HUNT v. ROUSMANIER'S Administrators.

Supreme Court 21 U.S. 174
5 L.Ed. 589

8 Wheat. 174

HUNT
v.
ROUSMANIER'S Administrators.

February Term, 1823

APPEAL from the Circuit Court of Rhode Island.

The original bill, filed by the appellant, Hunt, stated, that Lewis Rousmanier, the intestate of the defendants, applied to the plaintiff, in January, 1820, for the loan of 1450 dollars, offering to give, in addition to his notes, a bill of sale, or a mortgage of his interest in the brig Nereus, then at sea, as collateral security for the repayment of the money. The sum requested was lent; and, on the 11th of January, the said Rousmanier executed two notes for the amount; and, on the 15th of the same month, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale of three fourths of the said vessel to himself, or to any other person; and, in the event of the said vessel, or her freight, being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. This instrument contained, also, a proviso, reciting, that the power was given for collateral security for the payment of the notes already mentioned, and was to be void on their payment; on the failure to do which, the plaintiff was to pay the amount thereof, and all expenses, out of the proceeds of the said property, and to return the residue to the said Rousmanier.

The bill farther stated, that on the 21st of March, 1820, the plaintiff lent to the said Rousmanier the additional sum of 700 dollars, taking his note for payment, and a similar power to dispose of his interest in the schooner Industry, then also at sea. The bill then charged, that on the 6th of May, 1820, the said Rousmanier died insolvent, having paid only 200 dollars on the said notes. The plaintiff gave notice of his claim; and, on the return of the Nereus and Industry, took possession of them, and offered the intestate's interest in them for sale. The defendants forbad the sale; and this bill was brought to compel them to join in it.

The defendants demurred generally, and the Court sustained the demurrer; but gave the plaintiff leave to amend his bill.

The amended bill stated, that it was expressly agreed between the parties, that Rousmanier was to give specific security on the Nereus and Industry; and that he offered to execute a mortgage on them. That counsel was consulted on the subject, who advised, that a power of attorney, such as was actually executed, should be taken

in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their arrival in port. The powers were, accordingly, executed, with the full belief that they would, and with the intention that they should, give the plaintiff as full and perfect security as would be given by a deed of mortgage. The bill prayed, that the defendants might be decreed to join in a sale of the interest of their intestate in the Nereus and Industry, or to sell the same themselves, and pay out of the proceeds the debt due to the plaintiff. To this amended bill, also, the defendants demurred, and on argument the demurrer was sustained, and the bill dismissed. From this decree, the plaintiff appealed to this Court.

The cause was argued at the last term.

March 1*st*, 1822.

Mr. *Wheaton*, for the appellant, stated, that the question in this case was, whether, under the agreement mentioned in the original and amended bill, by which the plaintiff was to have a specific security on certain vessels belonging to the defendents' intestate, for the repayment of a loan of money made to him in his lifetime by the plaintiff, a Court of equity will compel the defendants to give effect to that security, by joining in a sale of the vessels, or in any other manner.

That the original intention and contract of the parties, was to create a permanent collateral security on the vessels, in the nature of, or equivalent to, a mortgage, is explicitly averred in the bill, and, of course, admitted by the demurrer. But it is supposed by the Court below, that they have failed to give effect to this their intention and contract, not from any mistake of fact, or accident, but from a mistake of law, in taking a letter of attorney with an irrevocable power to sell, instead of an absolute or conditional bill of sale. It is said, that this power, though irrevocable during the lifetime of the intestate, was revoked on his death by operation of law, not being a power coupled with an interest in the thing itself, but only coupled with an interest in the execution of the power, which is supposed to expire with the death of the party creating it, in the same manner as a mere naked power; and it is, therefore, concluded, that this is not a case where a Court of equity will relieve.

1. But, it is conceived, that this conclusion proceeds upon the idea, that the original contract between the parties was entirely merged and extinguished in the execution of the instruments which were executed, and which, by the accident of the death of one party, have turned out to be insufficient in point of law to give effect to that contract. Here was no mistake of law in the formation of the original contract. The law was fully understood in respect to all the facts on which the contract was founded. The loan, and the terms on which it was granted, were lawful; the intestate was the owner of the vessels, and legally competent to hypothecate them for his just debts; he did actually contract to give the plaintiff a specific, permanent lien upon them, as collateral security for the payment of the notes. The mistake is not in the facts, nor the law, nor in the contract, *but in the remedy upon the contract*. It was not necessary that the contract should be reduced to writing at all, or evidenced by any written instrument, for it is not within the statute of frauds, like an agreement for the sale of lands, &c. There was a complete legal contract, but, by the mistake of the parties, the mode selected for its execution is defective *at law*. This contract still subsists in full force, and is not extinguished and discharged by the writings, which have turned out to be inadequate means of giving effect to it. The contract was not for a power to sell, but for a specific security; not for a pledge of the property which was to expire on the death of the party, but for a permanent lien upon it. It is an unquestionable rule of

law, that all previous negotiations are extinguished and discharged by the contract itself; but, the legal and just import of this rule is, that where the parties have definitively concluded a contract, all previous terms, propositions, and negotiations concerning it, are merged in the contract itself; and this is equally true, whether the contract is in writing, or by parol only. It does not, therefore, follow, that the contract is extinguished, but the contrary. The contract clearly exists, and is supposed by all the authorities to exist; but is not to be affected by the negotiations of the parties which preceded its final completion.

The contract, in this case, is not merged and extinguished in the writing; the power looks to something future to be done by virtue of it, and pursuant to the contract: the power is not the contract; it is a means by which a future act was to have been done, in fulfilment of the contract by one of the parties. It cannot be pretended, that the parties meant that the power should embrace the whole contract between them on both sides; neither does it. The agreement is not, and was not intended to be set out. The loan, the terms on which it was made, the negotiable notes, the assignment of the policy, all exist, independently of the power, and are binding engagements. The power was intended as a means in the hands of the plaintiff to coerce the intestate to the performance of his agreement; it was *not intended* as evidence at all, and, at most, *it is* evidence of part of the contract only; of the means which the parties had selected to carry into effect the contract, but which does not preclude a resort to other means, *that* having failed by accident. It cannot be denied that, according to the whole current of authorities, parol evidence is admissible to correct errors and mistakes in the written instrument. But how can this be reconciled with the notion, that the parol contract is extinguished by the writing? For, if the writing alone is the contract, all idea of mistake is utterly and necessarily excluded. The writing, in that case, would be the original, and to admit parol proof, would be, not to *correct*, but to *alter* the original. And, perhaps, it may be well doubted, whether the power, in this case, can be considered as legal direct written evidence of any part of the contract. If A. sells his ship to B., and gives him a power of attorney to take possession of her, it can hardly be considered, that this power is the direct, written evidence of the contract; it is a power growing out of the contract, and given to aid its execution. The undisputed execution of the instrument by which the power was given, is evidence of its being a voluntary act, and by inference, proves that it was agreed to be given, but is not the direct evidence of the contract itself. There is an essential difference between a contract to perform a particular thing, and the actual performance of that thing. Here the contract was for a specific lien on the vessels, and to secure that lien the power was given; it is evidence of an after act intended to be done under the contract, rather than direct evidence of the contract itself.

It must be admitted, that there was originally a contract for a lien, by mortgage, bill of sale, or some other mode; nor can it be successfully contended, that the power of attorney, when adopted, operated either as an extinguishment of the original contract, or as a waiver of all other security; thus narrowing down that instrument, the original contract for a lien, in the same manner, and with like legal effect, as if the original contract was for that identical instrument, and nothing more. The contract was for a legal and valid security on the vessels; and the parties, by adopting the power, did not change, nor mean to change, the contract, but to execute it in part. It was a mode, and the parties believed, a good and sufficient mode of securing the lien, pursuant to the contract. It has now proved insufficient of itself. The contract, however, remains the same as at first, a contract for security, and wholly unexecuted; and if the

particular instrument adopted by the parties to carry it into effect, proves insufficient for that purpose, it clearly entitles the injured party to the interposition of a Court of equity.

2. It cannot be denied that, in some cases, mistakes in a written instrument may be corrected by parol evidence. But, it is said, by the Court below, that this is not one of those cases; that here is no mistake of fact; that the power contains the very language and terms the parties intended it should contain, and that to grant relief in such a case, would be in opposition to the whole current of authorities.

But, it is submitted, that such is not the rule upon this subject. It would seem to be an inference, from the decision of the Circuit Court, that no relief can be granted unless something is omitted which was expressly agreed to be inserted, or something inserted more than was agreed; that the errors to be corrected are such as have occurred in omissions or additions, in drawing up the written instrument, but not the errors in its legal import and effect; that if the formal instrument, and the language, are used, which the parties intended should be used, no relief can be had, although that instrument does not contain the legal intentions of the parties. But, it is humbly conceived, that the distinction, as here applied, is not supported by the authorities. If too much is inserted, or something is omitted in the written instrument, it may be corrected by parol evidence, because it does not contain the meaning and intention of the parties. And if every word, and no more, is inserted, which the parties designed to have inserted, yet, if those words do not embrace and import the meaning and intention of the parties, it is as clear a mistake and misconception as the other, and the contract is as effectually defeated by the mistake in the one instance as the other. The true foundation for the admission of parol evidence, is, that the instrument does not speak the *legal*, though it may the *verbal*, language of the parties; it does not speak the legal import of their contract as they intended it should. And wherever the intention of the parties will be defeated by a defect in the instrument, that defect may be proved and corrected by parol evidence, whether it arises from omission or addition, or from insufficient and inapt language and terms of the instrument. When it is satisfactorily proved by parol, that there is a mistake in the instrument as to its provisions, or a misconception of its legal import and effect, so that the intentions of the parties will, in either instance, be defeated, it is clearly a case of equitable cognizance, and a subject of equitable jurisdiction and relief. 2 Freem. 246, 281; Newland on Contracts, 348, 349; 3 Ves. jr. 399; 1 Johns. Ch. 607; 1 Ves. sen. 317, 456; 1 Bro. C. C. 341; 1 P. Wms. 277, 334; 2 Vern. 564; 3 Atk. 203; 2 Eq. Cas. Abr. 16; Sudg. Vend. 481; *Atk.* 388; 2 *Ves.* jr. 151; 1 *Ch. Rep.* 78; 2 Vent. 367; 1 *Vern.* 37.

3. Again; the plaintiff is entitled to the benefit of his lien, upon the ground, that the contract has been, on his part, fully performed; and even if no writing whatever had been executed, he would be entitled to the performance of it by the other party. Part performance has always been considered as obviating the necessity of written evidence, and gives to the performing party the benefit of specific relief against his negligent and faithless adversary. It has, indeed, been questioned, in several cases, (arising under the statute of frauds, and touching an interest in lands,) whether the payment of *a small part* of the consideration money, would take the case out of the statute, as amounting to part performance. But, in all, or nearly all these cases, the payment was of what is called earnest money, to bind the bargain, and not in the nature of a substantial, beneficial payment of part of the consideration money. But even if it be a principle, that part payment does not exempt the case from the provisions of the statute, yet, it is conceived, that the rule does not extend to a case

where the contract stated in the bill is distinctly admitted, and where the full consideration has actually been advanced and paid. Wherever the party has completely and fully executed his part of the contract, whether by payment of money, or other acts, the rule in equity is, I apprehend, almost universal, to coerce the other party to a specific execution of the contract on his part. *Newland on Cont.* 181; 1 *Ves.* 82; 7 Ibid. 341; 3 *Atk.* 1; 2 *Ch. Cas.* 135; 4 *Ves.* 720, 722; 1 *Vern.* 263 ; 3 *Ch. Rep.* 16; *Tothill*, 67; *Roberts*, 154; 1 *P. Wms.* 282, 277; 1 *Madd. Ch.* 301; 2 *Eq. Cas. Abr.* 48.

As to the cases which are supposed to lay down a general and inflexible rule, that a mistake of parties *as to the law*, is not a ground for reforming the instrument, they will all be found to resolve themselves into cases, where there was no *other*, or *previous* agreement, than what was contained, or meant to be contained, in the instrument itself. Thus, in a leading case on this subject, Ld. Irnham v. Child, 1 *Bro. C. C.* 91, where an annuity was granted, but no power of redemption contained in the deed, it being erroneously supposed by the parties that it would make the contract usurious, Lord Thurlow refused to relieve. But here the whole contract was unquestionably merged in the deed; and, therefore, the Lord Chancellor refused to add a new term to the agreement, upon the ground, that it was intentionally omitted by the parties, upon a mistake of the law. But, in the case now before the Court, there was no intentional omission in the instrument, upon a mistake of law or fact, for the instrument was never meant by the parties, to contain the terms of the contract. It was merely intended as an instrument, or means, to carry the contract into effect, and I have already endeavoured to show, that the contract might well subsist, and be carried into effect without it. Not so with the grant of the annuity in *Lord Irnham* v. *Child*.

But there are many cases in the books, where the party has been relieved from the consequence of acts founded on ignorance of the law, (Landsdowne v. Landsdowne, Mosely 364; Pusey v. Desbouvrie, 3 *P. Wms.* 315; Pullen v. Ready, 2 *Atk.* 591); and I am unable to reconcile these cases with the idea, that there is any universal rule on this subject, still less that it can be applied to the present case.

4. Lastly; the power was unquestionably *intended* by the parties to be irrevocable for ever, and to transfer an interest in the thing itself, or the authority of disposing of it for the benefit of the plaintiff; and even admitting, *argumenti gratia*, that this intention has failed at law, by the death of the party, still it is insisted, that a Court of equity will now compel the personal representatives to do what it would have compelled their intestate to do, if the intention had been defeated by any other accident during his lifetime. It was an equitable lien, or mortgage; and such a lien will be enforced in equity against the claims of all other creditors, although imperfect at law. 3 Johns. 315. So, too, an agreement for a mortgage, and an advance of money thereon, binds the heir and creditors. 3 *Ves.* 582; 1 *Atk.* 147. And a deposite of title deeds, even a part of the title papers, upon an advance of money, without a word passing, creates an equitable mortgage. Russel v. Russel, 1 *Bro. C. C.* 269. *A fortiori*, ought an express agreement for a lien, to be specifically enforced in equity. The power is a power coupled with an interest, not merely in the execution of the power, but in the thing itself, at least in the view of a Court of equity; and the only reason why it is not effectual at law, to secure the specific lien stipulated, is on account of its being made in the form of a letter of attorney, authorizing the plaintiff to sell *in the name of the grantor*. Even admitting, that such a power cannot be executed, *qua* power, after the death of the grantor; still, the instrument containing the power recites, that it was given as collateral security for the payment of the notes; and in case of loss of the

vessel, or freight, authorizes the plaintiff to receive the amount to become due on the policy of insurance on the same, which was also assigned. Here, then, is an equitable lien or mortgage, and equity will now compel the administrators to put the party in the same situation, as if such lien or mortgage had been perfected. Burn v. Burn, 3 *Ves.* 573.

Mr. *Hunter*, for the respondents, stated, that the first question was, whether the letters of attorney were powers coupled with an interest, or only personal authorities, which expired with the intestate.

This question was fully investigated by the learned Judge in the Court below, and determined in favour of the defendants. 'In his judgment, these were not powers coupled with an interest, in the sense of the law. They were naked powers, and, as such, by their own terms, could be executed only in the name of Rousmanier, and, therefore, became extinct by his death.' This question, arising on the original bill, seems now to be abandoned by the plaintiff's counsel, and it is, therefore, unnecessary to argue it anew. The Court will be in possession of the able opinion referred to; it exhausts the subject, and it would be useless to repeat, and presumptuous to add to, or vary its arguments. A single authority, however, may be added, on account of the coincidence of the facts in the case, to that now under discussion.

'One *being indebted to* B., makes a letter of attorney to him to receive all such wages as shall after become due to him, then goes to sea, and *dies;* this authority is determined, so that he cannot compel an account of wages, if any due at making the letter of attorney, much less of what after became due, but the administrator *must pay according to the course of the law*.' Mitchel v. Eades, *Prec. in Ch.* 125.

2. As to the amended bill, it entirely disappoints the liberal intentions of the Judge in granting it. He said, that Courts of equity would relieve where the instruments have been imperfectly drawn up by mistake, or where, by accident, the parties have *failed* in *executing* their agreements.

The amended bill refers neither to accident nor mistake, or to any *facts* tending to prove their existence. It excludes and negatives the *supposition* of accident or mistake. The whole matter (it appears) was done upon advice, with the *assistance of counsel learned in the law*. The security which the plaintiff ultimately received, was that which he preferred. He could, at the time, have taken that kind of security he seems *now* to desire. He rejected the offer of a mortgage, or bill of sale, and elected to take these powers of attorney. They were the most convenient for both parties, and so far was either party from being surprised or mistaken, that what was done appears as the judicious result of mutual and advised deliberations. Neither party had reference to the death of the other; it may be admitted, that it was the death of Rousmanier which frustrated Hunt's expectation of indemnity; but where an event happens without default on the other side, although expectation may be frustrated, and that expectation grounded, too, on the true intent of the parties, yet equity will not give relief. 1 *Ves.* 98, 99. 2 *Atkyns*, 261. The case presents no mistake or misconception. Fraud is not suggested; and it is admitted, there is no mistake either of omission or addition. It is clear, that the parties intended not an ordinary sale, or assignment of the vessels in question; yet the plaintiff seeks to have the same effect produced by his powers of attorney, as if they were grand bills of sale, or mortgages.

In the cases that have arisen upon the redeem ability of annuities, where the parties, by mutual and innocent error, left out of the deed a provision for redemption, under an idea that, if inserted, it would make the transaction usurious, there being no charge of fraud in the omission, the Court would not grant relief. They could see no mistake. Lord Eldon says, the Court were desired to do, not what the parties intended, but something contrary thereto. They desired to be put in the same situation as if they had been better informed, and had a contrary intention. It is admitted, that the plaintiff's security was to be by powers of attorney; and why should the Court now turn them into bills of sale, or mortgages, or any security equivalent to these, but different from those originally and deliberately taken. See *Phillips' Evid.* 451; 6 *Ves.* 332; 1 *Bro. C. C.* 92; 3 Ibid. 92.

It was the fault of the plaintiff, that he waived taking a mortgage or bill of sale; and no maxim of equity is better established than this, 'that no man is entitled to the aid of a Court of equity, when the necessity of resorting to that Court is created by his own fault.'

It seems to be admitted, that there was no mistake in point of fact; it is, in substance, urged, that there was a mistake in point of law; both parties, assisted by counsel, were mistaken in supposing a defeasible to be an indefeasible security; that powers of attorney, deriving their sole force from the *life* of the constituent, were perpetually obligatory, though *death*, and the law, decreed otherwise. No case is cited, which has gone the length of deciding, that a transaction taintless of fraud, undisturbed by accident, and unaffected by mistake in fact, has been *rescinded* and reversed, because the parties innocently misconceive the law.

All the cases are of a contrary tendency. Every party stands upon his own case, and his counsel's 'wit.' In the case of *Pullen* v. *Ready*, 2 Atk. 587, 591, Lord Hardwicke, in substance, says: if parties act with counsel, the parties shall be supposed to be acquainted with the consequences of law, and nothing is more mischievous than to decree relief for an alleged mistake, in a matter in which, if there was any mistake, it was that of all the parties, and no one of them is more under an imposition than the other. Every man, says Mr. Chancellor Kent, must be charged at his peril with the knowledge of the law; there is no other principle that is safe or practicable in the common intercours of mankind. Courts do not undertake to relieve parties from their acts and deeds fairly done, on a full knowledge of facts, though under a mistake of the law. Lyon v. Richmond, 2 Johns. Ch. 51, 60. I never understood, says Lord Eldon, (Underhill v. Horwood, 10 Ves. 209, 228), that though this Court, upon the ground of a mistake, (in point of fact,) would reform an instrument, that, therefore, it would hold, that the instrument has a different aspect from that which belongs to it at law. Lord Thurlow, long before, refused to add a new term to an agreement, upon the ground, that it was *intentionally* omitted upon a mistake of the law. Irnham v. Child, 1 Bro. C. C. 91. And the Master of the Rolls subsequently adhered to this doctrine. Lord Portmore v. Morris, 2 Bro. C. C. 219; Marquis of Townsend v. Stangroom, 6 Ves. 328, 382. It was substantially upon this view of the case, that the learned Judge in the Court below decided, that the demurrer to the amended bill was well taken. 'He could perceive no ground for the interference of a Court of equity. There was no mistake in the execution of the instruments; they expressed exactly what the parties intended they should express; this security was the choice of the plaintiff; in the event it has turned out unproductive; but this is *his* misfortune, and affords no ground to give him a preference over other creditors.' As a creditor, he obtains his share, legal payment of his note. The administrators, as trustees for all the creditors, are bound to exert themselves to prevent a priority which they believe to be unsanctioned by law. They

contend for equality, they act on the defensive; they are solicitous to avoid an evil, they have no hope of receiving a gain; and they who are so placed, (*de damno evitando certantes*,) may take advantage, if it may be so called, of the error of another. This, says Lord Kaimes, is a universal law of nature, and is especially applicable as to creditors. *Principles of Equity*, 26, 27. 162.

The reasoning of the counsel for the appellant, has no reference to the facts of the case. It strips the case of all its facts and circumstances, and goes upon the general intention of the deceased intestate to give his creditor a permanent and specific security. This general intention was consummated and ascertain d by a particular and detailed execution, in the very mode which the creditor preferred.

The powers of attorney are now regarded by the plaintiff's counsel as non-existent. To give motion and progress to their argument, they would remove this obstruction; and do to this, they are obliged to attempt (merely human as they are) that which the schoolmen long ago (without impiety) said was impossible even with Deity: *Quod factum est Deus ipse non potest revocare*. But, at *first*, the powers of attorney *were* resorted to, and set up as charging the defendants, and that upon their own strength and validity, without the suggestion of mistake or insufficiency; they were the foundation of the *original bill*.

Having chosen to begin his pursuit on the writing exclusively, and in perfect confidence of its validity, is it competent to the plaintiff, by an amendment to his bill, to resort to verbal negotiations merely introductory of the final settlement and consummate act between the parties, in which all negotiations were merged beyond the power of revival? The existence of the powers is at first not only asserted, but they are endowed with a continued existence beyond the life of their author. As this is found to be impossible, they are now to be considered as nothing; far from being a specific performance of the general intention, they are not *the* contract, nor any evidence of it. They are overthrown, for the purpose of erecting upon their overthrow a firmer fabric of obligation out of loose equities and verbal negotiations. There seems, in this course, to be too much inconsistency for sound and safe reasoning. Administrators must, necessarily, be ignorant of the private verbal communications of the parties, and they are left defenceless, and liable to impositions which cannot be detected nor repelled. The case of *Haynes* v. *Hare*, determined by Lord Loughborough, (1 H. Bl. 664), is, as to many of its facts, and all its points of law, similar to the one now under consideration. The Court then said, there is nothing so dangerous as to permit deeds and conveyances, after the death of the parties to them, to be liable to have NEW TERMS added to them on the *disclosure* of an attorney, in a matter in which he could meet with no contradiction. See Poole v. Cabanes, 8 *T. R.* 328.

3. Even if we could suppose the existence of a mistake, yet a review of all the leading cases would not furnish one, in any degree analogous to the present, in which relief has been granted. In the case of *Graves* v. *The Boston Marine Insurance Company*, the plaintiffs, in the bill, grounded themselves on the allegation, that their case was but the common one of a mistake in using *inapt* words to express the meaning of the parties. (2 Cranch 430.) The proof, as to the intention of one of the parties, was perfectly satisfactory, and as to the other, it pressed so heavily on the Court, that they acknowledged there were doubts and difficulties in the case. But they decided against relief; they shrunk from the peril of conforming a written instrument to the alleged intention of the *party plaintiff*, upon a claim not asserted until an event made it his interest so to do. In a case between the *original* parties, unaffected by death or insolvency, where no new and third party sought mere equality of condition, the Court

appeared to have acted upon the principle, that they had before them a written instrument, not in itself doubtful, and they repelled the recourse to parol testimony, or extraneous circumstances, to create a doubt where the instrument itself was clear and explicit. See Parkhurst v. Van Cortlandt, 1 Johns. Ch. 282; Souvelage v. Arden, Ibid. 252. The doctrine of the cases under the statute of frauds, applies *a fortiori*, for, by the *common law*, an attorney must be *made by deed*. Co. Litt. 401; 2 Roll. Abr. 8; 1 Bac. Abr. 314, tit. Authority.

4. But, again; admitting, *argumenti gratia*, the existence of a mistake, can a *plaintiff* claim on that account relief, admitting that a defendant could. A *defendant*, in a proper case, is privileged to show a mistake as matter of defence, and for the purpose of rebutting the plaintiff's equity; but no *English* case can be shown, where the *plaintiff* has been allowed to give parol evidence varying a written instrument on the ground of mistake. *Phillips's Evid.* 454; Woolan v. Hearn, 7 *Ves.* 211; Higginson v. Clowes, 15 Ibid. 516; Clinan v. Cooke, 1 *Sch. & Lef.* 38, 39, determined by Lord Redesdale. These cases, of the highest authority, and determined on great consideration, show the difference of *right* and *condition* as to plaintiff and defendant, of evidence offered for the different purpose of resisting a decree, and that offered for obtaining it. The difference exists in the code of every civilized nation. *Favorabiliores rei potius quam actores habentur*, is the maxim of the civil law. *Potior est conditio defendentis*, is the familiar language of our own. These, and other similar maxims, are of universal prevalence, and uncontradicted reception, and equally applicable in concerns civil and criminal. Both parties are the object of equal protection; but to make that protection *equal*, a certain position and condition is assigned to the defendant; he is so placed that he may not be overcome by surprise; the law seeks for actual, not nominal reciprocity; the relative condition of the parties enters into the account; evenhanded justice first corrects the balance, by making the proper allowances before she weighs the merits of the cause. Looking to the statute of frauds, or to the pre-existing rule of the common rule, (*a fortiori*, applicable in the instance of a power of attorney, which cannot be but with deed,) we must conclude, that, in a case like this, the defendants are not to be charged, unless they have agreed to be so by writing; and if there is a writing, it excludes a reference to what may have been the previous talk or negotiation, the original proposition, or the rejected offer. There is a writing or deed which does not charge the present defendants, and there the case ought to end. It is not necessary to invoke the aid of arguments drawn from public policy, or to exhibit the sad inconveniences that would result from the plaintiff's success. The impolicy of permitting a transaction of the kind exhibited by the plaintiff's bill, is obvious. It is contrary to what ought to be the openness of commercial dealing, and to the entire spirit of the commercial laws. *That* requires publicity in transfers of property, demands that possession should accompany the grant, permits the control of the possessor to prove the ownership, and avoids or limits secret trusts and liens; secret letters of attorney, granting a power to sell, especially in the case of ships, without delivery, without a change of papers, without notice to the government, or to the mercantile public, are fraught with dangerous consequences, and could hardly be supported as *against creditors*, though the life of the constituent still sustained their existence and efficacy. Upon the whole, it is submitted, that it is the aim of the plaintiff's counsel unduly to amplify equitable jurisdiction, and to extend an unwarrantable relief, upon the ground of mistake, in a case where no mistake exists, and where, even if it did, *his* right or faculty of availing himself of it is denied. '*Optima est lex qua minimum reliquit arbitrio Judicis; Optimus Judex qui minimum sibi*.'

Mr. *Wheaton*, for the appellant, in reply, first remarked, that the whole of the argument submitted by the counsel for the respondents, proceeded upon a mistaken assumption, that the entire contract between the parties was merged in the written power, and that this instrument is the only admissible evidence of the terms and conditions on which the loan was made. But the demurrer admits all the facts stated in the original and amended bill, as if the same were proved by parol testimony; all the terms and conditions of the contract were not intended to be reduced to writing by the parties, nor are they required by any positive law to be so expressed; and the power itself was merely incidental to the contract, and intended, like the transfer of the policy of insurance, as a means of carrying it into effect. It might as well be contended, that the transfer of the policy was the entire contract, as that the letter of attorney embraced all its terms and conditions. The true question is, whether, under all the circumstances of the case, an equitable lien was created, which a Court of Chancery will carry into effect.

Nor was it meant to be admitted, that this was not a power coupled with an interest, in the sense of the law. It was merely meant to insist, that even if that point were conceded, it formed no obstacle to the interference of a Court of equity in the present case. But it is with very great deference submitted, that this is not a mere naked power, according to the definition given of it by Chief Justice (now Chancellor) Kent. Bergen v. Bennett, 1 Caines' Cas. 1. That learned and accurate lawyer says, 'a power simply collateral, and without interest, or a naked power, is where, to a mere stranger, authority is given to dispose of an interest, in which he had not before, nor hath by the instrument creating the power, any estate whatever; but when a power is given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land.' In the text of Co. Litt. 1. 66. the deed of feoffment was made to one person, and a letter of attorney to deliver seisin to another, who was a mere stranger. But, here the power is given by a debtor to his creditor, and is expressly declared to be given as a collateral security for the debt. And, in the case cited from Precedents in Chancery, 125. the power did not purport, on the face of it, to be given as a collateral security, nor was there any evidence of a contract for a lien or security on the wages.

Nor do we proceed solely on the ground of a mere mistake, either in fact or law. We ask to have the contract executed in good faith by the personal representatives of the debtor, precisely as he would have been compelled to carry it into effect if its execution had been prevented by any other accident than that of his death. It is perfectly clear, that both parties intended to create a specific lien; and the lien is supposed to be as valid now, as in the lifetime of the intestate; for it is submitted to be a well established principle of equity, (with very few exceptions, of which this case is not one,) that when the party is holden to the specific execution of a contract, his personal representatives are equally holden. If the power is now defective in securing a lien, it was equally so in his lifetime. No legal or equitable right is, in this respect, lost by his death. 2 *Madd. Ch.* 112. 1 *Madd. Ch.* 41. 4 *Bro. Ch. Cas.* 472. 17 *Ves.* 489.

The respondent's counsel assumes it to be a settled doctrine of equity, that a *plaintiff* is never permitted to show, by parol proof, that there has been a mistake or misapprehension in a written contract, the execution of which he seeks to enforce; and that the rule which permits the introduction of such proofs, is exclusively confined to the defendant, against whom the contract is sought to be enforced. It is true, that Lord Redesdale, in *Clinan* v. *Cooke*, 1 *Sch. & Lef.* 22, seems to be of that opinion; and in a few other cases, relief has been denied on that ground. But all these were cases arising under the statute of frauds, and nearly all of them respected an interest in

lands; and in all such cases, parol proof, when offered to vary or materially affect a written contract, is certainly received with great circumspection and reserve. It is, however, submitted, that the rule stated by the respondent's counsel, is not founded in principle; and that parol evidence to show mistakes in written instruments, is, in equity, equally open to both parties. And, it will be found, that in almost all the cases where the plaintiff has failed in seeking the aid of parol proof, it was not because any such rule was interposed, but because his evidence of the supposed mistake was not clear and satisfactory. The case referred to in 2 *Cranch*, 419. is of this description. The Court, in that case, would have afforded the plaintiff relief, if he had been able to prove the mistake which he alleged in the policy. The same principle is adopted in 2 *Johns. Ch. Rep.* 274. 630.; and if there were any doubts growing out of some of the English decisions, they would be dissipated by the learned and able investigation of Mr. Chancellor Kent, 2 *Johns. Ch. Rep.* 585, where all the authorities are carefully reviewed, and it is clearly established, that no distinction is made, in this respect, between the party plaintiff or defendant, but that the benefit of the rule is impartially extended to both.

The cause was continued to the next term for advisement.

March 14*th*, 1823.

Mr. Chief Justice MARSHALL delivered the opinion of theCourt.

1
The counsel for the appellant objects to the decree of the Circuit Court on two grounds. He contends,

2
1. That this power of attorney does, by its own operation, entitle the plaintiff, for the satisfaction of his debt, to the interest of Rousmanier in the Nereus and the Industry.

3
2. Or, if this be not so, that a Court of Chancery will, the conveyance being defective, lend its aid to carry the contract into execution, according to the intention of the parties.

4
We will consider, 1. The effect of the power of attorney.

5
This instrument contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another, depends on the will and license of that other, the power ceases when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law. 2 *Esp. N. P. Rep.* 565. Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will; yet, if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his

own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

6
This principle is asserted in *Littleton*, (sec. 66.) by Lord Coke, in his commentary on that section, (52 b.) and in *Willes' Reports*, (105. note, and 565.) The legal reason of the rule is a plain one. It seems founded on the presumption, that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in *Coombes' case*. 9 *Co.* 766. In that case it was resolved, that 'when any has authority as attorney to do any act, he ought to do it in his name who gave the authority.' The reason of this resolution is obvious. The title can, regularly, pass out of the person in whom it is vested, only by a conveyance in his own name; and this cannot be executed by another for him, when it could not, in law, be executed by himself. A conveyance in the name of a person who was dead at the time, would be a manifest absurdity.

7
This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do *in the name of his principal*. He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted the attorney, and is authorized to make, and execute, a regular bill of sale in the name of Rousmanier. Now, as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity, that a deed should purport to be executed by him, even by attorney, after his death; for, the attorney is in the place of the principal, capable of doing that alone which the principal might do.

8
This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest,' it survives the person giving it, and may be executed after his death.

9
As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, 'a power coupled with an interest?' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing.

10
The words themselves would seem to import this meaning. 'A power coupled with an interest,' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be 'coupled' with it.

11
But the substantial basis of the opinion of the Court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle.

12
This idea may be in some degree illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term 'power coupled with an interest.' If the word 'interest' thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A. to sell for his own benefit, would be a power coupled with an interest; but a power to A. to sell for the benefit of B., would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for, a power to A., to sell for the benefit of B., may be as much a part of the contract on which B. advances his money, as if the power had been made to himself. If this were the true exposition of the term, then a power to A. to sell for the use of B., inserted in a conveyance to A., of the thing to be sold, would not be a power coupled with an interest, and, consequently, could not be exercised after the death of the person making it; while a power to A. to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title not in him, even after the vivifying principle of the power had become extinct. But every day's experience teaches us, that the law is not as the first case put would suppose. We know, that a power to A. to sell for the benefit of B., engrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it.

13
The general rule, that a power of attorney, though irrevocable by the party during his life, is extinguished by his death, is not affected by the circumstance, that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time or on a future contingency, and, in the mean time, descends to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention, that it shall

be executed after his death. The conveyance made by the person to whom it is given, takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will, is considered in a Court of Chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.

14
It is, then, deemed perfectly clear, that the power given in this case, is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death.

15
It remains to inquire, whether the appellant is entitled to the aid of this Court, to give effect to the intention of the parties, to subject the interest of Rousmanier in the Nereus and Industry to the payment of the money advanced by the plaintiff on the credit of those vessels, the instrument taken for that purpose having totally failed to effect its object.

16
This is the point on which the plaintiff most relies, and is that on which the Court has felt most doubt. That the parties intended, the one to give, and the other to receive, an effective security on the two vessels mentioned in the bill, is admitted; and the question is, whether the law of this Court will enable it to carry this intent into execution, when the instrument relied on by both parties has failed to accomplish its object.

17
The respondents insist, that there is no defect in the instrument itself; that it contains precisely what it was intended to contain, and is the instrument which was chosen by the parties deliberately, on the advice of counsel, and intended to be the consummation of their agreement. That in such a case the written agreement cannot be varied by parol testimony.

18
The counsel for the appellant contends, with great force, that the cases in which parol testimony has been rejected, are cases in which the agreement itself has been committed to writing; and one of the parties has sought to contradict, explain, or vary it, by parol evidence. That in this case the agreement is not reduced to writing. The power of attorney does not profess to be the agreement, but is a collateral instrument to enable the party to have the benefit of it, leaving the agreement still in full force, in its original form. That this parol agreement not being within the statute of frauds, would be enforced by this Court if the power of attorney had not been executed; and not being merged in the power, ought now to be executed. That the power being incompetent to its object, the Court will enforce the agreement against general creditors.

19
This argument is entitled to, and has received, very deliberate consideration.

20
The first inquiry respects the fact. Does this power of attorney purport to be the agreement? Is it an instrument collateral to the agreement? Or is it an execution of the agreement itself in the form intended by both the parties?

21

The bill states an offer on the part of Rousmanier to give a mortgage on the vessels, either in the usual form, or in the form of an absolute bill of sale, the vendor taking a defeasance; but does not state any agreement for that particular security. The agreement stated in the bill is generally, that the plaintiff, in addition to the notes of Rousmanier, should have specific security on the vessels; and it alleges, that the parties applied to counsel for advice respecting the most desirable mode of taking this security. On a comparison of the advantages and disadvantages of a mortgage, and an irrevocable power of attorney, counsel advised the latter instrument, and assigned reasons for his advice, the validity of which being admitted by the parties, the power of attorney was prepared and executed, and was received by the plaintiff as full security for his loans.

22
This is the case made by the amended bill; and it appears to the Court to be a case in which the notes and power of attorney are admitted to be a complete consummation of the agreement. The thing stipulated was a collateral security on the Nereus and Industry. On advice of counsel, this power of attorney was selected, and given as that security. We think it a complete execution of that part of the agreement; as complete, though not as safe an execution of it, as a mortgage would have been.

23
It is contended, that the letter of attorney does not contain all the terms of the agreement.

24
Neither would a bill of sale, nor a deed of mortgage, contain them. Neither instrument constitutes the agreement itself, but is that for which the agreement stipulated. The agreement consisted of a loan of money on the part of Hunt, and of notes for its repayment, and of a collateral security on the Nereus and Industry, on the part of Rousmanier. The money was advanced, the notes were given, and this letter of attorney was, on advice of counsel, executed and received as the collateral security which Hunt required. The letter of attorney is as must an execution of that part of the agreement which stipulated a collateral security, as the notes are an execution of that part which stipulated that notes should be given.

25
But this power, although a complete security during the life of Rousmanier, has been rendered inoperative by his death. The legal character of the security was misunderstood by the parties. They did not suppose, that the power would, in law, expire with Rousmanier.

26
The question for the consideration of the Court is this: If money be advanced on a general stipulation to give security for its repayment on a specific article; and the parties deliberately, on advice of counsel, agree on a particular instrument, which is executed, but, from a legal quality inherent in its nature, that was unknown to the parties, becomes extinct by the death of one of them; can a Court of equity direct a new security of a different character to be given? or direct that to be done which the parties supposed would have been effected by the instrument agreed on between them?

27

This question has been very elaborately argued, and every case has been cited which could be supposed to bear upon it. No one of these cases decides the very question now before the Court. It must depend on the principles to be collected from them.

28
It is a general rule, that an agreement in writing, or an instrument carrying an agreement into execution, shall not be varied by parol testimony, stating conversations or circumstances anterior to the written instrument.

29
This rule is recognised in Courts of equity as well as in Courts of law; but Courts of equity grant relief in cases of fraud and mistake, which cannot be obtained in Courts of law. In such cases, a Court of equity may carry the intention of the parties into execution, where the written agreement fails to express that intention.

30
In this case, there is no ingredient of fraud. Mistake is the sole ground on which the plaintiff comes into Court; and that mistake is in the law. The fact is, in all respects, what it was supposed to be. The instrument taken is the instrument intended to be taken. But it is, contrary to the expectation of the parties, extinguished by an event not foreseen nor adverted to, and is, therefore, incapable of effecting the object for which it was given. Does a Court of equity, in such a case, substitute a different instrument for that which has failed to effect its object?

31
In general, the mistakes against which a Court of equity relieves, are mistakes in fact. The decisions on this subject, though not always very distinctly stated, appear to be founded on some misconception of fact. Yet some of them bear a considerable analogy to that under consideration. Among these is that class of cases in which a joint obligation has been set up in equity against the representatives of a deceased obligor, who were discharged at law. If the principle of these decisions be, that the bond was joint from a mere mistake of the law, and that the Court will relieve against this mistake on the ground of the pre-existing equity arising from the advance of the money, it must be admitted, that they have a strong bearing on the case at bar. But the Judges in the Courts of equity seem to have placed them on mistake in fact, arising from the ignorance of the draftsman. In *Simpson* v. *Vaughan*, 2 *Atk.* 33 the bond was drawn by the obligor himself, and under circumstances which induced the Court to be of opinion, that it was intended to be joint and several.
In *Underhill* v. *Howard*, 10 *Ves.* 209. 227. Lord Eldon, speaking of cases in which a joint bond has been set up against the representatives of a deceased obligor, says, 'the Court has inferred, from the nature of the condition, and the transaction, that it was made joint by mistake. That is, the instrument is not what the parties intended in fact. They intended a joint and several obligation; the scrivener has, by mistake, prepared a joint obligation.'

32
All the cases in which the Court has sustained a joint bond against the representatives of the deceased obligor, have turned upon a supposed mistake in drawing the bond. It was not until the case of *Sumner* v. *Powell*, 2 *Meriv.* 36 that any thing was said by the Judge who determined the cause, from which it might be inferred, that relief in these cases would be afforded on any other principle than mistake in fact. In that case, the Court refused its aid, because there was no equity antecedent to the obligation. In delivering his judgment, the Master of the Rolls (Sir W. Grant) indicated very clearly an opinion, that a prior equitable consideration, received by the deceased, was

indispensable to the setting up of a joint obligation against his representatives; and added, 'so, where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation.'

33
Had this case gone so far as to decide, that 'the credit previously given' was the sole ground on which a Court of equity would consider a joint bond as several, it would have gone far to show, that the equitable obligation remained, and might be enforced, after the legal obligation of the instrument had expired. But the case does not go so far. It does not change the principle on which the Court had uniformly proceeded, nor discard the idea, that relief is to be granted because the obligation was made joint by a mistake in point of fact. The case only decides, that this mistake, in point of fact, will not be presumed by the Court in a case where no equity existed antecedent to the obligation, where no advantage was received by, and no credit given to, the person against whose estate the instrument is to be set up.

34
Yet, the course of the Court seems to be uniform, to presume a mistake in point of fact in every case where a joint obligation has been given, and a benefit has been received by the deceased obligor. No proof of actual mistake is required. The existence of an antecedent equity is sufficient. In cases attended by precisely the same circumstances, so far as respects mistake, relief will be given against the representatives of a deceased obligor, who had received the benefit of the obligation, and refused against the representatives of him who had not received it. Yet the legal obligation is as completely extinguished in the one case as in the other; and the facts stated, in some of the cases in which these decisions have been made, would rather conduce to the opinion, that the bond was made joint from ignorance of the legal consequences of a joint obligation, than from any mistake in fact.

35
The case of *Landsdowne* v. *Landsdowne*, (reported in *Mosely*,) if it be law, has no inconsiderable bearing on this cause. The right of the heir at law was contested by a younger member of the family, and the arbitrator to whom the subject was referred decided against him. He executed a deed in compliance with this award, and was afterwards relieved against it, on the principle that he was ignorant of his title.

36
The case does not suppose this fact, that he was the eldest son, to have been unknown to him; and, if he was ignorant of any thing, it was of the law, which gave him, as eldest son, the estate he had conveyed to a younger brother. Yet he was relieved in Chancery against this conveyance. There are certainly strong objections to this decision in other respects; but, as a case in which relief has been granted on a mistake in law, it cannot be entirely disregarded.

37
Although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided, that a plain and acknowledged mistake in law is beyond the reach of equity. In the case of *Lord Irnham* v. *Child*, 1 *Bro. C. C.* 91 application was made to the Chancellor to establish a clause, which had been, it was said, agreed upon, but which had been considered by the parties, and excluded from the written instrument by consent. It is true, they excluded the clause, from a mistaken opinion that it would make the contract usurious, but they did not believe that the legal effect of the contract was

precisely the same as if the clause had been inserted. They weighed the consequences of inserting and omitting the clause, and preferred the latter. That, too, was a case to which the statute applied. Most of the cases which have been cited were within the statute of frauds, and it is not easy to say how much has been the influence of that statute on them.

38
The case cited by the respondent's counsel from *Precedents in Chancery*, is not of this description; but it does not appear from that case, that the power of attorney was intended, or believed, to be a lien.

39
In this case, the fact of mistake is placed beyond any controversy. It is averred in the bill, and admitted by the demurrer, that 'the powers of attorney were given by the said Rousmanier, and received by the said Hunt, under the belief that they were, and with the intention that they should create, a specific lien and security on the said vessels.'

40
We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say, that a Court of equity is incapable of affording relief.

41
The decree of the Circuit Court is reversed; but as this is a case in which creditors are concerned, the Court, instead of giving a final decree on the demurrer in favour of the plaintiff, directs the cause to be remanded, that the Circuit Court may permit the defendants to withdraw their demurrer, and to answer the bill.

42
DECREE. This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Rhode Island, and was argued by counsel. On consideration whereof, this Court is of opinion, that the said Circuit Court erred in sustaining the demurrer of the defendants, and dismissing the bill of the complainant. It is, therefore, DECREED and ORDERED, that the decree of the said Circuit Court in this case, be, and the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court, with directions to permit the defendants to withdraw their demurrer, and to answer the bill of the complainants.