counsel. Instead of it, the court instructed the jury as follows:

"If the invention is valuable, if by its use the power and efficiency of the fire-engines belonging to the defendant are so increased, that fifty engines used with this improvement are equal in practical effect to seventy-five, or any other number of engines, used without this improvement, the jury are at liberty to infer, if they think the inference a just one, that the defendant, in its corporate capacity, has saved the cost

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of the purchase and operation of the additional number of engines which would have been required to produce the same results if this invention had not been used; and that the corporate authorities, if they had admitted the plaintiffs' rights, would have paid the amount of this additional cost, or a large portion of it, as the consideration for a license to use this invention, rather than to abandon its use; and that the plaintiffs have therefore lost by the infringement what the defendant would have so paid to secure such license. It is for this reason that the benefits received by the defendant in its corporate capacity, from the use of the invention, in the consequent reduction of its expenditures for fire-engines, and their management and operation, are proper subjects for consideration in determining the plaintiffs' damages; and the jury must determine for themselves, upon the consideration of this and the other facts of the case, (if they find that the plaintiffs are entitled to recover,) what damages have been actually sustained by the plaintiffs in consequence of the unauthorized and wrongful acts of the defendant, being careful only to give the actual damages proved, and not to speculate upon the possibility or even probability of damages beyond such as are proved to have been sustained by the plaintiffs."

It was of little use to caution the jury from giving speculative or any other than "actual damages," after the large margin of inference and presumption which they were permitted to take in order to find data by which to calculate them.

It was said, in the case to which we have referred, "actual damages should be actually proved, and cannot be assumed as a legal inference from facts" which afford no data by which they can be calculated.

In order to find out the plaintiffs' loss or damage, the jury were allowed by the court to *infer* that the defendants have saved all the money indicated by the comparative powers of the engines with and without the improvement; and after having made this inference, they may *presume* that the defendants would have paid this amount to the plaintiff for the use of his improvement.

Thus the possible advantage or gain made by the use of

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plaintiffs' improvement on their machines, is made the measure of his loss. If the plaintiffs, unable to furnish any other data for a calculation, had proved that the defendants had made a certain amount of money by putting out the fires in New York, which the plaintiffs would otherwise have made by use of their invention, he might with some reason contend that this was a proper measure.

But if he fails to furnish any evidence of the proper data for a calculation of his damage, he should not expect that a jury should work out a result for him by inferences or presumptions founded on such subtle theories.

We therefore direct the case to be remanded for a *venire facias de novo.*

GEORGE B. MOREWOOD, JOHN R. MOREWOOD, AND FREDERIC R. ROUTH, APPELLANTS, *v.* LORENZO N. ENEQUIST, OWNER OF THE BRIG GOTHLAND.

The admiralty jurisdiction of the courts of the United States extends to contracts of charter-party and affreightment. These are maritime contracts within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty, by process either *in rem* or *in personam*. Appellants should not expect this court to reverse a decree of the Circuit Court, merely upon a doubt created by conflicting testimony.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York.

It was a case in admiralty, arising under the following circumstances:

The brig Gothland, owned by Enequist, was chartered by Burt, Myrtle, & Co., of Batavia, to proceed to Padung, on the island of Sumatra, there to receive a quantity of coffee; to return thence to Batavia and complete her cargo, and deliver the same in New York, freight to be paid by the assignees of the bills of lading on delivery of the cargo.

It was admitted that the bills of lading were assigned for value to the appellants, composing the firm of G. B. Morewood & Company.

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Enequist first filed a libel *in rem* against the cargo for the amount of the freight; but after some proceedings which it is not necessary to mention, this action was discontinued, and a libel *in personam* filed, which is the present case. The respondents alleged that, owing to the neglect of the carrier, the coffee, black pepper, and cassia, were damaged to the amount of \$4,720.60, which they claimed as a deduction from the freight. The whole freight claimed was \$9,160.56, with interest from April, 1853.

The District Court referred the case to a commissioner, who reported that the freight due in September, 1857, was \$11,372.56, for which amount a decree was rendered, with costs.

The case, being carried to the Circuit Court, was there tried on the appeal from the District Court and on additional evidence taken by the respondents. The decree of the District Court was affirmed with costs, and the respondents appealed to this court.

It was submitted on printed arguments by *Mr. Dodge* and *Mr. Johnson* for the appellants, and by *Mr. Donohue* for the appellee.

The counsel for the appellants considered that the jurisdiction of the courts of the United States over an action on contract by a libel *in personam* in admiralty upon a contract of affreightment was still an open question, and therefore proceeded to argue it. The elaborate arguments against the jurisdiction filed by them, and for it by *Mr. Donohue*, are omitted by the reporter, in deference to the opinion of the court.

Mr. Justice GRIER delivered the opinion of the court.

The ship *Gothland*, owned by Enequist, the libellant, was chartered by Burt, Myrtle, & Co., of Batavia, to proceed to Padung, on the island of Sumatra, there to receive a quantity of coffee; to return thence to Batavia and complete her cargo, and deliver the same in New York, freight to be paid by the assignees of the bills of lading on delivery of the cargo. The

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libellants' suit is *in personam* against the consignees or assignees of the cargo, for the amount of freight stipulated in the charter-party.

The only defence alleged in the answer is, that a portion of the merchandise delivered was not in good order, and had been greatly damaged by sweating, caused by want of proper ventilation on the voyage.

This defence was fully discussed and examined both in the District and Circuit Court, and a decree was entered for the libellant in both.

In the argument in this court, the counsel, without abandoning the original defence, have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those of England, has no jurisdiction over contracts of charter-party or affreightment. They do not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject, and return to the fluctuating decisions of English common-law judges, which, it has been truly said, "are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice."

The errors of those decisions have mostly been corrected by legislation in the country of their origin; they have never been adopted in this.

We do not feel disposed to be again drawn into the discussion of the arguments which counsel have reproduced on this subject. The case of the New Jersey Steamboat Company *v.* the Merchants' Bank of Boston (6 How., 334) was twice argued (in 1847 and 1848) at very great length. The whole subject was most thoroughly investigated both by counsel and the court. Everything connected with the history of courts of admiralty, from the reign of Richard the Second to the present day—everything which the industry, learning, and research, of most able counsel could discover, was brought to our notice. We then decided that charter-parties and contracts of affreightment are "maritime contracts" within the true meaning and construction of the Constitution and act of

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Congress, and cognizable in courts of admiralty by process either *in rem* or *in personam*.

Lord Tenterden admits that, by the maritime law, "the ship is bound to the merchandise and the merchandise to the ship; and it is a necessary consequence that the contract is as much a maritime contract as a bottomry or respondentia bond, or mariners' wages." See *Abbot on Shipping*. But in England they cannot have the benefit of this lien or privilege, because courts of common law cannot enforce a lien *in rem*, and will not permit the court of admiralty to do it. Our District Courts had exercised this jurisdiction without question till the case just mentioned came before this court. Since that time no objection has been raised in this court to the jurisdiction of courts of admiralty over contracts of affreightment. See *Rich v. Lambert*, 12 Howard, 347, &c., &c.

The numerous briefs of argument filed in this case contain nothing which was not brought to our notice in the former discussions of this subject, except some remarks on the case of the People's Ferry Co. *v. Beers*, (20 How., 401.) It has been contended that this case has established the doctrine, that the jurisdiction of our courts of admiralty under the Constitution should be restrained to that which they were permitted to exercise in the Colonies before the Revolution. The court decided in that case that a contract to build a ship is not a maritime contract; and though, in countries governed by the civil law, courts of admiralty may have taken jurisdiction of such contracts, yet that in this country they are purely local, and governed by State laws, and should be enforced by their own tribunals. As a cumulative argument, it was stated that the act of Congress of 1789 was not intended to conflict with the rights of the State tribunals to enforce contracts governed by their own laws, and not strictly of a maritime nature; that such contracts were thus considered at the time the Constitution was formed, and had never been previously cognizable in courts of admiralty as within the category of maritime contracts; and that the contest of jurisdiction in that case "was not so much between rival tribunals as between distinct sovereignties claiming to exercise power over contracts, property,

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and personal franchises." The arguments used in stating the opinion of the court must be referred to the subject before it, and construed in connection with the question to be decided. They had no reference whatever to any former decisions of this court on the question *now* (it is hoped for the last time) mooted before us.

There is much testimony in the record of this case, on the issue made by the answer, with the usual discrepancy and contradiction in matters of opinion. The question whether the cargo was injured through the negligence and fault of the master, or whether the damage to it was caused by the innate vice of the cargo and its necessary exposure on the voyage, was a very complex one, depending wholly on the opinion of experts. Where witnesses of proper skill and experience have formed their judgment from a personal examination of the subject of the controversy, their opinions are generally more worthy of confidence than those elicited by hypothetical questions, which may or may not state all the accidents and circumstances necessary to form a correct conclusion.

The decision of this case by the District and Circuit Courts is supported by the testimony of numerous witnesses, who had both the capacity and experience to judge, and had examined the *subject* of the controversy. We see no reason to dispute the correctness of their judgment, or to enter into a particular examination of the conflicting testimony in order to vindicate the correctness of our own. We have frequently said that appellants should not expect this court to reverse a decree of the Circuit Court merely upon a doubt created by conflicting testimony.

The judgment of the Circuit Court is affirmed with costs.

JOHN YONTZ, ADMINISTRATOR OF JOSE DOLORES PACHECO, DECEASED, APPELLANT, *v.* THE UNITED STATES.

Where a grant of land in California had this clause, viz: "The tract of which grant is made is of the extent mentioned in the plan, which goes with the expediente, with its respective boundaries; the officer giving the possession

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shall cause it to be measured, according to the ordinance, to mark boundaries; the surplus to remain for the nation, for its uses," according to the face of the grant, it must be confined to two leagues mentioned in the petition. Otherwise, there could be no surplus.

As there was no legal title, but only an equity, this court holds, according to previous decisions, that the petition and concession must be taken together, in which case the result would be the same, viz: that the claimant must be confined to two leagues.

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

The case is stated in the opinion of the court.

It was argued by *Mr. Goold* for the appellant, upon which side there was also a brief by *Mr. Volney E. Howard*, and by *Mr. Stanton* for the United States.

Mr. Justice CATRON delivered the opinion of the court.

Yontz prosecutes this appeal as administrator of Jose Dolores Pacheco, who died pending the suit below.

There is no controversy in relation to the validity of the grant, but only as respects the quantity confirmed by the District Court, being two square leagues. The claimant insists that he is entitled to a survey and patent from the United States corresponding to the out-boundaries embraced in his *diseno*, and the description given of the rancho in the Governor's grant, which recites: "Whereas citizen Jose Dolores Pacheco has sought to obtain for his personal benefit and that of his family the place lying between the 'creek or ravine' of La Tasajera and the place of 'San Ramon,' bounded by the house of the same place of San Ramon down to the 'dead trees,' (palos secos,) and from this point, taking by the 'Tular' to the 'high hill' (Loma Alta) along the creek or ravine of said Tasajera, and along the range of hills (sierra) and the land of citizen Bartolo Pacheco." After which the conditional clause follows, to wit: "The tract of which grant is made is of the extent mentioned in the plan, which goes with the expediente, with its respective boundaries. The officer giving the possession shall cause it to be measured, according to the

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ordinance to mark boundaries; the surplus to remain for the nation, for its uses."

Pacheco petitioned Governor Figueroa for two leagues of land, in June, 1834, lying within the boundaries set forth in the foregoing description and plan. He then failed to have his petition favorably considered by the Governor, because opposition was made by the mission of San Jose.

On the 30th of November, 1837, Pacheco again petitioned Governor Alvarado to grant him the same land; he says: "At this time I confine the application for two leagues, more or less, according to the boundaries of said mission of San Jose to the south; the plan of which I enclose herein again." The Governor referred this second petition to the council of San Jose, and they reported the land to be vacant, and that it could be adjudicated for colonization. On this report the Governor made the grant. It was confirmed by the Departmental Assembly, May 12th, 1840, with directions, "that the expediente be returned to his excellency the Governor, for the proper ends." No final document in consummation of a perfect title issued to the grantee; nor was judicial possession given of the land, and in this unsurveyed condition the claim stood when the United States acquired the country.

If we are bound to take the last paper issued by the Governor as concluding all reference to preceding steps in the progress of obtaining a complete title, then we find the grant inconsistent on its face. The argument urged on our consideration is, that there are specific boundaries given as to the extent of the land granted, so that it is clearly a grant of all the land within these prescribed limits. In contravention of this assumption, the clause above recited directs that the officer giving judicial possession shall cause the land to be measured, according to the ordinance, and to mark boundaries; "*the surplus to remain for the nation, for its uses.*" If it be true that the boundaries are conclusively defined in the grant, then no surplus could be thrown off by the survey. But if two leagues are to be surveyed within the larger limits, then the clause is consistent.

In the next place, it is insisted that the clause is a condition,

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usual in all these grants, and amounts to little more than a mere formality. Ascribing to the clause usually declaring quantity only this degree of credence, then we are thrown on the recitals of the grant, and bound to look behind it, to the incipient steps, and to other title papers referred to, and from all these to ascertain how much land was intended to be conceded.

The claimants come before us, presenting an equity; their title not being completed, because the land has never been surveyed, and severed from the public domain. Hanson's case, 16 Peters, 200; Rosa Pacheco's case, now decided.

We are called on to adjudge what the equities of claimants are; and to do this, it is proper "to look at all the several parts and ceremonies necessary to complete the title, and to take them together as one act." 10 How., 372.

This court has uniformly held, in cases coming up by appeal from the District Courts of Missouri and Florida, which adjudicated Spanish claims under the act of 1824, that the petition to the Governor for land and his concession must be taken as one act, and the decree usually proceeded on the petition, which described the land as respected locality and quantity. This was necessarily so, as the concession was often a mere grant of the request, without other description than the petition contained.

And this is manifestly one of the rules of decision governing the tribunals in California, prescribed by the 11th section of the act of March 3d, 1851. In this case the grant refers to the previous steps, (including the petition, asking for only two leagues,) and carries them along with the grant.

From all the acts, taken together, it is manifest that the decree of the District Court, restricting the quantity to two square leagues, must be affirmed, if so much land is found within the out-boundaries of the tract of country set forth in the grant and *diseno*; otherwise, the less quantity.

United States v. Heirs of Berreyesa.

THE UNITED STATES, APPELLANTS, v. THE WIDOW AND HEIRS OF JOSE E. BERREYESA, DECEASED.

A decree of the District Court affirmed, in a case where the genuineness of the grant of land in California and the fulfilment of its conditions are established.

This court declines to give instructions to the court below relative to the location and survey of this grant. No question was decided in the court below upon this subject, and it is to be presumed it will act according to the established rules on the subject.

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

The case is stated in the opinion of the court.

It was argued by *Mr. Stanton* for the United States, and by *Mr. Goold* for the appellees.

Mr. Justice CAMPBELL delivered the opinion of the court. The appellees were confirmed in their claim to a parcel of land in the county of Santa Clara, known by the name of San Vicente, and being a part of the Canada de los Capitancillos, containing one square league, and adjoining the lands of Justo Larios.

They are the widow and heirs at law of Jose E. Berreyesa, who became possessed of the land in 1834, under the authority of the Governor, Figueroa, and occupied it, with his family, until 1842. In that year he presented a petition to the Governor, representing these facts, and complained that his neighbor Larios had disturbed his enjoyment and repose, and desired that there might be granted to him two sitios, from the house of Larios to the Matadera, with all the hills that belong to the Canada. He says that he served the country in the army for twenty-four years and upwards, without receiving pay, and that he had with him eleven children.

A reference was made of the petition to the justice of the pueblo, who called Larios before him, and an agreement was then made between the parties in reference to the division line.

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This report was returned to the Governor, who directed that a title should issue to the applicant, and that the expediente be remitted to the Departmental junta, for its approval. The decree and titulo describe a parcel of land included within natural boundaries; but in the conditions, it is confined to a single league in quantity.

Subsequently to this, Berreyesa complained to the Governor of the limitation, insisting that his petition had been for two leagues, and that he had returned the grant, to have it corrected. The Governor directed the proper inquiries, and the result was to concede the prayer of the petitioner; but, for some reason, the grant did not issue.

The board of commissioners confirmed the claim of the petitioners for one square league; and this decree was confirmed by the District Court on appeal, and it ordered the land to be located, according to the description and within the boundaries set out in the original grant, and delineated in the map contained in the expediente, to both of which reference is made for a more particular description. The genuineness of this grant and the fulfilment of the conditions are fully established, and the validity of the claim is unquestionable.

The appellees have requested the court to give instructions relative to the location and survey of this grant, similar to those found in the case of the United States *v.* Fossatt, 20 Howard. But no question was decided in the court below upon the location of the lines of the tract, and it would be irregular for this court to assume that the action of that court will not conform to the established rules on the subject. The decree of the District Court has not been called in question by the appellees; and should any difficulty arise in the location of the grant, it will be competent for the appellees to invoke the aid of that court.

Decree affirmed.

RUEL C. GRIDLEY, CLARISSA H. BEEBE, SARAH P. SNYDER,
AND CHARLES SNYDER, AND OTHERS, APPELLANTS, *v.* DAVID
WYNANT.

Where a married woman became a trustee of land for the benefit of her son in law, and executed a deed (without joining her husband) to a bona fide pur-

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chaser, who had paid the purchase money to the cestui que use, it was not necessary, under the circumstances of the case, for her husband to join in the deed.

These circumstances were, that by executing the deed she did not defeat an estate to which her husband was entitled, nor did he claim adversely to the deed, but it was within the scope of her authority as trustee, and therefore will be sustained by a court of equity against her heirs.

Her children, who were her heirs at law, having brought a suit at law to recover the land from the bona fide purchaser, a court of equity will interpose to restrain their proceedings.

The alleged illegality of the consideration of the deed of trust—viz: that it was intended to protect the property of her son in law, who was insolvent—was not sufficient to destroy the independent equity of the bona fide purchaser, nor was it necessary to make the son in law a party when the bona fide purchaser sought relief in a court of equity against the title of the heirs.

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

The case is stated in the opinion of the court.

It was submitted on printed arguments by *Mr. Grant* for the appellants, and by *Mr. Smith* for the appellee.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee filed this bill to enjoin the appellants from prosecuting a suit to recover a parcel of land in his possession, and to quiet his title against their claim as heirs at law of Sarah A. Blakely, deceased. He charges in his bill that he purchased the land from William B. Beebe, and paid to him the purchase money, and that Mrs. Blakely made him a deed at the request of Beebe, who was her son in law, and for whose use and benefit it had been conveyed to her with her consent. At the time of her conveyance she was a married woman, and the bill avers that by error, ignorance, or oversight, her husband failed to join in her deed.

The defendants admit that they claim as heirs at law of Mrs. Blakely, and insist that she was under a disability to convey land without the consent of her husband.

They deny that she held the land in trust for Beebe, but insist that even if that were the case the trust was illegal, for

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that Beebe was an insolvent debtor, and the sole design of such a conveyance was to defraud and delay his creditors.

They object that Beebe is a necessary party in the cause. The District Court granted relief according to the prayer of the bill. The testimony sufficiently establishes the case made by the bill. It appears that Beebe purchased the land from the tenants in fee simple, and that it was conveyed to Mrs. Blakely by his directions, and that this was done because he was in debt, and did not desire the exposure of his property.

That he sold the land to the appellee, and that Mrs. Blakely executed to him titles without joining her husband in the conveyance. The question arises, whether the heirs at law of Mrs. Blakely can contest the validity of her conveyance. There is no incapacity in a married woman to become a trustee, and to exercise the legal judgment and discretion belonging to that character. A trustee in equity is regarded in the light of an instrument or agent for the *cestui que trust*, and the authority confided to him is in the nature of a power. It has long been settled that a married woman may execute a power without the co-operation of her husband. *Sug. on Pow.*, 181. Some doubt has been expressed whether, at law, a married woman could convey an estate vested in her in trust, and inconveniences have been suggested as arising from her asserted incapacity to make assurances which a court of law would recognise as valid. And it has been determined that she could not defeat a right of her husband, or impose a legal responsibility upon him, by her unassisted act. *Lewen on Trusts and Trustees*, pp. 89, 90; *Sug. on Pow.*, 192, 196; *2 Spence Eq.*, 31. But within the scope of her authority a court of equity will sustain her acts, and require those whose co-operation is necessary to confirm them. In the present instance, her deed was within the scope of her authority and duty. She did not defeat an estate to which her husband was equitably entitled, nor does he claim adversely to it. The complainants are her own children, her heirs at law, who are seeking to divest of his estate a bona fide purchaser, and to acquire one for themselves—one to which their mother had no claim in equity or good conscience. Nor can the appellants avail themselves of the ille-

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gality of the consideration on which their mother became the trustee for Beebe. The trust has not only been constituted, but carried into execution. The appellee is not a mere volunteer seeking to enforce its terms, nor does his equity depend upon the validity of the trust for its support. He has an independent equity, arising from his purchase from persons professing to hold a legal relation to each other and to the subject of the contract, and to enforce his right there is no need for any inquiry into the consideration or motives that operated upon these parties to assume their relation of trustee and *cestui que* trust. In such a case, equity does not refuse to lend its assistance. *McBlair v. Gibbes*, 17 How., 232.

The objection that Beebe is a necessary party to the bill cannot be supported. Beebe has not claimed adversely to the title of the appellee. The legal title has never been invested in him, nor do the appellants recognise any privity or connection with him. They claim the property discharged of any equity either in his favor or that of the appellee.

Upon the whole case, the opinion of the court is in favor of the appellee, and the decree of the District Court is affirmed.

RUEL GRIDLEY, CLARISSA H. BEEBE, SARAH P. SNYDER, AND CHARLES SNYDER, AND OTHERS, APPELLANTS, *v.* EDWIN S. WESTBROOK and JAMES P. GUAGER.

Where proceedings are instituted in the State court of Iowa under certain articles of their code, and then removed into the United States court, although these proceedings do not conform to the mode prescribed for chancery proceedings in the courts of the United States, yet, if the pleadings and proofs show the matter in dispute between the parties, this court will adjudicate the questions which they present.

The principle adopted in the preceding case respecting the execution of a deed by a married woman as trustee, is equally applicable to a deed executed under a power of attorney granted by her.

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

It arose out of the same circumstances nearly as the pre-

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ceding case, as will be evident from the statement in the opinion of the court.

It was argued by *Mr. Grant* for the appellants, and by *Mr. Wilson* for the appellees.

Mr. Justice CAMPBELL delivered the opinion of the court.

This suit was commenced in the District Court of Jackson county, Iowa, by the appellees, under articles 2025 and 2026 of the code of Iowa, to quiet their title and possession to certain lands in that county against the impending and adverse claim of the appellants, the heirs at law of Sarah A. Blakely, deceased.

The appellants appeared, and answered the petition, and procured the removal of the cause to the District Court of the United States for Iowa, under the 12th section of the judiciary act of September, 1789. After the removal of the suit to the District Court, the appellants commenced a cross-suit, asserting therein their own title to the lands in controversy, and praying for a decree of delivery of the possession to them, and an account of the mesne profits. The original and cross-suit were "consolidated" on the motion of the appellants, and were heard as one suit.

The proceedings in these causes seem to have been framed upon the course of practice prevailing under the code of Iowa; and we have found some difficulty in entertaining the suit, as not conforming to the mode of proceeding prescribed for courts of the United States in chancery proceedings; but as we are enabled to ascertain, from the pleadings and proofs, the matter in dispute between the parties, we shall proceed to adjudicate the questions they present.

The facts disclosed by the proofs show that William. B. Beebe, an insolvent debtor, in order to carry on business without interruption, made purchases and sales of property on his own account, in Iowa, but under the shelter of the name of Sarah A. Blakely, the mother of his wife, a resident of Missouri. To enable him to do so with facility, he procured from her powers of attorney, which conferred authority for that purpose.

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The land described in the petition was purchased by Beebe with his own money, and the titles were made for his use to Mrs. Blakely. Subsequently he sold them to one of the parties to the cross-suit (Mrs. Wells) for a valuable consideration, and, as attorney in fact for Mrs. Blakely, executed to her a deed; and the appellees, Westbrook and Guager, claim as purchasers from this person.

At the time of the execution of the deed of Mrs. Blakely, and of her death, she was a feme covert. The appellants insist, that the conveyance to Mrs. Wells in the name of Mrs. Blakely is void, and that they are entitled to hold the lands as heirs at law.

We discover no material variation between the principles applicable in this cause and that of the same appellants and Wynant, which we have just decided. Upon the authority of that case, we determine that the decree of the District Court must be affirmed.

THE STATE OF ALABAMA, COMPLAINANT, *v.* THE STATE OF GEORGIA.

The boundary line between the States of Georgia and Alabama depends upon the construction of the following words of the contract of cession between the United States and Georgia, describing the boundary of the latter, viz: "West of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary between the United States and Spain, running up the said river and along the western bank thereof."

It is the opinion of this court that the language implies that there is ownership of soil and jurisdiction in Georgia, in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme drought of the summer or autumn.

The western line of the cession on the Chattahoochee river must be traced on the water line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the above-recited paragraph.

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By the contract of cession, the navigation of the river is free to both parties. See the case of *Howard v. Ingersoll*, 13 Howard, 381, and the correction of its syllabus in the errata in 14 Howard in this, that "the boundary line runs along the top of the high western bank," instead of "the boundary line runs up the river, on and along its western bank, and the jurisdiction of Georgia in the soil extends over to the line which is washed by the water wherever it covers the bed of the river within its banks."

THIS was a case of original jurisdiction in the Supreme Court, under that article in the Constitution which confers jurisdiction over controversies between two or more States.

The State of Alabama filed her bill in this court at December term, 1855. After stating the compact of 1802 between the United States and Georgia, the bill stated the claim of Alabama as follows:

The complainant further states, that this line can only be ascertained with certainty and accuracy by a just and proper construction of the agreement and cession aforesaid, made and entered into as aforesaid by and between the State of Georgia and the said United States, and that, by a just and proper construction thereof, the said line commences at a point where the 31st degree of north latitude crosses the Chattahoochee river, and on the western bank of said river, on that part or portion of the said bank that reaches to or touches the water at ordinary or common low water, and runs up said river and along the western bank thereof, and on said portion of said bank that touches the water at its ordinary or common height, until said line reaches the point on said river from whence it leaves the same in a straight direction to Nickajack—in other words, that said line, so far as it runs on the bank of the Chattahoochee river, runs upon the western bank at the usual or common low-water mark. And as evidence that the line as above described is the true and correct line according to the true intent and meaning of said agreement and cession, your complainant states, that the banks of said river over and upon which said line runs, though at some few places high and steep, over which the water never passes, yet said banks are mostly low and flat, so that when the river is high, or when there is a usual or common freshet, the water of said

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river spreads over the land at some places as much as a half mile, at some places less, and other places more than a half mile west from the common low-water mark. And your complainant cannot and never has believed that it was the intention, either of the State of Georgia or of the United States, that said line was to be placed on what may be termed the high-water mark of said river, at the time they entered into the agreement and cession aforesaid, not only on account of the uncertainty in ascertaining and locating the same, but also for the further reason, that at some places on said river the jurisdiction of the State of Georgia would pass far west of the river at its ordinary height, whilst at other places, where the banks or bluffs are high and steep, it would pass but little or none at all beyond the line marked by the ordinary or common stage of the water.

Influenced by these reasons, as well as by the consideration that the line of ordinary low-water mark is readily and easily ascertained, the State of Alabama has ever claimed that said line runs upon the bank where the water touches the same when the river is at its ordinary or common height—that is, that said line runs on the western bank of said river at usual or common low-water mark, and not on the bank at high-water mark. And your complainant has ever claimed and exercised jurisdiction all along and upon said bank to low-water mark, as above described, until the line reaches that point on the river from whence it starts directly to Nickajak.

The State of Alabama then called upon the State of Georgia to answer the following questions:

1. Whether or not the said defendant does not claim all the lands on the western bank of the Chattahoochee river, north of the 31st degree of north latitude, up to the point or place where the line that separates the State of Alabama from the State of Georgia leaves the bank of said river in a straight direction for Nickajack, and whether she does not claim and assert a right to exercise jurisdiction and authority over all of said land on the western side of the Chattahoochee river up to high-water mark?

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2. Whether the defendant does not claim that the jurisdiction and soil all along the bank of said river, up to high-water mark, belong exclusively to her, the said State of Georgia, and that the line separating the State of Alabama from the State of Georgia is located on the western bank of said river, at high-water mark?

3. Has not the complainant described correctly the character of the bank of said river, and particularly that portion of the bank commencing at the 31st degree of north latitude, and extending sixty or seventy miles above?

4. Does not the water, at many places on the western side of said river, and south of the point where said line leaves the same for Nickajack, pass far beyond and west of the ordinary low-water mark?

5. Are not the banks of said river, at many places north of the 31st degree of north latitude, low and flat? and does not the water of said river, during the usual freshets, pass over the adjoining land, at some places as much as a half mile, at some places less, and at other places more than a half mile west of the ordinary low-water mark of said river?

6. Has not the complainant correctly set forth the first section of the articles of agreement and cession between the United States and the State of Georgia (and described in this bill) so far as is necessary to ascertain the boundary line between the States of Alabama and Georgia, and has not the complainant correctly described the titles by which the United States acquired the Alabama territory? And, if not, in what particular is the description defective, and what part of the articles of agreement and cession not set forth is material in ascertaining said line?

At December term, 1858, the State of Georgia answered, after reserving to herself all manner of advantage to be derived from demurrer or plea to the bill. The facts of the case, as stated by Alabama, were admitted, as was the conclusion that the eastern boundary of Alabama was the western boundary of Georgia, wherever that might be. This Georgia not only admitted for Alabama, but affirmed for herself.

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The claim of Georgia and answer to the interrogatories propounded were as follows:

So far as this line runs along the western bank of the Chattahoochee river, Georgia denies that it runs along the usual or common low-water mark, but, on the contrary, she contends that it runs along the western bank at high-water mark, using high-water mark in the sense of the highest line of the river's bed; or, in other words, the highest line of that bed, where the passage of water is sufficiently frequent to be marked by a difference in soil and vegetable growth.

In answer to the specific questions which are propounded by the bill, the State of Georgia says, that so far as the Chattahoochee river is the dividing line between her and the State of Alabama, she does claim all the lands, and a right to exercise jurisdiction over all the lands on the western bank of said river up to high-water mark, using high-water mark in the sense just above explained. She says, in answer to the second question, that she does claim that the jurisdiction and soil all along the western bank of said river, up to high-water mark, belong exclusively to her, and that the line separating the State of Alabama from the State of Georgia is located on the western bank of said river, at high-water mark, using the term high-water mark in the sense before explained. To the third question, the State of Georgia says, that while she regards the description of the banks of the river given in the bill as being too highly drawn, yet she admits that it is more applicable to the southern part of the bank than to that part of it sixty or seventy miles above the 31st degree of north latitude; and she admits that in some places the banks are flat, but she says that in other places, especially on the upper and longer portion of the river, the banks are generally steep and well defined—so much so as to be familiarly known as “the bluffs of the Chattahoochee.” To the fourth and fifth questions, Georgia says, that the banks of said river, at a number of places along the dividing line between the two States, are low and flat; and it is true that in freshets the water passes west of the low-water mark, as far, perhaps, as half a mile in some places, and, in a few places, perhaps even farther. To

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the sixth and last specific question, Georgia answers, that the first section of the articles of cession from Georgia to the United States is set forth in the bill with substantial correctness, so far as this controversy can be affected by it, and that the exact words of that section are as before stated in this answer. Also, she admits that section to be the only one material to this issue. She admits that the title of the United States to the territory of Alabama was acquired from Georgia by the means described in the bill, but she does not admit the intimation that the United States had acquired a previous title from the State of South Carolina, nor can she perceive the relevancy of such an intimation to the present issue.

The evidence in the case was all documentary. There was filed for the complainant an argument by *Mr. Dargan* and one by *Mr. Phillips*, who also argued the case orally. It was also argued orally by *Mr. McDonald* and *Mr. Gibson*. These arguments partook rather of the character of a diplomatic negotiation than a forensic dispute, and the reporter declines to attempt to abbreviate them in a law book.

Mr. Justice WAYNE delivered the opinion of the court.

This case involves a question of boundary between the States of Alabama and Georgia.

Alabama claims that its boundary commences on the west side of the Chattahoochee river at a point where it enters the State of Florida; from thence up the river along the low-water mark, on the western side thereof, to the point on Miller's Bend, next above the place where Uchee creek empties into such river; thence in a line to Nickajack, on Tennessee river.

Georgia denies that the line intended by the cession of her western territory to the United States runs along the usual low-water mark of the perennial stream of the Chattahoochee river, but that the State of Georgia's boundary line is a line up the river, on and along its western bank, and that the ownership and jurisdiction of Georgia in the soil of the river extends over to the water-line of the fast western bank, which, with the eastern bank of the river, make the bed of the river.

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The difference between the two States must be decided by the construction which this court shall give to the following words of the contract of cession: "*West of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary between the United States and Spain, running up the said river and along the western bank thereof.*"

In making such construction, it is necessary to keep in mind that there was by the contract of cession a mutual relinquishment of claims by the contracting parties, the United States ceding to Georgia all its right, title, &c., to the territory lying east of that line, and Georgia ceding to the United States all its right and title to the territory west of it.

We believe that the boundary can be satisfactorily determined and run in this suit, from the pleadings of the parties, notwithstanding their difference as to the locality and direction of it on the Chattahoochee river.

Georgia is interrogated in certain particulars in the bill, which the complainant thinks will produce answers illustrative of the right of Alabama to the boundary which is claimed. Georgia answers them separately, having previously given a correct and literal copy of the contract. It is as follows: "The State of Georgia cedes to the United States all the right, title, and claim, which the said State has to the jurisdiction and soil of the lands situated within the boundaries of the United States south of the State of Tennessee, and west of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary line between the United States and Spain; running thence up the said river Chattahoochee, and along the western bank thereof, to the great bend thereof, next above the place where a certain creek or river called Uchee (being the first considerable stream on the western side above the Cussetas and Coweta towns) empties into the said Chattahoochee river; thence in a direct line to Nickajack, on the Tennessee river; thence crossing the said last-mentioned river; and thence running up the said Tennessee river, and along the western bank thereof, to the southern boundary line of the State of Tennessee."

In answer to the first question, Georgia admits what is

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alleged in the bill in relation to the definition of the boundaries of the Territory of Alabama by an act of Congress, passed in eighteen hundred and seventeen, and the subsequent grant of admission of the State of Alabama into the Union with the same boundaries in the year eighteen hundred and nineteen; and the conclusion from it is, simply, that the eastern boundary line of Alabama is the western boundary line of Georgia, but that, so far as that line runs along the western bank of the Chattahoochee river, Georgia denies that it runs along the usual or low-water mark; but, on the contrary, Georgia contends that it runs along the western bank at high-water mark, using high-water mark in the sense of the highest water-line of the river's bed; or, in other words, the highest water-line of that bed, where the passage of water is sufficiently frequent to be marked by a difference in soil and vegetable growth.

Georgia also answers affirmatively the other interrogatory in the bill with the same qualification, that what she claims is a right to exercise jurisdiction over all the lands up to the water-line of the western bank of the river's bed.

Georgia also says, that while she regards the description of the banks of the river given in the bill as highly drawn, she admits it to be more applicable to the southern part of the bank than to that part of it sixty or seventy miles above the thirty-first degree of north latitude. It is admitted that in some places the banks are flat, but that in other places, especially in the upper portion of the river, the banks are generally steep and well defined, so much so as to be familiarly known as the "Bluffs of the Chattahoochee;" and that the banks of the river in a number of places along the dividing line between the two States are low and flat, and that in freshets the water spreads as far as half a mile beyond the line to the west, and in a few places further than the western line of the river's bed, over low lands, which Georgia does not claim to be under its jurisdiction.

These declarations and admissions upon the part of Georgia simplify the controversy, and narrow it to the claim of the respective parties as heretofore set forth.

The contract of cession must be interpreted by the words

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of it, according to their received meaning and use in the language in which it is written, as that can be collected from judicial opinions concerning the rights of private persons upon rivers, and the writings of publicists in reference to the settlement of controversies between nations and States as to their ownership and jurisdiction on the soil of rivers within their banks and beds. Such authorities are to be found in cases in our own country, and in those of every nation in Europe.

Woolrych defines a river to be a body of flowing water of no specific dimensions—larger than a brook or rivulet, less than a sea—a *running stream, pent on each side by walls or banks*.

Grotius, ch. 2, 18, says a river that separates two jurisdictions is not to be considered barely as water, but as water confined in such and such banks, and running in such and such channel. Hence, there is water having a bank and a bed, over which the water flows, called its channel, meaning, by the word channel, the place where the river flows, including the whole breadth of the river.

Bouvier says banks of rivers contain the river in its natural channel, where there is the greatest flow of water.

Vattel says that the bed belongs to the owner of the river. It is the running water of a river that makes its bed; for it is that, and that only, which leaves its indelible mark to be readily traced by the eye; and wherever that mark is left, there is the river's bed. It may not be there to-day, but it was there yesterday; and when the occasion comes, it must and will—unobstructed—again fill its own natural bed. Again, he says, the owner of a river is entitled to its whole bed, for the bed is a part of the river.

Mr. Justice Story, in Thomas and Hatch, 3 Sumner, 178, defines shores or flats to be the space between the margin of the water at a low stage, and the banks to be what contains it in its greatest flow; Lord Hale defines the term shore to be synonymous with flat, and substitutes the latter for that expression. Mr. Justice Parker does the same, in 6 Mass. Reports, 436, 439.

Chief Justice Marshall says the shore of a river borders on

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the water's edge; and the rule of law, as declared by the court in 5 Wheat., 379, is, that when a great river is a boundary between two nations or States, if the original property is not in either, and there be no convention about it, each holds to the middle of the stream.

Virginia, in her deed of cession to the United States of the territory northwest of the Ohio, fixed the boundary of that State at low-water mark on the north side of the Ohio; and it remains the limit of that State and Kentucky, as well as of the States adjacent, formed out of that territory. 3 Dana Kentucky Reports, 278, 279; 5 Wheaton, 378; Code of Virginia, 1849, pp. 49, 34; 1 St. Ohio, 62. By compact between Virginia and Kentucky, the navigation is free. A like compact exists between New York and New Jersey, as to the Hudson river and waters of the bay of New York and adjacent waters.

Webster's definition of a bank is a steep declivity rising from a river or lake, considered so when descending, and called acclivity when ascending.

Doctor Johnson defines the word bank to be the earth arising on each side of a water. We say properly the shore of the sea and the bank of a river, brook, or small water. In the writings of our English classics, the two words are more frequently used in those senses; for instance, as when boats and vessels are approaching the shore to communicate with those who are upon the banks.

Bailey, in his edition of the Universal Latin Lexicon of Facciolatus and Forcellinus, says that *ripa*, the bank of a river, is *extremitas terræ quod aqua alluitur et proprie dicitur de flumine*; *ut litus de mare, nam hoc depresso est declive atque humile, ripa altior fere est præruptior*; and again, *ripa recte definitur id quod flumen continet, naturalem vigorem cursus sui tenens*.

Notwithstanding that there are differences of expression in the preceding citations, they all concur as to what a river is; what its banks are; that they are distinct from the shore or flat, and as to what constitutes its channel.

With these authorities and the pleadings of this suit in view, all of us reject the low-water mark claimed by Alabama

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as the line that was intended by the contract of cession between the United States and Georgia. And all of us concur in this conclusion, that by the contract of cession, Georgia ceded to the United States all of her lands west of a line beginning on the western bank of the Chattahoochee river where the same crosses the boundary line between the United States and Spain, running up the said Chattahoochee river and along the western bank thereof.

We also agree and decide that this language implies that there is ownership of soil and jurisdiction in Georgia in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.

The western line of the cession on the Chattahoochee river must be traced on the water-line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the preceding paragraph of this opinion.

By the contract of cession, the navigation of the river is free to both parties.

JUAN M. LUCO AND JOSE LEANDRO LUCO, APPELLANTS, *v.* THE
UNITED STATES.

A grant of land in California, purporting to have been made to one Jose de la Rosa, dated 4th of December, 1845, and purporting to be signed by Pio Pico as acting Governor, and countersigned by Jose Maria Covarrubias, secretary, adjudged to be false and forged.

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

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The case is stated in the opinion of the court.

It was argued by *Mr. Benham* and *Mr. Cushing* for the appellants, and by *Mr. Stanton* and *Mr. Della Torre* for the United States.

This case was remarkable for this one thing, amongst others: that in the trial below, Mr. Vance, a photographer, was examined, who attached to his deposition photographs of original documents, of impressions of genuine seals, and of the signatures of Pio Pico. These were exhibited during the argument in this court.

The counsel for the appellants contended that the evidence of Mr. Hawes and Raphael Guirado ought to be thrown out of the case, and then proceeded to argue the other points as follows:

1. To show why the claim was not presented in time, referring to the proceedings of Congress.
2. To show why the archives did not contain a notice of the claim, the reason being that the book of *Toma de Razon* was lost.
3. That the reason why the journal of the Departmental Assembly did not contain a record of the approval by that body was, that the journal produced was only the record of ordinary sessions, whereas the evidence shows this grant to have been approved at an extraordinary session.
4. That the testimony clearly establishes the possession of Rosa.
5. That the signatures were not forged. Upon this point the counsel remarked as follows:

The first testimony offered to prove a forgery is that of certain persons introduced as experts.

This testimony is inadmissible. At the time it was offered, Pio Pico had not been called to disprove his signature. He should have been called by the Government in the very beginning.

When the object is to disprove handwriting, the supposed maker is the best evidence, and must be called.

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1 Phil. Ev., pp. 223, 224, 225.

Ibid., p. 43, and note, 918.

2 Phil. Ev., pp. 553, and note, 423.

3 Phil. Ev., pp. 1332 *et infra*, 1337.

Gurney *v.* Langlands, 5 Barn. and Ald., p. 330.

To say the least, it argues very ill for the conviction on the minds of the Government agents of the forgery, that they did not call Pio Pico.

[Then followed an examination of the testimony upon this point.]

6. That the seal was not false.

It is said that the seal on our grant differs from that on our certificate of approval, which latter is admitted, and proved by the Government's own witness, to be genuine; and that, inasmuch as Covarrubias says that he does not remember more than one seal, the impression on our grant is false.

We do not admit that the difference claimed to exist between the impression on the grant and that on the approval proves, by any means, that they were made by different stamps. These stamps were very rude; they were prepared for printing by greasing them, and holding them in the blaze of a candle until the soot and grease made a coloring matter; they were then applied to the paper, not by a machine which would give a just impression, but by the hand.

The differences visible in the two impressions consist only of minute differences between the spaces of parts of the objects on the impressions, or of differences in the relative angles of two or three of the letters of the inscription. All these differences are mechanical only, occasioned either by the want of uniform density and proportion in the lampblack and grease with which the impression is made, or in the want of precision or uniformity in the action of the hand in applying the stamp. There seems a greater difference as found occurring accidentally in all such impressions, and they may be produced experimentally at will with any stamp, either employing wax, or still more employing lampblack and grease.

It will be found, however, that Covarrubias does not say there was but one seal. It is true, he uses the words imputed

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to him, but he is speaking of the legend of the seal, not of the stamp or die. At the time he was examined, nobody dreamed there was any difference between the impressions. An examination of his deposition shows he was speaking of the legend, and nothing else.

As to any deduction to be drawn from our not producing an impression from the archives similar to the one impugned, we protest against it. If the Government desire to predicate an argument upon the fact, if fact it is, that the archives present no impression like the one on our grant, it should have been proved. We do not admit that there is any ground of suspicion in this circumstance. Until it is proved that there was but one die, there is no reason to suspect the genuineness of the seal at all. It has the same legend and device the others have.

This seal is vindicated by the two other seals; they are admitted to be genuine, and the stamp that made them is proved to have been delivered into the hands of Fremont as early as the change of flags; the presumption is, that it has remained in the custody of the Government ever since.

The seal was not necessary upon these papers; it was not required by law. Covarrubias would not have put on a false seal when none was necessary. He is the man who made the grant. He says so, and it is in his handwriting. He knew the law. He was the very man to know exactly what was required. He had been Secretary of State.

It is affirmatively proved to be genuine. Larkin and Arenas both say it is genuine.

“After proving the seal, it will be presumed to have been properly affixed, and it will lie on the opposite party to show that it was affixed by a stranger.”

Lord Brouner and Sir Robt. Atkyns, Skinner’s Rep., p. 2, cited in 3 Phil., 1062, n. 717.

If it be supposed we found two blank papers with the genuine seals on them, we ask, why did we not write the grant and approval on them, and the petition and marginal decree on an unsealed one? This theory is forbidden by the fact that this is not the stamp seal, the habilitating seal, but it is

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the Governor's seal put on acts in his office, to attest their genuineness as his, not to show the paper was lawful. If it be supposed that we had access to the genuine stamp, why not use it on all the papers?

Or if we forged the stamp, why not make a *fac simile*? We have as fine artists in San Francisco as there are in the world, and the seal is a very rude one.

7. That the description of Pico's office, written at the head of the grant, was not incorrect.

8. That the character of the witnesses has not been successfully impeached.

9. That the circumstance of other grants made about the same time not being approved till the next ordinary session of the Departmental Assembly, was owing to De la Rosa having so many influential friends, such as Alvarado, Castro, and Vallejo.

Mr. P. Della Torre, United States attorney for the northern district of California, for the United States.

This is a claim for confirmation, under the treaty of Guadalupe Hidalgo and the acts of Congress thereon, of a tract of land known as Ulpinas. The grant, it is alleged, was made by Pio Pico, the last Mexican Governor of California, to one Jose de la Rosa, on the 4th of December, 1845; and the case is conducted in the name of the Lucos, purchasers from De la Rosa. The grant is one of that class known as "sobrante" grants, being for the land remaining within a certain district, after satisfying the calls of senior grants. Its quantity is estimated at from fifty to sixty square leagues. The claim was not presented to the board of land commissioners within the time limited by the act of 1851, but in 1854 the claimants applied for and obtained a special act of Congress enabling them to submit it for adjudication. Claimants produce a grant in the usual form, purporting to be signed by Governor Pio Pico, countersigned by Jose Maria Covarrubias, and attested by the seal of the California Department; also, from their own possession, the original petition of Jose de la Rosa, with a marginal decree of the Governor, and a certificate that the

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Departmental Assembly had approved the grant. Upon these documents, sustained by a great mass of parol testimony, they ask a confirmation. The United States oppose the claim.

It is one of the most important cases of its class which has yet claimed the attention of this court, both from the magnitude of the claim, and from the line of defence successfully adopted in the court below, and here renewed. No frivolous issue is raised; no technical rule of law is invoked, to defeat substantial rights; no attempt is made to force rules adapted to other circumstances into strange meanings, in order to wrest private property from the citizens of a subjugated province. Nothing of the sort. This grant and the papers connected with it are denounced as false and simulated. Forgery is the charge, and, by consequence, perjury; for how can the two be disconnected?

And the cause will be fully argued, without any surprise to the claimants. The charges now made are the same as those made in the District Court. The court will observe, that such matters as are specially intended to affect the integrity of the grant, such as the proofs drawn from the silence of the archives, the photographic exhibits to display the forgery of the Governmental seal of the Department of the Californias, and the falsity of the signatures, were all put into the record below, after the strictest form of legal requirement, and the claimants had abundant opportunity to rebut them, if they could. No other record will be appealed to, except such as the appellants have themselves brought, and very properly brought, into the case, for the proof of historical facts, and of such other public matters as by well-settled rules the court of itself would take judicial notice.

The issue before the court, then, is, whether the documents of title now produced, under sanction of a private act of Congress to enable them to be produced, supported by an imposing array of testimony, by a crowd of witnesses, certified and sworn to by officers formerly high in honorable position under the Mexican Government, are or are not the result of criminal contrivance, and the work of the criminal hand. It would be idle to contend that the positions of the United

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States are compatible with the good fame and truth of many of the witnesses for the claim. The court will have to weigh the veracity of witnesses, directly, positively testifying in favor of the claim, against facts and circumstances which sternly and out of all doubt declare its falsity. From the painful nature of the duty already performed in this regard, the counsel is furnished with a standard to estimate how distasteful may be this task; still, the case requires it to be done. But, as the argument of these matters of fact will take a wide range, it is hoped that, as some compensation, it will be found that the discussion will enable the court to lay down certain rules, by which the validity of California land claims may in future be certainly and readily tested.

There is an interest which in this and many other California cases cannot be overlooked—the interest of bona fide settlers. The Government of the United States contests these cases for the benefit ultimately of that class. It acquires territory, not that it may become and remain a vast land owner, but that the acquired territory may be thrown open to its citizens, for their occupation in moderate quantity, in aid of a public policy so well settled that this court on all proper occasions feels bound to carry it out. And the rights of pre-emptors can be worked out only under the guardianship and in the name of the Government, as they are not allowed to appear and defend in person. It cannot be conceded, as contended, that their rights should be altogether ignored, nay, even their claims rebuked. For that class of men, calling themselves settlers, who intrude upon land in despite of law, or in speculation upon title, there can be but one just feeling; the Government can have no care for their imaginary interests. But vastly different is the case with those who, as in the present instance, go upon the land in accordance with an invitation from the Government, in perfect good faith, not only without notice of any adverse claim, but most, if not all of them, after active inquiry and full information that no private claim had ever been made or heard of. The rights of such men must be not only respected, but protected by a just Government. They are the people who have carried our laws, institutions, and all that make up

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an empire, into the wilderness, and subdued it to the purposes of civilization; who, to reach this spot where they werebidden by law, have tempted the dangers of two oceans, or traversed vast spaces of desert, cut off from their old homes by savage mountains and barbarous tribes. They are entitled to regard and protection.

At the first blush of this case, two circumstances are prominent:

First. The extent of this grant, its quantity being so much beyond the colonization laws, and being made to such a man as De la Rosa.

Second. The late date at which it has been made known to the public.

As to the first. The grant is for a tract of land contained within certain boundaries. Its quantity is about sixty leagues, whilst the granting power of the Governor was restricted to eleven leagues, by the rules of Mexican colonization, with which the court is so familiar that they need not be cited. Under any circumstances, would the court respect this usurped power? It seems to be supposed that some of the cases arising under the treaties for the acquisition of Louisiana and Florida furnish precedents by which this grant may be supported. But not so. It is true that in some of those cases the court fixed no limits to the power of the Spanish Governor in making grants. Yet the reason assigned is conclusive. The Spanish Governors represented the royal personage, an unlimited monarch; and any exercise of authority on their part was to be referred to, and fed by, the fulness of the powers of him whom they represented. Their acts were done as by him, and were valid unless abrogated by his will. Dealing with the royal domain, if the Crown of Spain was content with its disposal, who was to complain? Hence this court, with perfect logic, has raised every presumption allowed by law to sustain the acts of the colonial Governors of Spain. But the case is widely different when we come to examine the acts of a Governor of a Mexican Territory or Department. Whatever disturbances there may have been to the idea, Mexico for many years has professed to be a constitutional republic, has so held

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herself out to the world, has been so recognised by our own and all other Governments dealing with her, and must therefore be so regarded by this court in any judicial examination of the system of law prevailing in any portion of her territory prior to our acquisition of it. When the question turns upon the validity of any acts of her officers, they must be submitted to the same tests as those by which the acts of our own officers are tried. As with us, the great leading rule must be, that when an officer does an act purporting to bind his Government, the first step in proof of its validity is to show his authority to bind the Government. Until this be done, the act is held void as to the Government. In an unlimited Government, the power may be presumed from the act; the authority, from its exercise. But in a limited Government, of a written constitution and laws, where no power exists in public agents save what is specially delegated, the existence of the power must first be established *aliunde*, before we can proceed to examine the effect of its exercise.

Now, we are not referred to any regulation, decree, or usage, of Mexico, to any law, written or unwritten, by which the Governor of a Department was authorized to grant more than eleven leagues of land to one individual. On the contrary, we assert, none such can be adduced.

But even disregarding the effect of the want of power in Governor Pico to make this excessive grant, let us examine its probability as a question of fact. Is it at all probable that a Governor, when acting under his oath of office, with all the sanctions that attend such position, would grant sixty leagues of land without shadow of authority, and that, too, by an instrument in which he recites (as is done in this title) the law of 1824 and the regulations of 1828 as conferring the power by virtue of which he acts, whilst they in terms expressly forbid the act? Still further: is it likely he would have usurped this power for the benefit of "Don Pepe," the household jester of General Vallejo, who, living with the profusion and bounty of semi-barbaric pomp, kept such an appendage to his establishment? For this position does the record assign to Jose de la Rosa, the alleged grantee.

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Nor can it benefit the appellants, that their counsel in this court have suggested that it was perhaps intended that the grant should be valid for only eleven leagues. It is an ingenuous after-thought, and may show the skill of counsel, but it comes too late. The original alleged petition of De la Rosa to Governor Pico asks for all the land within certain limits; the "titulo" of Governor Pico grants all the land so asked; the deed of De la Rosa to the Lucos conveys the same; their petition in the court below claims the same; the cause was urged for the whole tract; evidence was introduced to that end; and it is in this court that, for the first time, there is any intimation of a smaller quantity being asked.

This consideration of the antecedent improbability of such a grant raises, to say the least, gravest doubt of its genuineness.

Next, as to its late publication.

The doubt caused by the first consideration is strengthened and raised almost to a certainty by the next strange feature of this case—the length of time and the circumstances under which the fact of a grant was kept concealed. The influx of American settlers had, from the year 1849, given great value to these lands; had placed them in worth, as they were in extent, on an equality with a principality; yet De la Rosa kept the secret of his ownership. He remained a pauper and a dependent, as he had always been; and with titles to an estate of enormous value, he is silent and content with his poverty. Pioneer after pioneer came to his neighborhood, and inquired after the grants and the vacant lands of the vicinage, yet no pretence of ownership is heard of. Finally, the United States officers, after diligent inquiry, fail to discover any claimant, and survey the lands as vacant. It is not until the year 1853, when the land is covered with the abodes of those whose industry has given it its value, that this most extraordinary grant is heard of. It is contrary to all ordinary rules of human conduct, that De la Rosa should have acted as he did, had he all that time been the owner of an estate of such gigantic dimension.

Taking in connection these two great improbabilities, and

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in the absence of even plausible explanation, a court might well hesitate to give its belief to the story told, that such a grant was made under such circumstances.

Yet this view is not sufficient. The United States in this, from which results may be deduced affecting many other cases, intend absolute certainty, so far as that can be predicated of the examination of human testimony. Indeed, it is most desirable that the charges made below may either be entirely dissipated, and those implicated restored to their fame and credit, or that the truth be made so plain that the court will pronounce it proven.

It is proposed, therefore, in the order of this argument, to examine first the parol testimony, especially that adduced to sustain the claim; and after showing its utter unreliability, next to demonstrate, by proof drawn from the archives of California, that the whole fabric of the case is composed of glaring forgeries.

A single remark may be premised. Counsel have demanded of the United States attorney a theory as to the time and circumstances of the forgery, if it be one. But the United States are not bound to present or prove any such theory; it is enough if the existence of the grant, at the time of its alleged date, is shown to be incompatible with a state of facts demonstrated to be true. The claimant in a case like this, when all the actors in the affair are still living—the Governor who made the grant, his secretary who countersigned and recorded it, the officer who recommended and the grantee who received it—has the means of obtaining all the information on the subject, and is bound to clear up all difficulties as they arise. The Government is a stranger to these matters. Its officers resist these claims, either because of their insufficient or conflicting evidence, of counter parol testimony, or, most satisfactory of all, as in this case, from a knowledge of the history of the country, and from a familiarity with the archives which deny the justice of the claim. It would be difficult, if not impossible, without a disclosure made by confederates in the plot, ever to discover the precise time and circumstances of the contrivance and execution of a scheme of forgery. But

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as truth must be consistent in itself, and with all circumstances surrounding it, the establishment of any facts inconsistent with other assertions necessarily destroys all evidence in what is so asserted, no matter how bold or how solemn the statements.

[Counsel then proceeded to examine in detail the parol testimony in favor of the grant, but the argument could not be properly reported without a reprint of the record.]

Can any court, from this confused, perplexed, tangled, and self-destructive mass of assertions, conclude anything in favor of the grant? Does it not all but demonstrate that the claim is a fraud, and the evidence a fabrication? Does it not strongly impress the mind with a belief that the whole matter is a mere contrivance? Is it not entirely lacking in those qualities of clearness, simplicity, and coherence, which a truthful event, simply narrated, always presents?

But the grant is now to be submitted to tests much more satisfactory.

The testimony given by the Mexican archives exposes the whole deformity of the case. After the experience of this single case, the court will readily understand why the counsel for the United States below has been forced to abandon almost all reliance upon the parol testimony which abounds in these cases. No fact to establish the validity of a grant ever lacks a witness; seldom is any circumstance attested by one person, but another is found directly to contradict it. Witness after witness is then produced on either side, to sustain or impeach those preceding them, until the mind rejects all such testimony as bewildering, and seeks elsewhere for means of attaining legal certainty. Fortunately, there is a source whence impartial evidence can be obtained of a satisfactory nature. The old Spanish and Mexican archives now collected enable us, by proper and diligent examination, to speak with unfailing accuracy as to the character of the claims presented for confirmation. The counsel for Government has therefore, in the preparation of his cases below, seen fit to discard in a great measure the system of relying upon parol testimony, and to introduce in lieu thereof the habit of

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consulting the archives, in whose disclosures he has much more confidence. Being equally accessible to both parties in these issues, the court has the further assurance, that an error or oversight committed by one, can always be readily corrected by the other.

But as the integrity and completeness of the archives have been challenged by the other side, and as these points have to be settled conclusively, at some time or other, by this tribunal, it is proper here to examine and vindicate their authority, both as to their original accuracy and their present condition. It can be clearly shown that the striking characteristic of the Spanish race, in its adherence to form and profusion of records, was retained by them in California, and pervades their public registries; and, also, that the present condition of the archives entitles them to respect.

[Counsel entered into a minute account of the manner and the places in which the archives of California had been formerly kept; the forms of authentication of laws, decrees, &c.; the mode of transmission from officer to officer, and of registration by each; the time and manner in which the public documents came into American possession, at and after the occupation of the United States forces in 1846; and especially all matters connected with the expedientes of land grants; the Toma de Razon (or Book of Registry) for the years 1844 and 1845; the journals of the Departmental Assembly; the uses and values of habilitated paper, and the various Government seals, whose forgery has been charged. It is impossible to report the argument in a compressed form.]

Now, to apply this test: Upon an examination of the archives, for the purposes of this case, it is shown:

1. That no expediente for this grant exists among the archives, where it certainly would have been at one time, had the grant been genuine. It is true that one witness, and he the former Secretary of State, is made to say, in an *ex parte* affidavit, "that it was the practice of the office to return the petition with the grant." Yet, in giving his testimony, upon his cross-examination, he corrects the error, and says what is true: that when an appli-

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cation was made for a grant of land, the petition and balance of the expediente were always carefully archived, and never permitted to be withdrawn. Even without this correction, the court itself knows that this was the only course permitted by Mexican law and usage. A close search has also shown that every genuine grant for the year 1845 has its corresponding expediente properly on file; this alone has none.

2. The expediente is not only missing now from the archives, but we show that it never could have been there.

The expedientes are numbered on their covering sheets, and the numeration follows the order of the dates of the grants. Now, for the month of December, 1845, (the alleged date,) the expedientes are, as usual, continuously numbered; and for every grant (save this) bearing date in that month, its corresponding expediente exists in the archives. Now, as there is no expediente for this in the archives, and no gap in the numbering, there never could have been an expediente for it on file. This disposes of the supposition that the expediente might have been once archived, and afterwards lost; for, had this been the case, a blank would have been left in the numbering.

3. No explanation is given of the fact that the claimants have produced from their own possession papers in the usual form of an expediente. They have no business to be there; if they were genuine, they could not be there. It is just where they would be, however, if the contrivers of this case thought a manufactured expediente necessary to sustain a simulated grant. It is to be observed that General Vallejo, who asserts that he delivered the grant to Jose de la Rosa, is equally confident that no other papers accompanied the grant; how, then, did De la Rosa come by it? There is no explanation of this damaging fact.

4. The title by which Governor Pico styles himself in making the grant is entirely different from the one he used at the time of its date. Standing by itself, this would be but a small circumstance; but it weaves in with all the other circumstances making the woof of the fraud. It is just the blunder men would be apt to make in constructing an ante-dated docu-

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ment. It is a mistake which an officer in the daily discharge of his functions would scarcely make.

5. There is no approval of the Departmental Assembly found among its records. Its journal is preserved, but there is no mention of this grant. Its evidence is not merely negative; on this point, it is positive and decisive. It shows that at the very time that it is alleged its approval was given, the Assembly was not even in session. A certificate, produced by the claimants, asserts that the grant was approved by the Assembly on the 11th December, 1845; but the journals show that, on the 8th of October, 1845, the Assembly suspended its session for the rest of the year, and did not reassemble until the 2d of March, 1846. This shows the fabrication of the certificate produced from the custody of the grantee. It is suggested that perhaps an extraordinary session had been held, at which this grant was confirmed, but of which no minute had been taken. Passing over the strange fact, that in such case this would be the only grant ever presented at an extraordinary session, and that all grants made about its date were presented at subsequent ordinary sessions, the effort fails entirely. The witness (Botello) called to prove that there might have been an extraordinary meeting, declined entirely to prove any such action at the meeting, if there was one; so the evidence amounts to a possible meeting and possible approval.

6. There is no minute or entry of this grant in the book of Toma de Razon (or Registry of Grants) for 1844, 1845. All other grants made within those two years are found recorded there; and had this been genuine, it would have been entered. The grant has the usual endorsement of "Queda Toma de Razon," or note that an entry had been made in this book, but it is not therein. The reason is, that the writers of the grant could put upon it any memorandum they pleased, but they had no access to the original registry, and could interpolate no entry in it.

Now, on these several points, the archives deny the grant; whilst, had it been genuine, upon some or all they would have surely testified in its favor. And they are dumb throughout;

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the counsel for the Government undertakes to say, from his own knowledge of the archives, that in the whole two hundred volumes there is no mention of or allusion to this grant.

But, even beyond all this, the whole case is more strongly concluded by the next consideration.

The signature of Governor Pio Pico, and the seal of State to the grant, are both forged.

To facilitate the examination by the court of this part of the case, photographic copies of the documents were prepared and put in evidence below. They are now exhibited to the court, with perfect confidence that they will entirely dispose of the case. By the employment of the beautiful art of photography, this tribunal can examine the assailed title, and contrast it with papers of undoubted genuineness, with the same certainty as if all the originals were present, and with even more convenience and satisfaction.

As to the signatures.

From among the archives were selected all the signatures of Pio Pico which occur on the expedientes during the month in which it is claimed this grant was made. These were photographed upon one sheet in the order of their dates, and are now exhibited to the court. Their corresponding archive numbers are placed opposite to each, and it will be observed, as before stated, that there is no blank number, showing that all the expedientes of this date, which were ever numbered, are still in the archives. Upon the same sheet is photographed the signature to the grant in question. It has no corresponding expediente in the archives, and there is no number left for one. The court can now not only read the parol testimony understandingly, but can for itself contrast the genuine with the simulated signature.

[Counsel then pointed out the differences in the nature of the handwritings, the signatures and rubrics of Governor Pico, and contended it was physically impossible that one and the same person could have made the genuine and disputed signatures.]

The Government seal is forged.

There was a seal in the office of the Mexican Governor of

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California, with a certain device, and the legend, "Gobierno del Dep'to. de Californias;" it was habitually used to authenticate papers issued from that office, and in the latter part of 1845 and in 1846 it was commonly applied to the sheets on which land grants were written. It is this seal of which the counterfeit is made. To exhibit this clearly, on another sheet are photographed several impressions of the genuine seal, grouped around a photograph of the assailed stamp. The principal witness for the claim, J. M. Covarrubias, the former Secretary of State, whose name appears in that capacity affixed to this paper, testifies that there was but one stamp or die ever used in the office. And herein he is undoubtedly correct. The court can now see for itself the essential differences between the impressions. Although, at first glance, there is a general resemblance between them, a few minutes close observation, a little patient training of the eye, will satisfy every one, as a plain matter of sense, that it is perfectly impossible the impression on this paper could have been made by the same stamp or die that produced the other and genuine impressions. Of course, there is but one conclusion.

[Counsel pointed out, upon the photographic sheets, more than twenty differences between the two classes of impressions.]

In order that there might be no objection to this novel mode of preparing the case for final hearing, the court will observe that these photographs are all matters in the record; the originals were given in evidence below, according to the strictest forms of law, and the copies filed as exhibits when parol evidence of these differences was given.

These photographs are now presented, that the members of the court may apply the evidence to them, and observe for themselves not only the differences pointed out, but others, that each eye will soon detect for itself.

Throwing aside all other objections, this last examination closes the case. Taken in connection with the examination of the archives, the matter stands thus. An alleged grant is produced, of which no evidence exists in the archives now, and which, it is demonstrated, never had any mention or

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record in any of those public registries, where, had it been genuine, it must have been found. With the signature of the grantor forged, with the attesting seal of State forged, what can it avail the claimants, then, that men should have been found careless or reckless enough to swear to its genuinesss and validity, and to speak of their own connection with it as a cotemporaneous transaction? No matter how such evidence may be accumulated, it fails of its purpose. Whilst it may have the effect of shaking credence in human testimony, it cannot carry belief to any reasoning mind. But it may practically have one other effect, which is now respectfully submitted on the part of the Government. And that is, that scrutinizing the vast mass of testimony accumulated in this record, and its manifest refutal by incontrovertible facts, the court may adopt, as a canon, in passing upon these grants, that the fleeting impressions of official memory are not a safe reliance, and that to establish their validity some evidence drawn from the archives must be presented in their behalf.

Mr. Justice GRIER delivered the opinion of the court.

The appellants, Juan Manuel Luco and Jose Leandro Luco, filed their petition with the board of commissioners for ascertaining and settling land claims in California, on the 13th of September, 1854. This was after the time limited by the act of Congress of 1851. But, on their application, Congress passed a special act (July 17, 1854) authorizing the presentation of their claim.

They claim under a grant made to one Jose de la Rosa, dated 4th of December, 1845, and purporting to be signed by Pio Pico, as acting Governor, and countersigned by Jose Maria Covarrubias, secretary. This document was deposited in the surveyor general's office on the 25th of October, 1853, and had attached to it a paper, purporting to be a petition, by Jose de la Rosa to the Governor, setting forth that the Government was indebted to him in the sum of \$4,650 for services as printer, and praying for the *sobrante*, or lands remaining between certain ranches of Vallejo and others.

The boundaries of the land prayed for are set forth very dis-

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tinely, but without any limitation as to the quantity of land contained therein. On the margin of this petition is the usual order for title, purporting to be signed by Pio Pico on 8th of November, 1845.

There is also attached a paper, purporting to be a certificate of approval by the Departmental Assembly, certified by the signatures of Pio Pico and Jose M. Covarrubias, and dated 18th of December, 1845.

This grant is for land within certain boundaries, and unrestricted as to quantity. Its confirmation was vigorously opposed by the counsel for the Government. They alleged that the documents produced to support the claim were forgeries, supported by perjuries of persons who had conspired to defraud the Government of an immense body of valuable land. Upon this issue the parties went to trial before the commissioners, who found in favor of the United States. The case went by appeal to the District Court, where much additional testimony was taken, a thorough investigation made, and these documents were again adjudged to be forgeries.

The appeal to this court compels us, however unpleasant the task may be, to pass upon this issue of fact, in which the character and conduct of others, besides the parties, will necessarily be made the subjects of discussion.

This claim first made its public appearance in 1853, after the lands had been surveyed by the United States Government as vacant. Previous to such survey, the public officers had used every diligence to discover whether any person possessed any title or claim to these lands, but the inhabitants of the district, and the owners of adjoining lands, were all ignorant of any claim, by possession, grant, or otherwise.

The lands within the boundaries of this alleged grant amount to 270,000 acres, or thereabouts.

The person to whom the grant purports to be made was almost a pauper, and though not actually a servant, yet a dependant of General Vallejo, residing in Sonoma, gaining a precarious livelihood by making and mending clothes and tin ware, acting as alcalde, printer, gardener, surveyor, music teacher, and attending to a grocery and billiard table for Val-

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lejo; and during all this time, from the date till the public appearance of this title, wholly unaware of his wealth and immense possessions, and always representing himself as a poor man, while he had in his possession a title to 270,000 acres of valuable land.

The archives of the Mexican Government furnish not the slightest trace of any such grant; although all the other grants made in the same year and month, and on the same day, are carefully recorded and registered, and the expedientes found on file.

These facts might well justify the Government officers in questioning the authenticity of this grant, whatever the character and standing of the parties might be, who pretend to establish it by their testimony.

The claimants, in order to establish their title, examined Jose M. Covarrubias, who was secretary of the Governor, Pio Pico, at the time the grant purports to have been signed. He testifies that "it is in his handwriting, and the attestation is his signature; that he does not remember to have seen Pio Pico sign it; but that his signature appears to be genuine, and he believes he signed it."

We shall have occasion to notice the testimony of this witness more particularly hereafter. At present we only say, that there is no reason to doubt the truth of his statement, so far as he attests his own acts; but that he wrote and signed it on the day it bears date, needs confirmation; for, if it was so written and signed by him on that day, he should be able to give some reason why it does not appear on the register with the other grants made on the same day. It is true, he attempts to do this by alleging that he registered it in some other book not found in the archives, but he cannot give a reason why all other grants were on the book found, and this one alone in some unknown register. If it was so written and signed by him on the 4th of December, 1845, it is incumbent on the claimants to give some account of it—to show why it was kept secret till 1853. If in possession of the grantee, why it was not produced and laid before the commissioners; why the petition and marginal order forming part of the expediente, if

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there was one, is found in the possession of the grantee; and where and when the certificate of approval was found and kept.

These and many other questions, which demand a solution, the claimants have not endeavored to answer. But they endeavor to prove—1st, that this grant was seen about the time it bears date; and 2d, that Rosa had a ranch on this tract of land, with a stock of cattle and horses, and resided on it, for a time at least, with his wife and family, up to 1849, claiming it as his own.

The chief witnesses to establish these facts, besides numerous others, called to prove the possession, are Jose de la Rosa, Mariano G. Vallejo, and his brother, Salvador Vallejo. More than twenty witnesses have been called to prove that the character for veracity of these persons is so bad that they should not be believed on their oaths. As many testify to their good character, and especially to that Mariano G. Vallejo.

There is proof also of declarations of Rosa that Vallejo was indebted to him or his false swearing for the property he possesses: "That the only right way of swearing was by the priest, with the Catholic cross," and that "he was not afraid of the laws from the way the Americans swore witnesses."

Such testimony of admissions is of very little value, and is generally not worthy of regard; and the testimony as to character is so equally balanced, that we do not feel at liberty to reject any portion of it for that reason. There are many more satisfactory tests of the truth of parol testimony than that of character of the witnesses. Where the facts sworn to are capable of contradiction, they may be proved by others not to be true; and when they are not, the internal evidence is often more convincing than any other. A shrewd witness, who is swearing falsely to something which cannot be disproved by direct testimony, will confine his recollection wholly to that single fact, professing a want of recollection of all the facts and circumstances attending it. An inexperienced witness, whose willingness to oblige his friend exceeds his judgment, will endeavor to give verisimilitude to his tale by a recital of imaginary circumstances. A stringent cross-examina-

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tion will generally involve the latter in a web of contradictions, which will be in a measure evaded by the other, with the answer that he "*does not recollect.*" Where many witnesses are produced to the same facts, and they contradict one another in material circumstances, they prove themselves unworthy of credit.

It would be a tedious, and we believe an unnecessary task, to examine severally the testimony of the 120 witnesses examined in this case, and test their respective credibility on the principles we have stated. With the exception of a few remarks on the testimony of the witness already alluded to, we shall therefore content ourselves with stating the result of our examination, without an attempt to vindicate its correctness by exhibiting the process by which it has been attained.

Jose de la Rosa was called by the claimants, and examined. Having sold to the claimants without general warranty, he was a competent witness. He was the person who might elucidate and explain the many difficulties and suspicious circumstances connected with this transaction, if they were capable of explanation. But, instead of it, we find his examination in chief exceedingly brief. He is asked to prove the signatures of Pico and Covarrubias from his knowledge of their signatures. He is then asked if he ever had in his possession this grant, and when and where he received it. To which he answers, that "he received it from Don Mariano G. Vallejo, in Sonoma, in the latter part of December, 1845."

He is then asked if he ever had in his possession the certificate of approval, and when and where he received it. To which he answers, that it was delivered to him by Vallejo in the beginning of the year 1846.

With this meagre statement of matters, impossible to be contradicted except by Vallejo himself, the claimants conclude their examination in chief. The cross-examination fully confirms the wise caution of the claimant's counsel in not troubling the witness with too many questions.

When asked to explain his circumstances since 1846, he answers, that "he is rich; that his wealth consists in money at present; formerly in horses, cows, oxen, houses, and land, and

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a house in Sonoma. Of mares and horses (he says) I have probably had five hundred, but not all at one time. From 1846 to 1847, I had 500 head of cattle; that in 1846 he had four hundred upon the rancho of Julpines." Now, all this has been proved by numerous witnesses to be utterly false. It would be tedious to notice all the absurdities and contradictions of himself, to be found in this cross-examination, as to the mode in which he has disposed of his wealth.

With regard to the existence of this grant, Mariano G. Vallejo testifies that he received it by a courier from the Governor, in December, 1845; that he handed it to Rosa, "*and he was much pleased.*" That this was the only paper received by him, *and that is all.* On cross-examination, he said he had seen the petition before he saw it on the files of the land office, but not the approval.

Again, in answer to another question, he denies ever having seen any paper but the grant at the time he received it, or afterwards, till he found the three papers connected together in the land office. In this he contradicts not only himself, but Rosa, who says he received the certificate of approval from him.

This testimony, instead of solving the difficulty as to the origin and history of this grant, leaves it in greater obscurity than it was before.

The testimony offered to prove the possession and improvements is so contradictory as to furnish material evidence of its untruth. One witness describes the house built by Rosa as made of poles; another declares that it was an adobe house, and that Rosa resided in it with his family; and as the house was near the Sacramento road, he had frequently seen them in it, and their cattle, horses, &c., on the land, up to the year 1849; another, that the house was more than eight leagues from the road. One says that he lent Rosa horses to convey his family to the rancho; another, that he took them in a boat; while Rosa himself ignores the boat, and swears he had horses of his own, and had no need to borrow, and that his family or himself had never resided anywhere but in the town of Sonoma, forty miles distant from the land—sometimes visiting his

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rancho for two or three days. Another, after swearing to the fact of residence by Rosa and family on the land, admits, on cross-examination, that he never saw the land.

The testimony for the United States establishes beyond a doubt that the whole of this testimony is a mere fabrication; that Rosa never resided on the land; that he had no cattle or horses, but lived in the town of Sonoma, a dependant of General Vallejo; with difficulty gaining a precarious support from his numerous avocations; always declaring to the tax assessors that he had no real property, except a small lot in Sonoma, and no personality beyond a cow and a horse.

Thus far the testimony produced by the claimants, instead of dispelling the suspicions attached to this grant, has only increased them—forcing on our minds the conviction that a grant attempted to be supported by perjury must necessarily itself be false.

The first public appearance of this claim, therefore, cannot be dated earlier than the 18th of March, 1853, when Jose de la Rosa makes his conveyance to the claimants, reciting this paper of 4th of December, 1845, for the alleged consideration of \$15,000. This deed describes the land by boundaries, and is entirely silent as to quantity.

Now, we need not have recourse to the testimony of Rafael Guirado of the conversation overheard in the house of Vallejo between him and the claimants, and the alleged confessions of Vallejo with regard to this grant. Some doubts have been cast upon the character of this witness for veracity, and the testimony of such declarations and admissions is generally worthy of little reliance. Nevertheless, his story has an air of probability when connected with other evidence in the case, that forbids the conclusion that so great a simpleton as Guirado could ever have invented it.

The United States, in order to support this issue, are not bound to show by whom a scheme of fraud has been concocted, or how, when, and where, it was executed. It will be sufficient if they can show facts inconsistent with the allegation that the deed in contest existed on the day or year of its date. It is possible that the officers of the late Government

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may execute grants since their power has ceased; and when called to prove their authenticity, may forget to mention the fact that their deeds are antedated. We regret to say that the testimony in this case justifies and demands this assertion.

Three facts tending to prove the authenticity of this grant are proved by claimants: 1st, that the petition *now* produced in connection with the grant was signed by Jose de la Rosa; 2d, that the marginal order on the same is in the handwriting of Covarrubias, the secretary, being the only instance in which he has been known to have acted as clerk to make such entry; 3d, the *titulo* and certificate of approval are in his handwriting, and signed by him.

Admitting these facts to be proved, we must inquire whether there is sufficient evidence to convince us that these documents were not executed at the time of their date, but some seven years thereafter.

I. We have already shown that this grant made its *first* public appearance in 1853, when it suddenly came forth, *as is alleged*, from the chest or pocket of Jose de la Rosa, and was immediately transferred to the claimants.

II. That the grantee himself, examined as a witness, can give no consistent or probable history of its origin, or why he had always lived in ignorance of it; or, if its existence was known to him, why he kept it a secret, or why a poor and garrulous old man should never mention it to friend or neighbor till about the date of its public appearance; or what possible motive could be found for a millionaire living as a pauper for so many years, and then disposing of his immense estate for a trifle.

III. We have shown also that the testimony of the witnesses called to prove a long possession and claim under this title is a tissue of falsehoods.

These facts alone would be sufficient to condemn this grant, and show that it had no existence before 1852; but if any doubts should still exist, that which remains to be stated will certainly dispel them.

IV. It is proved that the counsel to whom the claimants first made application for his services to obtain a confirmation

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of this grant, on examination of the document presented to him as evidence of title, refused to be so employed, because the deed produced was a palpable forgery; that it was *not* the instrument *now* produced; that it had the signature of the secretary, Covarrubias, forged so badly that his name was twice misspelt in different ways, while the present is written by Covarrubias himself, and is consequently free from such blunders.

It has been argued that this testimony should be rejected as incompetent, because counsel has revealed the secrets of his client. To this it is answered, that the relation never existed, the counsel having refused to stand in that relation to the claimants. The right of privilege from examination was neither claimed by the counsel nor by the claimant, and the witness being examined without objection, we are not required to decide how far a counsellor who has been requested and refused to be a partaker with persons attempting to defraud the Government may plead his privilege, and refuse to answer. Having answered without objection, it cannot affect his credibility that he willing to expose a fraud under these circumstances. As a witness, his testimony is unimpeached and uncontradicted, and unwillingly confirmed by Covarrubias.

V. When the application was made to Congress, the petition and certificate of approval do not *appear to have been found*, and were not annexed to the grant till it appeared on file in the land office.

VI. There is no attempt to account for the fact that the petition, instead of being annexed to the expediente, is found in the hands of claimants, and not among the archives, where the expedientes of all the authentic grants made in that year are found. To account for this fact, Covarrubias, in his first affidavit, testified "that it was the practice of the office to return the petition with the grant." But when his deposition was taken, with cross-examination, he is forced to confess the untruth of the first statement, and admits, what is a well-known fact, that the petition formed part of the expediente always preserved on file among the archives.

VII. No trace of this grant is to be found among the archives of the Government; it is not found on the registry of

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grants for that year, while authentic grants made in that year and month, and day of the month, are found on the files and registry.

VIII. The seal on this paper differs from that found on authentic grants of the same date, and Covarrubias himself admits that there was but one seal used in the office while he was secretary. This seal, on careful examination by persons qualified to judge, is proved to be a forgery.

IX. The signature of Pio Pico and his rubric, when compared with a large number of his authentic signatures found in the archives, and those made on the same day in which the grant in question is dated, is found to differ in many particulars from that found on this paper. His official signatures are remarkable for their uniformity. Many excellent judges have carefully scrutinized and compared these signatures, and declare the signatures in question are forgeries. Two of them express the opinion that the person who wrote the body of the instruments made the signatures also.

We have ourselves been able to compare these signatures by means of photographic copies, and fully concur (from evidence "*oculis subjecta fidelibus*") that the seal and the signatures of Pico on this instrument are forgeries; and we are the more confirmed in this opinion by the testimony of Pico himself, found on the record. In a brief affidavit made on the 9th of June, 1853, he swears, without hesitation, that "the document bearing date December 4, 1845, was signed by him." But in his deposition taken in this cause on 27th of February, 1857, while this issue was pending, he appears to testify with very great caution. He seems to have drawn out a certain formula of words, on which it is clear that a conviction of perjury could never be sustained, whether his testimony was true or false. The answer is in these words, and three times repeated in the very same words:

"I cannot now remember in regard to the original document mentioned in said interrogatory, but the signature, as appears in the traced copy, appears to be my signature, and I believe it was placed there by me at the time the document bears date." His memory appears to be much weaker than his faith, as it

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might have been supposed that such a sale of territory would have attracted his attention sufficiently to be remembered forever after.

X. This certificate of approval by the Departmental Assembly bears date at a time when the public records and minutes of that body show that it was not in session. It is dated on the 18th of December, 1845, and the resolution of approval appears to have passed on the 11th of the same month.

The records of the proceedings of the Assembly at the close of 1845, and beginning of 1846, are preserved. They show that on the 8th October, 1845—

“The sessions of the Assembly were suspended for the *rest of the year*, in consequence of permission having been granted to the Senores deputies, who reside out of this capital, to retire to the places of their residence, in view of the injuries they must suffer in consequence of their salaries due them respectively, as functionaries, not being paid.”

A publication of the foregoing in all the pueblos of the Department was ordered to be made, October 11th, 1845.

The next session of the Assembly, as shown by its journals, was on the 2d March, 1846. The journals state that the Governor and certain deputies, who are named, had “assembled for the purpose of reopening the ordinary sessions, which, by a resolution of the body, had been suspended for the balance of last year. Whereupon the proceedings of the 8th day of October of the last year were read and approved,” &c.

It is evident that no ordinary session of the Assembly was held on the 11th December, the day on which this grant is certified to have been approved.

It is contended, however, that extraordinary sessions were held, of which no record was kept, and the testimony of several witnesses has been taken to establish the fact.

But this attempt to supplement or falsify these records has wholly failed, and more especially as it appears that all the other grants admitted to be genuine, and which are of a date later than the adjournment, were presented and approved after the Assembly reassembled, on the 2d of March, 1846; and the form of words used in the certificate of approval of this one

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differs from the eleven others, dated between November 22d, 1845, and December 19th, 1845.

In conclusion, we must say, that, after a careful examination of the testimony, we entertain no doubt that the title produced by the claimants is false and forged; and that, as an inference or corollary from the facts now brought to our notice, it may be received as a general rule of decision, that no grant of land purporting to have issued from the late Government of California should be received as genuine by the courts of the United States, unless it be found noted in the registers, or the expediente, or some part of it, be found on file among the archives, where other and genuine grants of the same year are found; and that owing to the weakness of memory with regard to the dates of grants signed by them, the testimony of the late officers of that Government cannot be received to supply or contradict the public records, or establish a title of which there is no trace to be found in the public archives.

Let the judgment of the District Court be affirmed.

INDEX
OF THE
PRINCIPAL MATTERS.

ADMINISTRATORS AND EXECUTORS.

See **CHANCERY.**

ADMIRALTY.

1. The jurisdiction of courts of admiralty in torts depends entirely on locality, and this court have heretofore decided that it extends to places within the body of a county. The term "torts" includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case. *Philadelphia, Wilmington, and Baltimore Railroad Co. v. Philadelphia and Havre de Grace Steam Towboat Co.*, 209.
2. Hence, where a railroad company employed contractors to build a bridge, and for that purpose to drive piles in a river, and, owing to the abandonment of the contract, the piles were left in the river, in such a condition as to injure a vessel when sailing on her course, the railroad company were responsible for the injury. *Ibid.*
3. That the vessel so injured was prosecuting her voyage on Sunday, is no defence for the railroad company. The statute of Maryland and the cases upon this point examined. *Ibid.*
4. Where there was conflicting testimony in the court below upon the amount of damages sustained, and there was evidence to sustain the decree, this court will not reverse the decree merely upon a doubt created by conflicting testimony. *Ibid.*
5. In a collision which took place in the Chesapeake bay between a steamer and a sailing vessel, the steamer was in fault. *Haney v. Baltimore Steam Packet Co.*, 287.
6. It was the captain's watch, and his duty to be on deck, which he was not. *Ibid.*
7. The only man on deck, acting as pilot, lookout, and officer of the deck, was not in the proper place for a lookout to be. *Ibid.*
8. A former decision of this court referred to, indicating the proper place for a lookout. *Ibid.*
9. When the collision was impending, the order on the steamer was to starboard the helm instead of porting it, the schooner having previ-

ADMIRALTY, (*Continued.*)

- ously kept on her course, as the rules of navigation required her to do. *Ibid.*
10. In a collision which took place between two schooners in the Chesapeake bay, the colliding vessel, being the larger, and fastest sailer, and attempting to pass the smaller to windward, was in fault, because there was not a sufficient lookout. *Whitridge v. Dill*, 448.
 11. The absence of a lookout is not excusable, because of an accident which had happened, and which required all hands to be called to haul in the damaged mainsail. *Ibid.*
 12. She was also in fault, because, being not sufficiently to the windward to have passed the other vessel in safety, she did not seasonably give way and pass to the right, the wind being from the northwest, and both vessels directing their course north by east, the smaller vessel laying one point closer to the wind than the larger. *Ibid.*
 13. Where a vessel astern, in an open sea and in good weather, is sailing faster than the one ahead, and pursuing the same general direction, if both vessels are close hauled on the wind, the vessel astern, as a general rule, is bound to give way, or to adopt the necessary precautions to avoid a collision. *Ibid.*
 14. Cases cited to illustrate this principle. *Ibid.*
 15. Where a decree was made by the Circuit Court, sitting in admiralty, that two persons should pay freight, one in the sum of \$583.84, and the other in the sum of \$1,754.22, and the latter only appealed to this court, the appeal must be dismissed, as the amount in controversy is less than \$2,000. *Clifton v. Sheldon*, 481.
 16. The rights of the two were distinct and independent; but if the freight be considered a joint matter, both should have joined in the appeal. *Ibid.*
 17. The admiralty jurisdiction of the courts of the United States extends to contracts of charter-party and affreightment. These are maritime contracts within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty, by process either *in rem* or *in personam*. *Morewood v. Enequist*, 491.
 18. Appellants should not expect this court to reverse a decree of the Circuit Court, merely upon a doubt created by conflicting testimony. *Ibid.*

AGENTS.

1. The contract was made in Baltimore, between the purchasers and an agent of the seller, the seller residing in New York. The latter, and not the agent, was bound to bring the suit, as the character of the agent was disclosed on the face of the contract. There is no distinction in the principle governing agencies of this description between the cases of a home or foreign principal. *Oelricks et al. v. Ford*, 49.

ALABAMA, STATE OF.

See CONSTITUTIONAL LAW.

ALIENS.

1. The alien heirs of a colonist in Texas, who died intestate in 1835, cannot inherit his landed property there. The courts of Texas have so decided, and this court adopts their decisions. *Middleton v. McGrew*, 45.

APPEAL BOND.

1. Where a motion was made to dismiss an appeal, upon the ground that no appeal bond had been given, time was allowed the appellants within which to file the bond. If they complied with the order, the appeal was to stand; otherwise, to be dismissed. *Anson, Bangs, and Co. v. Blue Ridge Railroad Co.*, 1.
2. The appeal bond must be taken and approved by any judge or justice authorized to allow the appeal or writ of error. *Ibid.*

APPEALS.

1. Where a motion was made to dismiss an appeal, upon the ground that the appeal was taken by part only of the complainants below, and that the other complainants had not been made and were not parties to the appeal; and it appeared from the record that a fund had been decreed by the court below to be distributed ratably amongst two classes of creditors, one of which was composed of judgment creditors, and the other of those who had come in after the filing of a creditor's bill; and the first class only conceived themselves aggrieved by the decree admitting the others to a ratable proportion, and therefore became the appellants; this court will, in such a state of things, refuse the motion to dismiss and reverse this, together with all other points to be decided, when the case shall come up for argument hereafter. *Day et al. v. Washburn*, 309.

BARON AND FEME.

See MARRIED WOMEN.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See COMMERCIAL LAW.

CALIFORNIA.

1. Where two persons appear to have conflicting claims to land in California, and the United States do not appear to have any interest in the matter, and the case is brought to this court by proceedings to which the United States are a party, this court will remand the record to the court in California, with directions to allow the contesting parties to proceed in the manner pointed out by the act of Congress passed in 1851. *United States v. White*, 249.
2. The general title of Sutter to land in California again decided to convey no valid title. *United States v. Bennitz*, 255.
3. Sutter's general title to lands in California again examined, together with the historical events which preceded and attended it. The court again decides that claims under this title are not valid. *United States v. Rose*, 262.
4. Where an island in the bay of San Francisco, in California, was claimed, not under the colonization law of 1824, or the regulations of 1828, but under certain special orders issued to the Governor by the Mexican Government, and the Governor was alleged to have issued a grant in 1838, the petitioner never took possession or exercised acts of ownership of the island under that decree, which therefore affords no foundation for his claim. *United States v. Osio*, 273.
5. In 1839, a petition was addressed to the Governor, praying for a new

CALIFORNIA, (*Continued.*)

- title of possession, and it was alleged that a grant was issued, but it does not appear that it was recorded according to law, nor is the testimony satisfactory to show that it was signed by the Governor. *Ibid.*
6. Where no record evidence is exhibited, the mere proof of handwriting by third persons, who did not subscribe the instrument as witnesses, or see it executed, is not sufficient in this class of cases to establish the validity of the claim without some other confirmatory evidence. *Ibid.*
 7. The special orders above mentioned were contained in a despatch from the Mexican Government, giving the power to the Governor, in concurrence with the Departmental Assembly. *Ibid.*
 8. This provision differs essentially from the regulations of 1828, under which the action of the Assembly was separate and independent, and subsequent to the action of the Governor. But the power conferred by this despatch could not be exercised by the Governor without the concurrence of the Departmental Assembly. Both must participate in the adjudication of the title; and as the Assembly did not concur in this grant, it is simply void. *Ibid.*
 9. Where a grant of land in California was made in 1841, under the colonization laws, which looked to the settlement and improvement of the country, and eleven years elapsed, during which time the applicant took no step towards the completion of his title or the fulfilment of the obligations it imposed, nor is there any expediente in the archives to show the segregation of the land from the public domain, nor was there any delivery of judicial possession, nor any other assertion of right, the claimant must be considered guilty of an unreasonable delay in fulfilling his part of the engagement, and has slept for a lengthened period on his rights, coming forward at last, when circumstances have changed in his favor, to enforce a stale demand. *United States v. Noe*, 312.
 10. The excuse for the laches of the applicant, that the Indians were numerous and hostile, is not sufficient. That fact existed at the date of the decree in 1841. *Ibid.*
 11. The claim must be treated as one abandoned prior to the date of the treaty of Guadalupe Hidalgo, and is not entitled to confirmation. *Ibid.*
 12. Where proceedings for a grant of land in California were commenced by a Mexican in 1838, and continued from time to time, and the claimant has been in possession since 1840, and no suspicion of the truth of the claim exists, this court will not disturb the decree in his favor made by the court below. *United States v. Alviso*, 318.
 13. This court again decides that a claim to land in California, founded upon "Sutter's general title," is not valid. *United States v. Murphy*, 476.
 14. Where the archives of California show that a petition for land was presented to the justice of the peace and military commandant at New Helvetia in 1846; that a favorable report was made on the 1st May, 1846; that the prefect certified, on the 18th May, 1846, that the land was vacant; that the Governor, on the 11th of June, 1846, made an

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- order for a *titulo* in form, and the claimant produced from his custody a *titulo* dated at Los Angeles on the 20th of July, 1846, there is a departure from the regular and usual mode for securing lands under the colonization laws. *United States v. Pico et al.*, 321.
15. The *titulo* bears date on the 20th of July, and the 7th of July, 1846, is the epoch established by the act of Congress of 1851 and the decisions of this court, at which the power of the Governor of California, under the authority of Mexico, to alienate the public domain, terminated. *Ibid.*
16. The evidence that the claimant occupied the land in 1847 is not satisfactory, or that he made any assertion of claim or title until the presentation of the claim in 1853 to the board of commissioners. *Ibid.*
17. When this court is satisfied, from the evidence before it, that no appeal to it had been granted by the court below, and that the cause was not before it when an order was passed, at the instance of the appellee, to docket and dismiss the case, it will rescind and annul the decree of dismissal, and revoke and cancel the mandate issued thereupon. *United States v. Gomez*, 326.
18. A motion to docket and dismiss a case from the failure of the appellant to file the record within the time required by the rule of this court, when granted, is not an affirmation of the judgment of the court below. It remits the case to the court, to have proceedings to carry that judgment into effect, if in the condition of the case there is nothing to prevent it. That is for the consideration of the judge in the court below, with which this court has nothing to do, unless his denial of such a motion gives to the party concerned a right to the writ of mandamus. *Ibid.*
19. In the present aspect of this case, such a motion is not to be considered. *Ibid.*
20. Cases cited to sustain the above principles. *Ibid.*
21. A grant of land in California, purporting to have been made to one Jose de la Rosa, dated 4th of December, 1845, and purporting to be signed by Pio Pico as acting Governor, and countersigned by Jose Maria Covarrubias, secretary, adjudged to be false and forged. *Luco et al. v. United States*, 515.
22. Where a claimant of land in California produced as evidence of his title a grant, dated on the 10th February, 1846, made by Pio Pico, "first member of the Assembly of the Department of the Californias, and charged with the administration of the law in the same," the claimant had neither a legal nor an equitable title. *United States v. Bolton*, 341.
23. He had no legal title, because—
1. He had not complied with the mode of acquiring a legal title which is found in the regulations of 1828. These require a petition to the Governor, an inquiry by him into certain circumstances, which being satisfactory, a formal grant was to be executed. The petition, grant, and map, were to be recorded. This record was the evidence of grant, and the Government is entitled to require the production of that official

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record. The degree of record evidence required was adjudged in the case of Cambuston, 20 Howard, and of Fuentes, 22 Howard.

2. The claimant was bound to prove that records showing a substantial compliance with the laws of colonization did exist when the copy he produces was given to the grantee before he could be heard to prove their loss and their contents.

3. That the grantee had presented a petition, is stated incidentally, but indistinctly, by a single witness, and this unsatisfactory statement is disproved by the absence of the record and the evidence of his successor. And that the grant was confirmed by the Departmental Assembly early in 1846 is not credible, not being sustained by the journal, and no such confirmation being found in a list of grants which were confirmed.

4. It is not probable, from all the historical circumstances of the case, that the archives have been lost. *Ibid.*

24. He had no equitable title, because—

1. He was a secular priest, and a grant of mission lands to a priest for his own benefit was not heard of in any other case.

2. He was in necessitous circumstances, and subsisted on alms.

3. A condition was, that he should pay the debts of the mission, and there is no evidence of the amount of this debt, to whom it was owing, or how it was to be paid.

4. Until the spring of 1850, none of the large community then building up a city on the land had any suspicion that he claimed to be the owner of ten thousand acres of land, with an outer boundary including three other grants, and embracing nearly thirty thousand acres.

5. He had made some claim for the church, as a priest and administrator of the mission; and when no title was found to justify this, then, for the first time, he made this claim on his own account.

6. In November, 1849, he went to Santa Barbara, and on his return made use of expressions indicating that the acquisition of the deed was newly made. The testimony does not disclose what was the depository of this grant in Santa Barbara, nor when nor under what circumstances it was placed there, nor under what circumstances withdrawn. Neither the priest nor his agent were examined as witnesses, nor was Pio Pico interrogated in reference to the authenticity of the grant. *Ibid.*

25. Where there were two separate claimants of land in California, both claiming under one original grant, and the surveyor, in running out their lines, disregarded the limits of the original grant, and included within one of the surveys a large portion of Government land, the Commissioner of the General Land Office was right in refusing to issue a patent founded on such erroneous survey. *Castro v. Hendricks*, 438.

26. By a special dispatch from the Minister of the Interior, under the order of the Mexican President, dated 20th July, 1838, the Governor of California, with the concurrence of the Departmental Assembly, was authorized to grant the islands near the coast. *United States v. Castillero*, 464.

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27. See the case of the United States *v.* Osio, reported in this volume.
28. On the same day, another special dispatch was sent, reserving out of the general grant such island as Castillero might select, and directing a grant to be made to him for it, which was done. *Ibid.*
29. All the signatures being proved to be genuine, and the index of the concession being found in its proper place amongst the Mexican archives, the claim of the grantee must be confirmed. *Ibid.*
30. There was no necessity, in this case, for the concurrence of the Departmental Assembly. *Ibid.*
31. In California, where a will with its codicils was offered in evidence, the testator of which died in 1848, an objection to its admission because it had never been admitted to probate was not well founded. The codicil was not inadmissible as testimony on that account. *Adams v. Norris*, 353.
32. Neither was it inadmissible because the witnesses who were present at its execution had never been examined to establish it as an authentic act. *Ibid.*
33. An objection to the admission of the codicil, because it does not appear on the face of the instrument that the witnesses were present during the whole time of the execution of the will, and heard and understood the dispositions it contained, was not well founded. *Ibid.*
34. Cases cited to establish this point. *Ibid.*
35. It was proper in the court to allow evidence to go to the jury of a custom in California as to the manner of making wills, and to instruct them that the evidence was competent; and that if the custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, it will operate to repeal the prior law. *Ibid.*
36. The Spanish law upon this point examined, and also the decisions of the State courts in California. *Ibid.*
37. It was proper in the court to instruct the jury that the testator and witnesses should alike hear and understand the testament, and that, under these conditions, its publication as the will of the testator should be made. *Ibid.*
38. With regard to the proof of the will, as all the witnesses were dead, evidence of their signatures and that of the testator was admissible, and also of a declaration by him that he had made a will with a similar devise. The sindico, who attested it, should be counted among the witnesses. *Ibid.*
39. The binding force and legal operation of the codicil are to be determined by the law as it existed when the codicil was made. But the mode in which it should be submitted to the court and jury, and the effect to be given to the testimony that accompanied it, depend upon the law of the forum at the time of trial. It was a proper question to be submitted to the jury, whether, under the circumstances of the case, it was probable the formalities required by law were complied with. *Ibid.*
40. Where a grant of land in California had this clause, viz: "The tract of which grant is made is of the extent mentioned in the plan, which

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goes with the expediente, with its respective boundaries; the officer giving the possession shall cause it to be measured, according to the ordinance, to mark boundaries; the surplus to remain for the nation, for its uses," according to the face of the grant, it must be confined to two leagues mentioned in the petition. Otherwise, there could be no surplus. *Yontz v. United States*, 495.

41. As there was no legal title, but only an equity, this court holds, according to previous decisions, that the petition and concession must be taken together, in which case the result would be the same, viz: that the claimant must be confined to two leagues. *Ibid.*
42. A decree of the District Court affirmed, in a case where the genuineness of the grant of land in California and the fulfilment of its conditions are established. *United States v. Heirs of Berreyesa*, 499.
43. This court declines to give instructions to the court below relative to the location and survey of this grant. No question was decided in the court below upon this subject, and it is to be presumed it will act according to the established rules on the subject. *Ibid.*

CARRIERS BY WATER.

See COMMERCIAL LAW.

CHANCERY.

1. The courts of the United States, as courts of equity, have jurisdiction over executors and administrators, where the parties to the suit are citizens of different States, and this jurisdiction is not barred by subsequent proceedings in insolvency in the Probate Court of a State. *Green's Administratrix v. Creighton*, 90.
2. In such a case, the courts may interpose in favor of a foreign creditor, to arrest the distribution of any surplus of the estate of a decedent among the heirs. *Ibid.*
3. Although at law a creditor cannot sue the surety upon an administration bond until he has obtained a judgment against the administrator, yet it is not so in equity; and in the present case, where the original debtor and his surety are both dead, insolvent, and a portion of the assets of the estate of the latter can be traced to the possession of his administrator and his surety, the power of a court of equity is required to call for a discovery of the amount and nature of the assets in hand. *Ibid.*
4. Where the surety upon an administration bond was sued, and judgment recovered against him in Mississippi, and a court in Tennessee (where the principals upon the bond resided) decided that but a small amount was due by the administrators upon their account, and that the judgment against the surety, had been obtained in defiance of an injunction issued by the Tennessee court, and also by fraudulent representations made to the surety, and it was admitted that the decree in Tennessee was supported by the proofs, the surety was entitled to relief by the court in Mississippi, and the creditor must be perpetually enjoined from proceeding upon his judgment. *Cage's Executors v. Cassidy*, 109.
5. Where a bill in chancery was filed by persons residing in Canada, claim-

CHANCERY, (*Continued.*)

ing title to property in Detroit which had been in the exclusive possession of the defendants and those claiming under them since 1793, without, as far as appears, any right being set up by the complainants or by those claiming under them to the title or the possession of the premises until the filing of the bill, or any claim to the rents and profits or to an account as tenants in common, or for partition, or to be admitted to the enjoyment of any right as co-heirs, the case is one resting upon the enforcement of an implied trust, where courts of equity follow the courts of law in applying the statute of limitations. *Beaubien v. Beaubien*, 190.

6. The averments of concealment and fraud on the part of the defendants, which are made in the bill for the purpose of withdrawing the case from the operation of the statute, are too general and indefinite to have that effect. *Ibid.*
7. No acts of fraud or concealment are stated; and the time when even an intention to defraud, which is all that is averred, was discovered, was some fifty years after the exclusive possession of the defendants and those under whom they claim had commenced; and this, although the parties lived in the neighborhood and almost in sight of the city which has, in the mean time, grown up on the premises. *Ibid.*
8. Where a levy is made upon goods and chattels under a *fi. fa.*, the officer may confide them to another, for safe keeping, until there has been a settlement of the judgment and payment of all costs. He may, therefore, leave them in the hands of a receiver appointed by the court. *Very v. Watkins*, 469.
9. Where the receiver had the custody of goods, and the complainant was ordered to select such a portion of these goods as would pay his claim by a decree of the court below, which was affirmed by this court, and which he refused to do, and this portion was accordingly set apart, the receiver became from that time a trustee for the complainant. *Ibid.*
10. The receiver was entitled to hold this property, as trustee, until a demand was made upon him in proper form by the complainant to surrender it. This proper form should have been under a certified copy of that part of the decree which permitted the complainant to demand the property, and which required the receiver to surrender it with the complainant's acknowledgment of its receipt. These papers should then be filed in court, for the protection of the trustee. *Ibid.*
11. Where a bill in chancery was filed to set aside a deed as being fraudulent against creditors, and it is charged in the bill that the consideration mentioned in the deed was not paid, it is not satisfactory that the defendant relies upon the answer that it was paid, considering the answer, which is responsive to the bill, as evidence of the payment, when the execution of the deed is surrounded by circumstances of suspicion. *Callan et al. v. Statham et al.*, 477.
12. In the present case, the payment of the purchase money was alleged to be a secret transaction between the vendor and vendee, and there were other circumstances attending the deed which surrounded it with

CHANCERY, (*Continued.*)

suspicion. The evidence of payment must have been in the possession of the defendants, and they ought to have produced it. *Ibid.*

13. The title of the defendant, although encumbered, could have been made clear; the price alleged to have been paid was inadequate; the vendor remained in possession and collected all the rents without accounting to the vendee; the circumstance that the vendor was heavily in debt, and suits pending and maturing to judgment when he made the deed—all these things induce this court not to disturb the decree of the court below, which directed the property to be sold for the satisfaction of creditors. *Ibid.*
14. Where a married woman became a trustee of land for the benefit of her son in law, and executed a deed (without joining her husband) to a bona fide purchaser, who had paid the purchase money to the cestui que use, it was not necessary, under the circumstances of the case, for her husband to join in the deed. *Gridley et al. v. Wynant*, 500.
15. These circumstances were, that by executing the deed she did not defeat an estate to which her husband was entitled, nor did he claim adversely to the deed, but it was within the scope of her authority as trustee, and therefore will be sustained by a court of equity against her heirs. *Ibid.*
16. Her children, who were her heirs at law, having brought a suit at law to recover the land from the bona fide purchaser, a court of equity will interpose to restrain their proceedings. *Ibid.*
17. The alleged illegality of the consideration of the deed of trust—viz: that it was intended to protect the property of her son in law, who was insolvent—was not sufficient to destroy the independent equity of the bona fide purchaser, nor was it necessary to make the son in law a party when the bona fide purchaser sought relief in a court of equity against the title of the heirs. *Ibid.*

COUPON BONDS ISSUED BY RAILROAD COMPANIES.

See RAILROAD COMPANIES.

COMMERCIAL LAW.

1. The general rules which regulate the delivery of goods by a carrier, by land or water, explained. *Richardson v. Goddard*, 28.
2. Where the master of a vessel delivered the goods at the place chosen by the consignees, at which they agreed to receive them, and did receive a large portion of them after full and fair notice, and the master deposited them for the consignees in proper order and condition at mid-day, on a week day, in good weather, it was a good delivery according to the general usages of the commercial and maritime law. *Ibid.*
3. The fact that the Governor of the State had appointed a day as a general fast day, did not abrogate the right of the master to continue the delivery of the goods on that day. Holiday is a privilege, not a duty. *Ibid.*
4. There was neither a law of the State forbidding the transaction of business on that day; nor a general usage engrafted into the commercial and maritime law, forbidding the unlading of vessels on the day set

COMMERCIAL LAW, (*Continued.*)

- apart for a church festival, fast, or holiday; nor a special custom in the port, forbidding a carrier from unloading his vessel on such a day. *Ibid.*
5. In the absence of these legal restrictions, the master had a right to continue the delivery of the goods on the wharf on a fast day. *Ibid.*
 6. Where there was a written contract for the delivery of a certain number of barrels of flour at a given price, to be delivered within a named time at the seller's option, and evidence was offered by the purchaser of an usage existing, that a margin should be put up, the court below was right in refusing to allow this evidence to go to the jury, because it was too indefinite and uncertain to establish an usage. *Oelricks et al. v. Ford*, 49.
 7. And, moreover, if the usage existed, the proof would have been inadmissible to affect the construction of the contract, in which there was no ambiguity or doubt on the face of the instrument. *Ibid.*
 8. Any parol evidence of conversations or of an understanding of the parties that the contract was made subject to such an usage, was inadmissible, as these were merged in the written instrument. *Ibid.*
 9. Where a charter-party stipulated that a vessel should receive a full cargo, the opinions of experts are the best criteria of how deeply she can be loaded with safety to the lives of the passengers. *Ogden v. Parsons*, 167.
 10. The duties upon foreign merchandise are to be computed on their value on the day of the sailing of the vessel from the foreign port. (See 20 *Howard*, 571.) *Irvine v. Redfield*, 170.
 11. Where the notarial protest of a bill of exchange stated that the bill had been handed to him on the day it was due, that he went several times to the office of the acceptors of it in order to demand payment for the same, and that at each time he found the doors closed, and "no person there to answer my demand," this was a sufficient demand. *Wiscman v. Chiapella*, 368.
 12. It was not necessary to call individually upon one of the partners of the firm who had a residence in the city, or to make any further inquiries for the acceptors, than the repeated calls at their office. *Ibid.*
 13. Cases can be found, and many of them, in which further inquiries than a call at the place of business of a merchant acceptor have been deemed proper; but the rulings in such cases will be found to have been made on account of some peculiar facts in them which do not exist in this case. *Ibid.*
 14. In making a demand for an acceptance, the party ought, if possible, to see the drawee personally, or some agent appointed by him, to accept; and diligent inquiry must be made for him, if he shall not be found at his house or place of business. But a demand for payment need not be personal, and it will be sufficient if it shall be made at one or the other place in business hours. *Ibid.*
 15. The cases upon these points examined. *Ibid.*
 16. When, upon presentment for acceptance, the drawee does not happen

COMMERCIAL LAW, (*Continued.*)

- to be found at his house or counting-room, but is temporarily absent, and no one is authorized to give an answer, whether the bill will be accepted or not, in such case it would seem the holder is not bound to consider it as a refusal to accept, but he may wait a reasonable time for the return of the drawee. *Ibid.*
17. He may present the bill on the next day, but this delay is not allowable in a presentment for payment. This must be made on the day the bill falls due; and if there be no one ready at the place to pay the bill, it should be treated as dishonored, and protested. *Ibid.*
 18. Presenting a bill, under such circumstances, at the place of business of the acceptor, will be *prima facie* evidence that it had been done at a proper time of the day. If that shall be denied, it must be shown by evidence. *Ibid.*
 19. Where a suit was brought against a notary in Louisiana for negligence in making a protest, he will be protected from responsibility by showing that the protest was made in conformity with the practice and law of Louisiana, where the bill was payable. *Ibid.*
 20. An open or running policy of insurance upon "coffee laden or to be laden on board the good vessel or vessels from Rio Janeiro to any port in the United States, to add an additional premium if by vessels lower than A 2, or by foreign vessels," contained also the following clause, viz: "Having been paid the consideration for this insurance by the assured or his assigns, at and after the rate of one and one-half per cent., the premiums on risks to be fixed at the time of endorsement, and such clauses to apply as the company may insert, as the risks are successively reported." *Orient Mutual Insurance Co. v. Wright et al.*, 401.
 21. This is different from an ordinary running policy, in which the rate of premium to be paid is ascertained and inserted in the body of the policy at its execution, and in which species of policy the contract becomes complete, and the policy attaches upon the goods from the time they are laden on board the vessel, as soon as the ship is declared or reported, provided the shipment comes within the description in the policy. *Ibid.*
 22. The rules explained which govern this class of policies. *Ibid.*
 23. But in the policy in question there is something more to be done, in order to make the contract complete, than merely to declare the ship. The assured must pay or secure the additional premium, which the underwriter has reserved the right to fix at the time of the declaration of the risk in case the vessel rates lower than A 2. *Ibid.*
 24. Unless the assured paid or secured this additional premium fixed by the underwriter, the contract of insurance, in respect to the particular shipment, did not become complete or binding. *Ibid.*
 25. Hence, the instruction of the court below was erroneous, which held that the contract was complete and binding as soon as the vessel was reported; and that, if the parties could not agree as to the additional premium, the question was one for the courts to settle. *Ibid.*

COMMERCIAL LAW, (*Continued.*)

26. The parties stipulated that the additional premium should be fixed when the risk was made known. *Ibid.*
27. The cases upon this point cited. *Ibid.*
28. The principles with respect to a policy of insurance in the preceding case of the Orient Mutual Insurance Company against Wright, reaffirmed in the present case. *Sun Mutual Insurance Co. v. Wright et al.*, 412.
29. In the correspondence which took place between the insurer and the insured, there was no waiver by the former of the right of fixing the premium, nor was it claimed or suggested in the communications between the parties at the time. *Ibid.*

CONSTITUTIONAL LAW.

1. It is the settled doctrine of this court, that no action of ejectment will lie on an entry made with the register and receiver of the land office, such being merely an equitable title, notwithstanding a State Legislature may have provided otherwise by statute. *Hooper v. Scheimer*, 235.
2. The law is only binding on the State courts, and has no force in the Circuit Courts of the Union. *Ibid.*
3. The statutes of Mississippi provide that no plea of non est factum shall be admitted or received, unless the truth thereof shall be proved by oath or affirmation. *Bell v. Corporation of Vicksburg*, 443.
4. A plea of that kind was filed without the affidavit, and demurred to by the plaintiff. *Ibid.*
5. Although, upon the general principles of pleading, a demurrer only calls in question the sufficiency of what appears on the face of the pleading, and does not reach the preliminary steps necessary to be taken to put it upon file, yet, as the State courts where such a statute exists have held that the plea of non est factum is demurrable if there be no affidavit, and the course of practice in the Circuit Court conforms to the State practice, this court also holds that such a plea is demurrable. *Ibid.*
6. The following is an article of a treaty concluded between the King of Wurtemberg and the United States in 1844, (8 Stat. at L., 588:) "The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where said property lies shall be liable to pay in like cases." *Frederickson et al. v. State of Louisiana*, 445.
7. This article does not include the case of a citizen of the United States dying at home, and disposing of property within the State of which he was a citizen, and in which he died. *Ibid.*
8. Consequently, where the State of Louisiana claimed, under a statute, a tax of ten per cent. on the amount of certain legacies left by one of her citizens to certain subjects of the King of Wurtemberg, the statute was not in conflict with the treaty, and the claim must be allowed. *Ibid.*

CONSTITUTIONAL LAW, (*Continued.*)

9. Where the Circuit Court of the United States has jurisdiction over the parties and cause of action, by virtue of the 12th section of the judiciary act, it cannot be affected by any amendment of the pleadings, changing the cause of action, or by the proviso to the 11th section. *Green v. Custard*, 484.
10. The evils commented upon, arising from the courts of the United States permitting the hybrid system of pleading from the State codes to be introduced on their records. *Ibid.*
11. Where proceedings are instituted in the State court of Iowa under certain articles of their code, and then removed into the United States court, although these proceedings do not conform to the mode prescribed for chancery proceedings in the courts of the United States, yet, if the pleadings and proofs show the matter in dispute between the parties, this court will adjudicate the questions which they present. *Gridley et al. v. Westbrook*, 503.
12. The boundary line between the States of Georgia and Alabama depends upon the construction of the following words of the contract of cession between the United States and Georgia, describing the boundary of the latter, viz: "West of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary between the United States and Spain, running up the said river and along the western bank thereof." *State of Alabama v. State of Georgia*, 505.
13. It is the opinion of this court that the language implies that there is ownership of soil and jurisdiction in Georgia, in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme drought of the summer or autumn. *Ibid.*
14. The western line of the cession on the Chattahoochee river must be traced on the water line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the above-recited paragraph. *Ibid.*
15. By the contract of cession, the navigation of the river is free to both parties. *Ibid.*
16. See the case of *Howard v. Ingersoll*, 13 Howard, 381, and the correction of its syllabus in the errata in 14 Howard in this, that "the boundary line runs along the top of the high western bank," instead of "the boundary line runs up the river, on and along its western bank, and the jurisdiction of Georgia in the soil extends over to the line which is washed by the water wherever it covers the bed of the river within its banks." *Ibid.*

CONTRACT.

How far affected by Usage, see USAGE; made by Railroad Companies, see RAILROAD COMPANIES.

1. Where there was a contract for furnishing a steam engine, the following guaranty was made: "For value received, I hereby guaranty the performance of the within contract, on the part of Hopkins & Leach; and in case of non-performance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid." *Benjamin v. Hillard*, 149.
2. This contract is not in the alternative, but consists of two terms: one, that the principals shall perform their engagement, not merely by the delivery of some machinery, but of such machinery as the contract includes; the other, that if there be a non-performance, whether excusable or not, the money advanced on the contract shall be secured to the plaintiffs, to the extent to which the principals are liable. *Ibid.*
3. An acquiescence of both parties in the prolongation of the time within which the contract was to be fulfilled, will not operate to discharge the guarantor. There was no change in the essential features of the contract, and if the parties choose mutually to accommodate each other, so as better to arrive at their end, the surety cannot complain. *Ibid.*
4. So, where the machinery delivered was imperfect, and the two contracting parties had exchanged receipts, but the imperfection was afterwards discovered, and the recipients of the machinery had to expend money upon it, the guarantor is responsible for it. *Ibid.*
5. The defects in the machinery were latent, and could only be ascertained by its use. The settlement between the parties did not embrace the subject to which the warranty applied, nor contain any release or extinguishment of the covenants concerning it. *Ibid.*
6. The damages to be found should be such as would enable the plaintiffs to supply the deficiency, and the jury were not required to assume the contract price as the full value of such machinery. *Ibid.*
7. Where there was a special contract to build a house by a certain day, which was not fulfilled, owing to various circumstances, and the contractor brought a suit setting forth the special contract and averring performance, it was erroneous in the court to instruct the jury to find for the plaintiff, as the work was not finished by the appointed day, though it was completed after the time with the knowledge and approbation of the defendant. *Dermott v. Jones*, 220.
8. By the terms of the contract, the performance of the work was a condition precedent to the payment of the money sued for. *Ibid.*
9. The general rule of law is, that whilst a special contract remains open, that is, unperformed, the party whose part of it has not been done cannot sue in *indebitatus assumpsit*, to recover a compensation for what he has done, until the whole shall be completed. But the exceptions from that rule are in cases in which something has been done under a special contract, but not in strict accordance with it; but if the other party derives any benefit from the labor done, the law im-

CONTRACT, (*Continued.*)

plies a promise on his part to pay such a remuneration as the work is worth, and to recover it an action of indebitatus assumpsit is maintainable. *Ibid.*

10. The case must be remanded to the Circuit Court, to be tried upon such counts as are in the original declaration, which charges the defendant in the sum of \$5,000 for work and labor done, for materials furnished and used by the defendant in the erection and finishing certain stores and buildings in the city of Washington; and upon the money counts for a like sum paid by the plaintiff for the defendant; for a like sum had and received, and for a like sum paid, laid out, and expended, by the plaintiff, for the use of the defendant, at her request. And in such action the defendant may recoup the damages which she has sustained from the imperfect execution of the work. *Ibid.*
11. Where there was a company incorporated for the purpose of making screws, and they were sued by certain persons with whom they had been in the habit of dealing, for not supplying a sufficient quantity of the manufactured article, according to orders which had been given and received, the defence was, that the supply manufactured was not equal to the demand, and that the plaintiffs knew that the articles were furnished to customers in regular order, according to date. *Bliven et al. v. New England Screw Company*, 420.
12. Such custom was not a sufficient defence, unless it was known to the other contracting party, and formed a part of the contract. *Ibid.*
13. Parol evidence of usage is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage. *Ibid.*
14. But parol evidence of custom and usage is not admitted to contradict or vary express stipulations or provisions restricting or enlarging the exercise and enjoyment of the customary right. *Ibid.*
15. The evidence in this case proved that the plaintiffs knew of the usage of the defendants to supply orders as fast as the articles could be made, and according to a list kept in a book. *Ibid.*
16. It was correct in the court to construe this evidence, and to instruct the jury that if they believed the evidence, it showed that the plaintiffs were chargeable with notice of the defendants' custom to fill their contracts only in the order in which they were accepted and in proportion with each other, and not in full, according to the strict terms thereof. *Ibid.*
17. Where the screw company sued persons who had received the manufactured articles, and the defence was, that the whole amount which had been ordered had not been delivered, the contracts for the sale and delivery of the screws were subject to the custom of the plaintiffs to fill the same in part only. *Ibid.*, 433.
18. See the report of the preceding case. *Ibid.*

CORPORATIONS.

See RAILROAD COMPANIES.

CITY CORPORATIONS.

1. The charter of the town (now city) of Oakland, in California, which conferred upon the corporation power to regulate ferries, did not give an exclusive power, and therefore the corporation did not possess the power to confer upon others an exclusive privilege to establish them. *Minturn v. Larue et al.*, 435.
2. The difference pointed out between this charter and those grants which are exclusive. *Ibid.*

COUNSEL FEES.

1. Counsel fees are not a proper element for the consideration of the jury in the estimation of damages in actions for the infringement of a patent right. This point has been directly ruled by this court, and is no longer an open question. *Teese v. Huntingdon*, 2.

CURATOR AD HOC.

1. Where a party residing in Maryland sold land in Louisiana with a general warranty to a resident of Louisiana, who was afterwards evicted from a part of it, and obtained a judgment against his warrantor, whom he had vouched in, this judgment could not be rendered effective against the Maryland vendor, because no notice had been served upon him, and the appointment of a *curator ad hoc* was not sufficient. *Flowers v. Foreman*, 133.
2. An action of assumpsit having been afterwards brought against him in the Maryland court by the parties interested, the statute of limitations of Maryland was considered to be applicable to the case. *Ibid.*
3. The eviction of the vendee took place when he held the land under a title different from that which had been conveyed to him by his grantor, without the necessity of the execution of a writ of possession. *Ibid.*

DUTIES AT THE CUSTOM-HOUSE.

1. The duties upon foreign merchandise are to be computed on their value on the day of the sailing of the vessel from the foreign port. (See 20 *Howard*, 571.) *Irvine v. Redfield*, 170.

EJECTMENT.

1. It is the settled doctrine of this court, that no action of ejectment will lie on an entry made with the register and receiver of the land office, such being merely an equitable title, notwithstanding a State Legislature may have provided otherwise by statute. *Hooper v. Scheimer*, 235.
2. The law is only binding on the State courts, and has no force in the Circuit Courts of the Union. *Ibid.*
3. It is also the settled doctrine of this court, that a patent carries the fee, and is the best title known to a court of law. *Ibid.*

EVIDENCE.

1. For the purpose of impeaching a witness, a question was asked of another witness, "What is the reputation of the (first) witness for moral character?" This question was objected to, and properly not allowed to be put by the court below. *Teese v. Huntingdon*, 2.
2. The elementary writers and cases upon this point examined. *Ibid.*
3. Another witness was asked what was the reputation of the first witness for truth and veracity, who replied that he had no means of knowing,

EVIDENCE, (*Continued.*)

- not having had any transactions with him for five years. This question was excluded by the court, which must judge according to its discretion whether or not it applies to a time too remote. *Ibid.*
4. Where several defendants are joined in an action of trespass, a verdict of acquittal against one, in order to make him a witness, can only be demanded where there is no evidence against him. The cases upon this point examined. *Castle v. Bullard*, 172.
 5. Where the cause of action against the defendants was, that they had fraudulently sold the goods of the plaintiff, evidence was admissible that they had committed similar fraudulent acts at or about the same time, with a view to establish the intent of the defendants with respect to the matters charged in the declaration. *Ibid.*
 6. The cases upon this point examined. *Ibid.*
 7. So, also, evidence was admissible, to show that the purchaser was largely in debt and insolvent, and that the defendants represented him to be in good credit. The force and effect of such circumstantial evidence is for the jury to judge of the intent. *Ibid.*
 8. Where there was a company incorporated for the purpose of making screws, and they were sued by certain persons with whom they had been in the habit of dealing, for not supplying a sufficient quantity of the manufactured article, according to orders which had been given and received, the defence was, that the supply manufactured was not equal to the demand, and that the plaintiffs knew that the articles were furnished to customers in regular order, according to date. *Bliven et al. v. New England Screw Company*, 420.
 9. Such custom was not a sufficient defence, unless it was known to the other contracting party, and formed a part of the contract. *Ibid.*
 10. Parol evidence of usage is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage. *Ibid.*
 11. But parol evidence of custom and usage is not admitted to contradict or vary express stipulations or provisions restricting or enlarging the exercise and enjoyment of the customary right. *Ibid.*
 12. The evidence in this case proved that the plaintiffs knew of the usage of the defendants to supply orders as fast as the articles could be made, and according to a list kept in a book. *Ibid.*
 13. It was correct in the court to construe this evidence, and to instruct the jury that if they believed the evidence, it showed that the plaintiffs were chargeable with notice of the defendants' custom to fill their contracts only in the order in which they were accepted and in proportion with each other, and not in full, according to the strict terms thereof. *Ibid.*
 14. Where a surety upon a bond is sued, a conversation between his co-surety (now dead) and a third person is not admissible in evidence for the purpose of fixing a liability upon the defendant. The co-surety, if alive, would not himself have been a good witness. *Very v. Watkins*, 469.

EVIDENCE, (*Continued.*)

15. A paper in the handwriting of the co-surety, offered to impeach the testimony of two witnesses, was not admissible. *Ibid.*

EVIDENCE OF USAGE.

See *USAGE.*

FAST DAY.

1. The fact that the Governor of the State had appointed a day as a general fast day, did not abrogate the right of the master to continue the delivery of the goods on that day. Holiday is a privilege, not a duty. *Richardson v. Goddard*, 28.
2. There was neither a law of the State forbidding the transaction of business on that day; nor a general usage engrrafted into the commercial and maritime law, forbidding the unloading of vessels on the day set apart for a church festival, fast, or holiday; nor a special custom in the port, forbidding a carrier from unloading his vessel on such a day. *Ibid.*
3. In the absence of these legal restrictions, the master had a right to continue the delivery of the goods on the wharf on a fast day. *Ibid.*

FERRIES.

1. The charter of the town (now city) of Oakland, in California, which conferred upon the corporation power to regulate ferries, did not give an exclusive power, and therefore the corporation did not possess the power to confer upon others an exclusive privilege to establish them. *Minturn v. Larue*, 435.
2. The difference pointed out between this charter and those grants which are exclusive. *Ibid.*

GEORGIA, STATE OF.

See *CONSTITUTIONAL LAW.*

GUARANTY.

1. Where there was a contract for furnishing a steam engine, the following guaranty was made: "For value received, I hereby guaranty the performance of the within contract, on the part of Hopkins & Leach; and in case of non-performance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid." *Benjamin v. Hillard*, 149.
2. This contract is not in the alternative, but consists of two terms: one, that the principals shall perform their engagement, not merely by the delivery of some machinery, but of such machinery as the contract includes; the other, that if there be a non-performance, whether excusable or not, the money advanced on the contract shall be secured to the plaintiffs, to the extent to which the principals are liable. *Ibid.*
3. An acquiescence of both parties in the prolongation of the time within which the contract was to be fulfilled, will not operate to discharge the guarantor. There was no change in the essential features of the contract, and if the parties choose mutually to accommodate each other, so as better to arrive at their end, the surety cannot complain. *Ibid.*
4. So, where the machinery delivered was imperfect, and the two contract-

GUARANTY, (*Continued.*)

- ing parties had exchanged receipts, but the imperfection was afterwards discovered, and the recipients of the machinery had to expend money upon it, the guarantor is responsible for it. *Ibid.*
5. The defects in the machinery were latent, and could only be ascertained by its use. The settlement between the parties did not embrace the subject to which the warranty applied, nor contain any release or extinguishment of the covenants concerning it. *Ibid.*
 6. The damages to be found should be such as would enable the plaintiffs to supply the deficiency, and the jury were not required to assume the contract price as the full value of such machinery. *Ibid.*

INSURANCE.

See POLICIES OF INSURANCE.

JURISDICTION.

1. The courts of the United States, as courts of equity, have jurisdiction over executors and administrators, where the parties to the suit are citizens of different States, and this jurisdiction is not barred by subsequent proceedings in insolvency in the Probate Court of a State. *Green's Administratrix v. Creighton*, 90.
2. In such a case, the courts may interpose in favor of a foreign creditor, to arrest the distribution of any surplus of the estate of a decedent among the heirs. *Ibid.*
3. Although at law a creditor cannot sue the surety upon an administration bond until he has obtained a judgment against the administrator, yet it is not so in equity; and in the present case, where the original debtor and his surety are both dead, insolvent, and a portion of the assets of the estate of the latter can be traced to the possession of his administrator and his surety, the power of a court of equity is required to call for a discovery of the amount and nature of the assets in hand. *Ibid.*
4. Where a decree was made by the Circuit Court, sitting in admiralty, that two persons should pay freight, one in the sum of \$583.84, and the other in the sum of \$1,754.22, and the latter only appealed to this court, the appeal must be dismissed, as the amount in controversy is less than \$2,000. *Clifton v. Sheldon*, 481.
5. The rights of the two were distinct and independent; but if the freight be considered a joint matter, both should have joined in the appeal. *Ibid.*
6. Where the Circuit Court of the United States has jurisdiction over the parties and cause of action, by virtue of the 12th section of the judiciary act, it cannot be affected by any amendment of the pleadings, changing the cause of action, or by the proviso to the 11th section. *Green v. Custard*, 484.
7. The evils commented upon, arising from the courts of the United States permitting the hybrid system of pleading from the State codes to be introduced on their records. *Ibid.*
8. The admiralty jurisdiction of the courts of the United States extends to contracts of charter-party and affreightment. These are maritime contracts within the true meaning and construction of the Constitution

JURISDICTION, (*Continued.*)

and act of Congress, and cognizable in courts of admiralty, by process either *in rem* or *in personam*. *Morewood et al. v. Enequist*, 491.

9. Appellants should not expect this court to reverse a decree of the Circuit Court, merely upon a doubt created by conflicting testimony. *Ibid.*

LANDS, PUBLIC.

For PUBLIC LANDS IN CALIFORNIA, see CALIFORNIA.

1. On the 8th of August, 1846, a grant of land was made to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river, from its mouth to the Raccoon fork, in said Territory, one equal moiety, in alternate sections, of the public lands (remaining unsold and not otherwise disposed of, encumbered, or appropriated) in a strip five miles in width on each side of said river, to be selected within said Territory by an agent to be appointed by the Governor thereof, subject to the approval of the Secretary of the Treasury of the United States. *Dubuque and Pacific Railroad Co. v. Litchfield*, 66.
2. On the 15th of May, 1856, Congress passed an act granting to the State of Iowa, for the purpose of aiding in the construction of a railroad from Dubuque to a point on the Missouri near Sioux city, every alternate section of land, designated by odd numbers, for six sections in width on each side of said road. The State of Iowa regranted the lands to the Dubuque and Pacific Railroad Company. *Ibid.*
3. The land in question is claimed under these two acts by the parties respectively. *Ibid.*
4. The title held under the act of 1846 must prevail, provided the grant extended to lands above the Raccoon fork. *Ibid.*
5. This court has jurisdiction to construe this act in the case now before it, the proceedings before the Executive department, extending through more than ten years, not being sufficient either to conclude the title or to control the construction of the act. *Ibid.*
6. Those proceedings stated. *Ibid.*
7. The grant was confined to lands between the mouth of Des Moines river and Raccoon fork; that was the river to be improved, on each side of which the strip of land granted was to lie. The historical circumstances connected with the grant sustain this view. *Ibid.*
8. All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied. *Ibid.*
9. The claimant, under the act of 1846, cannot be considered as an innocent purchaser. The act of Congress was a grant to Iowa of an undivided moiety of the lands below Raccoon fork, and the officers of the Executive department had no further authority than to make partition of those lands. Having extended their acts to lands lying outside of

LANDS, PUBLIC, (*Continued.*)

the boundaries, their attempts to make partition were merely nugatory. *Ibid.*

10. The court is satisfied, from evidence before it, that this is not merely a fictitious action. *Ibid.*
11. It is the settled doctrine of this court, that no action of ejectment will lie on an entry made with the register and receiver of the land office, such being merely an equitable title, notwithstanding a State Legislature may have provided otherwise by statute. *Hooper v. Scheimer*, 235.
12. The law is only binding on the State courts, and has no force in the Circuit Courts of the Union. *Ibid.*
13. It is also the settled doctrine of this court, that a patent carries the fee, and is the best title known to a court of law. *Ibid.*
14. Where there were two separate claimants of land in California, both claiming under one original grant, and the surveyor, in running out their lines, disregarded the limits of the original grant, and included within one of the surveys a large portion of Government land, the Commissioner of the General Land Office was right in refusing to issue a patent founded on such erroneous survey. *Castro v. Hendricks*, 438.
15. In a treaty made with the Pottawatomie Indians in 1832, there were reservations to individual Indians, which should be selected under the direction of the President of the United States, "after the land shall have been surveyed, and the boundaries shall correspond with the public surveys." *Doe et al. v. Wilson*, 457.
16. Before this was done, one of these reservees made a conveyance by a deed in fee simple, with a clause of general warranty. In 1837, patents were issued for the reservations. *Ibid.*
17. This deed vested the title of the reservee in the grantee. The former was a tenant in common with the United States, and could sell his reserved interest; and when the United States selected the lands reserved to him, and made partition, (of which the patent is conclusive evidence,) his grantee took the interest which the reservee would have taken if living. *Ibid.*
18. A prayer to the court that the land patented was not the same as that reserved was properly refused, because the recital in the patent was conclusive evidence to the contrary. *Ibid.*

LIMITATION, STATUTES OF.

1. Where a party residing in Maryland sold land in Louisiana with a general warranty to a resident of Louisiana, who was afterwards evicted from a part of it, and obtained a judgment against his warrantor, whom he had vouched in, this judgment could not be rendered effective against the Maryland vendor, because no notice had been served upon him, and the appointment of a *curator ad hoc* was not sufficient. *Flowers v. Foreman*, 133.
2. An action of assumpsit having been afterwards brought against him in the Maryland court by the parties interested, the statute of limitations of Maryland was considered to be applicable to the case. *Ibid.*
3. The eviction of the vendee took place when he held the land under a title

LIMITATION, STATUTES OF, (*Continued.*)

different from that which had been conveyed to him by his grantor, without the necessity of the execution of a writ of possession. *Ibid.*

4. Where a bill in chancery was filed by persons residing in Canada, claiming title to property in Detroit which had been in the exclusive possession of the defendants and those claiming under them since 1793, without, as far as appears, any right being set up by the complainants or by those claiming under them to the title or the possession of the premises until the filing of the bill, or any claim to the rents and profits or to an account as tenants in common, or for partition, or to be admitted to the enjoyment of any right as co-heirs, the case is one resting upon the enforcement of an implied trust, where courts of equity follow the courts of law in applying the statute of limitations. *Beaubien v. Beaubien*, 190.
5. The averments of concealment and fraud on the part of the defendants, which are made in the bill for the purpose of withdrawing the case from the operation of the statute, are too general and indefinite to have that effect. *Ibid.*
6. No acts of fraud or concealment are stated; and the time when even an intention to defraud, which is all that is averred, was discovered, was some fifty years after the exclusive possession of the defendants and those under whom they claim had commenced; and this, although the parties lived in the neighborhood and almost in sight of the city which has, in the mean time, grown up on the premises. *Ibid.*

LOUISIANA, STATE OF.

1. The following is an article of a treaty concluded between the King of Wurtemberg and the United States in 1844, (8 Stat. at L., 588:) "The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where said property lies shall be liable to pay in like cases." *Frederickson et al. v. State of Louisiana*, 445.
2. This article does not include the case of a citizen of the United States dying at home, and disposing of property within the State of which he was a citizen, and in which he died. *Ibid.*
3. Consequently, where the State of Louisiana claimed, under a statute, a tax of ten per cent. on the amount of certain legacies left by one of her citizens to certain subjects of the King of Wurtemberg, the statute was not in conflict with the treaty, and the claim must be allowed. *Ibid.*

MARRIED WOMEN.

1. Where a married woman became a trustee of land for the benefit of her son in law, and executed a deed (without joining her husband) to a bona fide purchaser, who had paid the purchase money to the cestui

MARRIED WOMEN, (*Continued.*)

- que use, it was not necessary, under the circumstances of the case, for her husband to join in the deed. *Gridley et al. v. Wynant*, 500.
2. These circumstances were, that by executing the deed she did not defeat an estate to which her husband was entitled, nor did he claim adversely to the deed, but it was within the scope of her authority as trustee, and therefore will be sustained by a court of equity against her heirs. *Ibid.*
 3. Her children, who were her heirs at law, having brought a suit at law to recover the land from the bona fide purchaser, a court of equity will interpose to restrain their proceedings. *Ibid.*
 4. The alleged illegality of the consideration of the deed of trust—viz: that it was intended to protect the property of her son in law, who was insolvent—was not sufficient to destroy the independent equity of the bona fide purchaser, nor was it necessary to make the son in law a party when the bona fide purchaser sought relief in a court of equity against the title of the heirs. *Ibid.*
 5. Where proceedings are instituted in the State court of Iowa under certain articles of their code, and then removed into the United States court, although these proceedings do not conform to the mode prescribed for chancery proceedings in the courts of the United States, yet, if the pleadings and proofs show the matter in dispute between the parties, this court will adjudicate the questions which they present. *Gridley et al. v. Westbrook*, 503.
 6. The principle adopted in the preceding case respecting the execution of a deed by a married woman as trustee, is equally applicable to a deed executed under a power of attorney granted by her. *Ibid.*

MORTGAGE.

1. Where a mortgage was given to secure the payment of a note for \$5,500, and such advances as there had been or might be made within two years, not to exceed in all an indebtedness of six thousand dollars, and advances were made, the mortgage was good to cover the advances and the note for \$5,500. *Lawrence v. Tucker*, 14.
2. The parties to the transaction so understood it, and acted upon it accordingly. *Ibid.*
3. In respect to the validity of mortgages for existing debts and future advances, there can be no doubt. This court has made three decisions directly and inferentially in support of them. *Ibid.*
4. A railroad company authorized to borrow money and issue their bonds, to enable themselves to finish and stock the road, may mortgage as security not only the then acquired property, but such as may be acquired in future. *Pennock et al. v. Coe*, 117.
5. Although the maxim is true, that a person cannot grant what he has not got, yet, in this case, a grant can take effect upon the property when it is brought into existence, and belongs to the grantor in fulfilment of an express agreement, founded on a good and valid consideration, when no rule of law is infringed or rights of a third party prejudiced. The mortgage attached to the future acquisitions as described in it,

MORTGAGE, (*Continued.*)

from the time they came into existence, and were placed on the road.
Ibid.

6. Hence, where second mortgagees and holders of bonds of a second issue brought suit upon those bonds, recovered judgment, issued execution, and levied it upon a part of the rolling stock, which was not in existence when the first mortgage was given, the judgment creditors must be postponed to the claims of the first mortgagees. *Ibid.*
7. In the present case, a reasonable interpretation of the statutes creating the corporation would justify it in making the road where it was made. *Ibid.*
8. A bondholder of a class covered by a mortgage to secure the class of bonds issued in case of insolvency of the obligors cannot, by getting judgment at law, be permitted to sell a portion of the property devoted to the common security, as this would disturb the pro rata distribution among the bondholders, to which they are equitably entitled. *Ibid.*

NONSUIT.

1. The Circuit Courts of the United States have no power to grant a peremptory nonsuit against the will of the plaintiff. *Castle v. Bullard*, 172.
2. And where there are several defendants, against whom the charge is joint and several, there cannot be, at common law, a nonsuit as to one and verdict against the others, although the verdict may be against one and in favor of the others. *Ibid.*
3. And besides, in this case, there was evidence for the jury to say whether the party, in whose favor the nonsuit was prayed, was guilty or not. *Ibid.*

PARTNERS.

1. If the goods were fraudulently sold by one of the firm, and the firm received the profits in the shape of commissions, all the partners are responsible for the sale. *Castle v. Bullard*, 172.

PATENT RIGHTS.

1. Counsel fees are not a proper element for the consideration of the jury in the estimation of damages in actions for the infringement of a patent right. This point has been directly ruled by this court, and is no longer an open question. *Teese v. Huntingdon*, 2.
2. By the fifteenth section of the patent act of the fourth of July, 1836, the defendant is permitted to plead the general issue and give any special matter in evidence, provided notice in writing may have been given to the plaintiff or his attorney thirty days before the trial. *Ibid.*
3. It is not necessary that this should be served and filed by an order of the court; and it is sufficient if it was served and filed subsequently to the time when the depositions were taken and filed in court. *Ibid.*
4. In an action for damages for the infringement of a patent right, the plaintiff must furnish some data by which the jury may estimate the actual damage. If he rests his case after merely proving an infringement of his patent, he may be entitled to nominal damages, but no more. *City of New York v. Ransom et al.*, 487.

PLEAS AND PLEADINGS.

1. Where there was a special contract to build a house by a certain day, which was not fulfilled, owing to various circumstances, and the contractor brought a suit setting forth the special contract and averring performance, it was erroneous in the court to instruct the jury to find for the plaintiff, as the work was not finished by the appointed day, though it was completed after the time with the knowledge and approbation of the defendant. *Dermott v. Jones*, 220.
2. By the terms of the contract, the performance of the work was a condition precedent to the payment of the money sued for. *Ibid.*
3. The general rule of law is, that whilst a special contract remains open, that is, unperformed, the party whose part of it has not been done cannot sue in *indebitatus assumpsit*, to recover a compensation for what he has done, until the whole shall be completed. But the exceptions from that rule are in cases in which something has been done under a special contract, but not in strict accordance with it; but if the other party derives any benefit from the labor done, the law implies a promise on his part to pay such a remuneration as the work is worth, and to recover it an action of *indebitatus assumpsit* is maintainable. *Ibid.*
4. The case must be remanded to the Circuit Court, to be tried upon such counts as are in the original declaration, which charges the defendant in the sum of \$5,000 for work and labor done, for materials furnished and used by the defendant in the erection and finishing certain stores and buildings in the city of Washington; and upon the money counts for a like sum paid by the plaintiff for the defendant; for a like sum had and received, and for a like sum paid, laid out, and expended, by the plaintiff, for the use of the defendant, at her request. And in such action the defendant may recoup the damages which she has sustained from the imperfect execution of the work. *Ibid.*
5. The statutes of Mississippi provide that no plea of *non est factum* shall be admitted or received, unless the truth thereof shall be proved by oath or affirmation. *Bell v. Corporation of Vicksburg*, 443.
6. A plea of that kind was filed without the affidavit, and demurred to by the plaintiff. *Ibid.*
7. Although, upon the general principles of pleading, a demurrer only calls in question the sufficiency of what appears on the face of the pleading, and does not reach the preliminary steps necessary to be taken to put it upon file, yet, as the State courts where such a statute exists have held that the plea of *non est factum* is demurrable if there be no affidavit, and the course of practice in the Circuit Court conforms to the State practice, this court also holds that such a plea is demurrable. *Ibid.*

POLICIES OF INSURANCE.

1. An open or running policy of insurance upon "coffee laden or to be laden on board the good vessel or vessels from Rio Janeiro to any port in the United States, to add an additional premium if by vessels lower than A 2, or by foreign vessels," contained also the following clause, viz: "Having been paid the consideration for this insurance by the

POLICIES OF INSURANCE, (*Continued.*)

assured or his assigns, at and after the rate of one and one-half per cent., the premiums on risks to be fixed at the time of endorsement, and such clauses to apply as the company may insert, as the risks are successively reported." *Orient Mutual Insurance Co. v. Wright et al.*, 401.

2. This is different from an ordinary running policy, in which the rate of premium to be paid is ascertained and inserted in the body of the policy at its execution, and in which species of policy the contract becomes complete, and the policy attaches upon the goods from the time they are laden on board the vessel, as soon as the ship is declared or reported, provided the shipment comes within the description in the policy. *Ibid.*
3. The rules explained which govern this class of policies. *Ibid.*
4. But in the policy in question there is something more to be done, in order to make the contract complete, than merely to declare the ship. The assured must pay or secure the additional premium, which the underwriter has reserved the right to fix at the time of the declaration of the risk in case the vessel rates lower than A 2. *Ibid.*
5. Unless the assured paid or secured this additional premium fixed by the underwriter, the contract of insurance, in respect to the particular shipment, did not become complete or binding. *Ibid.*
6. Hence, the instruction of the court below was erroneous, which held that the contract was complete and binding as soon as the vessel was reported; and that, if the parties could not agree as to the additional premium, the question was one for the courts to settle. *Ibid.*
7. The parties stipulated that the additional premium should be fixed when the risk was made known. *Ibid.*
8. The cases upon this point cited. *Ibid.*
9. The principles with respect to a policy of insurance in the preceding case of the Orient Mutual Insurance Company against Wright, reaffirmed in the present case. *Sun Mutual Insurance Co. v. Wright et al.*, 412.
10. In the correspondence which took place between the insurer and the insured, there was no waiver by the former of the right of fixing the premium, nor was it claimed or suggested in the communications between the parties at the time. *Ibid.*

PRACTICE.

1. Where a motion was made to dismiss an appeal, upon the ground that no appeal bond had been given, time was allowed the appellants within which to file the bond. If they complied with the order, the appeal was to stand; otherwise, to be dismissed. *Anson, Bangs, and Co. v. Blue Ridge Railroad Co.*, 1.
2. The appeal bond must be taken and approved by any judge or justice authorized to allow the appeal or writ of error. *Ibid.*
3. By the fifteenth section of the patent act of the fourth of July, 1836, the defendant is permitted to plead the general issue and give any special matter in evidence, provided notice in writing may have been given to

PRACTICE, (*Continued.*)

the plaintiff or his attorney thirty days before the trial. *Teese v. Huntingdon*, 2.

4. It is not necessary that this should be served and filed by an order of the court; and it is sufficient if it was served and filed subsequently to the time when the depositions were taken and filed in court. *Ibid.*
5. The Circuit Courts of the United States have no power to grant a peremptory nonsuit against the will of the plaintiff. *Castle v. Bullard*, 172.
6. And where there are several defendants, against whom the charge is joint and several, there cannot be, at common law, a nonsuit as to one and verdict against the others, although the verdict may be against one and in favor of the others. *Ibid.*
7. And besides, in this case, there was evidence for the jury to say whether the party, in whose favor the nonsuit was prayed, was guilty or not. *Ibid.*
8. Where several defendants are joined in an action of trespass, a verdict of acquittal against one, in order to make him a witness, can only be demanded where there is no evidence against him. The cases upon this point examined. *Ibid.*
9. Where the cause of action against the defendants was, that they had fraudulently sold the goods of the plaintiff, evidence was admissible that they had committed similar fraudulent acts at or about the same time, with a view to establish the intent of the defendants with respect to the matters charged in the declaration. *Ibid.*
10. The cases upon this point examined. *Ibid.*
11. So, also, evidence was admissible, to show that the purchaser was largely in debt and insolvent, and that the defendants represented him to be in good credit. The force and effect of such circumstantial evidence is for the jury to judge of the intent. *Ibid.*
12. If the goods were fraudulently sold by one of the firm, and the firm received the profits in the shape of commission, all the partners are responsible for the sale. *Ibid.*
13. In the present case, the instructions given by the court below cannot justly be complained of by the counsel, and moreover were accompanied by explanations which constitute a part of them. *Ibid.*
14. Where a motion was made to dismiss an appeal, upon the ground that the appeal was taken by part only of the complainants below, and that the other complainants had not been made and were not parties to the appeal; and it appeared from the record that a fund had been decreed by the court below to be distributed ratably amongst two classes of creditors, one of which was composed of judgment creditors, and the other of those who had come in after the filing of a creditor's bill; and the first class only conceived themselves aggrieved by the decree admitting the others to a ratable proportion, and therefore became the appellants; this court will, in such a state of things, refuse the motion to dismiss and reverse this, together with all other points to be decided, when the case shall come up for argument hereafter. *Day et al. v. Washburn*, 309.

PRACTICE, (*Continued.*)

15. Where parties were sued on a promissory note executed by them, did not pretend to have any defence, entered a false plea which was overruled on demurrer, refused to plead in bar, and had judgment entered against them for want of a plea, this court will affirm the judgment with ten per cent. damages. *Sutton v. Bancroft*, 320.
16. Where a case is brought up to this court, and the writ of error appears to have been sued out for delay, the judgment will be affirmed with costs and ten per cent. damages. *Jenkins v. Banning*, 455.
17. When this court is satisfied, from the evidence before it, that no appeal to it had been granted by the court below, and that the cause was not before it when an order was passed, at the instance of the appellee, to docket and dismiss the case, it will rescind and annul the decree of dismissal, and revoke and cancel the mandate issued thereupon. *United States v. Gomez*, 326.
18. A motion to docket and dismiss a case from the failure of the appellant to file the record within the time required by the rule of this court, when granted, is not an affirmance of the judgment of the court below. It remits the case to the court, to have proceedings to carry that judgment into effect, if in the condition of the case there is nothing to prevent it. That is for the consideration of the judge in the court below, with which this court has nothing to do, unless his denial of such a motion gives to the party concerned a right to the writ of mandamus. *Ibid.*
19. In the present aspect of this case, such a motion is not to be considered. *Ibid.*
20. Cases cited to sustain the above principles. *Ibid.*

RAILROAD COMPANIES.

1. In 1851, the Legislature of Ohio passed a general law relating to railway companies, which empowered them at any time, by means of their subscription to the capital stock of any other company or otherwise, to aid such other railroad company, provided no such aid shall be furnished until, at a called meeting of the stockholders, two-thirds of the stock represented shall have assented thereto. *Zabriskie v. Cleveland, Columbus, and Cincinnati Railroad Co. et al.*, 381.
2. In 1852, another act was passed for the creation and regulation of incorporated companies in Ohio, re-enacting the above section, and providing further, that any existing company might accept any of its provisions, and when so accepted, and a certified copy of their acceptance filed with the Secretary of State, that portion of their charters inconsistent with the provisions of this act shall be repealed. *Ibid.*
3. The Cleveland, Columbus, and Cincinnati Railroad Company, when they endorsed the bonds hereafter mentioned, had not formally complied with either of these requirements; had neither convoked a meeting of the stockholders, nor signified their acceptance to the Secretary of State. *Ibid.*
4. In April, 1854, the Cleveland, Columbus, and Cincinnati Railroad Company endorsed a guaranty upon four hundred bonds of one thousand

RAILROAD COMPANIES, (*Continued.*)

dollars each, with interest coupons at seven per cent. interest, issued by the Columbus, Piqua, and Indiana Railroad Company. *Ibid.*

5. A stockholder in the Cleveland, &c., Company filed a bill to enjoin the directors from paying the interest upon the bonds which they had thus guarantied, upon the ground that these directors had exceeded their legal authority in making the guaranty. Some of the bondholders came in as defendants with the corporation. *Ibid.*
6. As between the parties to this suit, the acceptance of the acts of 1851 and 1852 may be inferred from the conduct of the corporators themselves. The corporation have executed the powers and claimed the privileges conferred by them, and they cannot exonerate themselves from the responsibility by asserting that they have not filed the evidence required by the statute to evince their decision. *Ibid.*
7. Amongst the acts of the corporators was this—that at a meeting of the stockholders of the Cleveland Company, in July, 1854, the endorsement of the bonds was approved, adopted, and sanctioned, and this resolution has never been rescinded at any subsequent annual meetings, of which there have been several, at which the complainant was represented. His proxy was also present at the meeting of July, 1854, but declined to vote, when his vote would have controlled the action of the meeting. *Ibid.*
8. These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence; and a corporation cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced. *Ibid.*

RECEIVER.

1. Where a levy is made upon goods and chattels under a *f. i. fa.*, the officer may confide them to another, for safe keeping, until there has been a settlement of the judgment and payment of all costs. He may, therefore, leave them in the hands of a receiver appointed by the court. *Very v. Watkins*, 469.
2. Where the receiver had the custody of goods, and the complainant was ordered to select such a portion of these goods as would pay his claim by a decree of the court below, which was affirmed by this court, and which he refused to do, and this portion was accordingly set apart, the receiver became from that time a trustee for the complainant. *Ibid.*
3. The receiver was entitled to hold this property, as trustee, until a demand was made upon him in proper form by the complainant to surrender it. This proper form should have been under a certified copy of that part of the decree which permitted the complainant to demand the property, and which required the receiver to surrender it with the complainant's acknowledgment of its receipt. These papers should then be filed in court, for the protection of the trustee. *Ibid.*

SUNDAY.

1. Where a tort was committed which was cognizable in admiralty, it was no defence that the vessel was prosecuting her voyage on Sunday. The

SUNDAY, (*Continued.*)

statutes of Maryland (in which State the tort took place) and the cases upon this point, examined. *Philadelphia, Wilmington, and Baltimore Railroad Co. v. Philadelphia and Havre de Grace Steam Towboat Co.*, 209.

SURETY.

1. Where the surety upon an administration bond was sued, and judgment recovered against him in Mississippi, and a court in Tennessee (where the principals upon the bond resided) decided that but a small amount was due by the administrators upon their account, and that the judgment against the surety had been obtained in defiance of an injunction issued by the Tennessee court, and also by fraudulent representations made to the surety, and it was admitted that the decree in Tennessee was supported by the proofs, the surety was entitled to relief by the court in Mississippi, and the creditor must be perpetually enjoined from proceeding upon his judgment. *Cage's Executors v. Cassidy*, 109.
2. Where a surety upon a bond is sued, a conversation between his co-surety (now dead) and a third person is not admissible in evidence for the purpose of fixing a liability upon the defendant. The co-surety, if alive, would not himself have been a good witness. *Very v. Watkins*, 469.
3. A paper in the handwriting of the co-surety, offered to impeach the testimony of two witnesses, was not admissible. *Ibid.*

TEXAS.

1. The alien heirs of a colonist in Texas, who died intestate in 1835, cannot inherit his landed property there. The courts of Texas have so decided, and this court adopts their decisions. *Middleton v. McGrew*, 45.

USAGE.

1. Where there was a written contract for the delivery of a certain number of barrels of flour at a given price, to be delivered within a named time at the seller's option, and evidence was offered by the purchaser of an usage existing, that a margin should be put up, the court below was right in refusing to allow this evidence to go to the jury, because it was too indefinite and uncertain to establish an usage. *Oelricks et al. v. Ford*, 49.
2. And, moreover, if the usage existed, the proof would have been inadmissible to affect the construction of the contract, in which there was no ambiguity or doubt on the face of the instrument. *Ibid.*
3. Any parol evidence of conversations or of an understanding of the parties that the contract was made subject to such an usage, was inadmissible, as these were merged in the written instrument. *Ibid.*
4. The contract was made in Baltimore, between the purchasers and an agent of the seller, the seller residing in New York. The latter, and not the agent, was bound to bring the suit, as the character of the agent was disclosed on the face of the contract. There is no distinction in the principle governing agencies of this description between the cases of a home or foreign principal. *Ibid.*
5. Usage of a company not a sufficient defence unless it was known to the

USAGE, (*Continued.*)

other contracting party, and formed a part of the contract. *Bliven et al. v. New England Screw Company*, 420.

6. Parol evidence of usage is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage. *Ibid.*
7. But parol evidence of custom and usage is not admitted to contradict or vary express stipulations or provisions restricting or enlarging the exercise and enjoyment of the customary right. *Ibid.*
8. Where the screw company sued persons who had received the manufactured articles, and the defence was, that the whole amount which had been ordered had not been delivered, the contracts for the sale and delivery of the screws were subject to the custom of the plaintiffs to fill the same in part only. *Ibid*, 433.
9. See the report of the preceding case. *Ibid*

WILL.

1. In California, where a will with its codicils was offered in evidence, the testator of which died in 1848, an objection to its admission because it had never been admitted to probate was not well founded. The codicil was not inadmissible as testimony on that account. *Adams v. Norris*, 353.
2. Neither was it inadmissible because the witnesses who were present at its execution had never been examined to establish it as an authentic act. *Ibid.*
3. An objection to the admission of the codicil, because it does not appear on the face of the instrument that the witnesses were present during the whole time of the execution of the will, and heard and understood the dispositions it contained, was not well founded. *Ibid.*
4. Cases cited to establish this point. *Ibid.*
5. It was proper in the court to allow evidence to go to the jury of a custom in California as to the manner of making wills, and to instruct them that the evidence was competent; and that if the custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, it will operate to repeal the prior law. *Ibid.*
6. The Spanish law upon this point examined, and also the decisions of the State courts in California. *Ibid.*
7. It was proper in the court to instruct the jury that the testator and witnesses should alike hear and understand the testament, and that, under these conditions, its publication as the will of the testator should be made. *Ibid.*
8. With regard to the proof of the will, as all the witnesses were dead, evidence of their signatures and that of the testator was admissible, and also of a declaration by him that he had made a will with a similar devise. The sindico, who attested it, should be counted among the witnesses. *Ibid.*
9. The binding force and legal operation of the codicil are to be determined by the law as it existed when the codicil was made. But the mode in

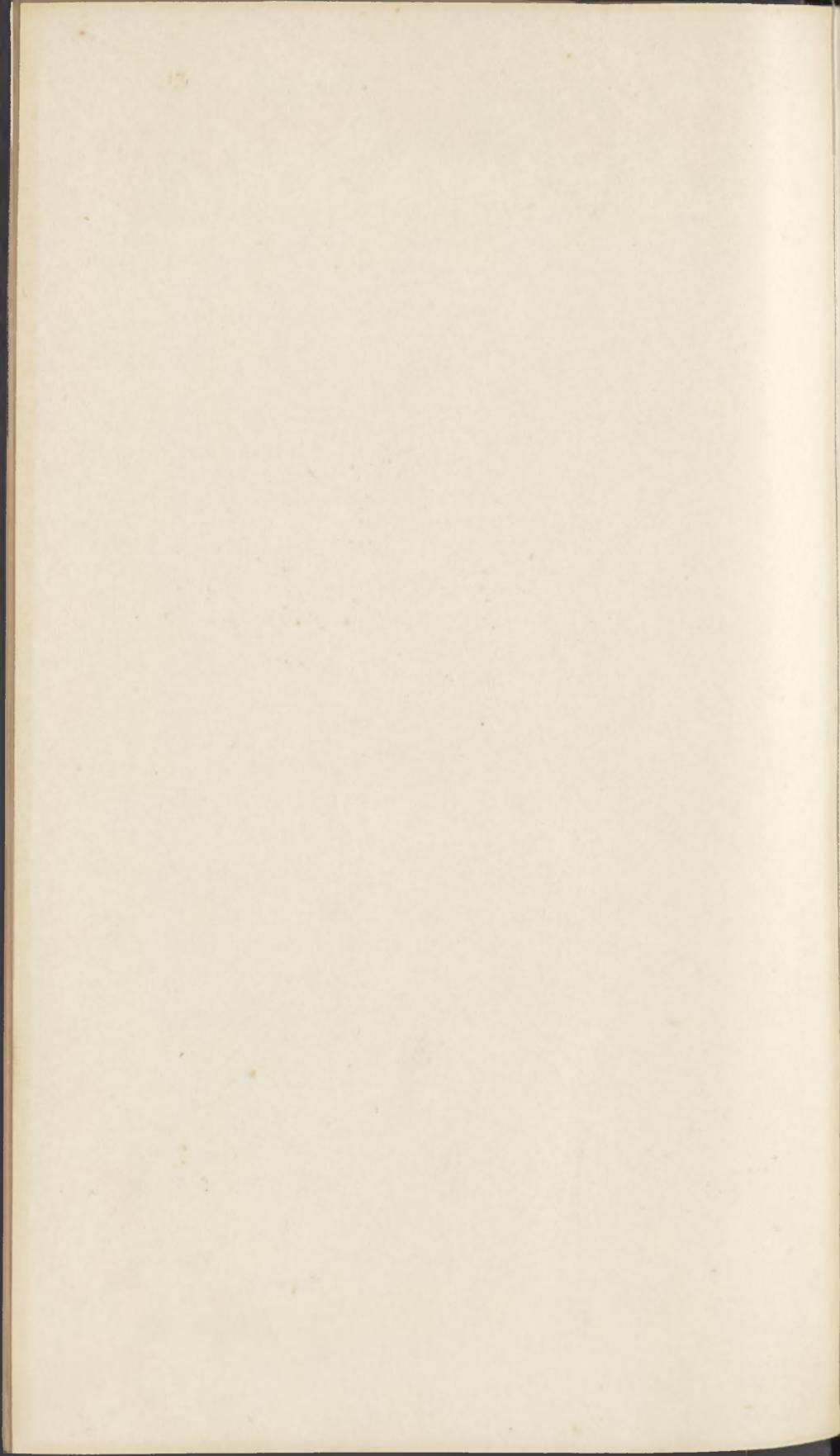
WILL, (*Continued.*)

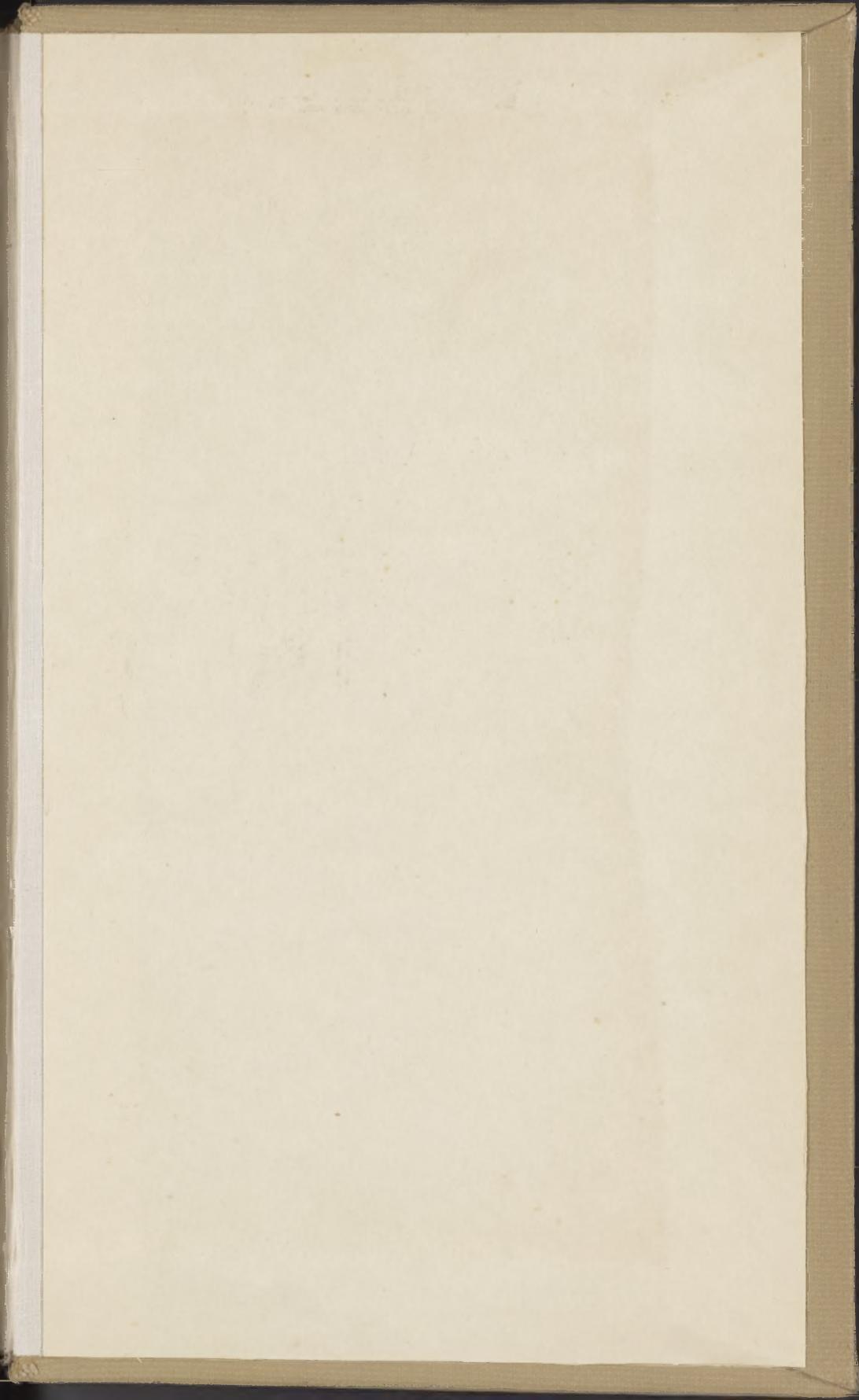
which it should be submitted to the court and jury, and the effect to be given to the testimony that accompanied it, depend upon the law of the forum at the time of trial. It was a proper question to be submitted to the jury, whether, under the circumstances of the case, it was probable the formalities required by law were complied with. *Ibid.*

WITNESS.

1. For the purpose of impeaching a witness, a question was asked of another witness, "What is the reputation of the (first) witness for moral character?" This question was objected to, and properly not allowed to be put by the court below. *Teese v. Huntingdon*, 2.
2. The elementary writers and cases upon this point examined. *Ibid.*
3. Another witness was asked what was the reputation of the first witness for truth and veracity, who replied that he had no means of knowing, not having had any transactions with him for five years. This question was excluded by the court, which must judge according to its discretion whether or not it applies to a time too remote. *Ibid.*







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