

Statement of the case.

quired to raise the question of citizenship. Here the citizenship of the parties is averred in the bill of complaint, and the consequent defect in the jurisdiction of the court is apparent, and a defect of this character thus disclosed may be reached on demurrer or taken advantage of without demurrer, on motion, at any stage of the proceedings. A plea in abatement is required only where the citizenship averred is such as to support the jurisdiction of the court and the defendant desires to controvert the averment. The question of citizenship constitutes no part of the issue upon the merits.

It follows, from the views expressed, that the decree of the court below must be REVERSED, and that the cause must be remanded with directions to the court to dismiss the bill

FOR WANT OF JURISDICTION.

UNITED STATES *v.* O'KEEFE.

1. By the proceeding known as a "petition of right," the British government accords to citizens of the United States the right to prosecute claims against it.
2. Accordingly, British subjects, if otherwise entitled, may recover by process in our Court of Claims the proceeds of captured and abandoned property; a privilege granted only to the citizens or subjects of such foreign governments as accord to our citizens the right to prosecute claims against such governments in their courts.

APPEAL from the Court of Claims; the case being thus: By act of Congress of 1855,* establishing the Court of Claims, persons are authorized to sue the United States. The words of the enactment are:

"And the said court SHALL hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein."

* 10 Stat. at Large, 612.

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When the court gives judgment for the claimant, the judgment is paid by the Secretary of the Treasury as of course, unless within a time specified the United States appeal to this court; Congress making always, in the annual appropriation bill, an appropriation for judgments in the Court of Claims.

By the terms of a later act (that of July 27, 1868),* the right to recover from the United States, by process in the said court, the proceeds of captured and abandoned property, is confined to "citizens or subjects of any government which accords to citizens of the United States *the right to prosecute claims against such government in its courts.*"

With these statutes in force, one O'Keefe, *a subject of Great Britain*, brought suit in the Court of Claims to recover from the United States the proceeds of certain captured and abandoned cotton. The question was, conceding his right otherwise to recover, whether Great Britain gave our citizens *the right to prosecute claims against her, in her courts.*

The Court of Claims found as a fact,

"That the government of England accords to its subjects *and aliens* the right to prosecute claims against it by petition of right given by the common law of England, and *regulated by statute 23d and 24th Victoria, July 3, 1860*, as to the mode of procedure; in which the petition addressed to the King is, by his fiat indorsed thereon, directed to a court of his kingdom, to hear and determine the case. The fiat, *except in a very extraordinary case*, is granted as a matter of right to any suppliant, subject or alien. The petition is in form addressed to the grace and favor of the King, but in practice is left at the office of the Home Secretary, and the fiat is then obtained *as a matter of official routine.*"

By the act of 23d and 24th Victoria, thus referred to in the above finding, and so made part of it, it is enacted that:

"§ 2. *The said petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to her Majesty for her Majesty's gracious consideration, and in order that*

* 15 Stat. at Large, 243.

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her Majesty, if she shall think fit, may grant her fiat that right be done, and no fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same.

“§ 3. Upon her Majesty's fiat being obtained to such petition, a copy of such petition and fiat shall be left at the office of the solicitor to the treasury, with an indorsement thereon in the form or to the effect in the schedule [No. 2] to this act annexed, praying for a plea or answer on behalf of her Majesty within twenty-eight days.”

The solicitor mentioned in the last section is to transmit the petition to the department of the government having charge of the subject to which it relates; and proceedings are there to be taken to have the thing judicially heard. In case of failure on behalf of her Majesty, or other person called upon to plead, answer, or demur, in due time, either to such petition, or at any subsequent stage of the proceedings thereon, the suppliant shall be at liberty to apply to the court or a judge for an order, that the petition be taken *pro confesso*; which, on proofs, &c., it may be. After judgment, it is made lawful for the commissioners of her Majesty's treasury, and they are required, to pay the amount of any moneys and costs as to which a judgment shall be given, &c., *out of any moneys in their hands for the time being applicable thereto, or which may be thereafter voted by Parliament for that purpose*, provided such petition shall relate to any public matter; and in case the same shall relate to any matter affecting her Majesty in her private capacity, the amount to which the suppliant is entitled shall be *paid to him out of such funds or moneys as her Majesty shall be graciously pleased to direct to be applied for that purpose*.

The 15th section of the act enacts that the judges of the courts of law, or three or more of the judges of the Court of Chancery, &c., shall make all such general rules and orders in their said respective courts of law and equity for regulating the pleading and practice on such petitions of right, and for the effectual execution of the act, and of its intention and object, as they may think fit, necessary, reasonable, or proper, and frame writs and forms of proceeding; “provided always,” however, the statute goes on to say,

Argument against the right to sue.

"That it shall be lawful for the Queen's most excellent Majesty, by any proclamation inserted in the London Gazette, or for either of the houses of Parliament, by any resolution passed at any time within three months next after such rules, orders, and regulations shall have been laid before Parliament, to suspend the whole or any part of such rules, orders, or regulations, and in such case the whole, or such part thereof as shall be so suspended, shall not be binding and obligatory on the said courts."

The Court of Claims, considering that this act of the British government did "accord to citizens of the United States *the right to prosecute claims against such government in its courts,*" and considering further, that on the merits O'Keefe had made out his case, held as matter of law that he was entitled to judgment. The United States appealed.

Mr. Akerman, Attorney-General of the United States, and Mr. Talbot, Assistant Attorney-General, for the appellant:

The facts found are not sufficient to support the conclusion of law rested upon them. The court does not find that the government of Great Britain grants to any person an independent right to sue that government. The sovereign's permission that the suit may be brought in court, is not granted as a matter of course, but at the royal discretion, which withholds it when the sovereign deems fit. A right differing from this altogether, is that which was provided by statute of the United States establishing the Court of Claims. That statute enacts that the said court SHALL hear and determine all claims . . . which shall be suggested to it by way of petition. Suppose that this enactment should read: "The said court, *the President in each case consenting thereto,* shall hear and determine all claims founded," &c. Can there be a doubt that the privilege then granted would be different from the right now provided? Certainly not. The right to sue the United States in the Court of Claims, which is now unconditioned, would then be subject to the will of the Executive. No petitioner could obtain hearing in that court until he first obtained the consent to such hearing of the President, the supreme head of the depart.

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ments, against the action of one of which he wished to obtain a judgment.

There is another respect in which the remedy by petition of right lacks an essential element of a genuine remedy by process of law. The 15th section of the act of Parliament shows that proceedings in courts upon a petition of right, are subject to the direct control of the royal authority. The sovereign may, by proclamation, suspend the rules adopted by the courts to regulate such proceedings, so that the same "shall not be binding and obligatory on the said courts." The proceeding, by petition of right, has none of the freedom of a *right* to prosecute a claim. The jurisdiction of the Court of Claims, on the other hand, is based upon a *law of the land*. The jurisdiction of an English court depends upon the arbitrary will of a ruler. The right, in return for which the American right is to be accorded, should be substantially like the American right. It is not substantially like the American right, when it depends for its exercise upon the arbitrary will of the government, no matter what may have been the general custom of the government in the exercise of such arbitrary will, no matter how liberal the actual practice in the past may have been.

Messrs. J. J. Weed and T. Wilson, with a brief of Messrs. Cooley and Clark, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is insisted that Great Britain does not accord to our citizens the right to prosecute claims against her government in her courts, because the mode of proceeding in that country for the recovery of claims against the government depends on the will of the Crown, while with us the right is absolute.

It is a familiar principle that all governments possess an immunity from suit, and it is only in a spirit of liberality, and to promote the ends of justice, that they ever allow themselves to be brought into court. If the privilege be granted at all, necessarily the regulations concerning it and

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the mode of proceeding will differ, as much as the governments themselves differ.

In England, it is easy to see that the method of redressing injuries to which the Crown is a party, would be different from the remedy adopted in this country in case the United States be the aggressor, because of the principle underlying the English constitution, that the King can do no wrong. On this account, although it would not do to issue mandatory process against the sovereign, yet the law being unwilling that private rights should be invaded in the conduct of public affairs and not redressed, has furnished the subject who is thus injured with a mode of obtaining redress, which is consistent with the idea of kingly prerogative. The law allows him by petition to inform the King of the nature of his grievance, and "as the law presumes that to know of any injury and to redress it are inseparable in the royal breast, it then issues, as of course, in the King's own name, his orders to his judges to do justice to the party aggrieved."*

This valuable privilege, secured to the subject in the time of Edward the First, is now crystallized in the common law of England. As the prayer of the petition is grantable *ex debito justitiae*, it is called a petition of right, and is a judicial proceeding, to be tried like suits between subject and subject.

It does not exist by virtue of any statute, nor does the recent legislation in England concerning it do more than to regulate the manner of its exercise and to confer on the petitioner the privilege, not before granted, of instituting his proceeding in any one of the superior courts of common law or equity in Westminster.

In this condition of the law regarding the petition of right, which is conceded to aliens as well as subjects, how can it be contended that the British government does not accord to citizens of the United States the right to prosecute claims against it in its courts? It is of no consequence that,

* 8 Blackstone's Commentaries, 255.

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theoretically speaking, the permission of the Crown is necessary to the filing of the petition, because it is the duty of the King to grant it, and the right of the subject to demand it. And we find that it is never refused, except in very extraordinary cases, and this proves nothing against the existence of the right. It is easy to see that cases might arise, involving political considerations, in which it would be eminently proper for the sovereign to withhold his permission, but Congress did not legislate with reference to such a state of things. It would be a severe rule of interpretation that would exclude all British subjects from the Court of Claims, because in a few sporadic cases, from motives of state policy, the petition of right was denied. And we cannot impute to the legislature an intention that would produce such a result, in the absence of an express declaration to that effect. Evidently Congress meant to confer on the British subject the right to sue in the Court of Claims under the act relating to captured and abandoned property, if, in the ordinary course of the administration of justice in England, the law secures to the American citizen the right to prosecute his claim against the government in its courts. That the petition of right accomplishes this object, cannot admit of question. If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights. Indeed, it is not less practical and efficient than a suit in the Court of Claims. And in one important particular the two proceedings are alike, for both end with the recovery of the judgments. After they are obtained, it depends in England on the Parliament, and in this country on Congress, whether or not they shall be paid.

We all agree that O'Keefe had the right to bring his action in the Court of Claims, and the judgment of that court is therefore

AFFIRMED.