

It will be remembered that in *Gregory v. Morris, supra*, Chief Justice WAITE observed that the contract there created a charge upon the cattle for the purchase-money in the nature of a mortgage. In *Fletcher v. Morey*, 2 Story, 555, 565, Judge STORY said:

"In equity there is no difficulty in enforcing a lien or any other equitable claim constituting a charge *in rem*, not only against real estate, but upon personal estate, or upon money in the hands of a third person, whenever the lien or other claim is a matter of agreement against the party himself and his personal representatives, and against every person claiming under him, voluntarily or with notice; * * * for every such agreement for a lien or charge *in rem* constitutes a trust, and is, accordingly, governed by the general doctrine applicable to trusts."

We have only to add that this case seems to be peculiarly one for a court of equity, in view of the situation of the property, and because the court can grant a reasonable time for the payment of the lien, and, in the event of a sale, may prescribe equitable terms.

Upon the whole case, then, we are of the opinion that the contractual lien of the Holly Manufacturing Company upon the pumping-engines here in question is valid and binding, and is enforceable in this suit. Counsel may prepare and submit the draft of a decree in accordance with the views expressed in this opinion.

ÆTNA INS. Co. v. BRODINAX *et al.*

(Circuit Court, S. D. Georgia. April Term, 1883.)

1. WIFE'S SEPARATE ESTATE—POWER TO CHARGE—INSTRUMENT OF SETTLEMENT.

Code, § 1783, declares that "the wife is a *feme sole* as to her separate estate, unless controlled by the settlement. Every restriction on her power must be complied with. But, while a wife may contract, she cannot bind her separate estate by any contract of securityship, nor by any assumption of the debts of her husband." *Held*, that where a husband settled property on his wife free from all his liabilities, except such incumbrances as the two together shall request the trustee to make, a mortgage given thereon to secure a debt of the husband is valid.

2. SAME.

Such an exception is not repugnant to the grant, but is merely a qualification thereof. Affirmed in 9 Sup. Ct. Rep. 61.

In Equity. Suit by the Ætna Insurance Company against Martha Brodinax and others to foreclose a mortgage. Decree for plaintiff.

Joseph Ganahl, for complainant.

J. B. Cumming and *Geo. A. Mercer*, for defendants.

MCCAY, J. On the 11th day of June, 1866, Benjamin E. Brodinax, of the county of Richmond, Ga., executed a deed in due form under the laws of Georgia, and in consideration of his love for his wife, Martha Brodinax, to a certain parcel of land in said county to William E. Brodinax, in trust for the said Martha during her life, with other limitations not here important to be considered. The deed contained various other

provisions, as for the alienation and reinvestment of the estate; for the appointment of a new trustee in case the trustee, Brodinax, should fail to act, or die; also, for the making of liens and mortgages on the property,— in each of which cases it was provided that the husband and wife should, in writing, join in what was done. The deed declared that the property should be for the use, benefit, and behoof of the said Martha, free from the debts, contracts, and liabilities of her present or any future husband, except such incumbrances or liens as by the written direction of the grantor and the said Martha might be made thereon. W. E. Brodinax accepted the trust. In January, 1858, he resigned, and the grantor and wife in writing appointed Ephraim Twedy as successor, who accepted. On the 14th of June, 1866, three days after the date of the deed, the trustee, in pursuance of the written request of the grantor and wife, executed a mortgage deed of the premises to the treasurer of the Soldiers' Loan & Building Association, a body corporate, to secure the loan of \$2,000. On the 11th of May, 1867, the trustee, in pursuance of the written request provided for in the deed, executed another mortgage to the complainant for \$3,000; the same being a debt due by note from the said Benjamin to the complainant. On the 4th of December, 1868, the complainant bought the first mortgage, and this bill is filed to foreclose these two mortgages. The defense set up is practically as follows: That both the debts secured by the mortgages were the individual debts of Benjamin E. Brodinax, and that under section 1783 of the Georgia Code it is illegal for the wife to pledge her separate estate to secure her husband's debts. Issue was taken as to the debt covered by the first mortgage, and, though the wife testified that she got no part of the proceeds of the said debt, yet it did not appear very clearly that the trustee did not, nor in fact whose debt it was, nor what was the consideration. As, however, under the view I take of the case, it is wholly immaterial whether it was the debt of the wife or the husband, it is unnecessary to go into that question.

The sole question in the case is whether, under such a deed, it is competent for a married woman, under the laws of Georgia, to pledge the estate granted for her husband's debts. By the terms of the deed it was to be free from the contracts, debts, and liabilities of the husband, except such liens and incumbrances as they might jointly, in writing, agree to place upon it. This language can have but one meaning. It is an exception to the clause of the deed which declares the property was not to be subject to the debts, etc., of the husband, and the inference is almost conclusive that the intent was to say, unless these debts, etc., are by the written direction of both husband and wife, by special lien or incumbrance, made such a charge thereon. It has been argued that this provision was inconsistent with the grant, and therefore void; but it is well settled that such restrictions on a separate estate to a married woman are not to be construed like restrictions on a legal estate to persons *sui juris*. The wife has only such power as the deed gives her, and the whole deed is to be taken together. An inconsistency, to be void, must be totally inconsistent,—must destroy the estate: if it only fetter it or qualify,

it is still good. 2 Story, Eq. Jur. §§ 1382-1384, and the cases there referred to. See, also, *Kempton v. Hallowell*, 24 Ga. 52. And this is the law of Georgia, even of legal estates to persons *sui-juris*. Section 2697, Code 1873. So that this case must turn, as I think, solely on the special provision of the Georgia Code of 1873. That Code, in substance, provides, first, that, to create a separate estate in the wife, no words of separate use are necessary; the appointment of a trustee, or any words sufficient to create a trust, is enough. Section 2307, Code 1873. Hence, under this deed, a separate estate would be created, although no words of separate use are used. The Code also provides as follows, (Code, § 1783:)

"The wife is a *feme sole* as to her separate estate, unless controlled by the settlement. Every restriction on her power must be complied with. But, while a wife may contract, she cannot bind her separate estate by any contract of securityship, nor by any assumption of the debts of her husband; and any sale of her separate estate to a creditor of her husband in extinguishment of his debts shall be absolutely void."

It may be added that the supreme court of Georgia, before the adoption of the Code, had established the doctrine that, however general the words of a deed to a married woman were, yet if it provided, as does this, that the estate was to be free from the debts, contracts, etc., of the husband, these were words of restriction upon the wife, and she could not pledge her estate for her husband's debts. Taking these decisions and the provisions of the Code together, it is contended that, admitting the words of this deed to be a power to so pledge, yet nevertheless the power does not exist, because such a power is illegal, contrary to the statutes, and therefore void. It is claimed that, whatever may be the words of the deed, however strong the language of the grantor, it is illegal, and therefore impossible for him to make it one of the terms of the grant that the grantee, if she be a married woman, shall have power to pledge the estate for the debt of her husband. It is claimed that the statutes plainly indicate it to be contrary to the policy of the law that a married woman shall, under any circumstances, have such a power. Without question, if she be restricted by the terms of the deed, or if the deed be general, she would not have that power. But here is a case where the power is expressly declared. There is first a separate estate created in the wife, and this is plainly upon condition on the part of the grantor that he and the wife may put liens upon it to secure his contracts and liabilities. This property belonged to the husband. Of his own free will, and for the love he bore his wife, he gives it to her on these terms. Did she ever get any estate except according to these terms and with this power? What was the intent of the statutes? Plainly, to protect the wife in the estate granted; to provide that, if anybody saw fit to give a married woman an estate with the expressed intent that it should be for her benefit, she should neither be "kicked nor kissed" into an appropriation of it, and to declare that any separate estate coming to her other than by deed, or in any unqualified way, shall not be capable of being used by her to secure her husband's debts, or to discharge them. This

clause, however, it will be noticed, does not declare that a deed granting an estate to a married woman may not qualify that grant by declaring that she shall have power so to pledge it. It is perhaps wise enough that the law should restrict her when the deed is silent, or when she becomes the unqualified owner of a separate estate. It is fair enough to infer that, if one intends a married woman to have an estate, she shall not be subject to the influences of her husband for its appropriation to the security or payment of his debts. But, if the grantor expressly says that she shall have such power, is not the inference that she cannot exercise that power a most shocking one? The mistake is in supposing that it was the intent of the law to protect the wife,—to establish a rule of domestic or marital economy that under no circumstances shall a "Georgia" wife be in such a position as that she shall be capable of using an estate for the payment of her husband's debts, even if the grantor of that estate so expressly declared, or even if that be one of the terms of the deed in which the grant is given. To lay down such a rule would, as I think, be a great wrong to married women. Many a husband would be willing to settle property on the wife, provided she had the power to come to his relief on proper occasions, who would refuse to do so if in such a contingency she was to be powerless. Many a father-in-law would be willing to settle property on his son's wife, provided she had such power, who would decline to do so if she was to be powerless in case of pecuniary trouble on the part of the husband. And this view of the meaning of this section is in harmony with the history of separate estates and with several other instances in the law of disability put upon persons for the performance of otherwise legal acts. At common law, a wife could make no contracts, sell no land, could not even make a will; yet it was always held that, if the instrument creating an estate gave such a power, even a married woman might execute it. So, too, an infant may, by a deed creating an estate in his favor, be clothed with power to dispose of it by will before he becomes capable of making a will generally. Indeed, it may be stated as a general rule that, if an instrument creating an estate provide for some specific mode of its disposition, it not only must be disposed of in that way, but that it may be sold and disposed of in that way although the person to whom the power is given, would not, under the general law, have a capacity to do such acts. And this proceeds in the idea that the owner of property has power to dispose of it, or provide for its disposal, at his discretion.

The contention that this provision of the Georgia Code is intended to declare it to be the policy of the state that under no circumstances shall a married woman have such a power seems to me far-fetched, and calculated to place an unnecessary and unnatural restraint upon the disposition of property to married women. The Code is, in my judgment, intended, not to protect the wife, but to protect the estate granted to her; to carry out either the expressed or the presumed intentions of the grantor, and, generally, to say, if she have an estate to her separate use, she shall not dispose of it to pay her husband's debts. This is a different thing entirely from the case at bar, where it is distinctly provided, if the

wife see fit,—if she and her husband concur in writing,—that such a power shall exist. She only gets the estate on these terms, and to say that she shall not exercise the power thus expressly granted is to confer on her an estate never contemplated by the grantor. Nor, as it seems to me, is there any analogy between a case like this and the case of a limitation over contrary to law or to public policy, as conditions in the restraint of marriage, and the like. These cases, as their history shows, turn upon the public evils growing out of such limitations and restrictions, while the history of this provision shows an intent to protect the estate of the wife, and not to establish such a rule of the marital relations as would say that it shall be illegal for a grantor to put the wife in any such situation. Upon the whole, therefore, I am of the opinion that the original deed conferred upon the wife the power here complained of, and, that being the case, the mortgages are good, even though they be securities for the debt of the husband.

Something was said in the argument to the effect that, as a second mortgage was made to secure a past-due debt of the husband, it was therefore without consideration; but, if this was his debt, it comes within the scope and intent of the deed, whether then-due or merely then contracted. The husband made the deed on these terms, and, if this was his debt, the deed gives her power by joining in a written request to secure it.

Ordered that a decree of foreclosure for the amount due be entered upon the minutes of the court.

In re MONTGOMERY *et al.*

(District Court, D. New Jersey. January 19, 1893.)

1. EMINENT DOMAIN—CONDEMNATION FOR USE OF UNITED STATES—PLEADING.

Under Act Cong. Aug. 1, 1888, authorizing officers of the government to condemn lands for the use of the United States, a petition for condemnation must affirmatively show that the officer is authorized by congress to acquire the lands, and that in his opinion it is "necessary or advantageous" to proceed by judicial process; and these facts cannot be inferred from an allegation that such officer has requested the attorney general to institute such proceedings.

2. SAME—EXERCISE OF RIGHT BY UNITED STATES—CONSTITUTIONAL LAW.

Act Cong. March 3, 1891, authorizes the secretary of war to modify existing plans for the excavation of Petty's island and the adjacent shoals, in the Delaware river, but declares that the title to any additional lands required for this purpose shall be vested in the United States without charge. *Held* that, in view of this latter provision, the United States has no constitutional power to acquire the lands by condemnation proceedings.

In Equity. Petition for the condemnation of lands belonging to Thomas Montgomery and others, for the use of the United States. Heard on motion to quash the petition for appointment of commissioners. Petition dismissed.

W. C. Hannis, for motion.

H. S. White, Dist. Atty., *J. Warren Coulston*, *Joseph K. McCammon*, and *C. V. D. Joline*, *contra*.

GREEN, J. By an act of the congress of the United States, approved April 24, 1888, entitled "An act to facilitate the prosecution of works projected for the improvement of rivers and harbors," it was enacted that the secretary of war may cause proceedings to be instituted in the name of the United States in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors, for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted: provided, however, that when the owner of such land, right of way, or material shall fix a price for the same, which, in the opinion of the secretary of war, shall be reasonable, he may purchase the same at such price without further delay: and provided further, that the secretary of war is hereby authorized to accept donations of land or materials required for the maintenance or prosecution of such works. By another act, entitled "An act to authorize condemnation of land for sites of public buildings, and for other purposes," approved August 1, 1888, it was further enacted that in every case in which the secretary of the treasury, or any other officer of the government, has been, or hereafter shall be, authorized to procure real estate for the erection of a public building, or for other public uses, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so; and the United States circuit or district courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the attorney general of the United States, upon every application of the secretary of the treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation within 30 days from the receipt of the application at the department of justice. And by said act it was provided that the practice, pleadings, forms, and modes of proceedings in causes arising under the provisions of this act shall conform as near as may be to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding. By another act, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1889, and for other purposes," approved October 2, 1888, it was, *inter alia*, provided that for the removal of Smith's island and Windmill island, in the state of Pennsylvania, and Petty's island, in the state of New Jersey, or such parts of them and the shoals adjacent thereto as may be required, and for the improvement of the harbor between the cities of Philadelphia, Pa., and Camden, N. J., the sum of \$500,000 should be appropriated: provided, that no part of said sum should be expended until the title to the lands forming said islands should be acquired and vested in the United States, without charge to the latter beyond \$300,000.

000. of the sum appropriated. By another act, approved March 3, 1891, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirteenth, eighteen hundred and ninety-two, and for other purposes," it was enacted that for improving harbor at Philadelphia, Pa., and continuing the improvement, and for the removal of Smith's island and Windmill island, Pennsylvania, and Petty's island, New Jersey, and adjacent shoals, \$300,000 were appropriated: provided, that the plan for the improvement may be modified by changing the line limiting the excavation on Petty's island to such position as the secretary of war may consider desirable, and the material to be removed from said islands and shoals under this appropriation and appropriations heretofore made, shall be deposited and spread on League island, and to the extent of the cost of such deposit and spreading the said appropriations are hereby made available: provided further, that the title to any additional lands acquired for this purpose shall be vested in the United States without charge to the latter.

Under the various acts above referred to, the present proceedings were begun by way of petition to this court upon the request of the secretary of war, and by direction of the attorney general, to obtain possession by condemnation of the lands, right of way, and material set out and described in the said petition for the purpose of improving the navigation of the river Delaware at or near the city of Philadelphia. The petition, reciting the acts hereinbefore set forth, alleges that the secretary of war, under the provisions of the act last above referred to, had approved modifications of the project for improving the harbor of Philadelphia by changing the line of excavation which had previously been adopted by the department in making said improvement, which modifications necessitated the acquisition by the United States of about 23 acres of land, parcel of Petty's island, in addition to that theretofore acquired; that, to acquire said lands, the secretary of war had requested the attorney general of the United States to commence these proceedings in condemnation according to the acts in such case made and provided, and that the petitioner, by its duly-authorized officials, had elected to conform said proceedings on condemnation to those authorized by the act of the legislature of New Jersey entitled "An act to authorize the formation of railroad corporations, and to regulate the same," approved April 2, 1873. The petition also described by metes and bounds the lands so required for the said improvement, and the names of the persons having an interest, as owners or otherwise, therein. The prayer of the petition was, that notice of this application should be given to the persons who were therein named as interested in said lands, and for the appointment of a particular time and place when and where the court under seal would designate three disinterested, impartial, and judicious freeholders, residents of the county of Camden, N. J., within the limits of which county said lands were alleged to be situate, to be the commissioners to appraise said lands, and to assess the damages to be paid by the United States therefor. Upon the filing of said petition an order was made to show cause why the prayer of the petition should not be granted, and

upon the return-day of said order those who were interested in said lands as owners, by their counsel appeared and moved to quash the said petition, and set aside any proceedings that might have been had thereunder, for the following reasons: (1) The petition fails to show upon its face that the secretary of war had been authorized to acquire the additional lands mentioned in the petition for public use. (2) The petition fails to show that, in the opinion of the secretary of war, it is necessary or advantageous to the United States that the land in question should be acquired by condemnation under judicial process. (3) The petition fails to show that any provision had been made by law to compensate the land-owners for the value of their land, and the damages they might sustain by this appropriation.

It cannot be denied that the petition, as it was originally filed, is open to criticism for the manner in which jurisdictional facts are stated therein. In the case of *In re Rugheimer*, 36 Fed. Rep. 369, which was a proceeding to condemn lands for a public building, it is held by the court that all three of the allegations which it is alleged this petition omits to make are necessary, and must affirmatively appear on the face of the petition for the appointment of commissioners, or the petition will be quashed. A strict criticism of this petition, using the opinion of the court in the case just cited as a criterion, would undoubtedly produce a similar result in this case. There certainly are no distinctive averments in the petition, as originally framed, that the secretary of war had been authorized in law to acquire these lands by condemnation, or that, in his opinion, it was necessary and advantageous to the United States that they should be so acquired. It is true, the petition alleges that the secretary of war had requested the attorney general of the United States to commence these proceedings; and it was argued that such request, made, as it was alleged to be, under the act of August 1, 1888, would carry with it the presumption that he was of opinion it was both necessary and advantageous to the United States to acquire the lands in the manner pointed out by that act; for the only possible authority to make, or justification of, such request, is to be sought for and found in the act referred to, and that act prescribes with precision when and under what circumstances the power of eminent domain is to be called into action at and by his request. As conditions precedent to such request for the institution of condemnation proceedings, the secretary of war must determine affirmatively both the advantage and necessity to the federal government of the possession of the lands sought to be condemned; and, as it is always to be presumed that every officer acts strictly within the limits and upon the lines of his delegated power, it would follow that the request made by the secretary, as stated in the petition, is evidence, presumptively at least, that all conditions precedent to the lawful making of such request have been complied with. This argument is plausible, but unsound. It is a well-settled principle that when the exercise of a special authority, delegated by statute to a particular person or to a special tribunal, is dependent upon conditions precedent, all preliminaries which show fulfillment of such conditions, and which confers upon

such person or tribunal power to act, must clearly appear upon the face of the proceedings. The proper practice is to state affirmatively and with certainty all facts upon which, in such case, jurisdiction depends. Intendment and presumption should not be resorted to for the justification of any judicial proceedings, in derogation of private rights. But it is not necessary, in the present state of the petition, to consider the effect either of this or of the first objection made to it. By consent, and after the argument, the petition was amended by adding averments, substantially meeting these objections, and curing the alleged defects, and setting forth as well the very important and necessary fact, until then omitted, that the federal government had been unable to agree with the owners of the lands for the purchase thereof. These amendments relieve the cause at bar of much embarrassment, and take out of the discussion objections which were pressed upon the court at the hearing with great vigor and ability. They are referred to now only to call attention to the deficiencies in the petition as originally framed, and to guard against the adoption of it as a precedent.

The other objection relied upon is, the petition fails to show that any provision has been made by act of congress, in terms, for the just compensation of the owners of the property sought to be appropriated and taken. I am doubtful whether this objection, stated as it is, should be held valid. There is a series of cases which seem to hold otherwise. The conclusion at which the courts in those cases arrived appears to be founded upon this argument: The proceedings were instituted by the sovereign government by virtue of the right of eminent domain, inherently possessed; not by an individual or a private corporation to whom the right of eminent domain had been delegated by the sovereign. Eminent domain is the supreme dominion the sovereign power has in and over all property within its jurisdiction, coupled with the absolute right to appropriate such property, against the consent of the owner, for the promotion of the general welfare, or as public necessity may require. It pertains as a necessary, constant, and inexhaustible attribute to sovereignty, and therefore does not depend upon constitutional recognition or legislative enactment. And so it has been determined that the clause in the federal constitution providing that private property shall not be taken for public use without just compensation is no part of the right itself, but only a limitation upon the exercise of the right. In other words, the right or power of eminent domain is as supreme now, in its initial operation, as it was before the amendment to the constitution, providing for just compensation was adopted. The amendment simply mitigates the harshness and severity of the final operation upon the interests of the property owner by endowing him with an indefeasible right to just compensation for his property taken and appropriated against his consent. Now, it will be noticed that this clause of the federal constitution differs from similar clauses in state constitutions in this: that it does not require just compensation to be made before the taking of the property. It simply provides for just compensation. The time of the making of the compensation is not fixed or determined. That it need

not be made, necessarily, before the taking, in cases where the sovereign power itself is the taker, has been repeatedly held by the courts. These adjudications go upon the ground that when the sovereign power—that is, the federal government, the state, or the municipality as agent of the state—has provided a remedy by resort to which the property owner can have his compensation duly assessed, adequate means are afforded for its satisfaction, since the whole property of the sovereign or of the state or of the municipality is a fund to which he can resort without risk of loss. That is to say, the compensation which becomes inalienably the owner's at condemnation becomes at the same time, and is, a public charge. The good faith of the public is pledged for its payment, and all resources of taxation may be, by the owner, called into action in raising and obtaining the amount. Hence the mere fact that a special fund for the compensation of the owner whose property was to be taken and appropriated by the sovereign power was not designated or fixed in the act authorizing the taking and appropriation, would not necessarily invalidate the act itself. While these cases to which I have referred are undoubtedly well considered, and the conclusion seems apparently justified by the argument, it is not necessary to consider the present case as standing upon such narrow ground. An examination of the statute of March 3, 1891, discloses an objection to these proceedings which must be fatal. The act not only fails to provide compensation, but in terms actually forbids the making of any compensation to the land-owner by the United States for the lands to be taken. The words of the act of March 3, 1891, are as follows:

“For improving harbor at Philadelphia, Pennsylvania: Continuing improvement by the removal of Smith's island and Windmill island, Pennsylvania, and Petty's island, New Jersey, and adjacent shoals, three hundred thousand dollars: * * * provided, further, that the title to any additional lands acquired for this purpose shall be vested in the United States without charge to the latter.”

In other words, this act, if it, as it has been argued, authorized condemnation proceedings to be taken for the purpose of acquiring the land needed for the improvements mentioned, would have to be read this way: That the secretary of war is authorized, for the purpose of continuing the improvement of the Delaware river at or near Philadelphia, and within the limits of the state of New Jersey, to expend the sum of three hundred thousand dollars; that for the purpose of acquiring possession of the lands necessary therefore he may, if, in his opinion, such lands are necessary and advantageous to the United States, institute proceedings to condemn such lands in a court having jurisdiction thereof, but with the express stipulation that under no circumstances whatever shall the United States make any compensation to the land-owner for the property so taken by them.

The distinction between such legislation and the legislation which fails in itself to provide the compensation for the benefit of the land-owner is readily seen. The omission in the one case to provide the compensation where the sovereign power is the condemning party, does not deprive the

land-owner of any right whatever. As Judge Cooley says in his treatise on Constitutional Limitations, the public faith is pledged to compensate him; all public property is subject to his claim, and his property cannot be taken without such compensation being awarded to him. But in the act now under consideration there is not only an omission to provide for compensation, but actual, positive, and direct legislative interdiction of the making of any compensation to the land-owner at all. In other words, the secretary of war is authorized by it, if these proceedings are to be justified, to deprive the land-owner of his property, and at the same time to notify the land-owner that under no circumstance will he be compensated therefor. Such an act would be clearly within the interdiction of the constitution. It is perfectly apparent from the reading of this act that the legislative power of the United States never intended that condemnation proceedings should be begun and proceeded with to obtain possession of this property. By the true construction of the act in question it contemplates the acquisition of the land necessary for the improvements in question, not against the will of the owners, and by condemnation, but by the voluntary conveyance from the owners, or from some one who may purchase the same from the owners, and who would thereupon transfer the title to the United States; and in that case the United States agreed to expend the sum of \$300,000 in the excavations and the removal of obstructions to navigation which the proposed improvements contemplate. In fact, the only circumstance under which the secretary of war is authorized to make the improvement and expend the appropriation is the free gift of the lands to the United States. My reading of the acts in question compels me to the conclusion that congress never intended to authorize the acquisition of these lands by the exercise of eminent domain. Their possession by the federal government was to depend upon voluntary conveyance alone. It follows that the petition must be dismissed.

UNITED STATES *v.* STROBACH.

(*Circuit Court, M. D. Alabama. May Term, 1838.*)

1. PRESENTING FRAUDULENT CLAIMS AGAINST THE UNITED STATES—DEPUTY-MARSHAL'S INDICTMENT.

Under Rev. St. U. S. § 5438, denouncing the offense of knowingly presenting for payment or approval to any officer in the civil, military, or naval service of the United States any false or fraudulent claim against the United States, an indictment averring the presentation of such a claim to "G. T., then late marshal of the United States, he being then and there an officer in the civil service of the United States," is not insufficient or repugnant, since a marshal, after the expiration of his term, is still an officer for the purpose of serving process then in his hands, and for settling his accounts with the government.

2. SAME—SUFFICIENCY.

An averment that the accused, claiming to be a deputy-marshal of the United States, presented a claim against the government of the United States, "purporting to have been for services rendered and payments made by said deputy-marshal" in a criminal proceeding mentioned, before a certain United States commissioner, sufficiently shows that the services were performed and payments made for the United States, in the defendant's capacity as deputy United States marshal.