20th Congress, 1st Session. [Doc. No. 242.] Ho. of Reps.

D. BOULIGNY AND J. E. FROST.

MEMORIAL

OF

D. BOULIGNY & JOHN E. FROST.

APRIL 12, 1828.

Referred to the Committee of the Whole House to which is committed the bill from the Senate, [No. 96] entitled "An act supplementary to an act to provide for the adjustment of claims of persons entitled to indemnification under the first article of the treaty of Ghent, and for the distribution, among such claimants, of the sum paid by the Government of Great Britain, under a convention between the United States and His Britannic Majesty, concluded at London, on the 13th of November, 1826," passed on the 2d day of March, 1827.

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1828.

MEMORIAL.

To the Honorable the House of Representatives of the United States of America :

The memorial of D. Bouligny and John E. Frost,

RESPECTFULLY REPRESENTS :

That your memorialists are the agents of a large number of claims of citizens of the States of Georgia and Louisiana, under the 1st article of the Treaty of Ghent, which have been established before the Commission instituted for the purpose of carrying the said 1st article into effect, by the most full and satisfactory proof; that your memorialists are impelled, by a sense of duty to those whom they represent, to employ all proper means within their power, for the protection of the fund paid by the British Government to the United States, in satisfaction of all claims arising under the said 1st article of the treaty of Ghent, against unfounded claims, in order that the persons whom they represent, and such others as shall establish their claims by full and reasonable proof, may not be deprived of that complete indemnification, which it was the intention of the British Government to make, for the wrong which she had done *them* by carrying away their property in the face of the said treaty ; by which it was stipulated that she should restore all property remaining in our waters upon her evacuation of our territory : that, in the performance of their duty, in February last, an application was made by them to the Senate of the United States for a continuation of the Commission, for the purpose of enabling them to repel, by proof, the pretensions of a large class of claimants who seek to share in the fund before mentioned, and who insist that, having proved the *taking* of their negroes by the British, in the course of the war, (an act, be it remembered, perfectly consistent with the strict rights of war,) the burthen of showing that they were not taken away contrary to the treaty of Ghent, ought to be imposed upon the fund, which, they contend, is to be treated and considered as the representative of the British Government : upon this application, the Senate thought it right to authorize a continuation of the Commission, for the purpose mentioned, and their bill is now before your honorable body. Your memorialists further represent, that, since the passage of the bill by the Senate, circumstances have occurred which strengthen the claims of the claimants whom your memorialists represent, to a further continuance of the Commission, and which they deem it their imperative duty to bring to the notice and consideration of your honorable body ; these circumstances are as follows : when the applica-

tion was made in February last for a continuation of the Board, it was deemed advisable, lest, for any cause, time should not be granted, to use all possible diligence to obtain such testimony as to the disposal of the negroes taken by the British forces, as could be found within the limits of the United States, and means were accordingly taken for that purpose, by which a body of important testimony, shewing that the negroes who were taken by the British forces in the Chesapeake and its waters, during the war, with the exception of those which were enlisted in the black corps, and some few others, were sent out of the United States during the war, by every opportunity, and were not, consequently, taken away by the British, contrary to the treaty of Ghent—that is, after peace was restored. This testimony, though taken in strict conformity with certain *new* rules which the Commission deemed it proper to prescribe, as will appear from the opinions of the Commissioners, accompanying this memorial, was suppressed by a majority of the Commission, on the ground that it was not returned under seal, according to the alleged practice of all judicial tribunals; whereby the exertions of your memorialists to maintain the rights of their constituents, have been rendered abortive, and, they fear, will utterly fail, unless your honorable body shall deem it just and right to continue the Commission, so as to enable your memorialists to retake the testimony which has been suppressed, and to obtain from foreign archives such other testimony as will enable the Commissioners to distribute the fund which has been committed to them, according to the just rights of the claimants.

Your memorialists beg leave further to represent, as an additional reason why the said bill should be passed, that a majority of the Commissioners have recently pronounced a decision, that leaves the fund, which it is the object of your memorialists to secure to those who are justly entitled to it, entirely exposed; those decisions (copies of which are hereto annexed) admit hearsay testimony to be received, and not only hearsay testimony, but the depositions of slaves to be read in evidence, in support of the claims of their masters.

Your memorialists, &c. &c.

D. BOULIGNY.
JOHN E. FROST.

Mr. Cheves' opinion in relation to the admissibility of hearsay evidence, and the evidence of slaves.

In the case of RALEIGH W. DOWNMAN, (No. 325 on the docket,) a claim for 10 slaves.
In the case of estate of WILLIAM WARING, Jr. deceased, a claim of 14 slaves, No. 615.
In the case of WILLIAM WARING Sen. a claim for 2 slaves, No. 616.
In the case of BENJAMIN T. FENDALL, a claim for 6 slaves, No. 551.

In these several cases, as in all the cases submitted for hearing, (perhaps four or five excepted,) *the taking* has been satisfactorily proved; and the only question which has really occupied the atten-

tion of the Board has been, whether the property claimed was within the territory or waters of the United States, at the date of the ratification of the treaty of peace? It is important to keep this fact always in view.

In the case of Raleigh W. Downman, the only testimony to this point was the deposition of John Hall, a slave, resident in Virginia, and there examined. In the case of the estate of William Waring, junr. and that of William Waring, sen. the only testimony to the same point, consisted of the depositions of three slaves, two the property of one of the claimants, and one the property of the other, and all examined and all resident in Virginia; both cases were supported by the joint testimony of three slaves.

In the case of Benjamin T. Fendall, the only testimony to the point was the deposition of John Massey, which narrated the declarations of the runaway slaves themselves, made in Halifax, in 1820, and the declarations of certain white men, who called themselves sailors, made at the same time.

To shew the character and operation of this testimony, I will submit a brief analysis of that which was received in the three last mentioned cases.

In the case of the Messrs. Warings, one of the slaves, *Louis, alias Lewis Jackson*, was twice examined: First, on the 21st August, 1821, when he deposed that he, with all the slaves in these two claims, (except *Tom Lewis*, whom he does not mention,) went off to the British, and were carried to Tangier Island: and that, while there, four of them, Jerry, Billy, Lucy, and Rachel, died. "That "*Jem*," he mentions him expressly, and no other, "enlisted, and "went away with the expedition to New Orleans. Isaac and An-"thony," (he says,) "have since returned. All the others, to the "best of the deponent's recollection, were still on Tangier, when the "deponent left there in *the month of March*, in the Spring of the "year 1815, and none of them have ever returned, that the depo-"nent has ever heard."

He was examined again on the 13th October, 1827, when he confirms his statement of the departure of himself and the other slaves, and in this deposition includes *Tom Lewis*, whom he had not mentioned before. He says nothing of the death of Jerry, Billy, Lucy, and Rachel; and states that Tom Lewis, Lewis Lewis, and James Broaddus, (in his first affidavit, he mentions only *Jem*,) were sent, as he understood, to New Orleans, "sometime before there was peace;" and he adds that, "after this news, all the other slaves," not excepting Jerry, Billy, Lewis, and Rachel, whose death he proves in his first deposition, "sailed from Tangier for Bermuda, except himself, who "was carried to St. George's Island, where he made his escape, and "returned to his master."

Anthony Champ, another of these slaves, examined on the 13th October, 1827, states that he, with all the slaves claimed, "were taken "to Tangier Island, where he remained *until he heard there was* "*peace*, except Tom Lewis, Lewis Lewis, and James Broaddus, who

"were sent to New Orleans. That the said Anthony Champ sailed "*with all the* other slaves, (not excepting those proved by Lewis Jackson to have died, nor Lewis Jackson, though *he* certainly never left the United States,) from Tangier Island, *on the 13th of Febru-* "*ary*, 1814, (the treaty was ratified *on the 17th February*, 1815,) "for Bermuda, where he and Isaac Smith, being desirous to come "home, were discharged."

Isaac Smith, the last of the three slaves examined, deposes, on the 13th October, 1827, to the same general facts, as the two preceding witnesses; making no mention of those who died, and says that "they "sailed for Bermuda *in February*," without saying any thing of the news of peace or the ratification of the treaty.

In the case of Benjamin T. Fendall, the witness, after a great deal of introductory matter, says that, in 1820, he was in Halifax, and went over to the town of Dartmouth, opposite Halifax, where he met all the negroes mentioned in this claim, (except, perhaps, one child;) and that, "while in the aforesaid town of Dartmouth, in con- "versation with the aforesaid negroes, *many persons*, calling them- "selves British sailors, and stating that they had been in, and be- "longed to, the British squadron that was in the Chesapeake Bay, "*would come up*, while the deponent was conversing with the afore- "said black people, and confirm what they, the said black people, "*would say* to him, viz: that the said blacks left the Tangier "Islands after they got the news of peace. The deponent did "not know the sailors who came up while the negroes and himself "were conversing; but they were white persons, and said they were "sailors, and were with the aforesaid British squadron when they "left the United States."

I mean not to question the truth of the witness who narrates these declarations, nor to consider whether, giving full credit to the testimony, it proves the point in controversy. The question I deal with is, whether, in any case, and under any any circumstances, such testimony should be received in evidence? and to my mind, to exhibit the testimony, is enough to disprove its admissibility according to the most relaxed rules that ever have been adopted in any case, and under any circumstances. In considering the question, the peculiar character of the testimony is important, independent of that testimony being hearsay, applied to a question on which hearsay *never* has been received. The concurrence of extraordinary circumstances in the declarations of these persons, (white and black,) is perfectly miraculous. Those alleged to be sailors of the British fleet leave the Chesapeake in the Spring of 1815; they are men whose "home is on the deep;" who, from their duties and habits, were necessarily and inevitably separated from each other, and scattered to all the winds of Heaven, on the occurrence of peace; yet *many*, (mark the expression,) many of them appear, five years after, to be congregated together in the obscure town of Dartmouth, opposite to Halifax, at the very moment this witness happens to meet with the negroes mentioned in the claim. These sailors know these identical negroes, after five years have elapsed, amidst hundreds with whom they were

mixed, and recollect that *they* were some of those who left the Chesapeake after the peace. The negroes happened to be speaking emphatically about the precise time they left the Chesapeake; a circumstance which was no more talked of than any other event connected with the war, till after the Convention of St. Petersburgh was published in the United States, which did not occur till the latter end of 1822, two years after this conversation; and, at this important moment, *many* of the sailors come up, and take a particular interest in confirming this particular fact. This is the testimony which has been relied upon as full proof of the point in controversy in this case. It is true there is, in the case, another witness, (John Wheelwright,) who says he saw, in Halifax, in 1820, *two* negroes, who said they had belonged to this claimant; and who also told him that they, and the other slaves mentioned in this claim, were carried off from the United States during the late war, but they were silent as to the time they left the United States, except that they state that they were carried off "during the late war."

In stating the testimony, my effort has been to do it in such a manner as to exhibit its deformity (at least what I suppose to be so) in a just relief, but to do it, at the same time, with accuracy, and without exaggeration; and I believe I have done so: but, if my colleagues shall, in their statements, differ from me, a reference to the original documents, which are not voluminous, will enable the reader to decide between us.

In the case of Raleigh W. Downman, it may be said the slaves were originally taken in violation of a flag of truce. This has, indeed, been denied by the British functionaries, yet I entertain no doubt of the fact; but this fact can have no bearing, more than any other circumstance of outrage occurring at the same time, on the question of fact in issue, namely, at what time were these slaves taken from the United States; and certainly no more effect than any other abuse of the usual practices of war, (of which the seduction of the slaves of the citizens of the United States is, in all the cases in which it occurred, an example sufficiently striking,) in bringing the claim within the first article of the treaty of peace. To regard it in deciding a general question of evidence, would be to mingle a circumstance of mere excitement with a question of general law, which is altogether inadmissible in sound reasoning and dispassionate investigation. But the question under consideration involves not that case alone, but all in which the testimony of slaves is adduced; and the cases of the Messrs. Warings place the question in its true light, and shew the extent and operation of the principle which the Board has decided. In these cases, there are no extraneous facts, and they depend, distinctly and solely, on the testimony of the runaway slaves. They are, too, not only slaves, but the slaves of the claimants themselves. I think I state the fact correctly; but, lest this should be denied, let me add, that the case of the estate of William Waring, junior, is proved by two slaves belonging to that estate, and one belonging to William Waring, senior. The case of the latter is proved by one of his own

slaves, and two belonging to the claimants in the other case. These cases, therefore, clearly and distinctly present the question whether the testimony of slaves alone can be received as full proof of the main question of fact on which the claim depends. If it be denied that this testimony alone has sustained these cases, I must refer to the proof itself, and ask the application of the following rule: Remove this testimony, and there will not remain a shadow of proof of the fact that the slaves claimed were taken from the United States after the ratification of the treaty of peace.

It may be said by my brethren (I have understood them so to say) that the testimony of these slaves is confirmed by some names mentioned by them, and found in the British documents; which circumstance induces them to believe the narrations of these witnesses to be true. But (without laboring to prove what is too clear to need proof, that the most erroneous and most false statements usually contain some well founded facts,) I reply, that the question here is, not whether these particular witnesses are to be believed, but whether the depositions of those slaves are *admissible* testimony before this Board? I would much sooner believe the claimants themselves. I should do so with much more security. Some of them I know, and would implicitly confide in their statements, deliberately made, without oath. If they were bad men, I should still confide in their testimony in preference to the testimony of their slaves; because they would still be subject to the fear of punishment and of shame, which they would much more easily escape, supposing them to be acting correctly, if allowed to establish their claims through the testimony of their slaves: for can it be contended that there is any security in the affidavit of a slave, taken under the influence of a fraudulent master? I would rather, therefore, take the allegation of these claimants, not on oath, than the testimony of their slaves, or any slaves, because I believe them to be men of character and talent, who would not state a falsehood from intention, nor be likely to make a misstatement from want of intelligence; and I should rather take the oath of any claimant, whatever his character, because he would be subject to the punishment of the law and the frowns of society, which would restrain him from rashly taking a false oath, under the control of neither of which would a slave be. But would we seriously think of admitting the testimony of a claimant, because we believed, however confidently, that he would state the truth with fidelity and accuracy? It is not enough that we *believe* the particular testimony adduced: it must be testimony that, at some time, under some circumstances, in some tribunals, has been received as credible testimony, to affect the rights of citizens. But is there one solitary example, even of this slender character, which can countenance the admissibility of the testimony of slaves?

I presume, however, that I am, in distinguishing between the questions of the credidility and admissibility of evidence generally, anticipating the question of admissibility of this particular testimony, which will properly be reserved until the statement and analysis of it are completed.

In several cases, the Board have admitted the testimony of free persons of color, who are resident, and have been examined in States where the testimony is inadmissible, in cases affecting the rights of citizens. I shall enter into no detail on this testimony, either in the statement or argument, because I consider it merged in the question of the admissibility of the testimony of slaves.

I am authorized, then, I think, to say, that the majority of the Board have received, as full proof of the fact they were respectively adduced to prove—

1st. The testimony of slaves, resident in States (and examined in these States) where their testimony is expressly rejected by law;

2d. The hearsay testimony of white persons who might have been examined on oath; and,

3d. The hearsay testimony of the absconding slaves, for whom compensation is claimed.

I now proceed to discuss the admissibility of this testimony: clearly, there is none of it admissible in any of the permanent tribunals in the United States; nor has any such testimony been received in any temporary tribunal, like this Board, on any question; nor has any law given any express or special authority to this Board to receive such testimony. These are all undeniable propositions; and, if they be, it seems difficult to know on what grounds the admissibility of the testimony will be rested.

It has been agreed by the Board, to prevent the possibility of unseemly controversy, that, in assigning their reasons for their opinions, where they differ, the members of it shall not reply to each other, and consequently the difficulty I have just stated is increased. Under these circumstances, I will suppose the following:

1st. It will, perhaps, be said, that it is *discretionary* with this tribunal, considering its peculiar and temporary character, to receive any testimony, on oath or not on oath, for as much as it may be worth; and the more especially as the decisions of such a tribunal cannot be considered as precedents.

2d. That, though the Board shall receive and weigh the testimony, it will examine it with peculiar scrupulousness, and only receive it as sustaining testimony. I state these as what I understand to be the grounds on which my colleagues rely; but, that I may not do them injustice, and that all collision between us may be avoided, I desire it may be understood, that, except so far as they shall, in their written opinions adopt them, they are to be considered as the grounds, and the only grounds, on which I suppose a plausible argument can be built, to shew the admissibility of this testimony.

1st. The discretion of this Board. What is meant by this discretion? Is it that this Board is not bound by the examples of other judicial tribunals? for this is a judicial tribunal. Is it that it is not bound by the general laws of evidence that prevail in our country, as a common basis to all our systems of evidence; as a fence arounds our property, our lives, and our characters? Is it that this Board is released from the disqualifying laws of the States where the witnesses re-

side? Is it that we are bound by no rules, no analogies? Is it, in short, that the discretion of each member of the Board, (however honestly indulged, and however enlightened,) shall be his only law? I sincere-hope not. Yet, if not, tell me on what principle, precedent, or analogy, this testimony is received?

We are undoubtedly bound by the examples of other like tribunals; and, being instituted in their very form and features, if I may so speak, their example is an implied law to us, understood so to be, alike by the Legislature which created the tribunal, and by the citizen whose rights are to be bound by it.

But in what tribunal, special or permanent, in this country, has an African slave been received, to affect the rights of free citizens, and to sustain, too, the claims of his own master? If with slavery, existing for centuries in the United States, no time, no occasion, no circumstances can be mentioned, when such testimony has been deemed admissible, either in States where slavery prevails, or in those where it is abolished, what does it prove? Surely nothing less than that it is absolutely, and co-extensively with the United States, repudiated: for else, how many occasions and interests must have called it forth? Are we at liberty to exalt into the character of competent witnesses, those thus universally rejected? Will Virginia, the State in which these slaves reside, and have been examined, deliberately consent, under any circumstances, to have her rights, or the rights of her free citizens, bound by the testimony of slaves? Would that State deliberately insist that the rights of the citizens of other States, should be bound by such testimony? Is it believed that Congress could be induced, under any circumstances, to establish, by law, the admissibility of such testimony? If not, what have we done? We have set an example (the first, and I hope it will be the last) to sustain the pretensions of those agitators, who are sometimes called by a name of fearful omen, *Les amis des noirs*, in one of the tenderest points affecting this property. If not the first, the loudest complaint of these people is, that slaves are not permitted to bear evidence against white persons. Ought we not to beware, lest we be stirring a volcanic fire? It is supposed, however, that the acts of this Board, as a temporary tribunal, cannot be regarded as precedents. If they be not, it will only be because they are unworthy of us. If they shall happen to be based on law, and justice, and wisdom, and experience, they will be quoted and venerated as precedents, temporary and humble as this tribunal may be: but is that really the character of this tribunal? Is it not a national tribunal, executing the high behests of sovereign States? Such a tribunal surely ought to do nothing which it believes cannot be referred to, as an example worthy of imitation, and beneficient in its remotest tendencies. Already have less important acts, than I deem the judgments of this Board to be, been quoted as precedents affecting this very species of property. But is it not a solecism in language, and something more dangerous in principle, to talk, in this sense, of the discretion of judicial functionaries, in a free State, where the citizen looks for his rights, and the judge for his duties, in a law prescribing each? Can there be, in such a State, any tribunal that is

not governed by the general rules of evidence? I hope I shall never be a member of such a one. It has been as truly as eloquently said of the discretion of a judge, "that it is always uncertain, it is different in different men. In the best, it is often caprice. In the worst, it is every vice, folly, and passion, to which human nature is liable."

Under a Government of laws, whose foundations reach back for ages, like ours, if a qestion arise where there are no guides to be found in the archives of its experience, either analogical or positive, it may safely be inferred that it is indefensible. But if all experience and precedent concur in forbidding, not simply not sustaining its adoption, we may with equal safety conclude that it is more than indefensible—that it is dangerous; such I consider the reception of the testimony of slaves. If not so dangerous, yet equally inadmissible do I consider the hearsay testimony,* as well of the white as the colored persons, which has been admitted in this case. As to the white sailors, if they have, indeed, thrown off their nautical character, and become so entirely part and parcel of this Nova Scotia African glebe, as the testimony seems to indicate, why have not their depositions been adduced? As to the runaway slaves, those who know best the character of such people, (unless by travel, and prison ships, and camps, they have been much improved,) would not deem their declarations creditable in the concerns of the kitchen or the nursery; and shall I consent to execute national treaties, and the compacts of sovereign States, by the lights of such evidence? I cannot.

2d. The scrupulousness with which the Board may weigh this testimony, and the use of it only as sustaining proof. In the first place, I am yet to learn that testimony, in itself inadmissible, can be rendered competent by the mental reserve of the judge who is to weigh it. I mean nothing offensive by the expression, but use it as the most expressive term I can select to convey an idea of the proposed restraint on this testimony. But what is this proposed restraint, but another form for that very judicial discretion which we have just been deprecating and refuting? It is a discretion ten times more dangerous, because ten times less responsible. I am sure it is an unheard-of rule of evidence; and the fallacy of it, as security, if it be relied upon on this occasion, has been demonstrated in the instant of its adoption. I have recited the testimony at considerable length, for the express purpose of exhibiting this fallacy. Let the reader refer to the testimony, and he will find that, excluding this evidence, there will not remain one particle of independent testimony to establish the fact in controversy; and if there be not, will it not shew how utterly vain these secondary efforts at doing right must be, even in the wisest and the purest hands. In fine, to my mind, it appears very clear, that none of this testimony is admissible; that it violates all rules and all precedents, and establishes some new ones of the worst and most dangerous kind.

LANGDON CHEVES.

* The essential rules of evidence will be the same among all nations governed by "reason, as that no man shall be a witness in his own case; that, in every issue, the affirmative is to be proved; that hearsay is no evidence, while the technical rules, *e g.* "such as respect the number of witnesses, or the mode of their examination, may infinitely vary."—2 Brown's Civil Law, p. 371.

Mr. Seawell's opinion.

The cases of Fendall, Forde, Dade, Ledwick, Downman, Waring, and others, for slaves carried off by the British forces, contrary to the provisions of the Treaty of Ghent, are submitted as proven by the testimony of Wheelright and Massey, and, in some of the cases, the evidence of slaves and persons of color: as regards the carrying away of the property, no difficulty, whatever, is felt. The point of difference is, whether there be sufficient evidence to satisfy the Board that they were carried off after the treaty was ratified; the evidence as to this part of the case, as regards several of the cases, is, that, in 1820, both the witnesses were in Halifax, Nova Scotia, where they saw the slaves in question, or, at least, the principal part of them. Wheelright says he saw James and Nancy, and that Nancy told him her four chidren were with her; that he saw James the husband of Nancy, who also told him that Peter and Fidelio were there. The other witness, Massey, says that he also saw Nancy, and *three or four children;* and that he saw her husband, James, who was known to him, before he left his master, as a sailor in the Chesapeake; both these witnesses say that they saw a number of Chesapeake slaves; all of whom, with many white persons, said they had been sailors in the Chesapeake during the war, declared that the slaves in question did not leave the Tangier, in the United States, till after the news of peace. And the question is, whether the foregoing evidence, taken in connexion with the fact that the slaves were taken from their masters in the month of August, 1814, is a sufficient proof of the carrying away after the ratification of the treaty? and I am of opinion that it is. The rule of law prescribed for the government of courts of justice, in all its strictness, never requires, of any party, the production of higher evidence than the *nature of the fact* he is required to establish necessarily presupposes in his power or possession: this may be called a rule without an exception. The application of it in this case is, that, as the carrying away was in British ships, from a British camp, and by crews evidently British, which camps and and ships were remote and inaccessible to any but those who belonged to the British army; and that the slaves deported remained in that situation, until their arrival at Halifax; and that, as it cannot, in the nature of things, be in the power of the claimants to know who the crew was, or in what vessels the slaves were carried off—the account which the slaves themselves give in Halifax must be admissible. If, however, it be said, that this account should be on oath, the answer is, that the slaves are carried by Great Britain into her own country, where the claimants must be unacquainted, and unable to obtain any judicial assistance, but such as she may think fit to extend to them: and, if the fact be that the slaves have stated untruly, it was completely in her power to call upon persons acquainted with the transaction, to confront, upon oath, the declaration of the slaves. In other words, unless this evidence be admissible, it is not in the power of the claimants, from the nature of the fact to be proven, to adduce

any. But, according to the opinion I have formed of the functions of this Board, I have believed that it was not so bound down, or intended so to be bound, either by the convention of St. Petersburg, or of London, or act of Congress, as to be confined in the admission of testimony to the technical niceties which prevail in courts of common law. The convention of St. Petersburg requires the Commissioners to determine the claims according to their "merits;" to examine all such persons on oath, as may come before them; and to "receive in evidence, according as they may think consistent with equity and justice, written depositions or *papers*—such depositions or papers being authenticated, either according to existing legal forms, or in such other way as they shall *see cause* to require or allow." The convention of London is silent upon the subject: and the act of Congress constituting this Board, requires of the Commissioners to "docket the claims and consider the evidence offered by the respective claimants, &c., and to award distribution according to their several rights." The just conclusion from which, I take to be, that, as this Board is not constituted as courts of common law are—the *permanent tribunals*, to which is to be referred the numerous transactions of human intercourse, and which, on that account, are to be guarded with every possible barrier to prevent fraud—but is merely temporary; to decide only the claims under the Imperial award; that it must be understood to have been the design of those who gave it existence, that the Board was to decide according to the evidence which the transactions were susceptible of, and leave the Commissioners at liberty to decide upon such facts and circumstances as satisfied their *consciences*, without being restricted by common law technicalities. If, then, I am correct, in regard to the nature and character of the Board, my conscience and understanding are both fully satisfied that the slaves in question were carried away by the British forces after the ratification of the treaty. Who could know it better than they themselves? They had no interest in stating an untruth: they say it was not till they heard the news of peace that they left the Tangier; and this is said in 1820, before the creation of the Board—nay, before the convention of St. Petersburg. It is shown by a mass of testimony, that, until after the ratification of the treaty, and as late as March, the British had an encampment of slaves, of all sexes and ages, at that place. From the view I have taken of these cases, I have not felt it necessary to point out the instances in courts of common law, where, *ex necessitate*, the acts of the party, as his letter book and invoice, are permitted to be given in evidence *for him*. I have no doubt whatever, from the evidence given, that the slaves were carried off after the ratification of the treaty; but a further difficulty has been raised in some of these cases, upon which the Board is also divided. It is said, that this is *hearsay* evidence; that it is the evidence of slaves. Who has the right to raise these objections? If by Great Britain—the answer is, that *hearsay* evidence is that alone which the nature of the fact is susceptible of. *Who* can the claimants adduce, that can testify to the fact of his own knowledge? Can they adduce an

American citizen? No; the Americans were at war with Great Britain, by which all intercourse was prevented. Then, can they adduce a British subject who has personal knowledge of the fact? They know not who to call upon. And how are they to obtain his testimony? If the evidence must be confined to the oath of British subjects, who is to administer it, but a British functionary? To say, therefore, that the claimants shall be required to produce evidence which, from its very nature, depends upon the voluntary concession of their adversaries; and that, without such evidence, their claims are to be disallowed, goes to prove that the convention of St. Petersburg was created for a very idle purpose: a tribunal constituted to decide upon claims, when, by the very nature of the transaction upon which they were founded, it was impossible to obtain any proof that was admissible. But, if we are to suppose that the framers of the convention were aware of the nature of the transaction upon which the claims were founded, and really intended the Board constituted to award compensation to the sufferers provided for, we must necessarily suppose that they contemplated these claims to be supported by that kind of testimony which the transaction admitted of, in the same way that it is contemplated by the lawgivers of the municipal code, that, where the next in blood is to succeed to the ancestor, the lineage is to be proven by that sort of evidence which it is in the *power* of the heir to bring; from the *nature* of the fact to be proven in such a case, we well know it is an established rule that *hearsay common report* is all that is required, though *marriages* and *births are registered: for the party may not know* what parish to look to for the registration. This is a rule in the courts of common law, where the rules of evidence seem to be more guarded to prevent fraud, than studious to advance right. But a fair interpretation of the terms of the convention, requiring the Commissioners to decide the cases according to their *merits;* leaving to them, as they should *think fit*, the nature and character of the evidence; requiring the Board to examine *all* persons who should come before them, taken in connexion with the nature of the facts to be proven; place, without doubt, in my mind, the admissibility of the *hearsay* evidence as to Great Britain. Then, as to the objection that it is the hearsay of *slaves*—that is not true. Great Britain has made them free British subjects. They are good witnesses in a British court against a prince of the royal blood. *She* has made them witnesses competent to testify in all her courts; and cannot, therefore, object to their complexion, any more than to their religion or forms of worship. It therefore, to my mind, is clear that, as regards Great Britain, the evidence is as admissible under every form of the objection. Then, how is the case altered by the convention of London of 1826? The sum paid by Great Britain is in the hands of the United States, as the trustee for the claimants. The United States cannot rightfully pocket one cent. She received it in the *character* of trustee, and must pay it to those entitled by the *agreement* under which it came to her hands, or must restore it. *She must not disappoint the purpose of Great Britain.* Have the United States received the fund under an agreement that the

nature of the proof was to be changed, so as to render inadmissible that which before was competent? If the convention is to decide, there is no such provision in the nature of the whole case; and all the proofs, as applicable to the respective claims, seem to me to remain unaffected, and are now precisely as before the late convention. Then how is it competennt for such claimants as have been allowed their claims, to urge these objections? How were their cases proven? By direct testification of witnesses who spoke of their own knowledge? Or, was it not in a great degree from *hearsay*—the declarations of British officers and soldiers, that the slaves claimed were at Dauphin island, were at Cumberland, were at Tangeir island, and the like? And what, indeed, is Bayley's list, but the names of slaves, or rather black persons, found by him at Tangier, whose names are taken from the account given by the very slaves themselves, *not upon oath?* All this evidence has been received without difficulty, and claims allowed upon it, and to the very persons now anxious to exclude it from all others. The cases are not susceptible of distinction upon application of the common law rule in relation to declarations which *constitute* a part of the *res gesta*. It is only necessary to advert to what is meant by the *res gesta*, to show its want of application. The *res gesta* is "the thing done." When the thing done consists of that which requires something to be said, as, for instance, to make a tender of money a dumb show, would amount to nothing: the *quo animo* must be stated, for it is *part of the act*. It is a tender on a *particular account*, which, of necessity, requires that the purpose should be stated when the money is offered; did the declarations of the British officers and soldiers, at Dauphin Island, and St. Mary's, or of the slaves at Tangier, constitute, or in any way form, part of the subsequent *carrying away?* It was evident that the slaves were *at* those places; and the ships going off, and the slaves not having returned to their owners, was satisfactory evidence that they were carried off *after* these declarations. But there is still a further objection, that the testimony of slaves, owned by citizens of the United States, and taken before magistrates, has been allowed, as admissible evidence. Upon that point, I concur *in omnibus*, with the opinion of my brother Commissioner Pleasants, who has stated at large his opinion upon that point; in a word, all the evidence which has been adduced by every claimant, would have been inadmissible, according to common law technicality; either as regards the *manner* of taking it, or the *matter* stated by the deponents; and the whole of it has only been allowed to operate in support of the claimants, so far as it carried the conviction of its truth; and so in respect to this latter sort of evidence, where it was supported by circumstances, or other facts, and convinced us that it stated the truth, like any other mean of arriving at truth, it has had its effect, and in no otherwise: and it should not be overlooked, that the same kind of testimony has, in fact, been laid before the Board: I allude to the deposition of Cato Johnson, in support of a case from Georgia, and an argument offered by counsel to prove its admissibility, who, it is understood, is now objecting to it in the Chesapeake cases. It is true that, in the Georgia case, though the deposition was read, I

believe there was other proof without it, sufficient to sustain the claim; but the bare *introduction* of it, is at least evidence, independently of the argument proposed, of what was the opinion of counsel, in relation to its admissibility. To conclude: When the declaration of the British officers on our coasts; when the declaration of the slaves at Tangier, by which Bailey's list was made out; when the deposition of Cato Johnson, from Georgia, has actually been laid before the Board, and aided by the apparent opinion of counsel; have all been received as proper for the consideration of the Board in supporting claims; I feel that I am sustained in hearing other declarations, and other depositions, of the same character.

The particular facts and circumstances, by which the testimony admitted, is supported, is not noticed; the point upon which the opinion is given, is only as to the *admissibility* of the evidence, not its *weight.*

H. SEAWELL.

Mr. Pleasants' opinion.

In the claim of Raleigh W. Downman, depending before this Board, asking compensation under the decision of the Emperor of Russia, for certain slaves carried away by the British forces, in violation of the first article of the treaty of Ghent, the deposition of John Hall, a slave, is introduced, to establish certain facts; and the question is made, How far, or, if at all, the deposition of a slave, or free person of color, can be received as testimony before this tribunal?

In considering this question, we are led to inquire, what persons are considered as competent witnesses in the courts and other tribunals of this country and Great Britain? Upon examination, we find that all persons of sound mind, who believe in a God, and a future state of rewards and punishments, are considered as competent. The words of Starkie, the most recent authority on the law of evidence, had better be given. In his 1st vol. p. 79, 80, he says "all persons may be sworn as witnesses, who believe in an existence of a God, in a future state of rewards and punishments, and in the obligations of an oath; that is, who believe that divine punishments will be the consequence of perjury; and, *therefore*, Jews, Mahometans, Gentoos, or, in short, persons of any sect, possessed of such belief, are so far competent witnesses."

To this general rule, all the well known exceptions of *interest*, debility of mind, &c. exist; and, in certain States of this Union, where the servile condition of these people exists, there are also statutory provisions, prohibiting the use of their testimony against white people. I need not state to my associates the reasons of these provisions; they, as well as myself, were born and raised in States in which this state of things exists, and the motives which have induced it are well known. It is also further known, that, whilst their testimony is totally excluded from bearing upon white persons, it is entirely competent before the tribunals in which these people, I mean slaves and free per-

sons of color, are tried for offences of all descriptions, and that corporal punishments, of all descriptions, are continually inflicted, on such testimony, and numbers of those persons executed. The propriety of this discrimination is not intended to be called in question; in the existing state of things, it may be considered as proper, even necessary. But it presents this obvious reflection, whether, in questions before this Board, where a conduct of the most liberal kind, in the reception of testimony, ought to characterize, and has, hitherto, characterized, the proceedings, evidence of an intelligent person, though a slave or free person of color, entirely free from any of the exceptions to the general competency of his testimony, except the one now under consideration, may not, with safety, be heard in connexion with other testimony, not as conclusive, nor even as *prima facie evidence*, in all cases, but as a circumstance, among others, carrying conviction to the mind, that the thing, such as stated by the slave, or free person of color, really existed as he or she represented it to exist. As one member of this Board, I have no hesitation in saying, that I think such testimony may, with entire safety, be heard by the Board, examined, weighed, and cautiously considered, received, or rejected, according to circumstances. My reasons for this opinion, in addition to such as are before stated, are, my knowledge of these people, as they exist in the State in which I reside, and of which I am a native: for they are intelligent, far more so than they are generally supposed by those whose opportunities have not led them to examine their characters closely; they are, in general, as moral as most other persons; they are strongly religious, as much so, generally, I incline to think, as the white people, as far as my observation has extended; they have their preachers, many of them quite respectable, as teachers of religion and morals, and numbers of them, the slaves, belong to the regular constituted Christian societies, of different denominations. To be brief, my opinion is, that we shall hear this testimony as circumstantial evidence, and, when it is strongly corroborated by other circumstances, allow that weight to it, which a credible witness, of a different description, would be entitled to.

Since the above remarks were written, the Board has ascertained, upon inquiry, that the laws of Maryland, operating in this part of the District of Columbia, authorize, in a qualified way, the use of the testimony of colored persons, in a manner as strong, perhaps stronger, than the use contemplated to be made of it, as stated in these remarks.

JAMES PLEASANTS.

Mr. Cheves' opinion in relation to suppressed depositions.

The question in this case arises under the following circumstances: Certain claimants had fully substantiated their claims; that is to say, had proved that their property was taken away after the ratification of the treaty of peace. Certain other claimants had failed to do so, but had proved *the taking* of their property (slaves exclusively) at different periods before the peace. This proof, with certain circum-

stantial testimony on which they relied, they contended, authorized the presumption that their slaves were in the United States at the time of the ratification of the treaty, and that they were, consequently, entitled to participate equally in the fund under distribution, unless the contrary should be proved; that the burthen of this proof, under the mixed commission, lay on the British Government; and that, before this Board, it either lay on the opposing claimants or on the fund; that is to say, I presume, on the Government of the United States.

To strengthen this presumption, these claimants filed sundry ex parte affidavits, stating general facts, the tendency of which was to confirm the proposed presumption.

The claimants of the first class (those who had substantiated their claims) controverted these propositions, but declared their intention also to adduce proof in opposition to them. Under these circumstances, they submitted to the Board the following representation:

"DECEMBER 18, 1827.

"Mr. Frost, in behalf of many claimants, stated to the Board, "that those who had sustained their cases by satisfactory evidence, "under the award of the Emperor of Russia, being interested in pro- "tecting the fund paid under the Convention of London, for the use "of the persons entitled to indemnity under the said award against "unfounded claims, are about taking testimony, for the purpose of "shewing, (what is a matter of general notoriety and history,) that "the negroes taken by the British forces in the years 1813 and 1814, "were, from time to time, during the course of the war, with the ex- "ception of those enlisted in the service, and some few others, sent to "Bermuda, Halifax, and other British possessions; *and desire to know "whether the Board will require such testimony to be taken in any other "form than that prescribed by the general regulations of the 11th July "last—and Mr. Frost moved for information accordingly.*

"Whereupon it was ordered, that all depositions taken with the ob- "jeet stated in this motion, shall be taken on interrogatories exhibit- "ed by the applicant, and cross-interrogatories exhibited by the other "party in controversy, if the latter shall see fit to exhibit cross-inter- "rogatories. The Board will determine, on each occasion, on the fit "notice and time for putting in cross-interrogatories. *If taken in the "United States, the depositions shall be taken and authenticated accord- "ing to the rules heretofore prescribed by the Board.*"

The following is the rule previously prescribed:

"Future authentications of testimony shall be good when taken "before, and certified under the seal of office of a Notary Public; or "when taken before a Magistrate, Justice of the Peace, or Judge of a "Superior or Inferior Court of any of the States or Territories, or "the District of Columbia, and certified by the Clerk of the county, "Corporation, or Superior or Inferior Court to which such Magis- "trate, Judge, or Justice belongs, under the seal of such Court, that "such person is a Magistrate, Justice of the Peace, or Judge for such

"county, corporation, or Superior or Inferior Court, as the case "may be."

The Board, at a subsequent day, prescribed the mode and time of serving interrogatories.

The claimants of the 1st class have complied with all these rules, in the most strict and faithful manner, and, under them, have taken a number of depositions, which they filed in the office of the Board. To these depositions being received as evidence, the claimants of the 2d class filed exceptions, which, according to a rule of the Board, were submitted to the Clerk, who overruled them, and this is an appeal from that decision. A majority of the Board (Messrs. Pleasants and Seawell) have sustained that appeal, and suppressed the depositions. Before proceeding to give my reasons for a contrary opinion, which lead me to dissent from my brethren, I will state some other facts.

Under the mixed commission, (as the Journals will shew,) no other authentications than those adopted by this Board were prescribed, except that it was required that the signature of the Magistrate should be certified to be genuine. This being unusual, was deemed a hardship, was objected to by me, and loudly condemned by the claimants. Ex parte affidavits were to be allowed before that Commission, in all cases, and on all questions; and in none were examinations required to be under interrogatories. When the motion of Mr. Frost was under consideration, I concurred, because I thought it would lead to a better and fuller investigation on both sides, in the rule requiring the examination to be under interrogatories on the general questions; but it appeared to me that the rule should apply to both of the parties in controversy; the question, therefore, arose, whether the ex parte depositions, filed by the claimants of the 2d class, to be used on the general questions, should be received as evidence or not: and Messrs. Pleasants and Seawell were of opinion they should; and it was so decided. I was of a contrary opinion; because I thought one rule should govern both parties. These depositions appear to be, some of them, in the hand writing of the deponents; some in that of the agents; and some in that of the magistrates. They are authenticated, only, according to the general rule of the Board, and were handed into the Board by the claimants or their agents. Let it be distinctly remembered, these depositions, it is determined, shall be used as evidence on the general questions; while the depositions under consideration, authenticated in the same way, but taken with additional strictness, and form, and solemnity, are to be suppressed.

The exceptions on the part of the claimants of the 2d class, to the depositions taken by those of the 1st class, under the rules of the 18th December last, are the following:

"1st. That many of the interrogatories are leading.

"2d. That many others call for hearsay evidence.

"3d. That the depositions *do not appear* to have been reduced to writing by the witnesses themselves, or the magistrates before whom they were sworn; and, *for aught that appears to the contrary*, were reduced to writing by the agent or counsel of the Georgia claimants, and may have been even previously prepared.

"4th. That the depositions were not returned under a sealed cover, but were delivered open to the agents of the Georgia claimants, and thus returned contrary to all the forms of practice in every tribunal.

"5th. That the depositions, for the most part, depend on hearsay, and the presumption and conjectures of the witnesses, instead of being confined to facts within their knowledge.

"On these grounds it is submitted, on the part of the Chesapeake claimants, that the depositions ought to be suppressed *as having been irregularly taken.*"

I will first notice the facts stated in these exceptions, and see how far they are before the Board. Of these there is no proof whatever, except those stated in the 4th exception, and except so far as the interrogatories and depositions on their face furnish evidence of them. I have looked into the depositions, and they appear to me to be, in every instance, in the hand writing of the magistrates taking them. The interrogatories appear to me to be as little characterized by leading questions as interrogatories usually are in cases of complicated facts; and I do not think, if they had been less so, they would have been sufficiently understood by the witnesses, so as to prevent them from omitting material circumstances in their replies; some of them, too, were to be administered to witnesses whose depositions had been filed by the claimants of the second class, and were, therefore, in the nature of cross-interrogatories.

Leading questions are only such as are formed "in such a way as to instruct the witness in the answers he is to give."—Peak, 188. But they should be so framed as to prevent the witness from omitting any material circumstance—*ibid;* and in cross examinations, leading questions are unexceptionable—*ibid.* The depositions are as free from hearsay testimony as depositions usually are; and I have great doubt whether there is a single answer which is not testimony, according to the strictest rules of evidence. Any of them having at all the character of hearsay, consist principally of such as speak of the declaration of the British officers during the war, and when the transactions were in progress to their consummation, and of the declared destination of ships at the time of their sailing. Now, these are a part of the *resgesta* which is clearly admissible, and not, therefore, hearsay evidence; and besides, the claimants on the other side had adduced evidence, in almost every affidavit filed or relied upon, of the declarations of the British officers, and even sailors, and of the declared destination of ships; and if the testimony can be adduced in chief, it surely may be contradicted by the opposite party by like testimony. But the whole of the depositions has been suppressed—not only the whole of a deposition in which it may be alleged there are some leading interrogatories, or some hearsay testimony; but depositions, against which neither objection can lie. Under these exceptions, the following questions arise:

1st. Whether the whole of the depositions (admitting that the interrogatories contain leading questions, and the depositions contain hearsay testimony, both of which are denied,) should have been suppressed, or only such parts of either as were exceptionable.

2d. That, whether it was necessary that the examining magistrate should have *certified* that the depositions were committed to writing by himself or by the witness.

3d. Whether it was necessary that the examining magistrate should have transmitted the depositions under a sealed cover.

1st. The authority quoted in support of the affirmative of the first question, is 2d Maddox's Chancery practice, p. 412. The question will hereafter be considered whether the Chancery practice of a foreign nation is a binding authority in this case. But we will examine this authority, to see how far it sustains the exceptions embraced by the question. The language of that authority is, "If the interrogatories are *leading*, the depositions, on a reference to the master *and his report that they are so*, will, on motion, be suppressed. If one interrogatory be reported leading the deposition, *the deposition only to that interrogatory is suppressed;* so, if part of an interrogatory be reported leading, *so much of the deposition* as relates to an answer, the leading part will be suppressed. It seems, then, that, according to the utmost strictness of the Courts of Chancery of England, (a practice, whose forms, and complication, and delays, and expenses, bring an involuntary shuddering over the unfortunate litigant, at the mere mention of them) will not sustain the decision of the Board. Only the peccant parts will be suppressed. According to that practice, too, before any part will be suppressed, the Master in Chancery must have sustained the exceptions. Here, if we are to be assimilated to a Court of Chancery, our clerk must be considered the master, and he has, on the contrary, overruled the exceptions. Whether the testimony be hearsay evidence or not, is a question for the Court on the hearing, when considering and weighing the testimony, and not a subject for exceptions; accordingly, the authority quoted, which embraces the whole body of the practice of Chancery, does not even name it under the head of exceptions: and, if the practice were otherwise, the suppression would be only partial, as in the case of leading interrogatories. Clearly, then, the whole of these depositions would not have been suppressed in the English Chancery, admitting the allegations of the exceptions to have been conceded or established *in extenso*. But I am not aware that this Board, as a Board, has even looked into these depositions.

2d. The next question is, whether it was necessary that the examining magistrate should have *certified* that the depositions were committed to writing by himself? I say that he should not have *certified* the fact: for, that *he did* commit them to writing is proved by the inspection of the depositions. And, if his *certificate* of the fact be *not* necessary, though the fact were not apparent, it would be incumbent on the party excepting, to sustain his allegations by testimony—which he has not done. No such certificate is required by the English Chancery practice. If it be, let an authority be quoted; none such has been referred to, and none such is to be found in the authority before quoted, which is intended to contain the whole practice; and, I feel satisfied, none can be found. The act of Congress, pro-

viding the mode of taking depositions, *de bene esse*, in judicial cases, has been referred to. (2d vol. Laws of United States, Bioren and Duane's edition, p. 67 to 69.) That act provides, that depositions shall be so taken, when the witness lives at a greater distance from the place of trial than 100 miles, is bound on a voyage to sea, &c. These are the reasons which authorize the taking of such depositions. The notice and mode of taking are then prescribed; and, under the latter, it is enacted, that the testimony "shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence; and the depositions so taken shall be retained by the magistrate, until he deliver the same, with his own hand, into the court for which they were taken; or shall, together with a *certificate* of *the reasons as aforesaid*, of their being taken, and of the notice, if any, given to the adverse party, be, by him, the said magistrate, sealed up, and directed to such court, and remain under his seal until opened in court." It appears, then, that no *certificate* is expressly required of the fact; that the depositions were committed to writing by the magistrate or the witness; and it is, according to well known rule of law, *expresio unius est exclusio alterius*, dispensed with, by the naming expressly of certain points, which must be certified. We will have hereafter to show, that this Board is, by its own act, in this case, precluded from enforcing the provisions of the act of Congress, or the Chancery practice, or any other code, except its own rules. At present, let it be observed, that the depositions have been committed to writing by the examining magistrate, as appears by an inspection of them. That, if it did not so appear, the exceptions ought to be, and are not sustained by proof to the contrary; and that it is not required by the Chancery practice, or the act of Congress, that the fact should be certified.

3d. Lastly. Is it necessary that the examining magistrate should have transmitted the depositions under a sealed cover?

Whether it is necessary, according to the English Chancery practice, cannot be discovered from the authority referred to in support of the exceptions, which is probably the latest and the best; nor perhaps from any other. It is necessary, under the act of Congress, in cases at common law, and in the admiralty; but what is necessary in the courts of the United States, in cases in equity or Chancery, may depend, according to circumstances, on the laws and rules of practice of each of the twenty-four States of the Union. (3d vol. Laws of the United States, Bioren and Duane's edition, p. 487.) Which of all those are to be our guide, and how are we to ascertain what is prescribed by them? If the Chancery practice is to have the dignity of affiliation, we can hardly be allowed to prefer that of the English courts to that of the courts of the United States; and, if we adopt the latter, it presents us the Augean stable of all the courts of Chancery in all the States of the Union to select from; or perhaps we may be bound to embrace all, if witnesses should be found in all. They are all alike recommended to our adoption, unless some should be entitled to a preference by their superior wisdom or fitness. But who is to

determine this point? None can be regarded at all as *authority*. The essential rules of evidence belong to all tribunals as they do to "all nations governed by reason:" but "technical rules may infinitely vary." (2 Brown's Civil Law, p. 371.) They do infinitely vary; and, I believe, an instance cannot be found in the history of jurisprudence, where the technical penalties of one tribunal (much more a foreign tribunal) have been enforced by another, without previous adoption, by which all concerned were amply notified, upon the rights and interests submitted to its authority. Tribunals, however limited in duration, usually establish a code of their own, original, if easily practicable, and, if not, the code of some other is embraced by *express* adoption. The mixed commission established its code, dure and rigid enough it was thought at the time; but it was all lenity and indulgence, compared with that which results from our decision in this case. This Board, also, at its first meeting, established its own code, which I thought was to govern all examinations and depositions; and, I do think, a stranger who had heard the agents of the claimants of the 1st class, ask, on the 18th of December last, for the instructions of the Board, as to the testimony in question, would have supposed they had not read our previous rules. He would have been undeceived, however, by the order of the Board which resulted, and, changing his view of these agents, would have thought them men, wise, at least, in their own generation; but, if he could have lifted the veil of futurity, and seen all their apparent wisdom and foresight turned to nothing, would he not have laughed in scorn at the vanity of human learning and sagacity?

The agents on that occasion, say to this Board, "We are desirous of being instructed as to every requisite the Board may deem fit to impose in the modes of taking, and authenticating, and securing the validity of the depositions we are about to take, and will conform to every direction that you shall prescribe." The Board, in response, prescribe a number of additional forms and means, supposed to be calculated to secure a fair and faithful examination of the witnesses, (all which have been literally and exactly complied with.) It then adds: "If taken in the United States, the *depositions* shall be taken and *authenticated as heretofore prescribed by the Board*." This, also, has undoubtedly been done, without the smallest defalcation. If so, have not these depositions been duly taken and authenticated, according to the rules of this Board? If duly authenticated, ought they not necessarily, and as matter of clear right, to be read in evidence? What is the meaning of *authenticated?* Must I turn to lexicographers, to show the well known meaning of this common word? The only one within my reach gives the following: "*That which has every thing requisite to give it authority.*" What means *authority?* "Legal power, influence, credit, *testimony*, credibility."

These depositions have every thing requisite to give them *authority* according to the express and most solemnly promulged and reiterated rules of this Board; and authority means, "legal power, influence, credit, *testimony*, credibility:" And yet we suppress them as utterly

void and unworthy of consideration; a result that excites my wonder and astonishment. Can any thing be plainer, than that the Board by rules so express, and full, and clear, precluded itself from referring to any extraneous codes? I beg pardon—the Board has determined otherwise. But what are the probable consequences of this decision? The Board is bound to-morrow, if Congress shall so soon act on the bill before it to give further time to this Board to close its business, to determine the question to which this vastly important testimony relates, unless the House of Representatives shall pass that bill; and we learn that the Committee, to whom it was referred, have reported unfavorably of it. If this bill do not pass, the consequence is inevitable, that this testimony is forever shut out, because it wants some of the circumstances of authentication which some foreign tribunal, or some act of Congress, happens to require; though these codes were before the Board and not prescribed; though they are no more authority than any other code in which these circumstances of authentication may not be required; and though, to common minds, and some legal minds, too, it would seem the Board had precluded itself from taking notice of them, and defended claimants to whom they are applied, from being bound by them.

It does appear to me, (I express myself with great deference,) there never was an occasion calculated more naturally and forcibly to bring to the mind one of the maxims of the common law; one, too, of philosophical wisdom and truth:

Misera est servitus ubi jus est aut vagum aut incognitum.

I did understand, the claimants have understood it has been proclaimd aloud, that the Board were to be governed only by the essential rules of evidence, and that technicalities were to be disregarded. We have even let in hearsay evidence, and the evidence of African slaves, and thus relaxed, as I suppose, the essential rules of evidence which are the guides of "all nations governed by reason;" and yet one class of these claimants find themselves involved in all the technicalities of foreign tribunals and domestic tribunals, mixed up with the incompatible requisitions of our own proper regulations. Thus it has been asked truly, is the examining magistrate to trudge for long distances, from his residence to the clerk of the county, to get him to certify, from time to time, as each deposition is taken, in obedience to our own rules, that he, the magistrate, is really the character he avows himself to be, and afterwards to conform to all the technical requisitions of the English Chancery practice, and the act of Congress both?

Is a peculiar practice and a peculiar strictness to be applied to *this* testimony? I have heard a language in reference to it, which I do not understand in any sense in which I am able to apply it: it is said to be *adversary* testimony. Does this mean that it is testimony which is to be governed by peculiar rules—to be prejudged, and, before it is received, condemned? That is impossible; either it ought not to be received at all, or it ought to be received like all other testimony. Is there any example of two rules for the admissibility of testimony

on the same issue? one, for one party, of indulgence, and another, for the other, of rigor. If not, what is meant by adversary testimony?

Is it meant to say, that the pretensions of one of the parties are not to be favored? This certainly cannot be the views of this Board. But that the question may be disabused of a character that seems to have been cast upon it, not certainly by my brethren—let us for a moment inquire what the question is? Certain citizens of the United States had their slaves taken from them *during* the war, according to the rights of war, (a harsh and disreputable exercise of those rights it is true, but still they were the rights of war;) and they were carried out of our territories and waters before the ratification of the treaty of peace. In the treaty of peace, all claims for these are abandoned by our own Government, but it is stipulated that all slaves within our territory or waters, at the ratification of that instrument, shall not be carried away. The treaty is violated. Indemnity is claimed and granted to all those whose slaves were taken away after the ratification of the treaty. The sum agreed to be paid is, probably, not more than sufficient to indemnify those really entitled. In this state of things, some who are not entitled, claim an equal participation with those who are entitled. I say those who are not entitled: for *all* claim this equal participation, and no one will venture to say that all the slaves taken during the war, were within the territory or waters of the United States at the peace; therefore, some (how many, it is neither fit, neither material nor fit, at this time, to enquire,) who are certainly not entitled, demand an equal participation in this fund. It is unjust, unconscionable, or unusual, to put claimants like these, whose rights are doubtful, to use no stronger language, to proof, and to rebut their proof, if it be unsatisfactory or unfounded. I am aware it may be invidious to speak the truth thus explicitly on this subject, and I wish I could have avoided it; but I am accustomed to do my duty, however invidious, and I have determined to do so on this occasion. I say that no person whose slaves were carried away before the ratification of the treaty, is justly or equitably entitled to one cent of the fund paid under the convention of London; andthat, if any such be allowed to participate, it will be, *pro tanto*, a perversion of all the compacts under which we sit and act. The question is, who and how many are entitled to participate of this fund? To determine that, it is necessary to ascertain when the slaves severally claimed, left the United States. Can it be proper to have two rules of testimony on this plain question of fact? one for the affirmative, and one for the negative of it; one of indulgence, and one of restriction? The search is after truth; and whether a welcome or unwelcome fact be sought, the course of investigation ought to be the same. I am sure my brethren have the same object in view; but, believing and knowing this, I ask, what is meant by the idea, that this is adversary testimony, and, therefore, to be regarded in a light different from other testimony affecting the same issue? If it be said that two rules have not been adoptnd in this case, I ask whether the ex-parte depositions filed in support of the presumption contended for

by the claimants of the 2d class, have not been allowed, without any other authentication than that required by the original rule? It will be admitted. I ask, then, whether the more solemn and formal examinations now under consideration taken on interrogatories, with the opportunity of cross-examination, authenticated according to the same rule, have not been suppressed? It will be admitted. Have not then different rules governed these respective decisions? When the depositions of the claimants of the 2d class were allowed, there was time to retake them according to the new rule prescribed by the Board; yet they were allowed. When the depositions, now under consideration, were suppressed, there was no time to take them anew; and the testimony will be utterly shut out, unless Congress grant further time. Is this dealing equally by the parties? There have then been different rules applied to evidence affecting the same issue, and these rules in reference to the two parties litigant; one of them, I contend, more indulgent than the most relaxed examples of other tribunals, and the other more rigorous than English Chancery practice, with all its forms and technicalities.

Madox says, 2 vol. p. 412, "Depositions before publication will, on motion, be suppressed for having been taken by the Commissioners *ready prepared*, and the Commissioners will be directed to re-examine that witness; but this order does not, in cases of necessity, prevent the court having recourse to the depositions, as where, for instance, the witness could not again be examined." There, the irregularity was gross and dangerous; here, there is no irregularity, except, as it has been determined, that the omission of certain formalities not prescribed by the Board, but found only in foreign or extraneous codes, shall be such. There, the testimony was used when the witness could not be again examined; here, it is rejected, though thewitn esses cannot be again examined, unless an act of Congress pass, which shall control the effect of the decision of the Board.

LANGDON CHEVES.

Mr. Seawell's Opinion.

Upon the appeal from the decision of the Clerk on the regularity of the return of the adversary depositions, taken at the instance of Mr. Frost, as agent for claimants whose claims have already been allowed, a majority of the Board is of opinion, that the decision should be reversed, and the depositions suppressed.

These depositions were taken under rules prescribed by the Board, which required that they should be *taken* and *authenticated* in a particular manner, upon interrogatories filed, and notice to the adverse party, whom it was intended to prejudice. The depositions were taken in every particular conformable to the rules, but were not returned to the Board *closed;* they were handed in *open*, by *the* agent, without any envelope, as a loose sheet, or common affidavit; and, upon that ground, I am of opinion, they should be suppressed. This Board, at its first session, without any previous rule, refused, as ad-

missible, the affidavits of agents in support of claims. It thought the policy of preserving from the imputation of suspicion, those concerned in the management of claims, required such a rule. If that decision is justified by its policy, how much more is the adoption of such a rule as grows out of the present determination of the Board? In what way could confidence be more abused, than by the withholding such depositions as militated against the opposing claimants. Depositions, when taken upon interrogatories, as required in this case, become the property of both parties; depositions, to be admissible, should, like the oath to the witness, declare, not only the truth, but the *whole* truth. What is there, if these depositions are allowed, to prevent an agent from withholding a deposition, or even making an alteration? It is no answer to say, that the honorable standing of the agent in this particular case, and his known sense of propriety, would forbid it; rules must be universal as to men, and apply to all, equally. The rules which the Board have prescribed, relate only to *manner of taking and authentication*. It would have been impossible to point out any objection that the depositions, when taken, would be subject to. Would it be said that the deposition of an agent, the deposition of an insane man, a deposition in the hand writing of an agent, a deposition taken before a Magistrate, who was a party or agent, would have been allowed? Yet, neither has been prohibited by the rules. It seems to me at war with the first principles of common justice, to allow a man to be prejudiced by evidence, when its truth, or its falsehood is to depend upon the bare will of his adversary; and particularly, where there is a mode by which it can be prevented, and the adversary entitled to the same benefits. The decision of the Board, I consider as required, not only by rules of policy and justice, but sanctioned by the universal practice of all Courts, whether foreign or domestic, international or municipal, whole rules I have any acquaintance with. If it be said, that the same strictness is not required as to depositions adduced in *support* of claims, the answer is, that the opposing claimant has already had the full benefit of that rule, and obtained an allowance of his claim under it, and can with a very bad grace now object to it. For these reasons, my opinion is, that the depositions be suppressed.

HENRY SEAWELL.

Mr. Pleasants' Opinion.

Having concurred with my colleague, Mr. Seawell, in the opinion that the depositions produced on the part of these claimants, whose cases have been favorably determined by the Board, the object of which depositions is to prevent a recovery, or rebut the presumptive evidence which it has been agreed exists in favor of the Chesapeake claimants generally, I concur with him in the general reasonings in support of the opinion we have given. The rules prescribing the form in which those depositions shall be taken and authenticated, are silent as to the manner in which they shall be transmitted to the

Board; and the reason of this silence certainly was, on my part, at least, and I presume on the part of the other members, that they would be forwarded in the mode prescribed by the statutory provisions or rules of those Courts where such testimony is used, which I believe to be general, without exception; that is, that they shall be carefully sealed up, and transmitted to the tribunal before which they are to be used. The great inferiority of *written* to *oral* testimony, in its very best form, points out, most strongly, the propriety of making use of every mean which can be devised for preserving the testimony as pure as practicable. The loose practice of forwarding depositions open, or placing them in the power of any of the parties interested, must, at first view, present such strong exceptions to them, that, to my mind, it is a conclusive objection. Having relied principally *on this* objection, which exists in the case of these depositions, I deem it unnecessary to go into the examination of others; they, indeed, are stated as abovementioned by my colleague, and I concur generally with him.

JAMES PLEASANTS.