

Statement of the case.

tions in a will, even to persons not *in esse*, in order to make a final decree and give proper instructions in relation to the execution of the trusts.* It is this necessity alone which compels a court to make such cases exceptions to the general rule. But in the present case no such necessity exists. The court is not called upon to make a scheme of the trusts, nor could they anticipate the situation of the parties in the suit, or those who may be in existence at the death of Mrs. De Valle. The court has no power to decree *in thesi*, as to the future rights of parties not before the court or *in esse*.

DECREE AFFIRMED WITH COSTS.

WRIGHT v. ELLISON.

1. To constitute an equitable lien on a fund there must be some distinct appropriation of the fund by the debtor. It is not enough that the fund may have been created through the efforts and outlays of the party claiming the lien.
2. A power of attorney drawn up in Spanish South America, and by Portuguese agents, in which throughout there is verbiage and exaggerated expression, will be held to authorize no more than its primary and apparent purpose. Hence a power to prosecute a claim in the Brazilian courts will not be held to give power to prosecute one before a Commissioner of the United States at Washington; notwithstanding that the first named power is given with great superfluity, generality, and strength of language.

IN 1827, the American brig Caspian was illegally captured by the naval forces of Brazil, and condemned in the prize courts of that country. There being nothing else to be done in the circumstances, her master, one Goodrich, instituted legal proceedings to recover the brig, and gave to Zimmerman, Frazier & Co., an American firm of the country, a power of attorney with right of substitution, to go on with matters. The power was essentially in these words:

“I authorize, &c., in my name and representing me, to appear in and prosecute the cause I am this day prosecuting before the

* See *Bowers v. Smith*, 10 Paige, 200.

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tribunal of justice, &c., in which this vessel is interested; said vessel has been detained by force of the blockade of Buenos Ayres, and that they make petitions, request, and protests, here and before all tribunals, superior and inferior, before whom it is customary to appeal; that they present all the documents favorable to my rights; that they except to and decline jurisdiction; that they give and refuse terms; that they submit written evidence and proof; that they retort and contradict everything unfavorable; that they challenge jurisdiction; that they express the causes of accusation, if it be necessary so to do; that they take cognizance of all decrees and interlocutory as well as final sentences; that they admit the favorable and appeal from the adverse; that they *prosecute the appeal before his Imperial Majesty* in the superior tribunals of war and justice, that in right they can and ought to do; that they *insinuate where and against whom they may deem advisable, doing in effect everything requisite and necessary that I, being present, would or could do*; that they make transactions and obligations, name arbitrators and mediators, demanding damages or adjusting them amicably with the opposite parties, receiving in my name the said brig Caspian and her cargo; that they give all receipts right and proper to be given in faith of delivery and acquittance; and after the restitution of said vessel they may name, in my absence, any other captain and crew to navigate her if they deem it advisable, and if not, they may sell her per account of her legitimate owners, and they may receive amount of said sale. And as to the necessary power referred to, with all *incidental and resulting powers*, I give it to and confer it upon my aforesaid attorney, *with free, frank, and general administration without limit*, in order that there be no clause or special expression which would destroy the effect of it, because I gave them full power to substitute another, to revoke the appointed one's authority, and to name again substitutes, all of whom I exonerate from costs."

Under the power of substitution thus given to them, Zimmerman, Frazier & Co. substituted in their place Mr. Wright, the consul of the United States, and a merchant of standing at Rio; whose official influence, it was apparently supposed, might be more potential than their own private efforts. Wright prosecuted the case diligently through the

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Brazilian courts, but without success. He afterwards came to the United States and urged our Government to demand indemnity for this as for other wrongs of a like kind. He spent money, removed difficulties, advanced proof, and furnished information. The result of his or of other efforts was that our Government finally made a demand for indemnity, and obtained it in this case, as in many others, under a treaty subsequently made. A commissioner was appointed to hear claims and decide them. But it was probable that, except for Wright's knowledge, effort and outlay, this result would not have been had, and neither this claim nor any other been asserted by our Government as they all were.

After the labor of Wright had been undergone by him, and when the money was open for claim, one Ellison, an executor of a part owner, applied to the commissioner, proved his case, and received his share of the indemnity. Wright now instituted, in the court below,—the Circuit Court for the District of Columbia,—this proceeding, *a bill in equity*, against this same Ellison and others interested, to have a commission out of this fund. The bill set forth Wright's long and effective services, his large outlays, and insisted that, "by the general maritime law and law of the place where the contract was made," he was entitled to compensation, and "that such compensation should be retained and received by him *out of the fruits of his said labors, services and expenses*;" and it set forth further, "that as well by agreements as by reason of the premises, and by force of the maritime law and the principles of equity, and the law and established usage of the place of said contract, he had *a lien upon the fruits and proceeds of the claim, in whatever form of proceeding the same was realized, through or by reason of his labors, advances, or services performed, advanced and rendered.*"

It did not appear that the owners of the vessel had, in form, ever ratified what Wright did; but the evidence apparently was that they were cognizant, to a greater or less degree, of what he was doing, though he himself was the promoter of what was done everywhere.

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The chief question now, therefore, was, Whether the complainant, Wright, had an equitable lien upon the fund? and a preliminary question, Whether the power of attorney authorized him to do anything more than prosecute the case effectively through the Brazilian courts, and dispose of the vessel afterwards, if he should prosecute it successfully?

Messrs. Carlisle and Cox for the appellant, Wright:

1. The power gives authority to manage the suit, on behalf of the owners, and to prosecute an appeal *before his Imperial Majesty* in the superior tribunals, to do whatever he, being present, could or would do, to make compromises, name arbitrators and mediators, demand and adjust damages, to receive the vessel and cargo, and give receipts, and after restitution to appoint a captain and crew to navigate her if they deem advisable, or, if not, to sell her on account of the owners and receive the proceeds, with *free, frank, and general administration, without limit*, and power of substitution, &c. What can be more comprehensive than the complete control given over the vessel and its proceeds, with *general administration, without limit*? Would not the right to receive the vessel, and convert her into money, involve the right to receive the proceeds, if the former were impossible? And is it possible, that with *all incidental and resulting powers*, and right of *general administration, or management, without limit*, the attorneys would not be entitled to apply to and receive indemnity from the Imperial Government at Rio, on the failure of a suit in the Superior Court, at that place?

2. Slight circumstances suffice to establish an equitable lien upon a pecuniary fund. An order drawn by A. on B., in favor of C., for a valuable consideration, indorsing and delivering a bond to an assignee, or *any order, writing, or act whatever*, intended as an appropriation of a fund, or part of it, would constitute an assignment, and give a lien on it in equity. An authority to an agent to prosecute a money claim and receive the proceeds, and deduct his compensation from them, is of the same character. And this agreement may be expressed or implied. Indeed, in every authority to

Argument against the claim.

prosecute and receive a money claim, there is implied an authority to deduct the agent's expenses and compensation from the fund. Attorneys, solicitors and collectors have this right, just as all persons dealing with any subject-matter in their hands, have a lien upon it for their work and labor.

In the matter of the Brazilian claims, there was no room for misunderstanding. Merchants of high standing had been engaged for many years in prosecuting them. Many had been settled under a previous convention; and it had always been understood that the agent's compensation was to be retained out of the fund. This is matter of common knowledge.

To establish the agency of the appellant is sufficient, therefore, to make good his claim upon this specific fund.

Messrs. Bradley and Chetwood contra:

1. The power, filled as it is with the verbiage of a Portuguese legal document, and with exaggerated generalities, has a purpose which is expressed in few words. It authorizes,—

1st. The attorney to continue in, appear in, and prosecute the cause which the captain, Goodrich, is then himself prosecuting before the Brazilian Prize Court.

2d. To appeal from an adverse judgment, and prosecute the appeal in the superior tribunals.

3d. In case of success, to receive the vessel and cargo, adjusting damages.

4th. After restitution, to despatch her with crew and captain, or sell her on account of the owners.

After thus expressing its purpose, it repeats the gift of the *necessary power* to do these things; and this specified, qualified necessary power is what the constituent gives with *free, frank, and general administration without limit*.

These words, upon which the appellant lays stress, as conveying unlimited power, are, in truth, only an exaggerated mode of expressing what has already been expressed, and of giving what has already been given in a specified and definite manner: mere "*style de notaire*."

2. The appellant asks, in fact, to be paid for having helped

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the Government of the United States to effect a treaty. If he have any claim against Ellison under the treaty, he must have a similar claim against every party in whose favor the commissioner awarded. He does not set up a *contract* with the owners of the vessel, or either of them directly, or through any agent, other than has been stated, but relies on the services he has thus rendered as imposing a *lien* upon the awards. If there is no lien, he has no case in equity at all. The assertion of the opposite counsel as to what gives an equitable lien is perhaps correct. But it does not apply to Mr. Wright's case. He has no "order or writing," nor does he show any "act intended as an appropriation of the fund."

Mr. Justice SWAYNE delivered the opinion of the court. The determination of the case depends upon the solution of the question whether the complainant has shown himself entitled to an equitable lien upon the fund, to which the controversy relates.

The instrument executed by Goodrich, the master of The Caspian, to Zimmerman, Frazier & Co., we think it quite clear, contemplated only judicial proceedings, and the disposition of the vessel, after those proceedings were successful. Zimmerman, Frazier & Co., in substituting the complainant in their place, did not attempt to give, nor could they have given, any greater authority than they themselves were clothed with. The acquiescence of the owners whose rights are here in question may be properly held to have ratified the acts of Goodrich in their behalf, but it cannot be held to enlarge the powers conferred by the instrument which he executed, beyond what is expressed, and the objects in the minds of the parties at the time of the transaction.

The services of the complainant in bringing into activity the diplomatic agencies of the United States, and otherwise, at Rio, and subsequently in prosecuting the claim in this city, were outside of his original authority. Nevertheless they were beneficial to the claimants, and the approval of the defendants may be fairly implied from their silence and inac-

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tion. When the defendant, Ellison, interposed, the fruit was ripe and ready to fall into the hands of those entitled to receive it. We regard the case as a proper one for compensation, and in an action at law the complainant could hardly fail to recover.

But this is a suit in equity. The rules of equity are as fixed as those of law, and this court can no more depart from the former than the latter. Unless the complainant has shown a right to relief in equity, however clear his rights at law, he can have no redress in this proceeding. In such cases, the adverse party has a constitutional right to a trial by jury. The objection is one, which though not raised by the pleadings nor suggested by counsel, this court is bound to recognize and enforce.*

The evidence in the case is wholly silent as to any agreement touching the compensation of the complainant. It is nowhere intimated what he was to receive, or when or how he was to be paid. No established usage is shown. The matter seems to have been left to rest upon the principle of *quantum meruit*, and to be settled by the agreement of the parties when the business was brought to a close. The doctrine of equitable assignments is a comprehensive one, but it is not broad enough to include this case. It is indispensable to a lien thus created, that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it.† This case is wholly wanting in these elements.

DECREE AFFIRMED WITH COSTS.

* Hipp et al. v. Babin et al., 19 Howard, 278; Parker v. Winnipiseogee Company, 2 Black, 551.

† Morton v. Naylor, 1 Hill, 583; Hoyt v. Story, 3 Barbour, S. C., 262; Burn v. Carvalho, 4 Mylne & Craig, 690; Watson v. The Duke of Wellington, 1 Russell & Mylne, 602.