REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

FEBRUARY TERM 1822.

By HENRY WHEATON,
COUNSELLOR AT LAW.

VOL. VII.

FOURTH EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

" BUSHROD WASHINGTON,
" WILLIAM JOHNSON,
" BROCKHOLST LIVINGSTON,
" THOMAS TODD,
" GABRIEL DUVALL,
" JOSEPH STORY,

} Associate Justices.

WILLIAM WIRT, Esq., Attorney-General.

MEMORANDUM.

DIED, on Monday, the 25th of February, in the city of Washington William Pinkney, in the fifty-eighth year of his age. He was one of the Board of Commissioners for settling the claims under the British treaty of 1794, and had represented the government of this country, as its minister plenipotentiary, successively, at the courts of London, Naples and St. Petersburgh, with dignity and ability; he had held, with the highest reputation, the office of attorney-general of the United States; and at the time of his death was a senator in congress from his native state of Maryland, and a distinguished ornament of this bar. His funeral took place on the ensuing Wednesday, in the forenoon, under the direction of the senate, and was attended with all those public solemnities and that reverential sorrow due to his exalted talents and station.

To extraordinary natural endowments, Mr. Pinkney added deep and various knowledge in his profession. A long course of study and practice had familiarized his mind with the science of the law, in every department; and his attainments in the auxiliary branches of learning, essential to the jurist and advocate, were of the most profound and elegant character. For many years, he was the acknowledged leader at the head of the bar of his native state; and during the last ten years of his life, the principal period of his attendance in this court, he enjoyed the reputation of having been rarely equalled, and perhaps never excelled, in eloquence and the power of reasoning upon legal subjects. His mind was acute and subtle; rapid in its conceptions, and singularly felicitious in the exposition of the truths it was employed in investigating. Mr. Pinkney had the command of the greatest variety of the most beautiful and peculiarly appropriate diction, and the faculty of adorning and illustrating the dryest and most intricate discussions. His favorite mode of reasoning was from the analogies of the law; and whilst he delighted his auditory by his powers of amplification and rhetorical ornament, he instructed the court by tracing up the technical rules and positive institutions of jurisprudence to their historical source and first principles. He was profoundly versed in the ancient learning of the common law—its technical peculiarities and feudal origin, its subtle distinctions and artificial logic, were familiar to his early studies, and enabled him to expound, with admirable force and perspicuity, the rules of real property. To this, and his other legal attainments, he superadded, at a later period of life, an extensive acquaintance with the theory and administration of public law.

In the various questions of constitutional law which have been recently

discussed in this high tribunal, it may be said, it is hoped, without irreverence, that Mr. Pinkney's learning and powers of investigation have very much contributed to enlighten and fix its judgments. In the discussion of that class of causes, especially, which, to use his own expressions, "presented the proud spectacle of a peaceful judicial review of the conflicting sovereign claims of the government of the Union and of the particular states, by this more than Amphictyonic council," his arguments were characterized by a fervor, earnestness, gravity, eloquence and force of reasoning, which convinced all who heard him, that he delivered his own sentiments as a statesman and a citizen, and was not merely solicitous to discharge his duty as an advocate. He exerted an intellectual vigor proportioned to the magnitude of the occasion. He saw in it "a pledge of the immortality of the Union—of a perpetuity of national strength and glory, increasing and brightening with age—of concord at home, and reputation abroad." And in his argument on the constitutionality of the charter of the Bank of the United States, he stated, that "the considerations which the question involved imparted to it a peculiar character of importance; and this tribunal, distinguished as it is for all that can give to judicature a title to reverence, is, in deliberating and adjudicating upon it, in the exercise of its most exalted, its most awful functions. The legislative faculties of the government of the Union, for the prosperity of the Union, are in the lists against the imputed sovereignty of a particular state; and you are the judges of the lists—not indeed, upon the romantic and chivalrous principles of tilts and tournaments, but upon the sacred principles of the constitution. In whatever direction you look, you cannot but perceive the solemnity, the majesty of such an occasion. In whatever quarter you approach the subject, you cannot but feel that it demands from you the firm and steady exertion of all those high qualities which the universal voice ascribes to those who have devoted themselves to the ministry of this holy sanctuary."

That intense application to his professional and public labors, for which Mr. Pinkney was so remakably distinguished, continued to animate his exertions to the last moments of his life; and as he held up a high standard of excellence in this honorable career, he pursued it with unabated diligence and ardor, and still continued to speak as from the impulse of youthful ambition. His example was, therefore, of the greatest utility in exciting the emulation of the profession. But it is as an enlightened defender of the national constitution against the attacks which have been made upon it under the pretext of asserting the claims of state sovereignty, that his loss is most to be lamented by the public. It is known to his friends, that he was, a short time before his death, engaged in the investigations preparatory to making a great effort in the senate upon this interesting subject. The loss of such a commentary upon the constitution, by one who had so profoundly meditated its principles, may be regarded as a public calamity. It is also to be regretted, that the great fame of his eloquence must rest mainly in tradition; as it is believed, that no perfect memorials of his most splendid efforts in the senate, or at the bar, have been preserved, and it is obviously impossible to form any adequate notions of the powers of an advocate, form the sketches of the arguments of counsel contained in the books of reports.

The following proceedings of the court and bar took place upon the occasion of Mr. Pinkney's decease

February 26.—On the meeting of the court, this morning, Mr. Harper rose, and addressed the judges thus :

" On the part of the bar, may it please your Honors, I am about to address a request to the court, which I am sure will accord with its feelings, and I hope will not be considered as inconsistent with its duty. A great man has fallen in Israel. The bar has lost one of its brightest ornaments ; the court one of its ablest and most enlightened advisers. When such men fall, it seems fit that some expression of public regret should attend them to the tomb. It cannot be useful or pleasing to them, but it tends to increase the effect of their example, to those who survive, and to soothe the sorrow of their afflicted relatives. Nowhere can such a tribute more properly be paid to the memory of our departed brother than here ; where the pre-eminent talents and acquirements by which he adorned our profession have been so often displayed ; and he has taken so large a part in fixing those great legal and constitutional land-marks, by the establishment of which this court has conferred the most solid and extensive benefits on the nation. To express our deep sense of this great public and private loss, and as the most appropriate tribute now in our power to offer to the memory of the deceased, I request the court to allow this day for the uninterrupted indulgence of our feelings, and for that purpose now to adjourn."

Mr. Chief Justice MARSHALL replied in the following words: "I am very confident, that I may say in the name of all my brethren, that we participate sincerely in the sentiments expressed at the bar. We all lament the death of Mr. Pinkney, as a loss to the profession generally, and especially to that part of it which is assembled in this room. We lament it too as a loss to our country. We most readily assent to the motion which has been made, and shall direct an adjournment till to-morrow at twelve."

The following entry was directed to be made on the minutes of the court : " The court being informed that Mr. PINKNEY, a gentleman of this bar, highly distinguished for his leaning and talents, departed this life, last night, in this city, the judges have determined, as a mark of their profound respect for his character, and sincere grief for his loss, to wear crape on the left arm for the residue of the term ; and to adjourn for the purpose of paying the last tribute to his remains, by attending them from the place of his death."

After the adjournment of the court, the members of the bar assembled in the court-room; Mr. Clay was called to the chair and Mr. Winder appointed secretary.

On motion of Mr. Harper, seconded by Mr. Webster, it was unanimously resolved, that the members of this bar, as mark of their regret for the memory of their deceased brother, the Hon. William Pinkney, and of their deep sense of the loss which the public and the profession have sustained in his death, will attend his funeral in a body, and wear a crape on the left arm, during the present term.

On motion of Mr. Wheaton, seconded by Mr. D. B. Ogden, it was unanimously resolved, that the proceedings of this meeting be signed by the chairman and secretary, and published in the National Intelligencer.

The meeting then adjourned.

H. CLAY, Chairman.

W. H. WINDER, Secretary.

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

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RULES OF PRACTICE

FOR THE

COURTS OF EQUITY OF THE UNITED STATES.

UNDER the authority given to this court, by the Act of May 8th, 1792, c. 137, § 2, the following rules were ordered by the court, at the present term, to be the rules of practice for the courts of equity of the United States :

RULE I. Rules shall be held monthly in the clerk's office, on the first Monday in every month, for the purpose of entering all proceedings and orders which may be entered at the rules, and which are not taken or made in open court. The rules shall be held under the direction of the clerk ; but either of the judges of the court may make or allow any special orders in any cause, not inconsistent with the regulations herein prescribed, which shall be entered in the rule-book, and take effect accordingly.

II. All process shall be made returnable to the next succeeding term, or to any intermediate rule-day, at the election of the party praying the same, and the return of the said process "executed," shall be effectual whereon to ground any subsequent proceedings. If the party be not found, a copy, served by the person leaving the same, shall be left with his wife, or any free white person who is a member of his or her family, at his or her dwelling-house or usual place of abode, and the truth of the case shall be returned ; and where such process shall not be executed, the clerk is directed to issue other similar process, if the same be required by the party at whose instance the original process was sued out ; and if, upon such second process, the party be not found, a copy shall be again left in like manner as is hereinbefore directed, and upon a second return, that the party is not found, and that a copy has been left as herein directed, the same proceedings may be had as on process returned executed.

III. Where any person, either plaintiff or defendant, in any suit, shall be dead, it shall be lawful for the clerk, during the recess of the court, upon application, to issue process to bring into court the representative of such deceased person.

IV. The plaintiff shall file his bill before or at the time of taking out the *subpœna*.

V. The plaintiff may amend his bill, before the defendant or his attor-

ney or solicitor hath taken out a copy thereof, or, in a small matter, afterwards, without paying costs; but if he amend in a material point, after such copy obtained, he shall pay the defendant all costs occasioned thereby.

VI. The day of appearance shall be the rule-day after the process is returned executed, or after the second return of a copy left, if the process shall not be executed, when the process is returnable to the rules, or the rule-day next succeeding the term, where the process shall be returnable to a term of the court; and if the defendant shall not appear and file his answer, within three months after, the day of appearance, and after the bill shall have been filed, the plaintiff may proceed to take his bill for confessed, and the matter thereof shall be decreed accordingly; which decree shall be absolute, unless cause be shown, at the term next succeeding that to which the process shall be returned executed.

VII. If the defendant cannot be found, it shall be sufficient service of any decree *nisi*, to leave a copy thereof with his wife, or any free white person who is a member of his or her family; and if no such person be found, then it shall be sufficient service to publish the same in such paper of the district as may be designated by the court, for such time as the court shall direct.

VIII. All process shall be executed by a sworn officer, or affidavit must be made of the service thereof, when executed by any other person.

IX. Every defendant may swear to his answer, before any justice or judge of the United States, or a commissioner or master, or other person appointed by the court, or judge of any court of a state or territory, or justice of the peace, or notary-public, of any state or territory.

X. If the defendant does not file his answer, within three months after the *subpœna* be returned executed, or after a second return of a copy left having been made, at least three months, the plaintiff may either proceed on his bill as confessed, or have a general commission to take depositions, or he may move the court for an attachment to bring in the defendant to answer interrogatories, at his election, and may proceed to a hearing in the last two cases, as if the answer had been filed and the cause was at issue: Provided, that the court may, on cause shown, allow the answer to be filed, and grant a further day for such hearing. And when a party is in custody on such writ of attachment, he shall be detained in custody, until he shall file his answer, or be discharged by order of the court, or one of the judges thereof.

XI. No special replication to an answer shall be filed, but by leave of the court, or one of the judges thereof, for cause shown; and if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same, with or without costs, at the discretion of the court.

XII. When a cross-bill shall be exhibited, the defendant or defendants to the first bill shall answer thereto, before the defendant or defendants to the cross-bill shall be compelled to answer such cross-bill.

XIII. The complainant shall put in the general replication, or file exceptions, within two calendar months after the answer shall have been put in. If he fails so to do, the defendant may leave a rule to reply with the clerk of the court, which being expired, and no replication or exceptions filed, the suit may be dismissed with costs; but the court may, for cause, order the same to be retained, on payment of costs.

XIV. If the plaintiff's attorney or solicitor shall except against any answer as insufficient, he may file his exceptions, and leave a rule with the clerk to make a better answer within two calendar months; and if, within that time, the defendant shall put in a sufficient answer, the same shall be received, without costs; but if any defendant insists on the sufficiency of his answer, or neglects or refuses to put in a sufficient answer, or shall put in another insufficient answer, the plaintiff may set down his exceptions, to be argued at the next term; and after the expiration of that rule, or any second insufficient answer put in, no further or other answer shall be received, but on payment of costs.

XV. If, upon argument, the plaintiff's exceptions shall be overruled, or the defendant's answer adjudged insufficient, the plaintiff shall pay to the defendant, or the defendant to the plaintiff, such costs as shall be allowed by the court.

XVI. Upon a second answer being adjduged insufficient, costs shall be doubled by the court, and the defendant may be examined upon interrogatories, and committed until he or she answer them; or the plaintiff may move the court to take so much of his bill as is not answered for confessed, and may file his replication, obtain commissions, and proceed to hearing in the usual manner.

XVII. Rules to plead, answer, reply, rejoin, or other proceedings not before particularly mentioned, when necessary, shall be given, from month to month, with the clerk, in his office, and shall be entered in a rule-book for the information of all parties, attorneys or solicitors concerned therein, and shall be considered as sufficient notice thereof.

XVIII. The defendant may, at any time before the bill is taken for confessed, or afterwards, with the leave of the court, demur or plead to the whole bill, or part of it, and he may demur to part, plead to part, and answer as to the residue; but in any case in which the bill charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the fact on which the charge is founded.

XIX. The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

XX. If a plea or demurrer be overruled no other plea or demurrer shall be thereafter received, but the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so, within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly.

XXI. If the plaintiff shall not reply to, or set for hearing, any plea or demurrer, before the second term of the court after filing the same, the bill may be dismissed, with costs.

XXII. Upon a plea or demurrer being argued and overruled, costs shall be paid as where an answer is adjudged insufficient; but if adjudged good, the defendant shall have his costs.

XXIII. The defendant, instead of filing a formal demurrer or plea, may may insist on any special matter in his answer, and have the same benefit thereof, as if he had pleaded the same matter, or had demurred to the bill.

XXIV. After any bill filed, and before the defendant hath answered,

upon oath made that any of the plaintiff's witnesses are aged, infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk may issue a commission for taking the examination of such witness or witnesses *de bene esse*, the party praying such commission giving reasonable notice to the adverse party of the time and place of taking such deposition.

XXV. Testimony may be taken according to the acts of congress, or under a commission. Whenever a general commission shall be issued for taking depositions, upon answer and replication, six months from the time of the replication shall be allowed the parties for taking their depositions; and either party, at the expiration of the said six months, may set the cause for hearing; and no deposition taken after that time shall be read as evidence on the hearing, unless the same was taken by consent of parties, by special order of the court, or out of the district.

XXVI. Commissions to take depositions may be executed by my person qualified to take testimony, according to the laws of the state, or by any person or persons, not exceeding three, appointed or named in the commission, by order of the court, or by any judge thereof in vacation. All testimony taken under a commission shall be taken on interrogatories and cross-interrogatories filed in the cause, unless the parties shall dispense therewith, which interrogatories shall be filed in the clerk's office, ten days previous to a rule-day, after which, the defendant shall be allowed five days to file his cross-interrogatories, unless he waives his right.

XXVII. Orders for the admission of a guardian *ad litem*, to defend a suit, may be made either by the court or one of the judges thereof.

XXVIII. Witnesses who live within the district may, upon due notice of the opposite party, be summoned to appear before the commissioners appointed to take testimony, or before a master or examiner appointed in any cause, by *subpœna* in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioners, master or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioners, master or examiner, an attachment may issue thereupon, by order of the court, or of any judge thereof, in the same manner as if the contempt were for not attending, of for refusing to give testimony, in the court. But nothing herein contained shall prevent the examination of witnesses *vivâ voce*, when produced in open court.

XXIX. When a matter is referred to a master, to examine and report thereon, he shall assign a day and place therefor, and give reasonable notice thereof to the parties, or to the attorney or solicitor of such party as may not reside within the district, and if, either party shall fail to attend at the time and place, the master may adjourn the examination of the matter to some future day, and give notice thereof to the parties, in which notice it shall be expressed, that if the party fail again to appear, the master will proceed *ex parte;* and if, after receiving such notice, the party shall again fail to appear, the master may proceed to examine the matter to him referred, and to report the same to the court, that such proceedings may be had thereon, as to the court shall seem equitable and right.

XXX. The courts, in their sittings, may regulate all proceedings in the office, and may set aside any dismissions, and re-instate the suits, on such terms as may appear equitable.

XXXI. Every petition for a re-hearing shall contain the special matter or cause on which such re-hearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or some other person. No re-hearing shall be granted, after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court. But if no appeal lies, it may be admitted, at any time before the end of the next term of the court.

XXXII. The circuit courts may make further rules and regulations, not inconsistent with the rules hereby prescribed, in their discretion.

XXXIII. In all cases where the rules prescribed by this court, or by the circuit court, do not apply, the practice of the circuit court shall be regulated by the practice of the high court of chancery in England.

ORDERED by the Court, that the foregoing rules be the rules of practice for the Courts of Equity of the United States, from and after the first day of July next, and the clerk of the court is directed to have the same printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several courts of the United States, and to each of the judges thereof.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1822.

MILLER and others *v.* KERR and others.

Land law.

A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title ; until the consummation of the title, by a grant, the person who acquires an equity, holds a right, subject to examination.[1]

Where the register of the land-office of Virginia had, by mistake, given a warrant for military services in the *Continental* line, on a certificate, authorizing a warrant for services in the *State* line, and in recording it, pursued the certificate, and not the warrant, it was held, that this court could not support a prior entry and survey, on a warrant thus issued by mistake, against a senior patent.[2]

Where the plaintiffs seek to set aside the legal title, because they have the superior equity, it is consistent with the principles of the court, to rebut this equity, by any circumstances, which may impair it ; and the legal title cannot be made to yield to an equity founded on the mistake of a ministerial officer.[3]

APPEAL from the Circuit Court of Ohio. This cause was argued and determined at the last term, but omitted to be reported.

TODD, Justice, delivered the opinion of the court.—*On the 29th of May 1783, Seymour Powell, heir of Thomas Powell, obtained a [*2
military land-warrant from the register's office in Virginia, No. 679, for 2663⅔ acres of land "due in consideration of services for three years, as a lieutenant of the Virginia continental line, agreeably to a certificate from the governor and council, received into the land-office." A part of this warrant was entered in the military district reserved for the officers and soldiers of the Virginia continental line, on the 16th of June 1795 ; and on the 30th of October 1796, 789 acres, part thereof, was surveyed in the name of the said Seymour Powell, which survey was, on the 1st of March 1797, recorded in the office of the surveyor-general. On the 10th of July 1800, Justus

[1] Bush *v.* Ware, 15 Pet. 93.

[2] And see Lindsey *v.* Miller, 6 Pet. 666.

[3] A party in possession under a legal title may rebut a supposed equity in another, by parol, without violating the statute of frauds. Myers *v.* Myers, 25 Penn. St. 100.

Miller purchased this land, and took an assignment of the entry and survey, and obtained a patent therefor, in February 1808.

John Neville made an entry on the same land, in May 1806, on a military land-warrant, for services in the Virginia continental line; and his heirs, the respondents, obtained a patent therefor, on the 30th of April 1807. They have brought an ejectment against the heirs of Justus Miller, who having, as they say, the elder equitable, though the junior legal title, have filed this bill to enjoin proceedings at law, and compel Neville's heirs to convey the legal title to them.

In their answer, Neville's heirs assert, that Thomas Powell never served
*3] in the Virginia continental *line, but that his service was performed in the state line, and that the certificate of the governor and council, on which the warrant was issued, was expressed to be given for services in the state line, so that the warrant issued fraudulently, or by mistake. They further insist, that as the officers of the state line could not enter their warrants in the district reserved for the continental line, the plaintiffs ought not to be permitted to avail themselves of a title founded in mistake, to defeat their legal title.

The testimony taken in the cause shows, that the records of the office of the executive council of Virginia have been examined, and that no certificate has ever been granted to Seymour Powell, as the heir of Thomas Powell, for services in the Virginia continental line; but that a certificate was granted to him for military services, for three years, in the state line. In the land-office, too, records are to be preserved of all the warrants which issue, and of the certificates on which they issue. This office also has been searched, and no certificate is found of any military service rendered by Thomas Powell, in the Virginia continental line, nor is there on record any warrant for such service; but there is a certificate given to Seymour Powell, for his military services as a lieutenant in the state line; and a warrant on record, for those services, bearing the same date and number with that on which the land now in controversy was entered.

There is no proof, and no reason to believe, that Thomas Powell ever
*4] performed any military service *in the Virginia line on continental establishment. It is, then, apparent, that the register of the land-office has, by mistake, given a warrant for military services in the continental line, on a certificate authorizing a warrant for service in the state line; and that, in recording it, he has pursued the certificate, and not the warrant. The question is, can this court support a prior entry and survey, on a warrant thus issued by mistake, against a senior patent?

It has been urged, on the part of the appellants, that the title of Thomas Powell, for services in the state line, is precisely to the same quantity of land as if those services had been rendered in the continental line; his claim on the state of Virginia is the same. That, had the warrant been properly issued, it might have been satisfied in the district set apart for the officers and soldiers of the state line, which district is in the state of Kentucky, and can no longer be appropriated by the holders of warrants for military services in the Virginia state line. Thus, the rights under Powell are sacrificed, without any fault of his, in consequence of a mistake committed by the register of the land-office. They say, that they are purchasers, without notice, of a title apparently good; and ought not to be

affected by the mistake of a public officer. They insist, that in the hands of a purchaser, a warrant ought to be liable to no objection, founded on circumstances anterior to its date.

*There is great force in these arguments; and, if the military district had remained a part of Virginia, until Mr. Powell's warrant was entered, they would, perhaps, be unanswerable. But, in 1784, this district, with all the territory claimed by Virginia, north-west of the Ohio, was ceded to the United States, with a reservation in favor of the legal bounties of the Virginia troops on continental establishment only. There is no reservation whatever in favor of the bounties in land, to the state troops. Provision for them was made elsewhere. After this cession, no title could be acquired under Virginia, which was not included within the reservations. The same principle was asserted by this court in the case of *Polk's Lessee* v. *Wendell*, 5 Wheat. 293, and is, we think, too clear to be controverted. The great difficulty in this case consists in the admission of any testimony whatever, which calls into question the validity of a warrant issued by the officer to whom that duty is assigned by law. In examining this question, the distinction between an act which is judicial, and one which is merely ministerial, must be regarded. The register of the land-officer is not at liberty to examine testimony, and to exercise his own judgment respecting the right of an applicant for a military land-warrant. He was originally directed to grant warrants to the officers or soldiers "producing to him a certificate of their claims respectively from the commissioner of war, and not otherwise." When the office of commissioner of war was put *down, this duty devolved on the executive department, whose certificate was as obligatory on the register, as that of the commissioner of war had been. The question of right, then, was tried before the executive council, and the register is a mere ministerial officer carrying the judgment of the executive into execution, by issuing his warrant in pursuance of their certificate. This certificate is filed and preserved in the office, as the document on which the warrant issued. It is as much a part of the record as the warrant itself. [*5 [*6

A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title. Until the consummation of the title, by a grant, the person who acquires an equity, holds a right subject to examination. The validity of every document is then open to examination, whatever the law may be, after the emanation of a patent. If this be correct, and the objection to the warrant delivered to Mr. Powell can be considered, he is shown, by the clearest testimony, to be the holder of a warrant issued by mistake. As an officer in the state line, he was not entitled to a warrant which could appropriate lands lying in the military district north-west of the Ohio.

As the plaintiffs are endeavoring to set aside the legal title, because they have the superior equity, we think it consistent with the principles of the court, to rebut this equity by any circumstances which may impair it. *The case is a hard one on the part of the plaintiffs; and they may have strong claims on the liberality and justice of the United States, or of Virginia; but we do not think the legal title can be made to yield to an equity founded in the mistake of a ministerial officer. [*7

Decree affirmed, each party paying his own costs.

Newsom *v.* Pryor's Lessee.

Land-law of Tennessee.

Where plats are returned, and grants made, without an actual survey the rule of construction which has been adopted, in order to settle the conflicting claims of different parties, is, that the most material, and most certain calls shall control those which are less material and less certain.

A call for a natural object, as a river, a known stream, a spring, or even a marked line, will control both course and distance.[1]

There is no distinction between a call to stop at a river, and a call to cross a river.

Where a grant was made for 5000 acres of land, "lying on both sides of the two main forks of Duck river, beginning, &c., and running thence west, 894 poles, to a white oak, thence south, 894 poles, to a stake, crossing the river, thence east, 894 poles, to a stake, thence north, 894 poles, to the beginning, crossing the south fork;" it was held, that it must be surveyed so as to extend the second line of the grant such a distance on the course called for, as would cross Duck river to the opposite bank.

Error to the Circuit Court of West Tennessee.

*8] February 6th, 1822. This cause was argued by *Law*, for the *plaintiff in error, citing 1 Cooke 146; 1 Hayw. 253; 2 Ibid. 75, 139, 179; 4 Wheat. 448: and by *White*, for the defendant in error, citing 5 Cranch 234; 2 Binn. 520; 1 Cooke 462; 2 Overt. 154, 200, 302; 2 Hayw. 237, 238, 258, 253, 496; 1 Hen. & Munf. 125; 3 Call 252.

February 11th. Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment given in the circuit court for the district of West Tennessee, in an ejectment brought by the defendants in error against the present plaintiff.

The plaintiffs in the court below claimed under the elder patent, to the validity of which there was no objection. Of consequence, the only question in the cause was, whether the lines of their grant comprehended the land in contest. The grant was made for 5000 acres of land, "lying on both sides of the two main forks of Duck river, beginning, &c., and running thence west, 894 poles, to a white oak tree; south, 894 poles, to a stake, crossing the river; thence east, 894 poles, to a stake; thence north, 894 poles, to the beginning, crossing the south fork." It is apparent, that a survey was not made in fact, but that, after marking a beginning corner, the surveyor made out and returned a plat, which he supposed would comprehend the land intended to be acquired. It is now too late to question the validity of grants made on such plats and certificates of survey. From the extraordinary circumstances of the country, they were frequent, and in consequence of those circumstances, have received the sanction of *courts. *9] An immense number of titles, believed to be perfectly secure, depend upon the maintenance of such grants. The extent of the mischief which would result from unsettling the principle, cannot be perceived; and is certainly too great now to be encountered. The patent, therefore, must be considered as if the survey had been actually made.

In consequence of returning plats, where no actual surveys had been made, and where the country had been very imperfectly explored, the description contained in the patent often varies materially from the actual appearances of the land intended to be acquired. Natural objects are called

[1] McEwen *v.* Buckley, 24 How. 242.

for, in places where they are not to be found ; and the same objects are found, where the surveyor did not suppose them to be. In a country of a tolerably regular surface, no considerable inconvenience will result from this circumstance. The course and distance of the patent will satisfy the person claiming under it, and seldom interfere with the rights of others. But in a country where we find considerable water-courses and mountains, there must be more difficulty. The surveyor calls for some known object, but totally miscalculates its courses, distances, or both, from some given point which he has made the beginning of his survey ; and there is a variance in the different calls of his survey, and of the patent founded on it. As in this case, the second line is to run south 894 poles, to a stake, crossing the river. This distance will not reach the river ; and must be continued to 1222 poles, to cross the river. The distance must be disregarded, and this line so extended *as to cross the river, or the distance must control the call for crossing the river. [*10

These difficulties have occurred frequently, and must be expected to occur frequently, where grants are made without an actual survey. Some general rule of construction must be adopted ; and that rule must be observed, or the conflicting claims of individuals must remains for ever uncertain. The courts of Tennessee, and all other courts by whom causes of this description have been decided, have adopted the same principle, and have adhered to it. It is, that the most material and most certain calls shall control those which are less material, and less certain. A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance. These decisions are founded on two considerations. Generally speaking, it is the particular intention of the purchaser, to acquire the land lying on the stream called for, as being more valuable than other land ; and in every case where a natural object is mentioned, it designates the land surveyed, had there been an actual survey, much more certainly than course and distance can designate it. In this case, for example, the surveyor says that he has run south 894 poles, to a stake, crossing the river. Now, it is much more probable, that he should err in the distance, than in the fact of crossing the river. The conclusion, therefore, had an actual survey been made, would be, that the line did cross the river.

The general effect of this principle undoubtedly is, that the purchaser acquires more land than is expressed *in his grant, and more than he has paid for. Where this has been thought an object worthy of [*11 legislative attention, provision has been made for it. Courts cannot now shake a principle so long settled, and so generally acknowledged. In this case, the counsel for the defendant in the court below seems to have admitted the rule, but to deny its application to this case. He founds his application to the court on a supposed distinction between a call to stop at a river, and a call to cross a river. After stating the testimony, "he required the judges to instruct the jury, that if they believed, there was no testimony to prove the making of any other corner than the beginning corner, the correct mode of running the said grant would be to go the course and distance from the beginning corner, which would form the termination of the first line, and run from thence, the course and distance called for in the second line ; and if the course and distance will not reach across the river, that the

call in the grant for crossing the river ought to be considered as a mistake in the surveyor, and be rejected; and the second line should terminate at the end of the distance, and from thence run the third line, according to the course and distance, and from thence to the beginning. And the said counsel requested the judges to instruct the jury, that such call as is in this grant, for a line to pass a river or other object, will be different in principle from what it should be, if said call had been for said river, at the termination of the line or boundary; and although, in the latter case the law is, that such
*12] natural object shall be the *boundary, disregarding distance, yet, in the present case, the distance shall be the criterion of boundary, disregarding the call for crossing the river."

The judges refused to give this instruction, and charged the jury, "that the second line of the said grant much be extended such a distance on the course called for, as will cross Duck river to the opposite bank." To this opinion, an exception was taken; and the jury having found a verdict for the plaintiff in ejectment, the defendant in the circuit court, has brought the cause into this court by writ of error.

We can perceive no sound reason for the distinction between a call for a river, at the end of a line, and for a river, in the course of a line. There is as much reason, in the one case, for supposing the surveyor intended the line should cross the river, or, in case of actual survey, for supposing he did cross the river, as in the other, for supposing an intention to stop at the river, or an actual termination of the line at the river. Whether the motives for the call were, that the acquisition of the land on the river was an object with the purchaser, or that the call for the river conduced more certainly to the designation of the land intended to be acquired, the motives for considering it as the controlling call in the patent, to which distance must be subordinate, seem to be precisely the same, whether the call be to cross the river, or to terminate at it.

It has been urged as an objection to the mode of surveying, the land
*13] directed by the court, that the *last line will not cross the south fork, and that the land will not be "on both sides of the two main forks of Duck river." But this objection will not be removed or diminished, by the instruction required by the plaintiff in error. Nor can the land be so surveyed, as that the last line shall cross the south fork. From the termination of the third line, it is necessary to proceed to the beginning, and the plat, shows us, that the south fork does not run between the two points. It cannot be brought between them, if at all, without extending the third line an immense distance, and changing the whole figure of the plat, or entirely disregarding the act of assembly, which directs lands to be taken up by lines running with the cardinal points, except in particular cases, of which this is not one.

Judgment affirmed, with costs.

TAYLOE *v.* T. & S. SANDIFORD.

Liquidated damages.—Application of payments.

In general, a sum of money, in gross, to be paid for the non-performance of an agreement, is considered as a penalty, and not as liquidated damages; *à fortiori*, when it is expressly reserved as a penalty[1]

Thus, where, in a building contract, the following covenant was contained: "The said houses to be completely finished, on or before the *24th of December next, under a penalty of $1000, in case of failure; it was *held*, that this was not intended as liquidated damages for the breach of that single covenant only, but applied to all the covenants made by the same party in that agreement; that it was in the nature of a penalty, and could not be set off, in an action brought by the party to recover the price of the work. [*14

An agreement to perform certain work, within a limited time, under a certain penalty, is not to be construed as liquidating the damages which the party is to pay for the breach of his covenant.

The case of Fletcher *v.* Dyche, 2 T. R. 32, commented on, and distinguished from the present.

A person owing money under distinct contracts, has a right to apply his payments to whichever debt he may choose, and this power may be exercised, without any express direction given at the time.

A direction may be evidenced by circumstances, as well as by words: a positive refusal to pay one debt, and an acknowledgment of another, with a delivery of the sum due upon it, would be such a circumstance.[2]

ERROR to the Circuit Court for the District of Columbia.

February 5th, 1822. This cause was argued by *Jones* and *Hay*, for the plaintiff in error, citing 2 Comyn on Cont. 528–39, and the cases there collected; *Fletcher* v. *Dyche*, 2 T. R. 32: and by *Key*, for the defendants in error, citing 4 Cranch 317; 6 Ibid. 9; *Dennis* v. *Cummins*, 3 Johns. Cas. 297; *Smith* v. *Dickenson*, 3 Bos. & Pul. 630; *Bank of Columbia* v. *Patterson*, 7 Cranch 299.

February 12th. MARSHALL, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court of the county of Alexandria, rendered in an action of *assumpsit*, brought by T. & S. Sandiford against Tayloe.

It appeared on the trial of the cause, that on the 13th of May 1816, the parties entered into a written contract, by *which the defendants in error undertook to build for the plaintiff three houses on the Pennsylvania avenue, in the city of Washington. On the 18th day of the same month, the parties entered into a contract, under seal, for the building of three additional houses, at a stipulated price. This contract contains the following covenant: "the said houses to be completely finished, on or before the 24th day of December next, under a penalty of one thousand dollars, in [*15

[1] Gouldsborough *v.* Baker, 3 Cr. C. C. 48; Swain *v.* United States, Dev. C. C. 35. Where the contract contains a provision by which the damages for a breach can be readily ascertained, and it does not appear that the parties intended that a sum stipulated as damages should be paid for any breach, however minute, it will be deemed a penalty only. Shreve *v.* Brereton, 51 Penn. St. 175; Jackson *v.* Baker, 2 Edw. Ch. 471; Lampman *v.* Cochran, 16 N. Y. 275; Niver *v.* Rossman, 18 Barb. 50. A penalty will not be considered in the nature of liquidated damages unless such appears to have been manifestly the intention of the parties. Dennis *v.* Cummins, 3 Johns. Cas. 297; Hoag *v.* McGinnis, 22 Wend. 163; Colwell *v.* Lawrence, 38 N. Y. 71. See Wallis *v.* Smith, 27 Alb. L. J. 180.

[2] S. P. Gass *v.* Stinson, 3 Sumn. 99; Moorhead *v.* West Branch Bank, 3 W. & S. 550; s. c. 5 Id. 542; Seymour *v.* Van Slyck, 8 Wend. 403; s. c. 15 Id. 19.

case of failure." The parties entered into a third verbal contract for some additional work, to be measured, and paid for according to measurement.

These three houses were not completed by the day, and the plaintiff in error claimed the sum of $1000, as stipulated damages, and retained it out of the money due to the defendants in error. This suit was, thereupon, brought; and, on the trial of the cause, the defendant in the circuit court claimed to set off in this action $1000, as in the nature of stipulated damages; but the court overruled this claim, and decided, that the said sum of $1000 had been reserved in the nature of a penalty, and could not be set off in this action. The defendant then moved the court to instruct the jury, that "upon the evidence offered, if believed, the plaintiffs were not entitled to recover in this action the said sum of $1000, inasmuch as the same, if due at all, was due under a contract under seal, and that the declarations of the defendant, and the understanding between the parties as to the reservation
*16] of the said $1000, given in evidence *as aforesaid, was competent and sufficient evidence of the defendant's intention to apply his payment to the extinguishment, in the first instance, of such parts of the said moneys as were due by simple contract, and to reserve the $1000 out of the money due under the said original contract." This instruction the court refused to give; and did instruct the jury, "that it was competent to the plaintiffs to recover the said $1000 in this action, unless they should be satisfied by the evidence, that the defendant, at the time of paying the money, had expressly directed the same, or a sufficient part thereof, to the payment of the $1500 due on the simple contract." To both these opinions, the defendant excepted; and the jury having given a verdict for the plaintiff in the circuit court, this writ of error was brought to the judgment rendered thereon.

It is contended, by the plaintiff in error, that the circuit court erred: 1st. In overruling the claim to off-set the $1000 mentioned in the agreement. 2d. In declaring that the plaintiff in that court might so apply the payments made, as to discharge the contract under seal, and leave the sum retained by the defendant in that court, to be demanded under the simple contract.

1. Is the sum of $1000 mentioned in the agreement of the 13th of May, to be considered as a penalty, or as stipulated damages? The words of the reservation are, "the said house to be completely finished on or before the
*17] 24th day *of December next, under the penalty of $1000 in case of failure." In general, a sum of money, in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is, to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such, to show, that they were so considered by the contracting parties. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence, to authorize the court to say, that their own words do not express their own intention. These writings appear to have been drawn, on great deliberation; and no slight conjecture would

justify the court in saying, that the parties were mistaken in the import of the terms they have employed.

The counsel for the plaintiff in error supposes, that the contract furnishes clear evidence that the parties intended this sum as liquidated damages. The circumstance, that it is annexed to the single convenant, stipulating the time when the work shall be completed, is considered as showing that it was intended to fix the damages, for the breach of that covenant. Without deciding on the weight to which this argument would be entitled, if supported by the fact, the court cannot admit, that it is so supported. The engagement, that the said houses shall be completely *finished on or [*18 before the 24th day of December next, is as much an engagement for the manner, as for the time of finishing the work, and covers, we think, all the covenants made by the defendants in error in that agreement. The case, therefore, presents the single question, whether an agreement to perform certain work, by a limited time, under a certain penalty, is to be construed as liquidating the damages which the party is to pay for a breach of his covenant. This question seems to have been decided in the case of *Smith* v. *Dickenson*, reported in 3 Bos. & Pul. 630.

The plaintiff in error relies on the case of *Fletcher* v. *Dyche*, reported in 2 T. R. 32, in which an agreement was entered into to do certain work, within a certain time, and if the work should not be done within the time, specified, "to forfeit and pay the sum of 10*l.* for every week," until it should be completed. But the words "to forfeit and pay," are not so strongly indicative of a stipulation in the nature of a penalty, as the word "penalty" itself; and the agreement to pay a specified sum, weekly, during the failure of the party to perform the work, partakes much more of the character of liquidated damages, than the reservation of a sum in gross. The court is well satisfied, that this stipulation is in the nature of a penalty, and, consequently, that there was no error in rejecting it as a set-off in this case.(*a*)

*The second objection goes entirely to the form of the the action. [*19 The declaration is in *assumpsit*; and the plaintiff contends, that the money claimed was due on a sealed instrument. It is admitted, that all the money, for the whole work performed by the defendants in error was paid, except the sum of $1000, which was retained by the plaintiff in error, expressly on account of that sum which he supposed himself entitled to, under the contract of the 18th of May, on account of the failure to complete the buildings by the 24th of December. If this money was due on the

(*a*) This subject is discussed, with his usual ability and acuteness, by Mr. Evans, in the appendix to his translation of Pothier on Obligations (Vol. 2, p. 93–98). He thinks that the penalty ought, in general, to be regarded as stated damages; and his observations are calculated to excite doubts as to the correctness of some of the decisions on this subject. In addition to the cases collected by him, and those cited in the argument of the above case, in the text (Tayloe *v.* Sandiford), the following cases may be referred to: Ponsonby *v.* Adams, 6 Bro. P. C. 418; Harrison *v.* Wright, 13 East 343; Rolfe *v.* Peterson, 6 Bro. P. C. 470; Sloman *v.* Walter, 1 Bro. C. C. 418; Hardy *v.* Martin, Id. 419; Love *v.* Peers, 4 Burr. 2229; Cotterel *v.* Hook, 1 Doug. 101; Wilbeam *v.* Ashton, 1 Camp. 78; Barton *v.* Glover, 1 Holt 43. The learned reader will also find the supposed result of all the English cases summed up by Mr. Holt, in a note to the last-mentioned case. 1 Holt 45.

simple contract, then this action was clearly sustainable; if it was due under the sealed instrument, then it could be recovered only by an action on that instrument. Its being due on the one or the other, depends on the application of the payments made by the plaintiff to the defendants in error. The court instructed the jury, that it was competent to the plaintiff to recover
*20] the said $1000 *in this action, "unless they should be satisfied by the evidence, that the defendant, at the time of paying the money, had expressly directed the same, or a sufficient part thereof, should be applied to the extinguishment of the $1500 due on the simple contract."

This instruction of the court is given in terms, the correctness of which cannot be entirely admitted. It would exclude an application of the money, made by the creditor himself, with the assent of the debtor, to the simple contract debt; for, in such case, it would not appear, that the debtor had "expressly directed" the application. Thus, among the accounts exhibited at the trial, is a receipt for the whole sum due for extra work performed under a verbal contract. It was not proved, that the application of this money to the discharge of the verbal contract was "expressly directed." Yet no person will say, that the creditor was at liberty to controvert this application, or to change it.

A person owing money under distinct contracts has, undoubtedly, a right to apply his payments to whichever debt he may choose; and although prudence might suggest an express direction of the application of his payments, at the time of their being made; yet there may be cases in which this power would be completely exercised, without any express direction given at the time. A direction may be evidenced by circumstances, as well as by words. A payment may be attended by circumstances which demonstrate its application, as completely as words could demonstrate it. A positive refusal to pay one *debt, and an acknowledgment of an another,
*21] with a delivery of the sum due upon it would, we think, be such a circumstance. The inquiry, then, in this case, will be, whether the payments made by the plaintiff, to the defendants in error, were accompanied with circumstances which amount to an exercise of his power to apply them?

A circumstance of no light import was given in evidence by the creditor himself. It was, that, at the time of discharging the account for the extra work, the debtor confessed "that he had retained in his hands $1000, as the forfeiture under the original contract, for not finishing the houses in the time stipulated by contract, and that he would hold it, unless compelled by law to pay it." This $1000 was the penalty stipulated in the agreement under seal; and when all the residue of the money was paid, the inference is very strong, that this sum was reserved out of the money stipulated by the same agreement, and that the payments were made in discharge of the sums acknowledged to be due for other work. The final payment was made by Tayloe, through the hands of a third person. His original purpose seems to have been, to insist on a receipt in full, before he would pay the sum which remained due, independent of the sum in contest. But on a representation of the peculiar pressure under which the Sandifords labored, they having a note in bank, which had become due, he agreed to pay the whole money due, under all the contracts, except the sum of $1000, which he claimed
*22] a right to retain, *under the stipulation of the sealed instrument. There existed no objection to the payment of the money due under

the simple contract. The whole objection was to the payment of that under the sealed instrument, out of which he claimed a right to deduct $1000, on account of a failure in the performance of that contract. Under these circumstances, we think, that the money retained must be considered as reserved out of the sum due on that contract, and that the simple contract was discharged.

The court erred, then, in this direction to the jury, and the judgment must be reversed, and the cause remanded for a new trial.

CERTIFICATE.—This cause came on to be heard, on the transcript of the record of the circuit court for the district of Columbia, in the county of Washington, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the said circuit court erred in instructing the jury, "that it was competent to the plaintiff to recover the said $1000, in this action, unless they should be satisfied by the evidence, that the defendant, at the time of paying the money, had expressly directed the same, or a sufficient part thereof, to be applied to the extinguishment of the $1500, due on simple contract." It is, therefore, adjudged and ordered, that the judgment of the said circuit court, in this case, be and the same is hereby reversed and annulled, and it is further ordered, that the said cause be remanded to the said circuit court, with directions to issue a *venire facias de novo*.

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*TAYLOR'S Lessee *v.* MYERS. [*23

Land-law of Ohio.

The owner of a survey, made in conformity with his entry, and not interfering with any other person's right, may abandon his survey, after it has been recorded.

The proviso in the act of March 2d, 1807, § 1, which annuls all locations made on lands previously surveyed, applies to subsisting surveys; to those in which an interest is claimed, not to those which have been abandoned, and in which no person has an interest.

THIS cause was argued at the last term, by *Doddridge* and *Scott*, for the plaintiff in error, and by *Brush*, for the defendant.

February 12th, 1822. MARSHALL, Ch. J., delivered the opinion of the court.—This case comes on, upon two questions, certified by the circuit court for the district of Ohio, in which the judges of that court was divided in opinion. The following is stated as the case on which the question arose:

"The plaintiff's claim is founded on an entry dated the 17th of February 1817, surveyed the 19th of February 1817, and on a patent founded thereon, dated the 18th of July 1818, covering the premises in question. The defendant showed that the plaintiff, on the 27th of February 1797, made an entry on the premises in question, on another warrant, surveyed the *same [*24
the 15th of April 1797, and recorded the plat, on the 20th of June of of the same year. That before making the entry on which his patent is founded, he had withdrawn his said first entry and survey, by a marginal note on the record thereof, made on the surveyor's book (if a survey so circumstanced, could be so withdrawn), and located the warrant elsewhere. The parties further agreed, that such withdrawals were customary, ever since the year 1799."

The questions are, 1. Can the owner of a survey, made in conformity

with his entry, and not interfering with any other person's right, abandon his survey after it has been recorded? 2. Can the defendant, upon these facts, protect himself, at law, under the act of congress, passed on the 2d of March 1807, entitled; "an act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the secretary of the department of war, and appropriating lands, for the use of schools in the Virginia military reservation, in lieu of those heretofore appropriated;" and the several subsequent acts on the same subject?

The military warrants, to which these questions refer, originate in the land-law of Virginia. The question, whether a warrant, completely executed by survey, can be withdrawn, and so revived by the withdrawal, as to be located in another place, has never, so far as is known, been decided in the courts of that state. In Kentucky, where the same law governs, *it *25] has been recently determined, that a warrant once carried into survey, with the consent of the owner, cannot be re-entered and surveyed in any other place. In Ohio, it is not understood, that the question has been decided.

The first question, however, does not involve the right of the owner of a warrant, which has been surveyed, to enter and survey it elsewhere; but his right to abandon it entirely. It draws into doubt, the right of an individual, to refuse to consummate a title once begun.

In this respect, no coercive principle is to be found in the act. An entry is forfeited, if not surveyed within a limited time. A survey is forfeited, if not returned to the land-office by a specified time. In these cases, the right of abandonment is recognised. An individual may abandon his survey, by not returning it to the land-office within the time prescribed by law. Why may he not abandon it, by any other unequivocal act? This is not prescribed as a single mode by which a right is to be exercised; but is annexed as a penalty for not proceeding to complete a title. The legislature determined, that no man should be allowed to lock up land from others, without such an appropriation as would subject it to the common burdens of society. He was at liberty to perfect his title, or to lose it; but was required to do the one or the other.

It seems to be an ingredient in the character of property, that a person who has made some advances towards acquiring it, may relinquish it, provided, the rights of others be not affected by such relinquishment. *This general principle derives great strength from usage which has *26] prevailed among these military surveys. The case states, that it has been customary, ever since the year 1799, to withdraw surveys, after they have been recorded. The place surveyed has, of course, been considered as having again become vacant, and has been appropriated by other warrants, which have been surveyed and carried into grant. It would be a serious mischief, the extent of which cannot be calculated, to declare these grants void. No subject requires to be treated with more delicacy than the land titles of a country, where a law has been explained by usage. Upon the general principle which has been stated, and upon the custom of the country in this respect, the court is of opinion, that the owner of a survey, under the circumstances stated in the first question, may abandon it; but by doing so, he will not cancel the rights of others.

If the plaintiff was at liberty to withdraw his survey, the defendant could not protect himself, under the act of congress, to which the second question

refers. The proviso of that act, which annuls all locations made on lands previously surveyed, applies to subsisting surveys, to those in which an interest is claimed; not to those which have been abandoned, and in which no person has an interest. A certificate is to be given in conformity with these principles.

CERTIFICATE.—This cause came on to be heard, on the facts agreed by the parties, and on the question on which the judges of the circuit court were *divided, and was argued by counsel: on consideration whereof, this court doth order, that it be certified to the circuit court of the United [*27 States for the district of Ohio: 1. That the owner of a survey, made in conformity with his entry, and not interfering with any other person's right, may abandon his survey, after it has been recorded: 2. That the defendant, on the facts stated in the case, cannot protect himself at law, under the act of congress, passed the 2d of March 1807, entitled, "an act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the secretary of the department of war, and appropriating lands for the use of schools in the Virginia military reservation, in lieu of those heretofore appropriated," and the several subsequent acts on the same subject.

GREEN *v.* WATKINS.

Real action.— Writ of right.

In a writ of right, the tenant cannot give in evidence the title of a third person, with which he has no privity, unless it be for the purpose of disproving the demandant's seisin.

Therefore, where the demandant proves an actual seisin, by a *pedis possessio*, the tenant cannot be permitted to prove a superior outstanding title, since it does not disprove the demandant's seisin.

But where the demandant relies for proof of seisin, solely upon a constructive *actual seisin [*28 in virtue of a patent from the state, of vacant lands, the tenant may show that the land has been previously granted by the state, for that divests the title of the state, and disproves the demandant's constructive seisin.

A writ of right brings into controversy only the titles of the parties to the suit, and is a comparison of those titles; and either party may, therefore, prove any fact which defeats the title of the other, or shows it never had a legal existence, or has been parted with.

The case of Green *v.* Liter, 8 Cranch 229, commented on and explained.

ERROR to the Circuit Court of Kentucky.

February 5th, 1822. This cause was argued by *Montgomery*, for the plaintiff in error, and by *B. Hardin*, for the defendant.

February 12th. STORY, Justice, delivered the opinion of the court.— The record in this case presents a great variety of facts, out of which several important questions have arisen; but as the merits of the cause may, in the opinion of the court, be completely disposed of by the decision of a single point, the facts which illustrate that point will alone be mentioned.

This is a writ of right, originally brought by the plaintiff in error, against the defendant in error, to recover a certain tract of land, in Kentucky, described in the writ. Issue being joined on the mere right between the parties, the demandant, to sustain his suit, gave in evidence a patent of the land in question, granted to him by the Commonwealth of Virginia, and dated the 28th day of January 1784, and offered proof of the boundary. But

he offered no proof, other than his patent, that he was ever seised of the
*29] land in question. According to the decision *of this court, in *Green* v. *Liter* (8 Cranch 229), a patent of vacant lands of the state conveys to the grantee a constructive actual seisin, sufficient to maintain a writ of right; and therefore, the demandant in this case entitled himself *primâ facie*, upon this evidence, to a recovery. To rebut this conclusion, the tenants offered in evidence, as well for the purpose of proving title in themselves, as to show that the demandant was never seised of the premises, certain patents from the commonwealth of Virginia, which included the premises, to wit, a patent of John Lewis and Richard May, dated the first of June 1782; a patent to Edmund Eggleston, dated the same day and year; and a patent to John Gratton, dated the same day and year; and a patent to Isham Watkins of the same date: under which patents, the tenants endeavored to derive, by mesne conveyances, a good title to themselves, in severalty. To the regularity of the title of the tenants, so derived, the demandant took several objections, which were overruled by the court, and the conveyances were admitted in evidence; and if, in point of law, the patents so offered in evidence by the tenants were admissible, for the purpose of showing that the demandant never had any constructive actual seisin in the premises, which was the only seisin on which he relied, the regularity of these mesne conveyances to the tenant becomes wholly immaterial, since, if these patents were still outstanding in strangers, they would, if admissible, all establish the same defect of seisin in the demandant. The question, then,
*30] which meets us at the threshold of this cause is, whether it *be competent for the tenants in a writ of right, where the demandant shows no seisin by a *pedis possessio*, but relies wholly on a constructive actual seisin, in virtue of a patent of the land, as vacant land, to disprove that constructive seisin, by showing that the state had previously granted the same land to other persons, with whom the tenants claim no privity. In other words, whether the tenants can set up title and seisin in a stranger, to disprove the seisin of the demandant: and upon the fullest consideration, we are all of opinion, that they may. The reasoning on which our opinion is founded, is this: the *mise* joined in a writ of right, necessarily involves the titles of both parties to the suit, and institutes a comparison between them. It is, consequently, the right of each party, to give any fact in evidence, which destroys the title of the other; for the question in controversy is, which hath the better mere right to hold the demanded premises. It has been already decided by this court, and is, indeed, among the best established doctrines of the common law, that seisin in deed, either by possession of the land, and perception of profits, or by construction of law, is indispensable to enable the demandant to maintain his suit. The tenant may, therefore, show in his defence, that the demandant had no such actual seisin; for the seisin of the freehold by the tenant, which is admitted by the bringing of the suit against him, is a sufficient title for the tenant, until the demandant can show a better title. The tenant may thus defeat the demandant, by proving that he never had any such seisin in deed; or, if he once
*31] had it, that he has parted with *his whole estate, by a conveyanc competent to convey, and actually conveying it.

To apply this doctrine to the present case. The demandant here relies not on a seisin in deed, by a *pedis possessio*, but on a seisin in deed, by con-

struction of law, in virtue of his patent. If the land included in the grant belonged, at the time of the conveyance, to the state, and was vacant, upon the principles already asserted by this court, it conveyed, by operation of law, a seisin in deed to the demandant. But if the state had already granted the land by a prior patent, it was already, upon the same principles, in the adverse seisin of another grantee, and, consequently, the patent to the demandant could not convey either title or seisin. It is, therefore, manifest, that for this purpose, to disprove the seisin of the demandant, the tenants in this case were entitled to introduce the four patents above stated (even if they failed to establish a privity of estate in themselves), since these patents were all prior to that of the demandant, included the land, and, if admitted, would show, that the seisin in deed, by mere construction of law upon the grant of his patent, never had a real existence.

It has been supposed, however, at the bar, that the case of *Green* v. *Liter* establishes a different doctrine on this point. In our opinion, that case does not justify any such conclusion ; and certainly, was not understood by the court to require it. It will be recollected, that the case of *Green* v. *Liter* came before this court upon a division of opinion of the judges of the circuit court upon certain questions *of law, stated in the record. [*32
To those questions, in the form in which they were stated, and to those questions only, could the opinion of this court properly extend. In answer to the fifth question, which involved the inquiry, whether actual seisin, or, as it is commonly expressed, seisin in deed, is necessary to maintain a writ of right, and whether a patent from the state, of its vacant lands, conferred, by construction of law, a seisin in deed to the grantee, this court expressed an unhesitating opinion in the affirmative, on both points. It follows, therefore, by necessary inference from this doctrine, that the tenant may disprove the demandant's seisin in deed, by any evidence competent for this purpose ; and if he succeeds in establishing the fact, the demandant must fail in his suit. That the proof of a prior patent of the same lands to another person, would be sufficient for this purpose, in a case where the demandant relied exclusively upon a constructive seisin in deed, in virtue of the grant of his patent, has been already asserted. The eighth question propounded to the court, in *Green* v. *Liter*, is that, however, upon which the difficulty at the bar has arisen. It is in these words : " Can the defendant defend himself by an older and better existing title than the demandant's in a third person ?" Now, it is material to consider, that this question does not purport to inquire whether the tenant may disprove the demandant's seisin, in a writ of right ; nor does it purport to inquire whether the tenant may not show that the demandant has no title, or a title defective in point of legal operation. It supposes, that the demandant has a *title [*33
per se, sufficient for a recovery, and then asks if a better title may be shown in a third person, to defeat such recovery. The answer of the court is in the following words : " we are of opinion, that a better subsisting adverse title in a third person is no defence in a writ of right. That writ brings into controversy only the mere rights of the parties to the suit." It is most manifest, that in this answer, the court proceed upon the supposition, that the demandant has, *primâ facie*, a good title, upon which he may maintain his suit ; and that he has established a seisin, sufficient, in point of law, to entitle him to a recovery. And the point then is, whether a superior

adverse title and seisin in a stranger, can be given in evidence, to dispute such recovery. The very reason assigned againt the admission of such evidence, shows the understanding of the court to be precisely what we now assert. It cannot be admitted, because a writ of right does not bring into controversy the right of the demandant as against all the world, but the mere right of the parties to the suit. But it does bring into controversy the mere right between these parties; and if so, it, by consequence, authorizes either party to establish, by evidence, that the other has no right whatsoever in the demanded premises; or that his mere right is inferior to that set up against him.

If, in the case at bar, the demandant had established an actual seisin, by occupation of the land, and taking the esplees, the case would then have presented precisely the point which was understood to be presented in *Green* v. *Liter;* and from the opinion *given in that case, on that point, there is not the slightest inclination in this court to depart. We think, that the decision in the present case may well be made upon the principles which have been already expounded, without, in any degree, breaking in upon the doctrines of that case.

*34]

If we are right in this view of the subject, it is unnecessary to enter into a minute examination of the points made in the court below, since the evidence which was objected to, was, under the circumstances of the case, clearly admissible, for the purpose of disproving the seisin of the demandant. As to the instructions prayed for by the demandant, at the close of the evidence, and refused by the court, and as to the instructions actually given by the court, to the jury, it does seem necessary to pass them in minute review. Several of them turn altogether upon the deduction of title by the tenant, from the original patentee, whose patents they set up in defence. And as to the others, they may be disposed of, by the single remark, that no error has been shown by them, in the argument here, and no error is perceived by the court.

Judgment affirmed.

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*35] *Page's Administrators *v.* Bank of Alexandria.

Promissory notes.—Presumption of fact.

A bill or note is *primâ facie* evidence, under a count for money had received, against the drawer or indorser.[1]

But the presumption that the contents of the bill or note have been received by the party sued, and for the use of the plaintiff, may be rebutted by circumstances; and a recovery cannot be had, in such a case, where it is proved, that the money was actually received by another party.

Error to the Circuit Court of the District of Columbia, for the county of Alexandria. This was an action of *assumpsit*, brought by the defendants in error, the Bank of Alexandria, against the plaintiffs in error, the administrators of William Byrd Page, deceased.

The declaration contained two counts. The first was on a promissory

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[1] Brown *v.* Noyer, 2 W. & M. 75; Heckscher *v.* Binney, 3 Id. 334; Bank of Alexandria *v.* Wilson, 2 Cr. C. C. 5; Stone *v.* Lawrence, 4 Id. 11; Hughes *v.* Wheeler, 8 Cow. 77; Olcott *v.* Rathbone, 5 Wend. 490; Smith *v.* Van Loan, 16 Id. 659; Black *v.* Caffe, 7 N. Y. 281; Benjamin *v.* Tillman, 2 McLean 213; Frazer *v.* Carpenter, Id. 235.

note, which was set forth, as made by William Hodgson, and payable on demand, to the intestate, Page, who indorsed it to the Bank of Alexandria, where it was discounted, and the money paid to Hodgson. In support of this count, a note was given in evidence, drawn by Hodgson, in favor of, and indorsed by, Page, payable fifty-four days after date. The other counts were for money lent and advanced by the plaintiffs below to the intestate, Page, and for money had and received by him for their use. Evidence was also given, to show that the bank had *used due diligence in demanding payment of the maker, and in giving notice of non-payment to [*36 the indorser; and that Page, in his lifetime, frequently promised the bank payment of the note, after it became due. Judgment was given for the plaintiffs below, on a demurrer to the evidence, and the cause was brought to this court by writ of error.

February 8th, 1822. This cause was argued by *Swann* and *Lee*, for the plaintiffs in error, citing *Sheehy* v. *Mandeville*, 7 Cranch 209; 1 H. Bl. 602; *French's Administrator* v. *Bank of Columbia*, 4 Ibid. 141; 2 H. Bl. 609; *Mackie* v. *Davis*, 2 Wash. 219; *Goodall* v. *Stuart*, 2 Hen. & Munf. 105: and by *Taylor*, for the defendants in error, citing *Tatlock* v. *Harris*, 3 T. R. 174; 3 Burr. 1516; 2 Wash. 233, 265; 6 Munf. 392; 5 Cranch 144; Ibid. 49; 1 Ibid. 290.

February 14th. Livingston, Justice, delivered the opinion of the court, and after stating the case, proceeded as follows:—Whether due diligence were used by the holder of the note, is immaterial now to inquire, as this court is of the opinion, that a note payable any number of days after date, could not be applied to a count describing it as one payable on demand.

The only remaining question is, whether this note were sufficient proof of the count for money lent and advanced, and for money had and received. There are, certainly, cases in which a promissory note, or an indorsement of such note, may be offered in *evidence, against the maker or indorser, [*37 under a count of this nature, and if unconnected with other circumstances, may be sufficient proof, in itself, to charge the defendant. This proceeds on the ground, that such note warrants a fair presumption or inference, that the maker or indorser has received the contents of such note. But the court is not satisfied, that, in this case, the mere production of this note was sufficient proof of Page's having borrowed money of the bank, or of his having received moneys for their use. Although a note or an indorsement be *primâ facie* evidence of a receipt of money from the holders, by the maker or indorser, yet, when all the other testimony in the cause produced by the plaintiffs themselves, shows unequivocally, that the money for which the note was made, was paid, not to the indorser, but to the maker himself, and for his sole use, the presumption arising from the mere act of indorsement is destroyed, and the party, in such case, ought not to be permitted to abandon his count on the written contract of the party, and apply it to the general money counts. It is admitted or proved, that this was a note made and indorsed for the accommodation of Hodgson, and that this fact was known to the directors of the bank, who received and discounted it as such, and for his sole use, and that he, and not Page, received the avails thereof. What pretence, then, is there, that this money was lent to Page, or that he received it for the use of the bank?

There was also proof in the cause, that "Page, in his lifetime, frequently promised the bank payment of the said note, after it became due." This
*38] promise *must be regarded as applying exclusively to the note which was offered in evidence, and was payable in fifty-four days after date: and if that note had been declared on, its influence on the cause would deserve serious consideration; but it cannot be used in support of the other count, for the testimony, in terms, confines this promise to payment of the note, and says not a word of his undertaking to repay the money which the bank had loaned to him, or which he had received for their use.

The opinion of the court then is, that the bank can only recover from the administrators of Page, if at all, on his indorsement; but that, having set forth the note incorrectly, and there not being sufficient evidence to support the second count, the present action cannot be sustained. The judgment of the circuit court is, therefore, reversed; and judgment is to be entered for the defendants below.

Judgment reversed.

Ex parte KEARNEY.

Habeas corpus.

This court has authority to issue a *habeas corpus*, where a person is imprisoned under the warrant or order of any other court of the United States.[1]

But this court has no appellate jurisdiction in criminal cases, confided to it by the laws of the United States, and cannot revise the judgments of the circuit courts, by writ of error, in any case where a party has been convicted of a public offence.[2]

*39] *Hence, the court will not grant a *habeas corpus*, where a party has been committed for a contempt adjudged by a court of competent jurisdiction.

In such a case, this court will not inquire into the sufficiency of the cause of commitment.[3]

The case of Crosby, Lord Mayor of London, 3 Wils. 188, commented on, and its authority confirmed.

February 9th, 1822. *Jones* moved for a *habeas corpus* to bring up the body of John T. Kearney, now in jail, in the custody of the marshal, under a commitment of the Circuit Court for the the District of Columbia, for an alleged contempt. The petition stated, that on the trial of an indictment in that court, the petitioner was examined as a witness, and refused to answer a certain question which was put to him, because he conceived it tended materially to implicate him, and to criminate him as a *particeps criminis*. The objection was overruled by the court, and he having persisted in refusing to answer the question, was committed to jail for the supposed contempt; and for no other cause.

Jones, for the petitioner, now argued: 1. That this court has power to issue the writ of *habeas corpus* in every case where the personal liberty of the citizen is restrained, under the judicial authority of the Union. The jurisdiction is settled by a uniform series of decisions. It had been exer-

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[1] See note to Bollman's Case, 4 Cranch 75.

[2] A writ of *habeas corpus* cannot be made to perform the functions of a writ of error; to warrant the discharge of the petitioner, the sentence under which he is held, must be not merely erroneous and voidable, but absolutely void. Ex parte Reed, 100 U. S. 23. And see Ex parte Milligan, 4 Wall. 2; Ex parte Yerger, 8 Id. 85; Ex parte Lange, 18 Id. 163.

[3] S. P. New Orleans *v.* Steamship Co., 20 Wall. 387: Hayes *v.* Fischer, 102 U. S. 121: Williamson's Case, 26 Penn. St. 9.

cised in a case of treason (*United States* v. *Hamilton*, 3 Dall. 17); in a case where the warrant of commitment was defective, in not showing a good cause *certain, on oath or affirmation (*Ex parte Burford*, 3 Cranch 448); and, at last, the case of *Bollman & Swartwout* (4 Ibid. 75) [*40 settled the power of the court to be universal, and co-extensive with the general judicial power of the Union.

2. He insisted, that a fit case was made out to justify the exercise of the jurisdiction upon the present application. The jurisdiction of this court cannot depend upon the nature of the commitment by the other court. The writ of *habeas corpus* is a writ of right, and the nature and grounds of the commitment are to be looked into, on the return. This court must have power to issue the writ, where an inferior court commits even for a contempt ; because if the process of contempt be a branch of criminal judicature, considered as a punishment for an offence, this court has authority to control all inferior courts and magistrates. In England, the court of common pleas, although a tribunal of original and civil jurisdiction only, has, from the earliest times, exercised the authority of issuing the writ of *habeas corpus* to inquire into the cause of commitments by other jurisdictions. *Wood's Case*, 3 Wils. 173 ; *Skrogges* v. *Coleshil*, Dyer 175 ; 4 Inst. 290; *Bushell's Case*, Sir T. Jones 12 ; 2 W. Bl. 745 ; 2 Hale's P. C. 144 ; Moore 838 ; 1 Hale P. C. 399, 406, 446.

Swann (District-Attorney), contrà, admitted, that this court had a general power of issuing the writ of *habeas corpus ad subjiciendum* to all the other *courts and officers of the United States, but insisted, that this [*41 was not a case in which the court could exercise the authority. Because the circuit court for the district of Columbia was an inferior tribunal, it did not, therefore, follow, that an appeal lies to this court from its judgment in criminal cases. This court has no appellate jurisdiction in criminal cases. It can only revise the decisions of the circuit court, in such cases, where there is a certificate of a division of opinion of the judges below. Here, there was no doubt, the court had jurisdiction of the case in which the party was committed for refusing to answer a question put to him, and which the court had determined he was bound to answer. The court cannot revise the principal case by an appellate process, neither can it revise that which has incidentally arisen out of it. Every court of justice must have a discretionary power of punishing contempts ; and if an appeal were allowed upon every interlocutory judgment of this sort, there would be the greatest possible embarrassment and confusion.

February 25th. Story, Justice, delivered the opinion of the court, and after stating the case, proceeded as follows :—Upon the argument of this motion, two questions have been made: first, whether this court has authority to issue a *habeas corpus*, where a person is in jail, under the warrant or order of any other court of the United States ; secondly, if it have, whether, upon the facts stated, a fit case is made out, to justify the exercise of such an authority.

*As to the first question, it is unnecessary to say more, than that [*42 the point has already passed *in rem judicatam* in this court. In the case of *Bollman and Swartwout* (4 Cranch 75), it was expressly decided,

upon full argument, that this court possessed such an authority, and the question has ever since been considered at rest.

The second point is of much more importance. It is to be considered, that this court has no appellate jurisdiction confided to it in criminal cases, by the laws of the United States. It cannot entertain a writ of error, to revise the judgment of the circuit court, in any case where a party has been convicted of a public offence. And, undoubtedly, the denial of this authority proceeded upon great principles of public policy and convenience. If every party had a right to bring before this court every case, in which judgment had passed against him, for a crime, or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and in some cases, totally frustrated. If, then, this court cannot directly revise a judgment of the circuit court in a criminal case, what reason is there to suppose, that it was intended to vest it with the authority to do it indirectly?

It is also to be observed, that there is no question here, but that this commitment was made by a court of competent jurisdiction, and in the exercise of an unquestionable authority. The only objection is, not that the court acted beyond its jurisdiction, but that it erred in its judgment of the law applicable to the case. If, then, we are to give any relief in this case,
*43] *it is by a revision of the opinion of the court, given in the course of a criminal trial, and thus asserting a right to control its proceedings, and take from them the conclusive effect which the law intended to give them. If this were an application for a *habeas corpus*, after judgment on an indictment for an offence within the jurisdiction of the circuit court, it could hardly be maintained, that this court could revise such a judgment, or the proceedings which led to it, or set it aside, and discharge the prisoner. There is, in principle, no distinction between that case and the present; for when a court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution; and so the law was settled upon full deliberation, in the case of *Brass Crosby, Lord Mayor of London* (3 Wilson 188).

Indeed, in that case, the same point was before the court as in this. It was an application to the court of common pleas for a *habeas corpus*, to bring up the body of the Lord Mayor, who was committed for contempt by the House of Commons. The *habeas corpus* was granted, and upon the return, the causes of contempt for which the party was committed, were set forth. It was argued, that the House of Commons had no authority to commit for a contempt; and if they had, that they had not used it rightly and properly, and that the causes assigned were insufficient. But the whole court were of opinion, that the House of Commons had a right to commit for a contempt; and that the court could not revise its adjudication. Lord
*44] Chief Justice De Grey, on *that occasion said, "when the House of Commons adjudged anything to be a contempt, or a breach of privilege, their adjudication is a conviction, and their commitment, in consequence, is execution; and no court can discharge on bail, a person that is in execution by the judgment of any other court. The House of Commons, therefore, having an authority to commit, and that commitment being an execution, what can this court do? It can do nothing, when a person is in execution by the judgment of a court having a competent jurisdiction. In such a case, this court is not a court of appeal." Again, "the courts of K.

B. or C. B. never discharged any person committed for a contempt, in not answering in the court of chancery, if the return was for a contempt. If the admiralty commits for a contempt, or one be taken upon *excommunicato capiendo*, this court never discharges the persons committed." Mr. Justice BLACKSTONE said, "all courts, by which I mean to include the two Houses of Parliament, and the courts of Westminster Hall, can have no control in matters of contempt. The sole adjudication of contempt, and the punishment thereof, belongs exclusively, and without interfering, to each respective court. Infinite confusion and disorder would follow, if courts could, by writs of habeas corpus, examine and determine the contempt of others."

So that it is most manifest, from the whole reasoning of the court in this case, that a writ of *habeas corpus* was not deemed a proper remedy, where a party was committed for a contempt by a court of competent *jurisdiction; and that, if granted, the court could not inquire into the [*45 sufficiency of the cause of commitment. If, therefore, we were to grant the writ in this case, it would be applying it in a manner not justified by principle or usage; and we should be bound to remand the party, unless we were prepared to abandon the whole doctrine, so reasonable, just and convenient, which has hitherto regulated this important subject. We are entirely satisfied, to administer the law as we find it, and are all of opinion, that, upon the facts of this case, the motion ought to be denied.

The argument of inconvenience has been pressed upon us with great earnestness. But where the law is clear, this argument can be of no avail; and it will probably be found, that there are also serious inconveniences on the other side. Wherever power is lodged, it may be abused; but this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice. This argument was also used in the case already cited, and the answer of the court to it is so satisfactory, that it would be useless to attempt any further refutation.

Upon the whole, it is the opinion of the court, that the motion be overruled.

Writ denied.(*a*)

(*a*) See Anderson v. Dunn, 6 Wheat. 204,[1] where it was determined, that an action could not be maintained against the sergeant-at-arms of the house of representatives for imprisoning the plaintiff on a warrant for a contempt adjudged by the house. See also the case of J. V. N. Yates, 4 Johns. 317; Yates v. Lansing, 9 Id. 395; Yates v. People, 6 Id. 337; Burdett v. Abbott, 14 East 1; s. c. 5 Dow 165.

[1] But see note to that case, which was overruled in Kilbourn *v.* Thompson, 103 U. S. 168.

*Bayley *v.* Greenleaf and others.

Vendor's lien for purchase-money.

The vendor of real property, who has not taken a separate security for the purchase-money, has a lien for it, on the land, as against the vendee and his heirs.[1]

This lien is defeated by an alienation to a *bonâ fide* purchaser, without notice; nor can it be asserted against creditors holding under a *bonâ fide* conveyance from the vendee.

Quære? Whether the lien can be asserted against the assignees of a bankrupt, or other creditors coming in under the purchaser, by act of law?

The *dictum* of Sugden in his Law of Vendors 364, examined and questioned.[2]

Appeal from the Circuit Court for the district of Columbia. This suit was brought by the appellant, in the circuit court for the county of Washington, for the purpose of subjecting a tract of land, lying within that county, which was sold by the plaintiff, Bayley, to the defendant, Greenleaf, to the payment of so much of the purchase-money as still remained due.

It appeared by the proceedings in the cause, that in the year 1792,
*47] William Bayley purchased from William B. Worman, *the land which is the subject of this suit, which he afterwards sold to James Greenleaf, to whom the title was made by Worman. A bond was given by Greenleaf to Bayley, for the purchase-money, which, in March 1796, was surrendered to Greenleaf, on his accepting bills drawn in favor of Clement Biddle, for its amount. Some of these bills were alleged to be unpaid, and were produced by the plaintiffs.

On the 30th day of September 1796, James Greenleaf, being then greatly indebted, conveyed sundry estates, and among others, the land in controversy, to George Simpson, in trust for the security of Edward Fox, who had entered into engagements for the said Greenleaf to a very large amount. The deed was also made to secure the said Fox for any further advances he might make to, or engagements he might enter into, on account of the said Greenleaf.

On the 23d of March 1797, George Simpson conveyed this land to the defendants, Pratt, Francis and others, as trustees, for the uses and purposes mentioned in the deed from Greenleaf and Simpson. On the 26th of June 1797, a general deed was made to the same persons, by Robert Morris, John Nicholson and the said James Greenleaf, conveying to them the property mentioned in the deeds of the 30th September 1796, and of the 23d of March 1797, with an immense mass of other property, for the payment of debts to a very great amount due from the said Morris, Nicholson and Greenleaf, which were enumerated in the said deed.

Some doubts having been entertained respecting the recording of these
*48] deeds, an attachment was sued *out by the trustees against the said Greenleaf, in the county in which the said lands then lay, on which judgment was obtained, on the 8th of February 1798; and on the 28th day of the same month, the land was sold under the judgment, purchased in for

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[1] Where a deed of land shows upon its face, that the purchase-money is unpaid, a purchaser from the grantee takes subject to the vendor's lien, unless it has been waived. Cordova *v.* Hood, 17 Wall. 1, and cases there cited. The taking of a note, with surety, is *primâ facie*, but not conclusive, evidence of a waiver of the vendor's lien. Ibid. And see Fish *v.* Howland, 1 Paige 20; Vail *v.* Foster, 4 N. Y. 12; Fisk *v.* Potter, 2 Keyes 64; Brown *v.* Gilman, 4 Wheat. 255.

[2] See notes to Perkins's edition of Sugden on Vendors, p. 681.

the trustees, and afterwards conveyed to them, to the same uses and trusts as had been expressed in the original conveyance, by deed dated in 1803.

In March 1798, James Greenleaf took the benefit of the insolvent law of the state of Pennsylvania; and in November of the same year, he was also discharged under the insolvent law of the state of Maryland. In November 1803, he was declared a bankrupt, under the laws of the United States. The plaintiff, William Bayley, also became a bankrupt, under the laws of the United States, in July 1802.

The trustees alleged they had contracted to sell the land in controversy to James Greenleaf; but that he had not paid the purchase-money, in consequence of which they retained the legal title. This suit was brought in the year 1812, by William Bayley, and by James S. Morrell, as trustee for the creditors of the said Bailey, and executor of the original assignee of the bankrupt, who was dead.

February 11th, 1822. *Law* and *Key*, for the appellants, insisted, that they had an equitable, subsisting, unwaived lien upon the lands sold to the defendant Greenleaf, for the amount of the purchase-money. The law on the subject has been settled by a long and uniform current of decisions. The lien exists between vendor and vendee, and against subsequent purchasers *from the vendee, with notice that the money remains unpaid, unless the parties, by some unequivocal act, waive the lien.(*a*) It [*49 may also be asserted against purchasers, coming in by act of law, as assignees of a bankrupt; and against creditors claiming under a conveyance for their benefit—they are considered as volunteers.(*b*) Nor has the lien, in this case, been waived. Taking a covenant, bond or note, is no waiver of the lien, if taken as a mode of payment, and not as a distinct security.(*c*)

Jones, contrà, contended, that under the circumstances of the present case, the lien could not be asserted against creditors taking a *bonâ fide* conveyance from the vendee. This is not a case where the party comes in by operation at law. A creditor, who takes a conveyance for the security of his debt, stands in equal equity with one who pays his money, and is equally a purchaser. The *dictum* of Sugden on this subject is not supported by the adjudged cases in England, or in this country. Besides, the alleged debt due from Greenleaf to Bailey, never attached any equitable lien to the land; Worman, and not Bailey, standing in the relation of vendor, and the true vendor being satisfied with the purchase-money.

February 18th. Marshall, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—*In opposition to [*50 the claim of the plaintiffs, it is alleged by the defendants, that the debt of Bailey has been discharged. As they have not succeeded in supporting this allegation, it will be necessary to inquire, whether, in such a case as this, the plaintiffs can assert a lien on the land sold by Bayley to Greenleaf, for so much of the purchase-money as remains due.

(*a*) Brown *v.* Gilman, 4 Wheat. 255, and cases collected in note *a*; Id. 292, 297.

(*b*) Sugd. on Vend. 364, and the cases there cited; 2 Madd. Ch. 105; Chapman *v.* Tanner, 1 Vern. 267.

(*c*) Sugd. on Vend. 353; 1 Sch. & Lef. 105.

It is contended for the defendants, that as the legal title to the estate was never in Bayley, he never had a lien upon it for the purchase-money. Upon this point, some difference of opinion exists in the court; and we pass it over, without positively deciding it, for the purpose of inquiring, whether Bayley, supposing him entitled to the same rights as a vendor of the legal title, has now a lien on the estate for the purchase-money.

That a vendor, who has taken no other security for the purchase-money, retains a lien for it on the land, as against the vendee or his heirs, seems to be well settled by the English decisions. It is equally well settled, that this lien is defeated, by an alienation to a purchaser, without notice. How far it may be asserted against creditors, seems not so well settled, and constitutes the subject of inquiry in this case. The lien asserted by the vendor is not disclosed by any information given by a record. In *Chapman* v. *Tanner* (1 Vern. 267), the Lord Keeper said, "in this case, there is a natural equity that the land should stand charged with so much of the purchase-money as was not paid, and that, without any special agreement for that purpose." In the case cited from 1 Bro. C. C. 420, the Chancellor says, "a bargain
*51] *and sale must be for money paid, otherwise it is in trust for the bargainor. If an estate is sold, and no part of the money paid, the vendee is a trustee; then if part be paid, it is not the same as to that which is unpaid."

But whether the lien of the vendor be established as "a natural equity," or from analogy to the principle that in a bargain and sale, the bargainor stands seised in trust for the bargainee, unless the money be paid, still it is a secret invisible trust, known only to the vendor and vendee, and to those to whom it may be communicated in fact. To the world, the vendee appears to hold the estate, divested of any trust whatever; and credit is given to him, in the confidence that the property is his own, in equity, as well as law. A vendor relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessary to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery, to the exclusion of *bonâ fide* creditors. The court would require cases in which this principle is expressly decided, before its correctness can be admitted.

The counsel for the plaintiffs say, there are such cases; and cite the *dictum* of Sugden, in his Law of Vendors, and the cases be quotes in support of the position. Mr. Sugden does indeed say, that persons coming
*52] *in under the purchaser, by act of law, are bound by an equitable lien, although they had no notice of its existence; and he adds, that "creditors, claiming under a conveyance from the purchaser, are bound in like manner as assignees, because they stand in the same situation as creditors under a commission." Mr. Maddock, who also recites the cases on this subject, says, that the vendor has a lien on the estate sold, "as against the vendee and his heir, and all persons claiming as volunteers, or purchasers for a valuable consideration, with notice." He adds, "nor does the bankruptcy of the vendee affect the lien of the vendor." But he does not say, with Sugden, that "creditors, claiming under a conveyance from the purchaser, are bound in like manner as assignees."

This lien has not, we believe, been extensively recognised in the courts of this country. In the case of *Garson* v. *Green and others* (1 Johns. Ch. 308), Mr. Chancellor KENT said, "the vendor has a lien on the estate for the purchase-money, while the estate is in the hands of the vendee; and when there is no contract that the lien, by implication, was not intended to be reserved." If the lien has, in any of the states, or in any court of the United States, been sustained against creditors, the decision is unknown to us. This is the first case in which the question, so far as respects creditors, has been made in this court, and may form a precedent on a subject, of great interest to the public. We have looked into the English authorities, for the purpose of inquiring how far the principle has been firmly established in that country.

*In *Chapman* v. *Tanner* (1 Vern. 267), the lien of the vendor was maintained against the assignees of a bankrupt. But in *Fawell* v. *Heelis* (Ambl. 724), the Lord Chancellor, speaking of that case, says, "it appears by the register's book, that the seller was to keep the title-papers till he was paid. The court said, that a natural equity arose from his having the deeds in his custody." This explanation of the case of *Chapman* v. *Tanner* lessens the weight of that case in support of the lien, not only as against the assignees of a bankrupt, but as against the vendor himself, since the retaining of the title deeds by the vendor is considered as equivalent to an agreement for the preservation of the lien. [*53

Fawell v. *Heelis and others*, reported in Ambler, was a suit to establish the lien of the vendor against the trustees of an insolvent debtor. The chancellor determined against the lien, because a receipt for the purchase-money was indorsed on the deed, and a bond taken for it from the vendee. "If," said the court, "the vendor parts with the estate, and takes a security for the consideration-money, there is no reason for a court of equity to assist him against the creditors of the purchaser." A doctrine, ascribed to Lord APSLEY, that "creditors claiming under such a deed (a deed of an insolvent debtor to trustees for his creditors) stand in the same situation as creditors under a commission," has been supposed to apply to the case now before the court, and is cited by Mr. Sugden to support his general proposition, that "creditors, claiming under *a conveyance from the purchaser, are bound in like manner as assignees, because they stand in the same situation as creditors under a commission." It is uncertain, whether this was said by the chancellor, as from himself, or with reference to the arguments of counsel; but if it be his *dictum*, it will not, we think, aid the plaintiffs in the cause under consideration; nor does it justify the broad and general terms use by Sugden; terms which have been probably understood in a more extensive sense than he intended. A declaration, that creditors, under a conveyance, and under a commission, are in the same situation as regards the lien of the vendor, made in a case in which the decree was against that lien, is not entitled to the respect which the same declaration would claim, had the decree been made in favor of the lien. The chancellor was against the lien, whether set up against assignees or trustees, and might not, therefore, examine very accurately the sameness or the discrepancy of the principles on which the two cases stood. Had he considered *Chapman* v. *Tanner* as decided on the general principle, and not on its particular circumstances, it would have been necessary to inquire, whether the same prin- [*54

ciple applied to the case of *Fawell* v. *Heelis and others;* but not being of that opinion, and being opposed to the lien, the inquiry became less necessary.

Another consideration, entitled to great attention, is, that this *dictum* of the chancellor, if it be one, is confined in terms to "such a deed" as was then under his consideration. That was a deed made by an insolvent, after
*55] his insolvency, to trustees for his creditors. *This was, we suppose, a deed made in pursuance of the statute; and between a deed assigning the estate of an insolvent, under the insolvent law, and a deed assigning the estate of a bankrupt, under the bankrupt law, there is not, perhaps, much difference. But it does not follow, that the same rule would be applied to a conveyance made by the mere act of the party, for the security of one or more creditors, or of creditors generally.

The case of *Blackburn* v. *Gregson* (1 Bro. C. C. 420) was also an attempt to set up the lien of the vendor against the assignees of a bankrupt. In that case, the general question of the existence of such a lien was argued at bar, as one not yet finally settled; and, although the inclination of the chancellor's mind seemed in favor of the lien, he made no decision on that point. An issue was directed to try whether the conveyance was made to defeat creditors, under the 13th Eliz., ch. 5, and the jury having found that it was so made, the conveyance was set aside.

The question of lien appears to have remained still open; and in the case of *Nairn* v. *Prowse* (6 Ves. jr. 752), it was still doubted, whether a vendor who had taken the bond or note of the vendee for the purchase-money, retained his lien on the land. That case was between a creditor, who claimed under an equitable mortgage created by the deposit of a deed, and the vendor, who had taken a deposit of stock to secure the payment of the purchase-money. The court determined, that by taking the deposit
*56] of stock, he had *waived his lien; and, consequently, the question between the creditor and vendor was not decided.

It does not appear ever to have been decided. We find no case in which the naked question has been determined against the creditor. Could the case of *Chapman* v. *Tanner* even be stripped of the circumstance that the vendor retained the title papers in his hands, still, the assignees of a bankrupt are not understood, in England, to stand in the same situation with a creditor, who is secured by a mortgage. In the case of *Mitford* v. *Mitford* (9 Ves. jr. 100), the master of the rolls says, "between a particular assignment for valuable consideration, and an assignment by operation of law, such a distinction has always been made, that the effect of the one is not necessarily to be inferred from that produced by the other." In the same case he says, "I have always understood the assignment from the commissioners, like any other assignment by operation of law, passed his rights precisely in the same plight and condition as he possessed them. Even where a complete legal title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. This shows they are not considered purchasers for a valuable consideration, in the proper sense of the words. Indeed, a distinction has been constantly taken between them and a particular assignee, for a specific consideration; and the former are placed in the same class as voluntary assignees and personal representatives."

Were it then completely settled, that the vendor retains his lien against the assignees of a bankrupt, it *would not follow, that he would retain it against creditors holding under a *bonâ fide* conveyance from the vendee. To establish this principle, on the authority of adjudged cases, the court would require cases in which the very point is decided. We have seen no such cases. We have seen no case in which this lien has been supported against a judgment-creditor, against a mortgagee, or even against a creditor charging an heir on the bond of his ancestor, in which he was bound. The weight of authority is, we think, the other way. The lien of the vendor, if in the nature of a trust, is a secret trust ; and although to be preferred to any other subsequent equal equity, unconnected with a legal advantage, or equitable advantage which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity, connected with such advantage. This principle is laid down in Hargrave and Butler's notes to Co. Litt. 290 *b* ; and the case of *Stanhope* v. *Earl Verney*, decided in chancery, in 1761, is quoted in support of it. (2 Eden 81.) That was the case of an equitable mortgage, founded on the deposit of a deed for a term of years, to attend the inheritance, with a declaration of the trust. This is a much stronger case. It is an actual conveyance of the legal estate. [*57

In the United States, the claims of creditors stand on high ground. There is not perhaps a state in the Union, the laws of which do not make all conveyances, not recorded, and all secret trusts, void as to creditors, as well as subsequent purchasers without notice. To support the secret lien of the vendor *against a creditor who is a mortgagee, would be to counteract the spirit of these laws. [*58

Decree affirmed, with costs.

Browder *v.* McArthur.

Rehearing.

This court will not grant a rehearing in an equity cause, after it has been remitted to the court below, to carry into effect the decree of this court, according to its mandate.

February 21st, 1822. *Doddridge*, for the appellant, Browder, moved for a rehearing in this cause, which is the same case that was determined at the last term, and remitted to the court below to carry into effect the decree of this court. (4 Wheat. 488.) It was now again brought before this court, upon an appeal from the decree of the court below, entered according to the mandate from this court. The appellant's counsel now moved for a rehearing upon the merits.(*a*)

The Court denied the motion, being of opinion, that it was too late to grant a rehearing in a cause, after it had been remitted to the court below, to carry into effect the decree of this court, according to its mandate ; and that a subsequent appeal from the circuit court, for supposed error in carrying into *effect such mandate, brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree. [*59

Motion denied.

(*a*) He cited 2 Madd. Chan. 390; 3 P. Wms. 8; 2 Atk. 439.

Ricard *v.* Williams and others.

Possession.—Disseisin.—Presumption.—Power.

Possession of land by a party, claiming it as his own in fee, is *primâ facie* evidence of his ownership and seisin of the inheritance.[1]

But possession alone, unexplained by collateral circumstances, which show the quality and extent of the interest claimed, evidences no more than the mere fact of present occupation by right.

But if the party be in, under title, and by mistake of law, supposes himself possessed of a less estate than really belongs to him, the law will remit him to his full right and title.

It is a general rule, that a disseisor cannot qualify his own wrong, but must be considered as a disseisor in fee.

But this rule is introduced only for the benefit of the disseisee, for the sake of electing his remedy.

And it must also appear, that the party found in possession entered without right; for if his entry were congeable, or his possession lawful, his entry and possession will be considered as limited by his right.[2]

Presumptions of a grant, arising from the lapse of time, are applied to corporeal, as well as incorporeal hereditaments.

They may be encountered and rebutted by contrary presumptions, and can never arise, where all the circumstances are perfectly consistent with the non-existence of a grant.[3]

A fortiori, they cannot arise, where the claim is of such a nature as is at variance with the supposition of a grant.

In general, the presumption of a grant is limited to periods analogous to those of the statute of limitations, in cases where the statute does not apply.

*60] Where the statute applies, the presumption is not generally resorted to; *but if the circumstances of the case are very cogent, and require it, a grant may be presumed within a period short of the statute.

Under the laws of Massachusetts and Connecticut, the power of an administrator to sell the real estate of his intestate, under an order of the court of probates, must be exercised within a reasonable time after the death of the intestate.

The case of such a power to sell is not within the purview of the statute of limitations of Connecticut, which limits all rights of entry and action to fifteen years after the title accrues; but the reasonable time within which the power must be exercised, is to be fixed by analogy to that statute.

One heir, notwithstanding his entry as heir, may, afterwards, by disseisin of his co-heirs, acquire an exclusive possession, upon which the statute will run, both against his co-heirs and against creditors.[4]

An heir may claim an estate by title distinct or paramount to that of his ancestor; and if his possession be exclusive, under such claim, against all other persons, until the statute period has run, he is entitled to the protection of the bar.

Error to the Circuit Court of Connecticut. This was a suit instituted by the defendants in error, against the plaintiff in error, in the court below. The original action is commonly known in Connecticut by the name of an

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[1] Possession, with claim of title, is *primâ facie* evidence of seisin in fee. Carpenter *v.* Weeks, 2 Hill 341; Hill *v.* Draper, 10 Barb. 454; Sparkman *v.* Porter, 1 Paine 457. If a man having two titles, one defeasible, and the other indefeasible, enter generally, the law adjudges that he entered under his better title. Gardner *v.* Sharp, 4 W. C. C. 610. And possession is presumed to be rightful, until the contrary appear, and therefore, adverse to the title of any other claimant. Stark *v.* Starr, 1 Sawyer 15. So, if there be a concurrent possession, the law adjudges the rightful possession to him who has the lawful title to the land. Mather *v.* Trinity Church, 3 S. & R. 509.

[2] Bradstreet *v.* Huntingdon, 5 Pet. 445.

[3] s. p. Blight *v.* Rochester, *post*, p. 535; Stillman *v.* White Rock Manufacturing Co., 3 W. & M. 539; Ransdale *v.* Grove, 4 McLean 282; Baird *v.* Wolf, Id. 549.

[4] Roberts *v.* Moore, 3 Wall. Jr. C. C. 292. But to give title to one of several co-heirs, under the statute, there must be an actual ouster and disseisin, by some plain, decisive and unequivocal act, hostile to his co-heirs. Forward *v.* Deitz, 32 Penn. St. 69. s. p. Miller's Appeal, 3 Grant (Pa.) 247; Kathan *v.* Rockwell, 16 Hun 90. And see Millard *v.* McMullin, 69 N. Y. 345.

action of disseisin, and is a real action, final upon the rights of the parties, and in the nature of a real action at the common law. The cause was tried upon the general issue, *nul tort, nul disseisin*, and a verdict being found for the demandants, a bill of exceptions was taken to the opinion of the court upon matters of law, at the trial.

The history of the case, as it stood upon the record, was, in substance, as follows: The demandants claimed the estate in controversy, by purchase from the administrator of William Dudley, at a sale made by him, for the payment of the debts of his intestate, pursuant to the laws of Connecticut, which authorize *a sale of the real estate of any person deceased, for the payment of his debts, when the personal assets are insufficient for [*61 that purpose. In order to establish the title of William Dudley in the premises, the demandants proved, that Thomas Dudley, the father of William, was, in his lifetime, possessed of the premises, as parcel of what were called the "Dudley lands," and died possessed of the same, in 1769, leaving seven children, of whom William was eldest, being of about the age of fourteen years, and Joseph Gerriel, the youngest, being about four years of age. Upon the death of his father, Joseph Mayhew, the guardian of William, entered into possession of the Dudley lands, and of the demanded premises, as parcel, taking the rents and profits in his behalf, during his minority; and upon his arrival of age, William entered and occupied the same, taking the rents and profits to his own use, until his death, which happened in the year 1786; all his brothers and sisters being then living. During the life of William, no other person claimed any right to enter or occupy the premises, except that his mother used to receive one-third of the rents and profits, until she died, in the year 1783. During his life, and while in possession of the premises, William always declared, that he held the same only for life, and thefore, would not allow any improvements on them at his expense; no leases were made by him, except for short periods; and no attempt was made by him, to sell or convey the premises; and he declared, that he had no right to sell them, and that upon his death, they would descend to his son, Joseph Dudley, under whom the tenant derived *his title, in the manner hereafter stated. No administration was ever taken in Connecticut upon the estate of William Dudley, until [*62 1814, and his estate was then declared insolvent; and in 1817, the lands in controversy were sold by the administrator, by order of the court of probates, for the payment of the debts found due under the commisssion of insolvency.

To rebut the title of the demandants, and to establish his own, the tenant proved that William Dudley died intestate, leaving seven children, the eldest of whom was Joseph Dudley. Upon the death of his father, the guardian of Joseph (the latter being within age) entered into possession of the Dudley lands, and the demanded premises, as parcel, and used and occupied the same, receiving the rents and profits, in behalf of Joseph, until his arrival of age, when Joseph himself entered into possession, claiming them as his own, and taking the rents and profits to his own use, and holding all other persons out of possession, until the year 1811 and 1812, when he sold the demanded premises, and the tenant, either by direct or mesne conveyances under Joseph, came into possession, and had ever since held the premises in his own right. In the year 1811, Samuel Dudley, the

brother of Joseph, claimed title to some of the Dudley lands possessed by Joseph, and brought an action of ejectment for the recovery of them; but the suit was compromised by Joseph's paying him about $2000; and about the same time, Joseph settled with another of his brothers, but did not pay
*63] him anything. But Joseph never admitted that his brothers *or sister had any interest in the lands; and said, he could hold them, and did hold them, in the same manner as he held the lands in Massachusetts.

The will of Governor Dudley, which was admitted to probate in Massachusetts in 1720, was also in evidence, but neither party established any privity or derivation of title under it.

Upon these facts, the tenant prayed the court to instruct the jury, that the demandants had not made out a title in themselves, nor in William Dudley. Not in themselves, because the sale by the administrator to the demandant was void, by force of the statute regarding the sale of disputed titles, the tenant being in possession of the property, at the time of the sale, claiming it as his own, and that William Dudley had acquired no title to the property in question by possession, as he claimed to hold the same only during his life, and could, therefore, acquire no title, except for life, by any length of possession, and that if he could acquire title by possession, if this estate descended from Thomas Dudley, said William could not, in seventeen years, acquire a title against his brothers and sisters, or, at least, against those of them who had not been of full age for five years before the death of said William; and if the demandants could recover at all, it could only be for that proportion of the estate which descended from William as one of the heirs of Thomas Dudley.

The tenant further prayed the court to instruct the jury, that if they found that Joseph Dudley had, for more than fifteen years before he sold the land in controversy, been in possession of the same, exclusively
*64] *claiming them as his own, and holding out all others, he had gained a complete title to the property.

The tenant further claimed, that the court ought to have instructed the jury, that under the circumstances attending the possession of said lands by William Dudley, the father, and by Joseph Dudley, and the length of time which had elapsed since the death of said William, without any claim on the part of the creditors of said William, the jury might presume a grant from some owner of the land to William, for life, with remainder to his eldest son.

But the court did charge and instruct the jury that the sale by the administrator, under an order of court, was not within the statute regarding disputed titles, and was not, therefore, void. That William Dudley, by mistaken construction of the will of Governor Dudley, might have claimed an estate for life in the premises, and that such mistake would not operate to defeat his title by possession. That the length of time in which this estate had been occupied by William and Joseph Dudley, would bar any claims by the other children of Thomas Dudley, deceased, and that the jury were authorized to presume a grant by said children to their brother William Dudley, deceased, and therefore, if the demandants recovered, they must recover the whole of the premises. The court also charged the jury that, as against the creditors of William Dudley, neither Joseph Dudley, nor the tenant, had gained title to the lands in controvery, by possession, and that

the jury were not authorized to presume a grant to Joseph. *To which several opinions of the court, the tenant, by his counsel, excepted.

February 12th. *D. B. Ogden*, for the plaintiff in error, argued: 1. That his being a writ of entry, in which the demandants or plaintiffs counted on their own seisin, and could count in no other way; and as they were unconnected with any other seisin than their own, it was necessary for them to have shown, upon the trial, an actual entry. Without such actual entry, there never could have been any seisin or possession in them; and without such seisin or possession in them, there never could have been any disseisin or forcing them out of possession. In an action of ejectment, which is a mere legal fiction, the execution of the lease, the entry under it, and the ouster, are all stated in the declaration, and they must be proved upon the trial. Unless the defendant will afford the means of that proof, by his confession, the plaintiffs cannot obtain a verdict. So, here, the entry and ouster must be proved, or the plaintiffs never can recover; because the entry and ouster are the very foundation of the whole action. Actual seisin is as necessary in a writ of entry as a writ of right. *Green* v. *Liter*, 8 Cranch 229, 244. The actual seisin and ouster are expressly stated in the declaration; they are material and necessary allegations. It is a universal rule, that whatever is a material and necessary allegation in the declaration, is a material and necessary part of the proof upon the trial, unless that necessity he dispensed with by *the pleadings. Now, in this case, there is no pretence, that any actual entry was ever made in the premises in question, by the plaintiffs. [*66 None was proved upon the trial; the demandants were, thereupon, not entitled to a verdict.

By the local law of Massachusetts and Connecticut, an administrator has no seisin of the lands of his intestate. They descend to his heir-at-law, subject to a naked power in the administrator, in case of an insufficiency of the personal property to pay the debts of his intestate, to sell the lands for the payment of those debts. The administrator or executor may lawfully sell them, whether they be in the possession of a devisee, or an heir, or their heirs or assigns, or of a disseisor of a devisee or heir: for, say the cases, the naked authority of an administrator to sell on license, cannot be defeated by the seisin of a devisee or heir, or by their alienation or disseisin. *Drinkwater* v. *Drinkwater*, 4 Mass. 354; *Willard* v. *Nason*, 5 Ibid. 240; *Hays* v. *Jackson*, 6 Ibid. 143. By the law of Connecticut, which, in this respect, is precisely similar to that of Massachusetts, the administrator may sell the lands of his intestate for the payment of debts, and his conveyance vests in the grantee, not the possession or seisin of the land, because that was never in the administrator; but a right to the property, and a right of entry into it; a right to the possession of it, but not the possession itself. Upon this right of possession, the grantee might at once bring an ejectment, in which he need prove no actual entry and ouster, but they must be *confessed by the defendant, or he might make an actual entry, and found upon [*67 it this remedy of a writ of entry. He has not thought proper to bring an ejectment, but has brought a writ of entry; and he must, therefore, prove an actual entry and ouster. *Drinkwater* v. *Drinkwater*, 4 Mass. 354.

2. Independent of this objection, the demandants are not entitled, upon

the evidence set forth in the bill of the exceptions, to the judgment which they have obtained. They claimed under a deed from the administrator of William Dudley, deceased. It became, therefore, necessary for them, in order to entitle themselves to recover, to prove, that William Dudley, in his lifetime, and at the time of his death, was seised of an estate in the premises, which descended to his heirs; because, unless William Dudley was seised of such an estate in the premises, it is manifest, that his administrator could grant no title to the property.

Did the demandants prove such a seisin in William Dudley? They proved, that Thomas Dudley, the father of William, was in possession of the premises, at the time of his death, in 1766; that upon the death of Thomas, the guardian of William, then an infant of 14 years of age, in right of his ward, entered into possession of the premises, receiving the rents and profits thereof, and continued in possession, until William came of age, in 1776; that William then took possession, and continued in the exclusive possession thereof, until he died, in 1786. This was all the evidence of title in William, offered by the plaintiff upon the trial: was this evidence of title sufficient? *Thomas, the father, died in possession, in 1769. What estate he had in the premises does not appear; but the subsequent acts of William afford strong evidence, that his father had not an estate in fee in the premises, but that his estate, whatever it was, terminated with his life. If Thomas, the father of William, had had an estate in fee in the premises, it would, upon his death, have either descended to his heirs-at-law, or vested in his devisees, if he had devised it by will. It is not pretended, that he made any devise of it, and of course, it would have descended to his heirs-at-law. The record states, that he left seven children, all of whom, by the law of Connecticut and Massachusetts, were at that time his heirs-at-law. The exclusive possession of the premises by William, taken after the death of his father, is, therefore, conclusive evidence, that William did not consider his father as having been possessed of the fee of this land; and the rest of the children of Thomas never having claimed any right to enter and occupy the premises, or any part thereof, after they came of age, affords strong evidence, that they also knew and believed, that Thomas, their father, had no estate in the premises, which could descend to his heirs-at-law. At the time Thomas died, William, his son, was 14 years of age, and his guardian, immediately upon his death, takes possession of the land, as the property exclusively of his ward William: thus affording his testimony, also, by his acts, that he knew that Thomas had no estate in the premises which could descend to his heirs-at-law. What was the estate which Thomas had in the premises does not appear, but it is *manifest, from the acts of all the parties at the time, that it is not an estate in fee-simple. William, then, did not enter as heir-at-law of Thomas, his father. He can, therefore, claim nothing from the possession of his father, as showing any title to the fee of this property: because, if his father was seised of the fee by right, it would have descended to his heirs-at-law, and if seised of it, by wrong as disseisor, the descent would still have been cast upon his heirs-at-law.

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Under what claim of title, then, did William enter? As he did not enter as heir-at-law, his entry must have been either adverse to his father's title, and, of course, to his heirs-at-law, in which case, his possession has no con-

nection with his father's; or, he must have entered, considering his father as a mere tenant for life, or for years, with remainder to him and his heirs, or that the father was tenant-in-tail, and the estate limited to William, his eldest son, and so on to the eldest male heir. If the father was tenant for life, or for years, with remainder to William, then William's right of possession commenced, when his father's ended, in 1769: and under that right, William possessed the premises from 1769, down to his death, in 1786; which would, under the laws of Connecticut, taking away the right of entry, after 15 years, give him, or those claiming under him, a right to recover the premises in question, if out of possession, or to hold them against all the world, if in possession, provided he claimed to hold the possession as the owner in fee. And why? Because William, in that case, would have *been in possession 17 years, and not because his father had been in possession before him. [*70

But that William did not enter, claiming that his father had been tenant for life, or for years, with remainder to him in fee, is manifest: 1st. Because William, when in possession, declared that he held the premises only for life; and that upon his death, they belonged to his eldest son: and 2d. Because, after his entry, he suffered his mother, the widow of the father, to receive one-third of the rents and profits of these lands as her dower. She could be entitled to no dower, if her husband had been either a tenant for life or for years of the premises.

As, then, Thomas, the father of William, was not the owner in fee of this property, nor the tenant of it for life or for years, under what right did he claim it? The answer to this question is, that it is most probable, he claimed it as tenant-in-tail, limited to the eldest son. 1st. Because, if Thomas was tenant-in-tail of these lands, his wife would have been entitled to her dower in them, which it has already been stated she took; and 2d. Because William frequently declared, that they were his for life only, and that after his death they belonged to his eldest son. Now, if Thomas claimed these lands as tenant-in-tail, and if William also claimed them as tenant-in-tail, *and was really entitled to them as such, then, upon his death, the estate in tail would vest in his eldest son, Joseph; and the [*71 creditors of William could have no lien upon the property for his debts, nor the administrator any right to convey the property for the payment of any such debts; and of course, the demandants, the grantees of the administrator, have no right to recover in this case.

But it may be said, that William had an estate in fee-simple in these lands, under the will of Governor Dudley, set forth in the record, which gave to his devisees an estate in fee-simple, and not in fee-tail. But it is a point of no importance whether that will gave the devisees a fee-simple or a fee-tail. How, if at all, William Dudley, or his father, were connected with the testator, nowhere appears on the record. There appears no connection of blood, and no privity of estate between them. His will, therefore, must be put entirely out of the question.

Again, it may be said, that by the laws of Connecticut, there can be no grant of an estate in tail to continue longer than the life of the first donee; and that all such estates given in tail, remain an absolute estate in fee-simple to the issue of the first donee in tail. What operation has this law upon the rights of these parties? The argument is, that Thomas, the father

of William, was not a tenant-in-tail, but in fee, of the premises in question, because, he being the issue of the first donee, became, by the local law, vested with an absolute estate in fee-simple. Let it for a moment be admitted: what then? William, his *eldest son, upon his death, *72] entered into possession, of the lands. I have already shown, that he did not enter into possession, as devisee of Thomas, his father, because the latter died intestate; nor as heir-at-law of his father, for he was not so; but he entered, claiming that the estate, subject to his mother's right of dower, was his for life, and upon his death, would descend to his eldest son. This is the claim under which William's entry was made, and under which the property has been possessed, from 1769 down to the present hour; a possession of 53 years; a possession, in favor of which any presumption would be justifiable; a possession, in favor of which, to use the strong language of Lord KENYON, the court ought to presume not only one, but one hundred grants.

If, then, Thomas, the father of William, was seised in fee of the premises in question, as he made no devise of them to William, and as William did not enter as heir-at-law, we are certainly to presume, that he entered with right, and that his claim to enter was a good one. We are then to presume a grant, consistent with his entry and possession, and with the acts of all parties at the time. We have a right to presume, that his father, being the tenant in fee, made a grant of the premises to his son William, in tail, limiting the estate to his, William's, eldest son. Such a grant is not inconsistent with the laws of Connecticut; and is perfectly consistent with his claim, as always declared by him, that he was only entitled to the estate during his life, and that after his death it would go to his eldest son. It is also consistent with his mother's claim of dower, to which she would *have *73] been entitled, the grant of his father notwithstanding: and consistent with the possession taken at William's death, by his son Joseph, under whom we claim. This presumption would support and confirm a title, under a possession of fifty-three years. Any other would shake and unsettle titles which have, for half a century, been considered as good and valid. If this grant be presumed from Thomas to William, then, according to the law of Connecticut referred to, Joseph, being the issue of William, the first donee, was the tenant in fee of the premises; and the plaintiff in error, being his grantee, is also the tenant in fee of them.

It was stated by the learned judge, in his charge to the jury, that as William had been so long in possession, the jury might presume a grant to him from his co-heir, in order to support that possession. But the nature of William's possession, the claim under which he must be presumed to have taken that possession, must be judged of, according to the state of things at the time when he took the possession. He must be presumed to have continued in possession, by the same right under which he originally claimed to enter into it, until it be shown, that he acquired another right. Now, when William entered, upon the death of his father, in 1769, I have already shown, that he entered under some claim of right, distinct and different from that of heir-at-law. He cannot be presumed to have entered as grantee of his co-heirs-at-law, because such grant could not be made; he was not only an infant himself, but his brothers and *sisters were all infants, still *74] younger than he was. As, then, when he entered, claiming the whole of

this property as his own, William could have had no grant from his co-heirs; and as his possession must be presumed to have continued under the same claim of title under which he originally entered, it seems to be a presumption against all law, that he ever had a grant from his co-heirs.

It is a well established rule, that the declarations of a person in possession of land, as to his title, are evidence against him and all persons claiming under him. In this case, we have the declarations of William Dudley, under whom the demandants claim, made while in possession of the land, that he held it for life only, and that after his death, it would descend to his eldest son. If, then, declarations are evidence against all claiming under William, they, of course, are evidence against the demandants, and show that William never had anything but an estate for life in the premises in question, which expired with him; and there was no interest left, which the administrator could sell after his death. In this view of the case, it is immaterial, how long William's possession continued. It was a possession under a claim of an estate for life, and the possession was commensurate with the claim. As I have already shown, that the plaintiff's title rests wholly on William's possession, and as William never pretended to any possession but for life, there can be now no title in the demandant. Presumptions are often made, to support old claims of title, accompanied by a long possession; but it is *new doctrine, that a possession under a claim of an estate for life gives a fee. [*75

It appears by the record, that immediately after the death of William Dudley, in 1786, Joseph, his eldest son, entered into possession of the premises, by his guardian, and, afterwards, by himself, taking the whole rents and profits, and claiming the lands as his own, and continued in the exclusive possession thereof, holding all others out, until he sold the land in 1811 and 1812, when his grantees entered as owners, and continued to hold, until this action in 1819. If, then, a possession of seventeen years in William gave him a title, which is a sufficient ground of recovery for the demandant, why is it that a possession of thirty-three years in Joseph, and those claiming under him, does not give a good title to the defendants? The reason assigned by the demandants, why this possession should not avail the defendants is, that William died in possession, and the possession of Joseph was but the continuance of William's possession, a part of the same title, and that title is subject to be sold for the payment of William's debts. But if the possession taken by Joseph was a possession taken under a claim, adverse to the claim of a fee in William, then it would seem to follow, as an inevitable consequence, that the possession of Joseph, and those claiming under him, would give them a good title. William died intestate, and left seven children. Joseph, the eldest, then being an infant, all these children, by the law of Connecticut, were his *heirs-at-law. Joseph, however, entered into the exclusive possession of the whole of the premises, "keeping all others out." He did not, then, enter as heir-at-law, but he entered denying the rights of the heirs-at-law: he entered, therefore, under a claim of title adverse to them, and of course, adverse to the claim of a fee now set up in William, his father. There can, in this case, be no presumption of a grant from his co-heirs, when he entered, because they were infants of very tender years, when he entered. [*76

But not only can no grant be presumed from them to Joseph, but the

record contains upon its face evidence that no such grant was ever made by them. The plaintiffs proved, that in 1811, two of the brothers claimed to be entitled to a portion of the property, which, at all events, shows that they had never granted it to Joseph. Inasmuch, then, as Joseph entered and continued in possession, claiming title, which title was adverse to any claim in the heirs-at-law of William—to any claim of the fee in William; and as this possession continued for thirty years, uninterrupted and undisturbed, it gave to Joseph, and to those claiming under him, a full and complete right to retain the possession against all the world.

We have, in this possession of Joseph, exclusively taken and held by him, and so long acquiesced in by others, not only evidence of the opinion of his guardian, founded, doubtless, upon a knowledge of the title at the time, and of his own opinion of the title, but we have, by their acquiescence,
*77] and by the admission *of his co-heirs that they had no right, and the admission of the creditors, for the payment of whose debts these lands have now been sold to the demandants, evidence that William, their debtor, had no estate of inheritance in the premises, which could descend to his heirs, or be liable for his debts. How else are we to account for their conduct in relation to these lands? That William possessed them, was notorious. The demandants, upon the trial, proved that they had always been known by the name of the "Dudley lands," which consisted of a large tract, situate in Connecticut and Massachusetts. If, then, the creditors of William Dudley had believed that he had been seised in fee of the lands, and that they were, therefore, liable for his debts, how is their conduct to be accounted for, in suffering their lands to go into possession of Joseph, as his own, and continue there, twenty-eight years, before they took a single step to enforce the lien which they had upon the lands? When William died, these creditors knew their rights, and no doubt, knew his title papers might at that time have been produced, to show what were the respective estates of William and Joseph in the premises. If, then, the creditors had not been conscious, that William didnot own the fee of the lands, they never would have remained so long quiet, seeing another enjoy the lands, and taking the rents and profits.

3. By the statute of Connecticut, no person has a right of entry into lands, but within fifteen years next after his right or title shall first descend
*78] or accrue, with the usual savings. It is contended, that *the right of entry of the demandants is not taken away in this case, because their right did not accrue until the conveyance to them, by the administrator, in 1817.

But the demandants claim a fee in these premises, under William Dudley. The fee held by William was the entire estate in the premises. If that estate has become extinct; if the fee which was in him has been extinguished, either by those who had a right to extinguish it, or by the operation of law, operating through an adverse possession, then no person can any longer claim under it. If William had been living, and there had been an adverse possession against him, his right of entry would have been gone. His heirs, by the adverse possession, have lost their right of entry; and every other person claiming under the same title, is in the same situation. If the right of William and his heirs be gone, and taken away, can the act of an administrator resuscitate it? Land is one thing, an estate in it, is

another. The lien of the creditor is upon Willam's estate in the land, and not upon the land. The lien is no inherent part of the soil always accompanying it. It is here a claim upon William's estate in it, which was a fee. Now, a fee is but one estate. Whether in the lands of William, or his heirs, or his grantees, or the grantees of his administrator, it is still but the same one estate. So long as that estate in the lands continue, the lien may possibly continue; but when the estate is gone, the lien is gone.

It may possibly be denied, that the heirs-at-law of William could maintain an action for the recovery of these lands, as they were tenants in common with *Joseph; and it may be said, that the possession of one tenant in common is the possession of all. This, as a general principle, is admitted. But if one tenant in common enters into actual and exclusive possession of the land, taking the rents and profits to his own use, and openly assert his own exclusive property in the lands, and deny the title of any other, it will be considered as an adverse possession by him, and those claiming under him, and an ouster of the other claimants. *Cummings* v. *Weyman*, 10 Mass. 464. In this case, the record states that Joseph did enter into the exclusive and actual possession of the premises, taking the rents and profits, denying the title of his brothers and sisters, and keeping all others out of possession for 30 years. The heirs-at-law, therefore, of William could not have entered; William, if alive, could not enter; and by what principle is it, that the grantee of an administrator, who can have no greater right than William, or his heirs-at-law, is to be held to have a right, which they would not have? [*79

In answer to this obvious question, it is said, that William's estate was liable for his debts, and to be sold by his administrator for payment of them; there is no limitation to the time in which letters of administration may be granted; that the sale of the administrator was in pursuance of the provisions of the law of Connecticut, and therefore, his grantee is entitled to the property. But let this argument be examined. By the common law, where a man bound himself and his heirs, the obligee might sue the heir, and have *execution of the land descended to the heir; but if the heir aliened the land, before action brought, the alienee held the land free from any lien for the debt of the ancestors. Co. Litt. 102. But by the law of Connecticut, and the construction which has been repeatedly given to it, the creditor may follow the lands into the hands of the grantee of the heir-at-law or devisee. But he can follow them only when the right of entry is not tolled. There are, besides, particular circumstances in this case, which show that the demandants cannot claim to be *bonâ fide* purchasers, without notice of the facts of the case, but that they had full notice, and were actors in the transaction. [*80

Lastly. The deed is void in itself, under the statute of Connecticut, of 1747, against the sale of disputed titles.

Pinkney, contrà: 1. Answered the objection made by the plaintiff in error, that in the present action, being a writ of entry, the demandants must show a seisin in deed; by which (he supposed) was meant either an actual or constructive seisin. The writ in this case sets forth a plea, that the tenant render to the demandants "the quiet and peaceable seisin and possession of two certain tracts of land," &c. The count is, that "on or about the

20th day of December 1817, they were well seised and possessed in their own right, as joint-tenants in fee-simple ;" and "that the tenant thereunto entered, and ejected and deforced the demandants, and ever since has continued to deforce and hold the demandants out of *the possession," &c. And it is now contended, that they are bound to prove their seisin and possession as they have laid it ; and not having done so, cannot recover.

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The first answer to this objection is, that the bill of exceptions does not cover it. The first prayer is, that the court should instruct the jury, that the demandants had not made out a title in themselves, nor in William Dudley. The second prayer is, for an instruction, that if the jury found that Joseph Dudley had been in possession of the lands for fifteen years, &c., that he had gained a complete title to the property. The third instruction asked for, is, that under the circumstances, &c., the jury might presume a grant from some owner of the land to William, &c. But the court charged the jury, 1st. That the sale by the administrator, under an order of court, was not within the statute regarding disputed titles, and was not therefore void : 2d. That William Dudley, by mistaken construction of the title of Governor Dudley, might have claimed an estate for life in the premises, and that such mistake would not operate to defeat his title by possession : 3d. That the length of time, in which the estate had been occupied by William and Joseph Dudley, would bar any claims by the other children of Thomas Dudley, deceased ; and that the jury were authorized to presume a grant by them to their brother William ; and therefore, if the demandants recovered, they must recover the whole of the premises : And lastly, that as against the creditors of William Dudley, neither Joseph Dudley, nor the plaintiff in error, had gained title by possession, *and that the jury were not authorized to presume a grant to Joseph. It is obvious, then, that neither the prayers nor instructions cover this objection, which was not made in the court below, and therefore, no opinion was given upon it. The bill of exceptions does not profess to do more than deal with the title ; it did not mean to state more than was sufficient to raise the questions which were raised in respect to that title.

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The second answer to this objection is, that in Connecticut, the writ of entry is constantly used as an action of ejectment. The forms of actions, concerning real property, depend, in all the states, upon local usage, and no positive enactments of the legislature have been thought necessary to authorize a deviation, in this respect, from the rules of the common law. The writ of entry, in the present case, is not like an English writ of entry. If tried by the rules of English law, it could not stand a moment's examination. It does not regard and set forth the different degrees, as is required at common law : nor is it a writ of entry in the *post*, under the statute of Marlbridge, 52 Hen. III., c. 30, alleging that the defendant had not entry, until after the disseisin or deforcement of the original wrongdoer, passing by all the intermediate degrees. In Connecticut, on the contrary, the defendant is always alleged to be the deforciant, which, if the fact were not so, would, in England, be fatal. Neither is the time of the deforcement or disseisin ever stated, either in the writ or count, at common law ; and in England, it would never be said, that the seisin or disseisin was about *such a time. This, at least, may safely be asserted to be pecu-

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liar to the practice of Connecticut. So that it becomes manifest, that the peculiar properties of writs of entry cannot be applied to this action, as it exists by the local law and practice. It is used indiscriminately with the action of ejectment, and intended to try the right of possession, which, in that state, is the right of property.

2. The title of the demandants is under an administrator's sale, by order of court. By the local law, there is no limitation to the granting letters of administration, by the mere lapse of time. *Wales* v. *Willard*, 2 Mass. 120. But even if there were, every question respecting it, and respecting the debts for which the lands were sold, has been decided by the competent court of peculiar and exclusive jurisdiction. This decision has been confirmed, in the last resort, by the superior court of the state, which is the only court that has an appellate jurisdiction from the decrees of the court of probates. There can, therefore, be no objection now to the validity of these letters of administration, and the sale which was made under them, on the ground of the debts being antiquated. The appointed *forum* has settled these questions for ever. If, then, the lands in question were, at the death of William Dudley, his lands, in fee, the demandant have a good title, unless that title has been intercepted by an adverse possession or title, as is contended on the other side.

3. The next question then is, upon William's title. His father died in possession, and William had exclusive possession, by himself or guardian, receiving the rents and profits, from 1769 to 1785, claiming *for himself only, to the exclusion of all the world. That this possession [*84 barred all strangers who, at the time, might have a right of entry, there cannot be a doubt: and the only possible question is, whether it barred his brethren and sisters. His father had an estate, or he had not. We may adopt the argument used on the other side for Joseph's protection. If his father had no estate, then none descended to his children; and William's entry was, of course, for his own benefit, and gained him, with the possession which followed, an estate by possession. It is not directly found, that his father had any estate which could descend. It might be a naked possession; and if it was, the entry of William, for his own exclusive benefit, he not being heir-at-law, was not a continuation of that possession for any person's benefit but his own. He did not come to a regular succession as heir, nor were there any duties cast on him as heir, by a regular descent. He took in his own right, so as to keep out everybody else. It is true, indeed, that his mother is stated to have received a third of the rents and profits, but whether as dower or how, *non constat:* and any inference from such a fact cannot now be made, in the absence of proof. His brethren and sisters did not need to be barred, if no estate descended to them; and William's possession was not their possession, unless they had right.

But suppose, an estate descended from Thomas, then William's exclusive possession, for himself, was sufficient to bar his brethren and sisters, under the statute of Connecticut, and to gain him a title in fee. *To this [*85 it is objected, that he claimed only a life-estate, and therefore, can gain no more. The answer is, he could not, by an adverse possession, gain an estate for life, nor any estate less than a fee. A limited estate can be given only by contract of the parties, or act of law. Wrongful possession must give a fee, or nothing. And it must be so, in the nature of things, since

there is nothing to limit it. The effect of possession is, to bar actions against the possessor by those who are entitled to bring the actions. It does not operate like a grant, or any other mode of alienation, which may be circumscribed and limited. His claim of a life-estate only, did not create a remainder in favor of any other, so as to give to that other, for the first time, a right of action, on his death. It did not contribute to exclude actions during his life. The person entitled might as well have sued, within the time of limitations, whether William claimed a life-estate or not. The restricted claim changed nothing. It did not prevent his possession from being adversary, nor make it less wrongful. It is the proprietor being out of possession, and another being in possession, against his title, that produces the bar: and it cannot be material, whether the adversary possession excludes the rightful possession, upon one pretext or another. Contract only can prevent the effect, and then, the possession is not adversary.

It is inconceivable, that a wrongful possession can be restricted in its effects as a bar of limitation to a life-estate, when the whole fee is action-
*86] able against *it. Cases may, indeed, be conceived, in which it would produce a limited effect; as, for example, if the heir should hold against tenant in dower, or by the curtesy. But there is nothing there to bar, but the tenancy in dower or curtsey. If there was, the bar would extend to it. In our case, the whole fee is against the possession by wrong, and his possession is against the whole fee. His declarations, that he claimed only a life-estate, did not give him a life-estate. They gave him nothing; and if they gave nothing, and secured nothing, how could they restain to the prejudice of the legal effect of his possession? Contract would have operated both ways. But the declarations of the party could not work the effect of contract one way, and there is no reason why it should, the other. Whose rights did his declaration save? It could save none, unless it took them out of the statute, by postponing their right of action. Whoever had a right of action was told by the statute—sue! or you will be barred by the adversary possession, after fifteen years. And unless the declarations of the possessor suspended the right of action, so as that the proprietor could not sue, by reason of it, the statute reaches the case; since, it bars all rights of action subsisting during the adversary possession, and not exerted within the time limited. A possession by a man claiming an estate-tail, but having in fact no title, would bar all the proprietors having a right to sue. No matter what he claims; if he claims adversely to everybody, during his possession of fifteen years, he excludes everybody claiming title during the time, and
*87] *everybody forbears to disturb him: and the statute says, he shall not afterwards be disturbed.

It is not here necessary to inquire, why William claimed only a life-estate. That belongs to another branch of the subject. For the present purpose, it is immaterial, why he did so.

The doctrine of remitter will illustrate this head. Littleton says (sect. 695), "If a man be disseised, and the disseisor let the land to the disseisee, by deed poll, or without deed, for term of years, by which the disseisee entereth, this entry is a remitter to the disseisee. For in such case, where the entry of a man is congeable, and a lease is made to him, albeit that he claimeth by words *in pais*, that he hath estate, by force of such lease, or saith openly, that he claimeth nothing in the land but by force of such lease, yet

this is a remitter to him, for that such disclaimer *in pais* is nothing to the purpose." So also, it is laid down, that a disseisor has a fee-simple, and cannot have less. Co. Litt. 227 *a*. And no claim can possibly alter or qualify it. Co. Litt. 296 ; Ibid. 266 *b*. (*a*)

The question then recurs, are the brothers and sisters barred by William's exclusive possession ? It may be said, they are not ; because, being coparceners with him, his possession is theirs. But a coparcener or tenant in common may be barred by the statute of limitations, if the possession of his companions *be adverse, or, in other words, amount to an actual ouster. So long as there is nothing adversary, the possession of one [*88 is the possession of all : but if one parcener usurp the whole, and hold out his companion, he is a deforciant, against whom a writ of entry will lie, as well as a writ of partition. Here, the coparceners of William never had possession at all. His first entry was for himself, and perfectly exclusive. There never was any possession but his. The leading case on this subject was determined in Lord MANSFIELD's time (*Fisher* v. *Prosser*, Cowp. 219), and his doctrine was afterwards confirmed by Lord KENYON. *Peaceable* v. *Read*, 1 East 275. An entry and sole occupation of the whole, keeping the co-tenant out, is sufficient. 5 Burr. 2604 ; 1 Atk. 493 ; 2 Ibid. 32 ; 1 Ld. Raym. So also, in a subsequent case, although it was strenuously contended at the bar, that there ought to be a receipt of the rents, and an actual hindering of the co-tenant from entering, which did not appear in the case, yet the court held, that " one tenant in common in possession, claiming the whole, and denying possession to the other, is evidence of an ouster." *Doe* v. *Bird*, 11 East 51. So also, Lord HARDWICKE says, "In the case of a fine and non-claim by tenant in common, it will bar his companion, if he does not call the person to an account for the profits : for this has always been admitted to be evidence of an ouster." 2 Atk. 632. And again, it is said, that, " although the entry of one co-tenant is the entry of both, yet if one enter *claiming the whole, this will be an entry adverse to his companion."(*b*) [*89

As to the minority of William's brothers and sisters, and its effect to prevent the operation of the statute, it may be observed, that they all arrived at age, during his life. The statute had been running against them, during minority, as to ten years, and when William died, it was running against them for the other five. He had then the fee in progress against them, and nearly completed. It descended to his heirs, and if his brethren and sisters did not sue, before the small remnant of the time expired, they are barred by the statute. It seems to be admitted, that they could not sue, after that time. Their title was extinguished, beyond all doubt ; and it was in progress to be extinguished, at William's death.

4. As to the title of Joseph Dudley, it is sought to be founded on the presumption of a grant, from somebody (not said whom) to William, for life, with remainder to Joseph, in fee or in tail. But presumptions may be rebutted by contrary presumptions. They depend on circumstances ; and these

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(*a*) Mr. Butler, in his note to the last-cited passage, says, " It is to be observed, that a disseisor by his disseisin acquires a tortious fee-simple, notwithstanding, at the time he makes the disseisin, he claims a less estate."

(*b*) 14 Vin. Abr. 512, pl. 5 ; and in the margin, "the possession of one heir in gavelkind, claiming the whole, is adverse."

must warrant the particular presumption, or, at least, not be inconsistent with it.(*a*) One of the grounds of presumption is the existence of a state or things which may most reasonably be accounted for, by supposing the fact presumed. Here, it must be founded on Joseph's possession, and on
*90] William's declaration, that he claimed *only a life-estate, and that it would descend to Joseph. The state of the case, as it appears on the bill of exceptions, is defective; but it is easy to see, that all the parties must have claimed under the will of Governor Dudley, and upon the supposition of a continuing estate-tail created by that will. This explains William's declarations.

It may, indeed, be said, that records, and acts of parliament, and grants of the crown, have all been presumed. But this has been, after the lapse of ages, with imperfect records, and the presumption supported by parol evidence.(*b*) But it will be found, in all these cases, that circumstances have been always shown to support the presumtion, and that, after a great length of time, all things which the case shows ought to have been done, will be presumed to have been done correctly. But in this country, where all the land titles are recorded, the presumption of a grant cannot be so easily indulged, and especially, where the lands lie in two different states, and the property depends on the same title. If the record were lost in one, it would be found in the other. Such a presumption would repeal all the registry acts of both states, and would promote the interests only of the negligent or the fraudulent.(*c*) It must be presumed, first, that the deed was made; and secondly, that it had been lost. If the grant be supposed
*91] from Thomas, who had some estate of inheritance, it must have *been made, before Joseph was born, and when William was under 14 years of age: not for a valuable consideration, certainly; and if a family donation or settlement, some traces of it would appear. Who preserved it for the infant William, or the unborn Joseph? How could it have been preserved, except on record? If the presumption goes on the ground of acquiescence, that acquiescence is of recent commencement. Joseph's supposed remainder first took effect in 1786. The deed must have been in existence at that time, to justify the aquiescence. How happens it, that no vestige of it now remains? A presumtion, which is to make a title, cannot stand under such circumstances. If it were merely to supply some defect arising from circumstances, congenial with the presumption, it would be different. William's claim of life-estate, connected with his declaration, that it would descend to his son Joseph, does not indicate a remainder in the latter; and can only be satisfactorily explained by going up to Governor Dudley's will, which reconciles the conduct and language of all parties.

The creditors cannot be charged with acquiescence; they were strangers to the title. The family believed it to be an estate-tail, and none of them administered. The statute of limitations is not a bar, for it allows an entry fifteen years after the title accured. Possession is adverse only to those

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(*a*) Phillips on Ev. 119, 121; 2 Saund. 175; 1 Taunt. 288; 3 East 290; 16 Id. 583; 2 Barn. & Ald. 791.

(*b*) 1 Inst. 115 *a*; 12 Co. 5; 1 Vent. 257; Cro. Jac. 254; Cowp. 102; 2 Str. 1129; 1 Atk. 19; 2 T. R. 154; 1 Ves. jr. 265.

(*c*) See Jackson *v.* Cary, 16 Johns. 302.

who have a right of entry. The creditors have no right of entry, and the demandants had none, till the sale to them by the administrators. The estate of the creditors was merely potential. Immediately on the sale, the *purchaser was in, as by the intestate. It is well settled by the local decisions, that "no seisin of the heir, of his alienee, or his disseisor, can defeat the naked power of the administrator to sell, on license." 4 Mass. 359. And at common law, where "A. devises lands to be sold by his executors; A. dies seised; the heirs of A. or a disseisor enters, and the heir or disseisor makes a feoffment to B., and B. dies seised, and his heir is in by descent. Yet the executors may enter and sell: for a descent takes away rights of entry; but not titles or powers, as entry for condition broken, for mortmain, &c. Neither does it take away, in case of devisee or patentee of land, where an abater enters, for they have no other remedy. And executors have only a power; and when they sell, the vendee is in by the will, paramount to the descent cast." Jenk. Cent. 184, ca. 75; Bro. Abr. Devise, pl. 36; Litt. 1, 381, 392, 169; Sir W. Jones 352. [*92

The entry of Joseph was consistent with the title of the creditors; and that shall not be taken to be unlawful, which by possibility may be considered as lawful. 10 East 538; Adams on Eject. 50. He had a right to enter, and his possession could not be adverse to the creditors. They might elect to consider him as a trustee for them. 1 Burr. 60, 120. He was heir; he took possession as heir, and his claim is reconcilable with that of the creditors. He took it, charged with the lien. It was a statutable lien, which he could not defeat by his wrong. He was a trustee, and could not bar the trust. The statute of *limitations only runs from the commencement of a clearly adverse possession. 3 Wheat. 224. If the statute acted against those having no present right, the argument we are considering would be conclusive. But though the tenant for life be barred, the remainder-man cannot, because he has no right of action. [*93

But it is said, that Joseph's possession barred his coparceners, represented by William; and as William's estate is barred, the lien which attached to it is gone, of course. The answer is, that the bar may exist for one purpose, and against some parties, and not for every purpose, and against all parties. Joseph still retains his character of heir, and by barring the other heirs, the claim of the creditors is not barred. Being heir, he has kept out his companions, by deforcing them; but being heir, he cannot destroy the statutable lien, by his own wrong, for his own benefit. He has ceased to be liable to his co-heirs, but not to the creditors. He has acquired the whole fee, as against his coparceners, because they had a right of action. He has not defeated the estate of the creditors, because they had no such right. In *Stanford's Case*,(a) it was held, that if the lessee of a future term dies, and the prior term expires, then the lessor enters, and levies a fine, and five years pass, and then B. takes administration to the lessee; he shall have five years afterwards; for no one had title till administration.

*Allusion has been made to the doctrine of the common law, by which the heir is liable for the specialty debts of his ancestor, so long as the lands remain in his hands, but no longer. It should be remembered, however, that the statute has remedied that evil; that the lands are [*94

(a) Cited in Cro. Jac. 61. See also Leon. 119.

now subject to the payment of the bond-debts of the ancestors, into whosoever hands they may come. The maxim of legislative policy is, *caveat emptor*. So, too, in equity, the rule is, the vendee under a power shall see to the application of the money. And under the local law of Massachusetts and Connecticut, the cases before cited show, that the alienation of the land will not discharge the lien. It is true, that the lapse of 20 years will, under certain circumstances, discharge that lien of a judgment. But how does it discharge it? By presuming payment and satisfaction of the judgment; but that is not the case here. The debts cannot be presumed to be satisfied, since the report of the commissioners to the court of probates shows them to be still in existence.

Lastly, the objection as to the sale of the demandants being void, as against the statute to prevent the selling of disputed titles, has been sufficiently answered, by what has been said respecting the authority of administrators and executors to sell lands in the possession of heirs, their alienees or disseisors, or the alienees of the latter. This is a sale by authority of law; nor is it within the words of the statute, which speaks only of "sales by a person disseised or ousted of the possession of lands, by the entry, pos-
*95] session and enjoyment of any other person." *Here was no disseisin or ouster of the creditors of the administrator.

Webster, for the plaintiff in error, in reply, stated, that there were two questions for consideration: 1. Whether William Dudley was shown to have been seised of such estate in the lands, that they became chargeable with his debt, at his decease? 2. Supposing him to have died seised of an estate thus chargeable, are the demandants entitled to recover against the adversary claim of Joseph Dudley and his grantees?

1. It is not proved, that William Dudley had a fee in the lands. He entered into possession, on the death of his father, Thomas, in 1769. But *non constat* what estate the latter held. The will of Governor Dudley may be wholly laid out of the case, inasmuch as neither party attempted, at the trial, to deduce title under that will. William, being a minor, and having brothers and sisters younger than himself, then living, entered into possession of the lands, by his guardian: and there being no devise in fee to him, from his father, in proof, the legal presumption is, that he entered, either as having an estate of his own, in the lands, commencing on his father's death, or as one of the co-heirs of his father. But it is apparent, that he did not enter as a co-heir, because he entered, claiming an exclusive right, took an exclusive possession, and held his brothers and sisters out. He claimed, however, an estate for life alone, and the same proof, which shows the possession, shows also, under what title that possession was held. This is not
*96] inconsistent with *the general doctrine, that a disseisor cannot qualify his own wrong. For it is first to be proved, that he was a disseisor. The presumption ought to be, that he entered rightfully, having such title as he pretended to have. It is clear, that the declarations of a person in possession of land, as to his title, are admissible against him. If he were tenant for life, then, he had a peculiar limited estate, acquired by purchase, and perfectly consistent with Joseph's title in the fee. That he held such a limited estate is shown, by his own conduct and declarations, and by the conduct of his brothers and sisters, who never disturbed his possession. On

the death of William, in 1786, Joseph, being then a minor, and having also brothers and sisters, entered upon the lands, taking the whole rents and profits, holding his brothers and sisters out of possession, and claiming the lands exclusively as his own, and finally conveyed them, as his property, to those under whom the tenant in the present action claimed. He did not, therefore, enter as a co-heir of his father, for he excluded his brothers and sisters. Nor did he enter as tenant for life, for he claimed the whole fee, and disposed of it. So that, from 1769, to the commencement of the present suit, a period of fifty years, these lands have been possessed and enjoyed in a manner strictly conformable to the supposition, that William had an estate for life in the premises, with remainder to his son Joseph in fee. Now, as neither party produced any documentary evidence of title, but both parties rested on the presumption of grants, arising from possession, such *a [*97
grant, and such a grant only, ought to have been presumed, as should conform to the whole length of possession. It ought to have been left to the jury, to presume a grant to William for life, with remainder to Joseph in fee, because the possession proved such a grant, if it proved any whatsoever. Why should the presumption arise from any one part of the possession, rather than from the whole? And especially, how can a grant to William in fee, be presumed, from his possession, when he pretended to have an estate for life only? His declarations were not contrary to his possession, but conformable to it: and both his possession and declarations, and all his conduct, are strictly conformable to a supposition of a remainder in fee in Joseph. The jury ought to have been directed to take all these circumstances into consideration, and to presume such a grant as would support the possession throughout its whole duration.

There is an insurmountable difficulty in any other view of the case. The learned judge below, going upon the supposition, that Thomas Dudley died possessor of an estate in fee, and that William entered as co-heir to that estate, instructed the jury, that they might presume a grant to him, by his brothers and sisters, of their portions of the inheritance. But this presumption could not be made, because, when he entered, claiming to hold them out, and down to the time of his death, in 1786, some of them were within the saving of the statute of limitations: and it is very clear, that, where the statute would apply, any length of time, short of the statute period, can never warrant a presumption; for that would be to presume against *the statute. Cowp. 114. If there were, in fact, any grant from the [*98
brothers and sisters of William, it is more reasonable to suppose such grant made to Joseph. If we admit, then, that the same length of possession by a parcener, would bar one of his coparceners, as would bar others, still, William, having entered in 1769, would not bar any of his co-heirs, by possession, until 1784; but in the latter year, the greater number of his brothers and sisters were still either minors, or within the five years' saving of the statute in favor of minors, and to be allowed after they came of full age. So that there is no ground whatever, on which it is possible to presume a grant to William, from his brothers and sisters.

There is then a double difficulty in supporting the instruction, which was given to the jury. 1st. Because they were told, that they might presume a grant to William in fee, when the whole possession, taken together, was shown to be incompatible with the existence of such a grant. And 2d.

Because they were instructed, they might presume a grant to William, from his brothers and sisters, in a case in which the statute of limitations would apply, if they had not been within its exception, as minors. The jury were further instructed, that William might have claimed an estate for life in the premises, by mistake, and that such mistake ought not to defeat his title by possession. I agree, that if it appeared, that he had an estate in fee, his mistake ought not to prejudice him; but that not appearing, there is no evi-
*99] dence of *any mistake whatever. All the evidence, which shows that he had any title at all, shows such title to be only to an estate for life, and there is no ground to presume any mistake.

2. The remaining general question is, whether, supposing William Dudley to have died possessed of an estate in fee, the demandants are entitled to recover in the present action? Here has existed a possession of 33 years in Joseph, and those claiming under him. The judge instructed the jury, that, as against the creditors of William, supposing him to have died possessed of the land in fee, neither Joseph, nor those claiming under him, had gained title by possession. There can be no doubt, this ought to be considered an adverse possession. Every possession is adverse, where there are circumstances to destroy a presumption, that the defendants is in under the plaintiff's title. *Jackson* v. *Todd*, 2 Caines 183. There is no ground to presume, that Joseph entered into possession, intending to hold subject to the incumbrance of William's debts: especially, as there were strong reasons to suppose, he entered, claiming a title in himself, not derived from his father. It seems clear, that this length of possession would have barred William Dudley himself, if he had lived. If he had conveyed, on the day of his death, it would have barred his grantee; if he had devised the lands, it would have barred the devisee; if he had mortgaged, it would have barred the mortgagee; if
*100] he had mortgaged for the payment of this very debt, the creditor *and mortgagee would have been long since barred, by the adverse possession of Joseph, and those claiming under him. The doctrine contended for on the other side, goes to give more permanency to a general unknown lien, than to a well-known and specific lien. A mortgage deed is registered, and may be known; but where are debts registered? How is a stranger to know anything of them? In the present case, a creditor, twenty-eight years after the death of his debtor, causes letters of administration of his estate to be taken out, proves his debt, or gets it confessed, and attempts to enforce his general lien, as creditor, on the debtor's land, after this lapse of time, against *bonâ fide* purchasers, buying without notice of the claim. To permit this, would be opposed to justice and equity, and to the whole policy of the law. If twenty-eight years will not bar such a claim, what lapse of time will bar it? or is it to be perpetual? The general mischiefs of such a doctrine are obvious. It would disturb titles to a very great extent; no man could buy, with any security. The defendant in this case has, of course, no means of contesting the existence or amount of the debt. That question is settled between other parties; and although, from lapse of time, all debts would be presumed to be paid, yet, if the administrator, who in such cases is generally the agent of the creditor, desires to admit the debt, the tenant of the land cannot dispute it. This renders it absolutely indispensable, for the security and safety of purchasers, that liens of this nature should be enforced promptly, or in reasonable time after the debtor's decease. No system could

answer the common *purposes of justice, which should allow a creditor to come on the land for his debt, at any time, and in whosoever hands he might find it. The courts of Massachusetts have expressed the opinion, that a creditor, by unreasonable neglect and delay, in pursuing his remedy, should be deemed to waive his lien on the land; and have very clearly intimated, that in ascertaining what neglect ought to be considered as unreasonable, they should be governed by the analogy of the statute of limitations. *Gore* v. *Brazer*, 3 Mass. 542; *Wyman* v. *Brigden*, 4 Ibid. 150. They have also decided, that the estate should not be sold, if the creditor's demand be barred by the act limiting actions against administrators and executors; and that if the administrator pay the debt himself, and then lie by, till it would have been barred, he shall not indemnify himself by charging it on the land. *Scott* v. *Hancock*, 13 Mass. 162; *Allen* v. *Strong*, 15 Ibid. 58.

In this case, there is great reason for following the analogy of the statute of limitations. The words of the Connecticut statute are the same as those of the English, except as to the number of years. "No person shall make entry into lands, &c., but within fifteen years next after his right or title shall descend or accrue." This is descriptive of the title under which he enters, and does not regard the time of his own accession to title. In the case of *Beach* v. *Catlin*, 4 Day 284, it would seem to be intimated by one of the *learned judges, that a judgment-creditor, coming into the land by extending his judgment on it, is in under a new title, and that, [*102 as to him, the statute runs only from the time of the execution of the writ. That case is understood to have been relied upon as applicable to this, in the court below. It would be difficult, I think, to support it; for supposing that a judgment can be extended on lands, of which the judgment-debtor is not in possession, but which are in possession of another, holding adversely to him, it would seem, that he could derive no higher right, or better title, than his debtor had, and must hold under him. This would not be the accruing of a new title in the judgment-creditor, but merely a transfer or devolution of an existing title. It is no more a new title, than if he had acquired it by deed of conveyance. Perhaps, it would not be going too far, in the case now before the court, to hold the demandants within the words of the statute, on a liberal construction, as having a right to enter, being creditors, on the death of their debtor, insolvent; for although the right was not perfect, they could make it perfect, whenever they pleased. They could as well have caused letters of administration to be taken out in 1784, as in 1814. But because this may be, I contend, the present case is within the principle of the cases which have been decided, by the analogy of the statute of limitations, and on grounds of public policy. It is well known, that many cases which are not within the letter of the statute, are construed to be within it, by analogy. The statute, for instance, does not apply, in terms, to proceedings in equity; *but they are affected by analogy. 1 Sch. & Lef. 413. Where [*103 a party has an equitable lien, if he be guilty of such negligence as would bar him at law, he shall be barred in equity. In relation to the whole class of incorporeal hereditaments, whether the cases arise in equity, or at law, the bar is furnished, not by the terms of the statute of limitations, but by its analogy. 2 Saund. 175, note *a*; 1 Bos. & Pul. 401; 3 East 294; 4 Day 244. So is the law, also, with regard to an equity of redemption. There

is no right to enter. It is but a mere equitable interest in the land; it is not, therefore, within the terms of the statute; but yet it is barred by the lapse of time prescribed by the statute for other cases. 1 Powell on Mortg. 408. Rent, also, a highly-favored lien, will be presumed to be discharged, by the lapse of the statute period. *Bailey* v. *Jackson*, 16 Johns. 210.

In short, it will be difficult to find a case in which a lien upon land, which may be asserted and enforced at any time, has been established, after the expiration of the time allowed to make title to the land itself. In most of these cases, the ends of justice, and the policy of the law, are attained, by presuming a grant. This presumption is made from principles of public policy, and the necessity of the case. It is for the furtherance of justice, and for the sake of peace: it is founded in this, that whatever has long
*104] existed, and has been acquiesced in by *those who had an interest to disturb it, had, probably, a lawful beginning. It is not to be supposed, that a man would suffer another to obstruct the enjoyment of his right, without complaint, and an effort to obtain redress. The presumption is not to be made out, by weighing minutely the evidence of particular facts and probabilities. This would be proof, not presumption.

Legal presumption is resorted to, where there is no particular proof, and because there can be no particular proof; the question, in such cases, is not to be decided by personal belief or disbelief. The grant presumed is taken to exist as a fact, in contemplation of law. 2 Bos. & Pul. 206; 12 Ves. 261. Whatever is possible, may be presumed, in order to establish long-continued possession. Royal charters, acts of parliament, grants from the state, common receivers, and private conveyances of all descriptions. 12 Ves. 374; 2 Hen. & Munf. 370; 2 T. R. 159. Some of the questions now presented here were fully discussed in the supreme court of Connecticut, in a case in which the same parties were plaintiffs, as in this, and which respected the same title: and I refer particularly to the judgment pronounced in that case by the chief justice. *Sumner* v. *Child*, 2 Conn. 607. The ground is, that by a neglect to assert the claim, and enforce the lien, for a length of time equal to that prescribed by the statute, to bar a title to the land itself,
*105] the creditor shall be presumed to have waived *or surrendered the lien; that this presumption stands on principles of public policy, and furnishes a complete bar to the demandants' recovery.

February 28th, 1822. STORY, Justice, delivered the opinion of the court.—The principal questions which have arisen, and have been argued here, upon the instructions given by the circuit court, and to which alone the court deem it necessary to direct their attention, are, first, whether, upon the facts stated, a legal presumption exists, that William Dudley died seised of an estate of inheritance in the demanded premises? and, if so, secondly, whether an exclusive possession of the demanded premises, by Joseph Dudley and his grantees, after the death of William, under an adversary claim, for thirty years, is a bar to the entry and title of the demandants, under the administration sale?

It is to be considered, that no paper title of any sort is shown in William Dudley or his son Joseph. Their title, whatever it may be, rests upon possession; and the nature and extent of that possession must be judged of, by the acts and circumstances which accompany it, and qualify, explain or con-

trol it. Undoubtedly, if a person be found in possession of land, claiming it as his own, in fee, it is *primâ facie* evidence of his ownership and seisin of the inheritance. But it is not the possession alone, but the possession accompanied with the claim of the fee, that gives this effect, by construction of law, to the acts of the party. Possession, *per se*, evidences *no more than the mere fact of present occupation, by right; for the law will not presume a wrong; and that possession is just as consistent with a present interest, under a lease for years or for life, as in fee. From the very nature of the case, therefore, it must depend upon the collateral circumstances, what is the quality and extent of the interest claimed by the party; and to that extent, and that only, will the presumption of law go in his favor. And the declarations of the party, while in possession, equally with his acts, must be good evidence for this purpose. If he claims only an estate for life, and that is consistent with his possession, the law will not, upon the mere fact of possession, adjudge him to be in under a higher right, or a larger estate. If, indeed, the party be in under title, and by mistake of law, he supposes himself possessed of a less estate in the land than really belongs to him, the law will adjudge him in possession of, and remit him to, his full right and title. For a mistake of law shall not, in such case, prejudice the right of the party, and his possession, therefore, must be held co-extensive with his right. This is the doctrine in Littleton (§ 695), cited at the bar; and better authority could not be given, if, indeed, so obvious a principle of justice required any authority to support it. But there the party establishes a *title*, in point of law, greater than his claim; whereas, in the case now supposed, the party establishes nothing independent of his possession, and that qualified by his own acts and declarations. This is the distinction between *the cases, and accounts at once for the different principles of law applicable to them. [*106 [*107

It has also been argued at the bar, that a person who commits a disseisin cannot qualify his own wrong, but must be considered as a disseisor in fee. This is generally true; but it is a rule introduced for the benefit of the disseisee, for the sake of electing his remedy. For if a man enter into possession, under a supposition of a lawful limited right, as under a lease, which turns out to be void, or as a special occupant, where he is not entitled so to claim, if he be a disseisor at all, it is only at the election of the disseisee. Com. Dig. Seisin, F, 2, and F, 3; 1 Roll. Abr. 662, L, 45; Ibid. 661, L, 45. There is nothing in the law which prevents the disseisee from considering such a person as a mere trespasser, at his election; or which makes such an entry, under mistake for a limited estate, a disseisin in fee absolutely, and, at all events, so that a descent cast would toll the entry of the disseisee. But were it otherwise, in order to apply the doctrine at all, it must appear, that the party found in possession entered without right, and was, in fact, a disseisor; for if his entry were congeable, or his possession lawful, his entry and possession will be considered as limited by his right. For the law will never construe a possession tortious, unless from necessity. On the other hand, it will consider every possession lawful, the commencement and continuance of which, is not proved to be wrongful. And this, upon the plain principle, that every man shall be presumed to act in obedience to his duty, *until the contrary appears. When, therefore, a naked possession is in proof, unaccompanied by evidence as to its origin, it will be [*108

deemed lawful, and co-extensive with the right set up by the party. If the party claim only a limited estate, and not a fee, the law will not, contrary to his intentions, enlarge it to a fee. And it is only when the party is proved to be in by disseisin, that the law will construe it a disseisin of the fee, and abridge the party of his right, to qualify his wrong.

Now, in the case at bar, it is not proved, of what estate Thomas Dudley died seised in the premises. His possession does not appear to have been accompanied with any claim of right to the inheritance. It might have been an estate for life only, and as such, have had a lawful commencement. If it were intended to be argued, that he had a fee in the premises, it should have been established by competent proof, that he was in possession, claiming a fee by right, or by wrong. No such fact appears. The only fact, leading even to a slight presumption of that nature, is, that his widow took one-third of the rents and profits, during her life. But whether this was under a claim of dower, or any other right, is not proved. The circumstance is equivocal in its character, and is unexplained ; and the inference to be deduced from it, of a descendible estate in her husband, is rebutted by the fact, that immediately on his death, his son William entered into the premises, claiming a life-estate, and held them during his life, as his own, without any claim on the part of the co-heirs of his father, to share in the estate. There is then nothing in the case, from which it can be judicially
*109] *inferred, that Thomas was ever seised of an estate of inheritance in the premises, and, of course, none, of a descent from him to his heirs.

Then, as to the estate of his son William in the premises. It is argued, that William had an estate in fee, by right or by wrong. That if his entry, either in person, or by his guardian, was without right, it was a disseisin, and invested him with a wrongful estate in fee. If, with right, then it must have been as a co-heir of his father, and a grant ought to be presumed from the other co-heirs to him, releasing their title, and confirming his.

The doctrine, as to presumptions of grants, has been gone into largely, on the argument, and the general correctness of their reasoning is not denied. There is no difference in the doctrine, whether the grant relate to corporeal or incorporeal hereditaments. A grant of land may as well be presumed, as a grant of a fishery, or of common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration, that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession. They may, therefore, be encountered and rebutted by contrary presumptions ; and can never fairly arise, where all the circumstances are perfectly consistent with
*110] the non-existence of a grant : **à fortiori*, they cannot arise, where the claim is of such a nature as is at variance with the supposition of a grant. In general, it is the policy of courts of law, to limit the presumption of grants to periods analogous to those of the statute of limitations, in cases where the statute does not apply. But where the statute applies, it constitutes, ordinarily, a sufficient title or defence, independently of any presumption of a grant, and therefore, it is not generally resorted to. But if the

circumstances of the case justify it, a presumption of a grant may as well be made in the one case as in the other; and where the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant, within a period short of the statute of limitations.(*a*)

If we apply the doctrines here asserted to the case at bar, we may ask, in the first place, what ground there is to presume any grant of the premises to William Dudley, and if any, what was the quantity or quality of his estate? It has been already stated, that there is no sufficient proof, that his father died seised of a descendible estate in the premises; and if so, the entry of William by his guardian, or in person, cannot be deemed to have been under color of title as heir; and in point of fact, he never asserted any such title. For the same reason, no estate can be presumed to have descended to his co-heirs; and if so, the very foundation fails, upon which the presumption of a grant from them to William can be built; for if they had no title, and asserted no title, there is no reason *to presume that he or they sought to make or receive an inoperative conveyance. [*111 There is no pretence of any presumption of a grant in fee, from any other person to William; and as there is no evidence of any connection with the will of Governor Dudley, or of any claim of title under it, by William, there does not seem any room to presume, that he was in under that will, upon mistaken constructions of this title derived from it. There is this further difficulty in presuming a grant from the co-heirs to William, that at the time of his own entry, as well as that of his guardian, all of them were under age, and incapable of making a valid conveyance. During this period, therefore, no such conveyance can be presumed: and yet William, during all this period, claimed an exclusive right, and had an exclusive possession of the whole, to his own use; and his subsequent possession was but a continuation of the same claim, without any interference on the part of the co-heirs. In point of fact, the youngest brother arrived at age, about the time of William's death; and as to two others of the co-heirs, the statute of limitations of Connecticut, as to rights of entry, would not then run against them. The presumption of a grant from them is, therefore, in this view also, affected with an intrinsic infirmity.

In addition to all this, William never claimed any estate in fee in the premises. His declaration uniformly was, that he had a life-estate only, and that upon his death, they would descend to his son Joseph. Of the competency of this evidence to explain the nature of his possession and title, no doubt can reasonably be entertained. His title being evidenced *only by possession, it must be limited in its extent to the claim which he asserted. If, indeed, it had appeared, that he was in under a writ- [*112 ten title, which gave him a larger estate, his mistake of the law could not prejudice him; but his seisin would be co-extensive with, and a remitter to that title. But there is no evidence of any written title, or of any mistake of law in the construction of it. For aught that appears, William's estate was exactly what he claimed, a life-estate only, and the inheritance belonged to his son Joseph. It is material also to observe, that the acts of the parties, and the possession of the estates, during the period of nearly fifty years, are in conformity with this supposition, and at war with any other. Why

(*a*) See Phillips on Evidence, ch. 7, § 2, p. 126; Foley *v.* Wilson, 11 East 56.

should William's brothers and sisters have acquiesced in his exclusive possession during his whole life, if the inheritance descended from their father? Why should Joseph's brothers and sisters have acquiesced in his exclusive possession, during a period of twenty-five years, whithout claim, if their father William was seised of the inheritance? Why should the guardians of William and Joseph have successively entered into the premises, claiming the whole, in right of their respective wards, if their title was not deemed clearly and indisputably an exclusive title, or if they were in by descent, under the title of their fathers? If, indeed, a presumption of a grant is to be made, it should be of a grant conforming to the declarations and acts of possession of the parties during the whole period: and if any grant is to be presumed from the facts of this case, it is a grant of a particular estate to William,
*113] with a remainder of the *inheritance to Joseph, or, in the most favorable view, of an estate-tail to William, upon whose death, the estate would descend to Joseph, as his eldest son, *per formam doni*. If Thomas, the grandfather, were proved to have been the owner of the fee, there is nothing in the other circumstances, which forbids the presumtion of such a grant from him; but as the cause now stands, it may as well have been derived from some other ancestor, or from a stranger. It is, therefore, the opinion of this court, that the circuit court erred in directing the jury, that William, by mistaken constructions of the will of Governor Dudley, might have claimed an estate for life in the premises, and that such mistake would not operate to defeat his title by possession—for there was no evidence that William ever claimed under that will; and also erred, in instructing the jury, that they were authorized to presume a grant by the children of Thomas to William. The compromise entered into by Joseph with two of his brothers is not thought to change the posture of the case, because that compromise was made with an explicit denial of their right; and is, therefore, to be considered as an agreement for a family peace.

The other question in the cause is of great importance, and if decided one way will probably put an end to further controversy. It has been very fully and ably argued at the bar, and does not, form anything before us, appear to have received a final adjudication in the state courts of Connecticut. It must, therefore, be examined and decided upon principle. By the
*114] laws of Connecticut (as has been already *stated), the real estate of an intestate is liable to be sold for the payment of debts, where there is a deficiency of personal estate. The administrator, in virtue of his general authority, has no right to meddle with the real estate; but derives this special authority from the order of the court of probates, which possesses jurisdiction to direct a sale, upon a proper application, and proof of the deficiency of the personal assets. This power or trust, call it which you please, when granted or ordered, is not understood to convey any estate to the administrator, in the lands of the intesate. He derives simply an authority to sell, from the court, and upon the sale, makes a conveyance to the purchaser; and the estate passes to the purchaser, upon his entry into the land, by operation of law, so that he is in under the estate of the intestate. So long as an administration legally subsists, or may be legally granted, this power over the land may be exercised, if the land remain in possession of the heirs; and it is not defeated, simply by an alienation or disseisin of the heirs. *Drinkwater* v. *Drinkwater*,

4 Mass. 354, 359; Jenk. Cent. 184, pl. 85. By analogy also to other cases of a like nature, at the common law, as, for instance, a power given by a will to executors to sell an estate for payment of debts, it may be true, that a descent cast will not toll an entry, for there is a distinction between a right of entry, and a mere power. Litt. § 169; Jenk. Cent. 184, pl. 85; Bro. Abr. Devise, pl. 36; Litt. § 391; Co. Litt. 240. The former is, in general, barred by a descent cast; but the *latter is not. On this, however, it is not necessary to express any opinion. [*115

It does not appear, that at the time of granting the administration on this estate, any statutable limitation of the period within which an original administration might be granted, existed in Connecticut, though a limitation generally to seven years after the death of the party has been since introduced.(*a*) And the present administration, though granted after the lapse of twenty-eight years from the date of William Dudley, must be considered as valid, it having been allowed by a court of competent and exclusive jurisdiction, whose decision we are not at liberty to review.

Still, however, the question recurs, whether a power of sale, thus derived under the law, and not from the act of the party, is to be considered as a perpetual lien on the land of which the intestate died seised, and capable of being called into life, at any distance of time, and under any circumstances, whatever may be the mesne conveyances, disseisins or descents, which may have taken place. If it be of such a nature, great public mischief must inevitably occur, and many innocent purchasers, fortified as their possession may be, by length of time, against all interests in the land, may yet be the victims of a secret lien, or power, which could not be foreseen or guarded against, and which may spring upon their titles, when the original parties to the transactions are *buried in the grave. The principles of justice would seem to require, that the law should administer its benefits to those who are vigilant in exercising their rights, and not to those who sleep over them. It is always in the power of creditors, to compel an administration to be taken upon an estate, by application to a count of probates; and if the next of kin decline the office, it is competent for the court to appoint any other suitable person. So that, if creditors do not choose to act, the loss or injury ought rather to fall on them, than on those who are meritorious purchasers, without the means of knowledge to guard them against mistake. A power to sell the estate for payment of debts, being created by the law, ought not to be so construed as to work mischiefs against the intent of the law. It ought to be exercised, within a reasonable time after the death of the intestate; and gross neglect or delay on the part of the creditors, for an unreasonable time, ought to be held to be a waiver or extinguishment of it. This appears to be the doctrine in Massachusetts (*Gore* v. *Brazier*, 3 Mass. 523, 542; *Wyman* v. *Brigden*, 4 Ibid. 150, 155), whose laws on this subject are like those of Connecticut, and is so just in itself, that unless prevented by authority, we should not hesitate to adopt it. There is no decision in Connecticut, which, to our knowledge, controverts this doctrine; and it stands supported by the very learned opinion of her late Chief Justice in the case of *Sumner* v. *Childs*, 2 Conn. 607. There *are many cases where indisputable liens on land may be lost by lapse of time, and transmutation of the property. And even the rights of mortgagors [*116 [*117

(*a*) Statutes of Connecticut, Revision of 1831, tit. 32, Estates, 33.

to redeem, and of mortgagees to enforce payment out of the land, may be lost by presumptions, or *laches* arising from time.

What then is to be deemed a reasonable time for the exercise of this power to sell? It has been argued, that the case of such a power is within the purview of the statute of limitations of Connecticut; and if not, that the reasonable time for its exercise is to be fixed by analogy to that statute. The statute provides, that no person shall, at any time thereafter, make entry into any lands or tenements, but within fifteen years next after his right or title shall first descend or accrue to the same, with a saving in favor of infants, *femes covert*, &c., of five years after the removal of the disability.(*a*) The language of the statute would seem to apply merely to rights of entry; but it has been the uniform construction of the courts of the state, that it also takes away all rights of action, and therefore, bars all real actions after that period.(*b*) Now, the argument at the bar is, that the words "right or title first accrued," refer solely to the commencement of the original title under which the party claims, and not to his own accession to
*118] the title. But it appears to us, that this *construction of the statute cannot be maintained. The title against which the statute runs, is a present right of entry; and it is admitted, that when once it so begins to run, no devolution of the same title, and no supervening disabililty, will stop its operation. When, therefore, it speaks of a right or title first accrued, it means a new right or title first accruing to the party, and not the transfer of an old title. Against titles *in esse* at the time of the adverse possession, the statute was intended to run; but titles which should afterwards come *in esse*, were not within the provision of the statute, because they could not be enforced within the period, and it would be unjust to bar future rights, in respect to which there could, by no possibility, be an imputation of *laches*. And such has been the uniform construction of all the statutes which contain a clause of this nature. *Stanford's Case*, cited at the bar, and referred to in Cro. Jac. 61, is directly in point; and it would be easy to multiply instances, under the statute of limitations, and the statute of fines, to the same effect.(*c*) If, indeed, the construction were otherwise, it would not help the present case, for the right of entry of the purchaser did not accrue, until after the conveyance to him, and if he should then be deemed in under the estate of the intestate, and in privity of title, it would be a new right, growing out of the exercise of a power conferred by law, and no more bar-
*119] red than a right of entry upon an extent, after a fine levied, *and five years past, where the judgment was obtained before the fine.(*d*)

But we do think it is a case clearly within the same equity as those which are governed by the statute of limitations; and that by analogy to the cases where a limitation has been applied to other rights and equities not within the statute, the reasonable time within which the power should be exercised, ought to be limited to the same period which regulates rights of entry. It would be strange, indeed, that when the estate of the heirs in the land,

(*a*) See the statute, in Revised Laws of Conn. tit. 59, § 1, p. 309; 1 Swift's System 335.

(*b*) 1 Swift's System 335, 336; Sumner *v.* Child, 2 Conn. 607, 615.

(*c*) Bac. Abr. Limitations, B; Ibid., Fines and Recoveries, F; Comyn's Dig. Fine, K, 2.

(*d*) Bac. Abr. Fines, &c., F, citing 1 Mod. 217.

which is but a continuation of the estate of the intestate, is extinguished by the statute, the estate should still be considered as a subsisting estate of the intestate himself. That the administrator should possess a power over the property, which the intestate could not possess, if living; and that a lien created by operation of law, should have a more permanent duration of efficacy, than if created by the express act of the party. The convenience of mankind, the public policy of protecting innocent purchasers, and the repose of titles honestly acquired, require some limitation upon powers of this nature, and we know of none more just and equitable than this, that when the right of entry to the land is gone, or the estate is gone, by an adverse possession from those who held as heirs or devisees, the whole interest in the land, the power of the administrator to make sale of the land for payment of debts, is gone also. In this opinion, we do but follow the doctrine which has been distinctly intimated *both in the Massachusetts and Connecticut courts. *Gore* v. *Brazier*, 3 Mass. 523, 542; [*120
Wyman v. *Brigden*, 4 Ibid. 150, 155; *Sumner* v. *Child*, 2 Conn. 607.

The remaining consideration under this head is, whether the possession of Joseph Dudley can be considered as an adverse possession, so as to toll the right of entry of the heirs, and, consequently, extinguish, by the lapse of time, their right of action for the land, as well as extinguish, by analogy of principle, the power of the administrator to sell the land. It is said, that the entry of Joseph into the premises is consistent with the potential right of the creditors; that he had a right to enter as a co-heir of his father, and if he entered as co-heir, his possession was not adverse, but was a possession for the other heirs and creditors, and he could not afterwards hold adversely, or change the nature of his possession; for the creditors might always elect to consider him their trustee. There is no doubt, that in general, the entry of one heir will inure to the benefit of all, and that if the entry is made as heir, and without claim of an exclusive title, it will be deemed an entry not adverse to, but in consonance with, the rights of the other heirs. But it is as clear, that one heir may disseise his co-heirs, and hold an adverse possession against them, as well as a stranger. And notwithstanding an entry as heir, the party may, afterwards, by disseisin of his co-heirs, acquire an exclusive possession upon which the *statute will run. An ouster or [*121
disseisin, is not, indeed, to be presumed from the mere fact of sole possession; but it may be proved by such possession, accompanied with a notorious claim of an exclusive right. And if such exclusive possession will run against the heirs, it will, by parity of reason, run against the creditors. For the heirs, *qua* heirs, are, in no accurate sense, in the estate, as trustees of the creditors. They hold in their own right, by descent from their ancestor, and take the profits to their own use, during their possession; and the most that can be said is, that they hold consistently with the right of the creditors. The creditors, in short, have but a lien on the land, which may be enforced through the instrumentality of the administrator, acting under the order of the court of probates.

But in order to apply the argument itself, it is necessary to prove, that the ancestor had an estate of inheritance, and that the party entered as heir. Now, in the case at bar, all the circumstances point the other way. There is not, as has been already intimated, any proof, that William Dudley died seised of an inheritance in the land; and there is direct proof, that he

asserted the inheritance to be in his son Joseph; and the entry of the guardian of Joseph, as well as his own entry, after his arrival of age, was under an exclusive claim to the whole, not by descent, but by title distinct or paramount. There is certainly no incapacity in an heir to claim an estate by title distinct or paramount to that of his ancestor; and if his possession be exclusive under such claim, and he hold all other persons out, until
*122] the statute period *has run, he is entitled to the full benefit and protection of the bar. It appears to us, therefore, that the jury ought to have been instructed, that if they were satisfied, that Joseph's possession was adverse to that of the other heirs, and under a claim of title, distinct from, or paramount to that of his father, during his 25 years of exclusive possession, the entry of the purchaser, under the administrator's sale, was not congeable, and that the power of the creditor over the estate was extinguished. There was, therefore, error in the opinion of the court to the jury, that as against the creditors of William Dudley, neither Joseph nor the tenant had gained any title to the land in controversy by possession.

For these reasons, the judgments of the circuit court must be reversed, and the cause remanded, with directions to the court to order a *venire facias de novo*.

Judgment reversed, and *venire de novo* awarded.

Bouldin and Wife *v.* Massie's Heirs and others.

Land-law of Virginia.—Loss of papers.

The patent issued on a military warrant, under the law of Virginia, is *primâ facie* evidence that every pre-requisite of the law was complied with.[1]

The loss of a paper must be established, before its contents can be proved; but where the patent issues upon an assignment of the warrant, and the legal title is thus consummated, the assign-
*123] ment itself being no *longer a paper essential to that title, the same degree of proof of its existence cannot be required, as if it were relied on as composing part of the title.[2]

Where there is a strong degree of probability, that the assignment has been lost or destroyed, through accident, its non-production by the party claiming under it, ought not to operate against him, so as to defeat his legal title.

The original law of Virginia, which authorizes the assignment of warrants, did not require, that it should be made by indorsement, or by an instrument annexed to the warrant.

Appeal from the Circuit Court of Ohio. This suit was brought by the appellants, who were plaintiffs in circuit court, to obtain a conveyance for twelve-nineteenths of a tract of land, lying in the state of Ohio, containing 1900 acres, for which a patent was issued, in December 1814, to the defendants, the heirs of Nathaniel Massie. The other defendants were purchasers from him.

The survey on which the patent was founded was made, as to 1200 acres, part thereof, on a military land-warrant No. 2675, granted by the Commonwealth of Virginia, to Robert Jouitte, 2666⅔ acres of land, of which 2051⅔ acres were alleged to have been assigned to Nathaniel Massie by Robert Jouitte. The plaintiff Alice claimed as heir of Robert Jouitte, and denied this assignment; on the existence and validity of which the whole

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[1] Stringer *v.* Young, 3 Pet. 320.

[2] S. P. American Life Ins. Co. *v.* Rosenagle, 77 Penn. St. 507.

cause depended. The assignment itself could not be produced, and was supposed by the defendants to have been consumed, with the other papers of the war-office, in November 1800. Under these circumstances, the defendants insisted that the patent was *primâ facie* evidence that every prerequisite of the law was complied with; and that *satisfactory and [*124 legal proof of the assignment was made; and they relied on the testimony in the cause, as supporting, instead of weakening, this presumption. The plaintiffs contended, that the papers filed in the land office did not justify the emanation of the patent; and that the absence of the assignment, and of any proof of its destruction, justified their requiring from the defendants the most complete proof of its existence and loss.

The papers on which the patent issued, were a copy of the original warrant, a copy of the plat and certificate of survey, made in the name of N. Massie, as assignee, on the 24th of December 1796, and recorded in the surveyor's office on the 9th of June 1797, to which were annexed the following certificate and affidavit:

"I do certify, that the within survey was made on 1200 acres, part of warrant No. 2675 (Jouitte's warrant); 403 acres, part of warrant No. 3398; and 277 acres, part of warrant No. 2642. The warrants No. 2675 and 3398 were taken out of this office, the 13th day of June 1797, with the original survey, of which this is a duplicate; warrant No. 4675 was taken out the 14th day of March 1799; and that the said warrants had not been satisfied prior to the date on which they were taken out of this office, and that so much of each warrant as is contained in this survey, at least, was assigned to said Massie. Given under my hand and seal of office, this 20th day of April 1802. RICHARD ANDERSON. (L. S.)

*State of Ohio, Ross county, ss:

Personally appeared before me, Joseph Taylor, a justice of peace [*125 in and for the county aforesaid, Nathaniel Massie, who made oath, that the original survey of which this is a duplicate, was lodged in the office of the secretary of war, for the purpose of obtaining a patent, prior to the 8th day of November 1800, and that the same has been lost or destroyed. Given under my hand and seal, this 16th day of January 1806.

JOSEPH TAYLOR. (L. S.)

The testimony of Anderson was taken in the cause, for the purpose of proving the assignment from Jouitte to Massie, and the substance of his evidence will be found in the opinion of the court. In confirmation of his testimony, the defendants also relied on a grant made to Massie, on the 2d of January 1802, on a survey made the 1st of April 1797, for Massie, as assignee of part of the same warrant. The entry was made on the 27th of January 1795, and the patent contained a recital of the assignment of 205⅔ acres, part of Jouitte's warrant.

A decree, dismissing the plaintiff's bill, was entered by the circuit court, *pro formâ*, by consent, and the cause was brought by appeal to this court.

February 21st. *Hammond*, for the appellants, argued, that the defendants stood in the same situation that Massie was, at the time he made the

sales, and it was incumbent upon them, to prove the assignment of the war-
*126] rant to Massie. *In every case, the person claiming as assignee, must establish his right by proof. If the indorsee of a promissory note, bill of exchange, or other writing, made assignable at law, sue in his own name upon such note, bill or writing, he cannot recover, without making proof of the assignment. The person who claims to be the assignee of a warrant, or plat and certificate of survey, until after a patent is issued to him, cannot assert in his own name, against third persons, a right arising under such warrant or survey, without proving his purchase. *Kerr* v. *Watts*, 6 Wheat. 550. If this be the law, where the original owner asserts no claim, and is no party before the court, there is much stronger reason that it should be so, when such original owner is pursuing his right in the hands of a third person, whose claim he contests. It has, indeed, been decided, that when a grant once issues, such grant is *primâ facie* evidence that every intermediate act necessary to authorize the emanation of the grant has been regularly transacted. *Polk's Lessee* v. *Wendell*, 9 Cranch 87; *Ross* v. *Reed*, 1 Wheat. 482, 487; 6 Ibid. 293. But that was at law, and the court, in the opinion delivered, plainly intimate, that the fact, whether the incipient right had actually been assigned, might be contested in equity. Upon whom the burden of proof should rest, in such a case, is not noticed.

But the Kentucky court of appeals has decided, that where there had been no actual assignment of the warrant, the owner might recover the lands in
*127] the hands of the pretended assignee, after the grant, or in the hands of the purchaser with notice. 1 Hardin 37; 4 Bibb 447. And they seem to have required the claimant to adduce proof, that no assignment ever was made. In these cases, the assignment was actually indorsed upon the warrant, which it is conceived is a material circumstance.

Warrants for land, and plats and certificates of survey, were not assignable, upon the principles of the common law. They were subject to contract, and might be sold and purchased; but without the aid of statutory provisions, the purchaser could not have acquired an absolute legal interest in them. The first statute of Virginia that provided for granting land-warrants, and executing surveys, enacted that "all persons, as well foreigners as others, shall have a right to assign and transfer warrants and certificates of survey for lands." To assign or transfer, that is, to vest in the purchaser an absolute legal title to the warrant, or plat and certificate of survey, can only be done by indorsing such assignment or transfer upon the warrant or plat itself, or by making it in writing, and attaching such writing to the document transferred; so that the subject assigned or transferred, and the act of assignment and transfer shall be inseparable. The owner of a land-warrant may sell it, either by parol or written contract. Such sale would vest in the purchaser an equitable right to the warrant; a right
*128] which a court of law would respect, and a court of equit enforce; *but it would not constitute him the legal owner. It would not operate as an absolute assignment or transfer of the legal ownership. So, the obligee of a bond, made assignable by law, may dispose of it by contract; but if no assignment be indorsed upon it, or absolutely attached to and connected with it, the purchaser, it is conceived, could not sustain an action upon it, in his own name, as assignee. He would be compelled to sue in the name of the original obligee, and upon establishing his purchase, a court of law would so

far respect it, as to preclude the nominal plaintiff from interfering to control the suit.

This position is sustained by the subsequent legislation of Virginia on this subject. Provision was made by law, for returning warrants in part located, or otherwise, and receiving new warrants in exchange. The propriety of issuing new warrants to assignees, where the name of the original owner was merely indorsed on an assignment, executed without the attestation of witnesses, was doubted. To provide for this case, the act of the Virginia assembly, of February 1809, was enacted. It recites the provision authorizing the assignment of warrants in general terms, and that there are "many warrants outstanding, which have been transferred, sometimes by the mere indorsement of the names of the holder, and at others, by assignment, without attestation, and doubts have arisen whether, in such cases, it would be proper for the register of the land-office to grant to the present holders new warrants, in exchange for the warrants so transferred and assigned. It *then directs, that in such cases, new warrants may be granted in exchange, provided always, that no such exchange shall [*129 be made, unless the applicant therefor shall have previously annexed to such warrant his own affidavit, stating that so far as he knows or believes, the indorsements or assignments appearing on such warrant have been made fairly and *bonâ fide*, and that he, or those in whose name or names such exchange is sought, is or are the true and rightful proprietor or proprietors of such warrant." The act provides, that this affidavit, with the original warrant, shall be preserved, and that the right of the original owner, or other, to the original warrant, shall not be affected by this proceeding. And it directs, that thereafter, warrants shall only be assigned by written assignment on the back, attested by two or more witnesses. It is insisted, that the framers of this statute recognised no mode of assignment, to vest a legal interest in the warrant, that existed distinct and separate from the warrant itself. They contemplated that, in every case, the warrant should carry with it the evidence of ownership. And because in all transactions with third persons, claiming to be owners, the evidence might be insufficient or fabricated, the law required the preservation of the warrant itself, that with it this evidence might be preserved. Lest, by exchanging the warrant, this evidence should be lost, and the relative rights of the parties changed, or otherwise affected, the provisions just recited were enacted.

In this case, the warrant never was so assigned or transferred, as to vest a legal interest in Massie, *and it certainly cannot be incumbent upon [*130 the complainants, to disprove that which does not exist. Had an assignment of any kind, subscribed with Jouitte's name, been indorsed upon the warrant, there would be something to which the complainants could direct their proof. They might attempt to negative the fact, that Jouitte had actually subscribed the paper; and the actual existence of such indorsement might be considered, at least, after the grant issued, as *primâ facie* evidence that it was genuine. But this presumption cannot be raised, without some foundation for it to rest upon.

Where the assignment is made upon a separate paper, as is claimed here, the defendants must establish the existence of this assignment, before it can avail them anything. When the existence of such separate assignment is established, its genuineness and operative effect are to be examined. The

deposition of Anderson does not sufficiently prove that any such assignment ever existed. He evidently testifies, not from any distinct recollection of the fact, but from a knowledge of what ought to have existed, to justify him in allowing entries in Massie's name, as assignee. His testimony is as to the general course of business in the office, from which he infers that an assignment must have existed. And when the defendants put the question direct, as to the character of the assignment, whether indorsed upon the warrant, or made on a separate paper, his answer is not positive as to the fact; but is clearly an inference from other facts. "On a separate piece of
*131] paper, I presume, as the entries *in the first instance were in Jouitte's name." This presumption, deduced by the witness from the fact that the warrant was deposited in the office by Jouitte, unassigned, and various locations made upon it in the owner's name, is but slender evidence upon which to establish any fact. The foundation on which the witness makes this presumption is before the court. Can it be said, that the inference is of that irresistible character that amounts to proof? If the witness were present, his testimony could not be received as competent to establish the fact that such paper existed, unless he were able to state, and did state, that he had such knowledge of Jouitte's handwriting as, upon well-settled principles, would enable him to testify to it. Nothing is shown in his deposition of his knowledge of Jouitte's handwriting. For this reason alone, his testimony is inoperative.

Were the existence of the paper clearly established, its contents and effect could not be proved, without first proving its loss. The testimony shows, that this assignment was delivered to Massie. It is thus traced to his possession. His own affidavit, made with a view to obtaining the grant for the lands in question, is wholly silent as to its loss or destruction, and there is no evidence what has become of it. In such case, it is not competent for the defendants to prove its contents.

The testimony of Anderson is liable to some exceptions. He is positive that he never made but one entry, without an assignment of the warrant; that Jouitte's first entries were made by Massie; that the assignment was
*132] taken out of the office with the plat *and certificate, and that the assignment was first produced by Massie. He is, with respect to other facts equally material, unable to recollect. He is not certain, that the assignment was on a separate paper; does not recollect, when it was produced; its date, or whether attested by subscribing witnesses; nor is he positive whether it was executed by Jouitte personally, or by an agent. It is manifest, from all this, that he does not state facts from a distinct recollection of circumstances and transactions; but from inference only. His official papers show, that certain facts ought to have existed, and hence he supposes that they existed, and so testifies.

The certificate of Anderson, on the 10th of May 1801, that the warrant had been taken out of the office, by mistake, on the 14th of June 1797, is incorrect in point of fact; because, both his subsequent certificate of the 20th of April 1802, and his deposition, show, that it was delivered to Massie, with the original plat and certificate of survey, to be returned to the war-office, that a patent might issue. As the warrant was wholly appropriated, the last survey upon it being made upon the first of April preceding, it was regular and proper, if not absolutely necessary, to return the warrant to the

war-office. The law required the warrant to be returned to the office, where the patent issued, or a certificate to be adduced from the surveyor, that a part remained unappropriated in the office, before a grant could issue. As the warrant was wholly appropriated, this certificate could not be made; there was, of consequence, a propriety in returning the original warrant. There *could be no mistake about it; and this certificate was found of great practical convenience to Massie, who was relieved by it from [*133 the necessity of returning the warrant, without an assignment, or the warrant, with the assignment, to be preserved as evidence against him.

The act of congress of March 3d, 1803, c. 343, which provided what evidence should supply the place of a warrant or certificate lost or destroyed, directed, that a certified copy of the warrant, or plat and certificate of survey, with satisfactory proof, by affidavit or otherwise, of the loss or destruction of the warrant, or plat and certificate of survey, should be sufficient. The warrant never was in fact returned. No evidence was ever produced of its loss. Massie, in his affidavit made in 1806, in conformity with the provisions of this law, is silent as to the loss of the warrant, and confines himself to the plat and certificate of survey. It is by means of this certificate, that the warrant was taken out of the office by mistake, that the omission to return the warrant is supplied; although a careful examination of the whole documents would have shown that this certificate did by no means account for keeping the warrant back. It is thus demonstrated from the documents themselves, that the grant issued to Massie's heirs was upon incompetent and insufficient evidence.

By depositing his warrant with the surveyor, and procuring it to be located, Jouitte did all he could to secure his own rights, and to prevent imposition upon others. The warrant no longer existed a mere floating *evidence of a right to land, which circulated through the country, [*134 and upon which any person might forge an assignment, and thereby deceive and prejudice others. After the location, the warrant was no longer assignable, until withdrawn; and it was by the unauthorized act of Massie, in withdrawing the warrant, that it was again in a condition to be assigned. The owner of a warrant, who has thus acted, stands in a situation different from one who has not thus been careful. From him and his representatives, the same degree of proof ought not to be required of a forged or unauthorized assignment, as might properly be exacted from one whose warrant, by his own act, or his own neglect, was thrown afloat into the market. Indeed, it is deemed doubtful, whether, after the owner had entered the warrant, and thus put an end to its assignable character, that character could again be restored, by the unauthorized act of another.

Upon the whole, we insist, that the evidence does not make for the defendants even a *primâ facie* case of assignment; that when its competency and effect are examined by settled principles of law, it amounts to nothing: of consequence, there is nothing for the plaintiffs to disprove. The right of their ancestor is vested in them, and they must recover.

Doddridge and *Scott*, contrà, stated, that whether the burden of proof of the assignment be cast on the respondents, who claim under it, or the appellants, who deny it, was a question of vast importance to those who hold lands anywhere under the laws of Virginia. The cases cited from the Ken-

tucky *reports furnish precedents in favor of the respondents, especially, as the proofs of the assignments claimed, were yet in being, which is not the case here.

It is insisted, on the other side, that the evidence of the contract of assignment ought to be written on the warrant, or on some paper attached to it; inseparably attached to it, to use the language of the counsel. A warrant for land, under the Virginia system, may strictly be termed a *chose in action.* It is the mere evidence of executory contract between the state a citizen. Bounties in land had been promised to the army, by various laws, as a reward for military services. Where the services were performed, the relation between the parties was that of debtor and creditor. It is immaterial, whether the debt thus created was payable in money, or in land, at a particular place, and at a future time. When, by the act of 1779, warrants for the bounties were created, like all other evidences or debts due from the state, they would have been subject to the policy of the common law, and not assignable, but for the policy of that act. The statute made warrants and the certificates of survey assignable; but the words "shall have right to assign and transfer warrants and certificates of survey for lands," do not import any particular mode of assignment. They give to the document its assignable quality, leaving the parties to choose their own mode of evidencing the contract. Whether they adopt the ancient policy of the common law, requiring all assignments to be made by deed of indenture, or the more
*136] easy mode of indorsement or *delivery, seems to be quite immaterial. If proof of an assignment on paper, either attached to the writing or not, were now required, the rights of assignees would, at this time, fail, for millions of acres: for, if positive proof of an assignment must be made, in all cases, by those claiming under it, the mere ink and paper importing the assignment would not be sufficient. Proof of the execution would be required: in a great majority of cases, it could not be produced. These papers passed from hand to hand like coin; they were owned by all classes of people; as well by the poor and illiterate, as by men of business.

Warrants, in many cases, were left with the principal surveyors, for safe-keeping, and a letter addressed to him from the owner, to let another have so many acres of warrant, was received as sufficient authority to make an entry for the assignee. These letters could be produced in but few cases; but if required at all, the mere production would not be evidence. Proof of the handwriting would be called for, on the appellant's principles. As to the cases cited from the Kentucky reports: in one of these, an assignment was indorsed; in the other, a breach of trust existed. As against the patentee, or those claiming under him, with notice, proof was admitted, in the one case, that the assignment was a forgery; in the other, that the confidence of the owner was abused. But this proof was given by the owner of the warrant, not by the claimants under the patent. In these cases, the nature of the claim could yet be traced; in ours, it cannot.

*137] From these cases, and the reason of the thing, it is *evident, that the patent is *primâ facie* evidence of all that was necessary to its emanation. Indeed, it seems to be admitted on the other side, that it has been so decided. But this admission is qualified. It is insisted, that where the patent-office contains the warrant, assignment and survey, all in regular order, there, claimants of the warrant will be held to disprove the deriva-

tive claim. If this be the rule, the patent is but *primâ facie* evidence of its own existence only, and of nothing necessary to its existence. This notion is fanciful, but not sound. The patent is *primâ facie* evidence of an assignment, or it is not. If it is *primâ facie* evidence, the appellants must wholly fail. We have a patent to Massie's heirs, and which they claim legally, and the other defendants, at least, equitably (for we are in a court of equity), and the appellants have no proof.

The act of 1809, referred to by the appellants' counsel, gives him no aid. It recites, that assignments were sometimes made in a loose manner, and that there was a consequent hazard in granting exchange warrants; and its provisions are prospective, and all of them are merely directory to the register.

But if the claimants are held to the proof of an assignment in fact, they have made that proof. Anderson states, that he came into office in July 1784, the commencement of the official duties in Kentucky; has ever since held the office. At the commencement, a few entires were made by another person; in 1812, eight or ten, by his daughter, while he was sick; and for some reason, not explained, about as many more, by his son, in 1814. With these exceptions, every *entry on his records was made by himself. All those on Jouitte's were so made; they were all directed by Massie. [*138 He considered him agent at first, but never saw a written power. Before the 27th January 1795, Massie produced a written assignment, on which he made the entry in question of that date. He further states, that on the 14th June 1797, he delivered the assignment and warrant to Massie, with the survey in question.

An attempt is made to discredit this testimony, by its intrinsic demerits. It is said to be wonderful, that he should not recollect whether there were any witnesses to the assignment, what its date, and when delivered to him. But the assignments in his office are so numerous, that if at the distance of twenty-two years, he should feign to recollect such particulars, that would, indeed, discredit him. It is further objected to him, that he states that he never, but in one instance, made an entry for an assignee, without having the assignment, and that was not in the present case; and that he pretends to recollect delivering out the warrant in question, to whom and when. But it is to be remembered, that upon delivering out official papers, entries are made, which assists the memory. As to the particular case of an entry, without an assignment, it would be strange, if he did not recollect it. That was the only case, in an official life of nearly forty years, in which he suffered such an indiscretion to pass him. He was uneasy about it, and made immediate inquiry of the owner. The attempt to discredit Anderson, from his own examination, therefore fails.

*So much for Anderson's testimony under the commission. Is it supported or defeated by the official evidence? Some apparent con- [*139 fusion occurs, which is cleared up by an attention to dates. His second certificate relates to the first transaction in point of time. It was his practice to forward the assignment with the first survey, in order that they might lie in the patent-office, to be referred to, when other surveys should be returned: and called thence a reference paper: the warrant with the last. But he delivered both the assignment and warrant to, Massie, with the survey in question, being the first, which, as to the latter, was a mistake. It was

not recollected, that one or more surveys were yet to come. Of such delivery, an entry is made. The time and the occasion can, therefore, be recollected. If our hypothesis be right, Massie may be well supposed to have delivered all the papers into the war-office, when they were destroyed by fire on the 8th of November 1800. After the destruction of the war-office, the surveyor is applied to for the last survey of 851 acres; then it was, that the warrant should have been delivered with the survey. But the warrant was not found, and the memorandum book would show what had become of it. He could not refer to the assignment or warrant, as reference papers, for they were destroyed. He, therefore, states what was the amount of the assignment, and that the warrant was taken from his office, by mistake, on the
*140] 14th of June 1797. On these papers, a grant issued for the 851 *acres. Although Anderson might have stated in his certificate by whom the warrant was taken, and on what occasion, the omission to do so is unimportant.

By a law of congress, patents can be had upon lost papers, by taking a copy of the warrant from the register, or a copy of the plat and certificate from the surveyor, and satisfying the officer of the loss of the papers by his own oath, or otherwise. Massie made affidavit on the copy of the plat and certificate, that the original, of which that was a copy, had been filed in the war-office, and that it had been lost or destroyed. The omission was, to state that the warrant and assignment accompanied the plat, and were destroyed with it. He got them all, in order to procure a patent. It was his interest to file them; and it is incredible, that he did not.

But supposing the assignment not to be clearly proved, the court will presume one from the circumstances, in order to support the possession. On the subject of such presumptions, generally, reference may be had to the authorities cited in the argument of another cause at the present term. (*Ricard* v. *Williams*, *ante*, p. 59.) To these may be added some of the decisions in the local tribunals. Thus, the court of appeals of Virginia have determined, that though the presumption arising from the lapse of time may be repelled by circumstances, yet those circumstances must be clearly proved, which, in the present case, they are not. 1 Wash. 188. By the law of Virginia, a person owning lands on one side of a stream, and desiring
*141] enough of the *lands of another, on the opposite side, against which to abut his dam, may acquire it, contrary to the will of the owner. He procures a writ from the county court, in nature of a writ *ad quod damnum*, to value the land. The law provides, that upon paying that value, the party shall be seised of the land condemned. In the case in question, the condemnation had taken place in 1777. The money had not been paid; the land had been sold; possession had gone with the condemnation, and a mill had been built. The statute period of limitation had not elapsed, yet the court presume the fact of payment; the very fact which divests one man and invests another with the inheritance. *Young* v. *Price*, 2 Munf. 534. In another case, a testator had appointed several executors, and empowered them to sell. Some had qualified, and some had not. They who qualified, sold and conveyed. Time had not elapsed to bar a writ of right. The case was decided under the stat. 21 Hen. VIII., c. 4. The deed was absolutely void; it passed no estate in law or equity, unless it appeared that the other executors had renounced. The court determined, that the renunciation was

a fact, which admitted of proof *in pais* as well as by record; but that in favor of the possession, it might be inferred from circumstances. *Giddy* v. *Butler*, 3 Munf. 345. The presumption sustained in the cases quoted, vastly exceeds what is required in ours. In our case, the circumstances are unanswerable.

The appellants cannot rely on any supposed difference between an imperfect legal title and an equitable one, as to the question of either presumption or *abandonment. If a warrant creates nothing but an equitable interest, and an entry upon it, an imperfect legal one, then Jouitte never had more than an equity. He never had an entry, unless the testimony of Anderson be sufficient to establish an agency. Give but credit to that testimony, and both agency and assignment are established. [*142

As to the defendants, who have not admitted the appellants' derivative claim, the decree must be affirmed at all events, unless the documents from Albermarle county court are sufficient to establish the character of Alice as heiress. Let this be conceded, for argument sake; then, what are they? Documents made *ex parte*, and received by usage only in Virginia, for the direction of the register of the land-office. If this evidence can establish a derivative title, ours, filed in the land-office for the direction of the commissioner, are of equal authority to support our derivative title: *à fortiori*, as ours grew into use, not by custom merely, but by act of congress.

Hammond, for the appellants, in reply, stated, that it had been insisted by the respondent's counsel, that as it is shown in the bill, that the complainants never abandoned the first original entries, they cannot claim the land in question, because, if entitled at all, it is to the lands upon which the first location is made. If this were correct, it would follow, that the warrant might actually appropriate double the amount of land that it called for. The complainants would hold the first location, and the defendants that where the warrant is patented. This absurd consequence *is sufficient to show that the position is incorrect. It is, however, untenable, for another reason. The owner of a land-warrant, who has never parted with his right to it, may regard the person, who intermeddles with it, as acting for him; and thus claim and hold the land appropriated, although he never directed the location. [*143

It is also said, that as the legal title was vested in Massie's heirs, by the patent to them, that title inures to the benefit of those to whom Massie had previously conveyed, without title, and that, therefore, the defendants are invested with a legal title. This proposition cannot be sustained. It is true, that in certain cases, where a person conveys without title, and the same person afterwards obtains title, as between such person, and the person to whom a conveyance was made, the after-acquired title cannot be set up to prejudice the purchaser. But this proceeds upon the doctrine of estoppel, and can have no application to a case like this, where the person with whom the title first commenced, is seeking to assert it against those who have unfairly gotten possession of it.

It is conceded, that a warrant for lands is made assignable by the statute that authorized it to issue; and it is said, that it is the mere evidence of an executory contract between the state and a citizen. The contract is for a grant of land, hereafter to be made, and the warrant is evidence of that

contract. The act did not mean to give authority to transfer the land, when granted ; but the evidence of right, before a grant was made. The power
*144] to assign and transfer *is, therefore, not a power to make a sale of the subject ; and it is apprehended, that a deed of indenture was never used at the common law, to transfer to a purchaser a legal right in any written evidence of an executory contract. The warrant, or plat and certificate of survey, is the subject that is to be transferred by the act of assignment, and it seems indispensable, that there should be some direct connection between an act and the subject upon which it operates. Hence, we insist, that an assignment can only be made as before suggested.

It is not pretended, that a purchaser of a warrant cannot hold, unless it be thus assigned. The principle is applied to the evidence that ought to be required. If the assignment be indorsed upon the warrant, or be executed upon a separate paper, and connected with the warrant, these facts might be considered *primâ facie* evidence of a sale, sufficient, at least, to put the claimant upon some proof to impeach them. But where nothing of this kind exists, and a purchase is claimed, such purchase is wholly matter *in pais*, and he who claims under it must furnish the proof of its existence. Until such proof be furnished, there is nothing for the other party to impeach. This might be insisted upon, even after the patent emanated. The law requires the warrant, and plat and certificate upon which the grant emanates, to be carefully preserved. And this is not without object. That object would seem to be a preservation of the evidence upon which the
*145] grant was obtained, that *the fact of ownership decided *ex parte* by the officers of the land-office, might be fairly open for investigation. But certainly this matter of fact cannot be presumed against an original owner, before the patent issues, and we insist, that this case stands as if the patent had not issued. And besides, it is conceived, that this fact ought not to be presumed against an owner, in a case standing as this does, where the proof is clear, that the patent was issued upon evidence that did not authorize it.

That a very loose method of transferring land-warrants was adopted and practised, cannot vary the law, nor has it been considered to have had that consequence. The cases cited show, that property in these warrants could not be acquired by delivery, as in the case of other chattels. The mischiefs apprehended do not exist. We do not claim, that the warrant can be followed into the hands of an innocent purchaser of the legal title. But we conceive, that the patentee is not such a purchaser. It is incumbent upon him, to know that he is fairly owner of the intermediate evidence of title ; and if he is not, he ought not to hold the land. This is the policy of the act of 1809, and though prospective as to its enactments respecting future assignments, it plainly intimates, by its provisions for existing cases, that its authors contemplated no such thing as an assignment, distinct and seperate from the subject claimed to be assigned. If any mischief results from the doctrine asserted, it can only fall upon those, who have possessed themselves
*146] of the rights of others, without *taking proper precaution, to be certain that they were not aiding to do injustice.

It is also insisted for the defendants, that although an assignment in fact may not be proved, yet from the circumstances, the court will presume an assignment to support the possession. All presumptions stand upon their

own particular circumstances. But presumptions are never resorted to, where the facts are otherwise understood. Here, the nature and character of the pretended assignment are fully in evidence. It stands surrounded with many suspicious circumstances. Proofs as well as presumptions are srong against the fairness of Massie's conduct. In such a case, it would surely be very unsafe, to found a title upon presumption. In all the cases cited, the parties were all residents in the same neighborhood. The claimants witnessed daily the acts of ownership exercised, and improvements made by the other party. From their omission to assert any right, the presumption naturally arose, that they had no right to assert. Here, the case was different. After commencing his title, the original proprietor died; his heir knew nothing of what was done; she resided in the interior of Virginia; the land-office was in Kentucky; the lands in the wilderness of Ohio. It is going too far to say, that she was bound to take notice of the entry in the office, in Kentucky, and of the improvements commenced and carried on, in Ohio; it is palpable, that she was in fact unacquainted with the whole subject. The court are asked to presume, first, that she was apprised of that of which she was really ignorant, and from that presumption to presume *again, that she knew there was a sale or asssignment, and for that reason forbore to assert her pretensions. [*147

The time, in this case, under its circumstances, would not bar a recovery on ejectment, in Ohio; an inchoate legal title ought not to be destroyed by presumption in a shorter period. It is believed, that none of the cases go so far.

The certificate of the court of Albemarle county is sufficient, in this case, to prove the heirship of the plaintiff, Alice, and her intermarriage with the other plaintiff. The facts are evidently denied in the answer, *pro formâ*. The defendants assert only their ignorance, and ask proof. The certificate in question, is exactly that kind of evidence, which is taken to establish the *primâ facie* right of the party to a warrant, plat and certificate, and patent, as heir or representative, and ought to be sufficient to satisfy those, who profess only that they know nothing, and therefore, call for proof.

The surveyor's certificate that the warrant was assigned, has been received in the land-office, as evidence of such assignment, and when the commissioner has acted upon it, and issued the grant, the defendant's counsel has strongly urged, that he who claims against it, must disprove it. We ask no more in the case of the certificate of the county court. There is no act of congress directing such certificate to be received for any purpose. In respect to this, the counsel are mistaken.

Marshall, Ch. J., delivered the opinion of the court, and after stating the case, proceeded as follows:—*It may be doubted, whether the act of the 10th of August 1790, authorized the issuing of a patent in the name of an assignee. This doubt however is entirely removed by the act of June 9th, 1794, c. 238, which enacts, that very officer and soldier, his heirs or assigns, entitled to bounty lands, &c., according to the laws of Virginia, "shall, on producing the warrant, or a certified copy thereof, and a certificate under the seal of the office where the said warrants are legally kept, that the same, or a part thereof, remains uncertified, and on producing the survey agreeably to the laws of Virginia, for the tract or tracts to which he or they [*148

may be entitled as aforesaid, to the secretary of the department of war, such officer or soldier, his or their heirs or assigns, shall be entitled to and receive a patent for the same, from the president of the United States, anything in any former law to the contrary notwithstanding." This act recognises the right of the assignee to a patent, without prescribing the manner in which the assignment is to be proved. It requires the production of the warrant, or a certified copy thereof, and of the plat and certificate of survey, but gives no rule respecting the proof of the assignment.

It is admitted, that the assignment may be indorsed on the warrant, or may be connected with it, and that the warrant may remain in the surveyor's office, since a patent may be issued for a part of it, as was done in this case, while a part remains unsatisfied; and may be issued on a certified copy of it. It would seem, from these circumstances, that proof of the assignment might
*149] be received by the surveyor. *If the warrant were assigned by indorsement, before the entry, or if the entry were assigned and transferred, before the survey, the survey would be made and certified to the land-office, in the name of the assignee. The law does not, in terms, require that the original assignment, or a copy of it, should be transmitted to the office with the survey. It would seem, then, that in ordinary cases, proof of the assignment might be made in the surveyor's office, and certified to the land-office.

Unquestionably, if notice were given by any person claiming title against the certificate of the surveyor, the fact would be examinable, before the emanation of the patent; but as no law requires that the assignment should be submitted to the person who issues the patent, or be always examined and decided on by him, nothing seems to oppose the practice of relying, in ordinary cases, on the surveyor's certificate. If such be the rule of the office, the court ought not to disregard it; and that it is the rule, is, we think, to be inferred from the fact, that this patent has been issued to the assignee, in this case, on such testimony, and that the bill does not charge it to have been issued irregularly. It denies the assignment; but not that the usual proof of it was made in the land-office. In this case, the survey was made in the name of the assignee, and the surveyor certifies that the warrant was assigned to the extent of the survey. We must suppose, that the usual proof of the assignment was received.

By the act of the 3d of March 1803, c. 343, it is enacted, that "where any warrants, granted by the state of Virginia for military services, have
*150] been surveyed *on the north-west side of the river Ohio, between the Scioto and the Little Miami rivers, and the said warrants, or the plats and certificates of survey made thereon, have been lost or destroyed, the persons entitled to the said land may obtain a patent therefor, by producing a certified duplicate of the warrant, from the land-office of Virginia, or of the plat and certificate of survey, from the office of the surveyor in which the same was recorded, and giving satisfactory proof to the secretary of war, by his affidavit, or otherwise, of the loss or destruction of said warrant, or plat and certificate of survey." This act has been literally complied with, except that instead of "a certified duplicate of the warrant from the land-office of Virginia," we find a copy of the warrant, certified by Richard C. Anderson, the principal surveyor, dated the 30th of April 1795, when the warrant was in his office, and the certificate regularly and officially given,

and written on the back of a survey, No. 1629, for 400 acres, part of the said warrant, on which a patent was issued to Robert Jouitte, dated the 28th day of October 1799.

The purpose for which a certified duplicate from the land-office of Virginia was required, in the case of a lost warrant, undoubtedly was, to protect the United States from fraudulent claims on warrants alleged to be lost, but which never existed; not to settle controversies between the original holder and those claiming under him by assignment. The land-office of the United States being in possession of an official copy of that warrant, on which a patent had been issued, no motive existed for requiring a duplicate *from the land-office of Virginia. The original existence of such warrant could not be more fully proved, and the evidence of it which [*151 was in the office was such as the law deemed satisfactory, at the time it was received. But if this were an irregularity, it is one which could only affect the United States, and is of no consequence in this cause, since all parties admit the existence of the warrant and claim under it. This patent, then must be considered as having issued regularly, on the documents required by the rules of the office; at least, so far as concerns the parties before the court. The title of the person who has obtained it, is undoubtedly examinable, but no presumption exists against him.

The testimony of Anderson, the principal surveyor has been taken, for the purpose of proving the assignment from Jouitte to Massie. He deposes, that the office was opened for making entries on the north-west side of the Ohio, on the 1st day of August 1787, and that he had continued ever since to transact the business in person, with the exception of a short time which he mentions, and which does not comprehend the making of the entries in this case. He has never, except in one instance, which was not Jouitte's, made entries in the name of an assignee, without having previously received the assignment, and in that instance, he was informed by the original proprietor of the warrant himself, that he had sold it. That Jouitte's warrant was deposited in his office, on the 19th day of November 1784 (he thinks by Robert Jouitte himself), and that the witness made *all the entries on it. He has no hesitation in saying, the assignment was prior to the [*152 entry on which this survey was made, or he could not have made the entry. On being asked whether the assignment was on the warrant, or on a separate piece of paper, he answers, on a separate paper, he presumes, as the first entries were made in Jouitte's name. On being cross-interrogated by the plaintiff, he says, that he does not recollect the precise time when the assignment was produced in his office, but it was not prior to the 27th of January 1795 (the date of the first entry in the name of Massie), and to the best of his recollection, purported and appeared to be made by Jouitte himself. He does not recollect its date, nor whether it was attested by a subscribing witness. It was lodged in his office by Nathaniel Massie, and taken out with the plat and certificate of survey of the assigned part of the warrant, by him, on the 14th of June 1797. In corroboration of the testimony of Anderson, the defendants rely on a grant made to Massie, on the 2d of January 1802, on a survey made the 1st of April 1797, for Massie, as assignee of part of the same warrant. The entry was made on the 27th of January 1795, and the patent contains a recital of the assignment of 2051⅔ acres, part of Jouitte's warrant.

It is impossible to read the testimony of the principal surveyor, or to credit it, without believing that an assignment, purporting to be made by Jouitte, was produced by Massie, and deposited in his office. His fixed rule
*153] to require the production of an assignment, *before an entry in the name of the assignee could be permitted, his averment that he never departed from that rule, except in a single instance, his clear recollection of the circumstances attending that instance, his admission of entries in the name of Massie, as assignee, in the lifetime of Jouitte, his averment, that the assignment was placed in his office, and taken out with the plats and certificates of survey, by Massie, prove that there must have been such a paper. But the proof of its being executed by Jouitte, is certainly not so explicit as it might or ought to have been. Colonel Anderson does not say, that he was acquainted with the handwriting of Jouitte, and believed the assignment to have been written by him. But he acted as a public officer, on the full conviction of this fact, and his whole testimony proceeds upon the idea, that he was entirely satisfied of the verity of the instrument. Jouitte and himself having been officers in the same service, it is not improbable, that the handwriting of the one was known to the other; and to the question, whether the assignment purported to be made by Jouitte himself, or by an agent, he answers that it "purported, and appeared to him, to be made by Jouitte himself, to the best of his recollection." The word "appeared," which is introduced by the witness in his answer to this interrogatory, and which is not in the question, seems intended to indicate that he had formed an opinion on the handwriting. Had the plaintiff suspected, that Anderson was not acquainted with the handwriting of Jouitte, or not
*154] perfectly satisfied that this assignment was in his handwriting, *some question would have been propounded indicating this suspicion. But no such question is propounded; and we can make no other justifiable inference from his whole testimony and conduct, than that he was acquainted with the handwriting of Jouitte, and was satisfied that the assignment was written by him.

On the character of the principal surveyor, no imputation is cast. His office is a proof of the confidence reposed in his integrity by those who knew him. His testimony is incorrect, is studiously calculated to establish an untruth, and his official conduct fraudulent, if he had no sufficient knowledge of the verity of the assignment. That his testimony is less explicit than it ought to have been; that it omits the express averment of a fact, implied by all he says, and which is necessary to its fairness and its truth, will not we think, justify a presumption against that fact. We understand Colonel Anderson's testimony as implying a knowledge of the handwriting of Mr. Jouitte, and of the verity of the assignment.

There is still another defect in the testimony which is by no means inconsiderable, and which has been strongly pressed by the counsel for the plaintiff. The assignment itself is not produced, and there is no direct proof of its loss. Its absence depriving the plaintiffs of the power of disproving it, is a circumstance calculated to excite suspicion, and ought to be accounted for. The rule that the loss of a paper ought to be established, before its contents can be proved, is well settled, and ought to be maintained. Yet there are
*155] difficulties in applying to this case which are not to be surmounted. *The legal title of Massie is consummated, and the assignment, having

performed its office, is no longer a paper essential to that title. The same proof respecting it, therefore, cannot be demanded, which might be required, were it relied on as composing part of the title. It was not absolutely incumbent on the assignee to preserve it, after the emanation of the patent; and he could not, unless the transaction be presumed fraudulent, foresee this controversy. He died, before any claim on the part of the plaintiffs was asserted, before any denial of the assignment was made, and therefore, could not be expected to prepare testimony in its support, or to account for its loss. Had the assignee been living, he might be expected to show, at least, by his own affidavit, supported by probable circumstances, the loss of the assignment; but he died before the occurrence of any circumstance which might suggest the propriety of such an affidavit. The defendants have done all in their power. They aver their belief that the assignment was real, their total ignorance of its present existence, and their belief of its destruction, and they state the probability that it was burnt with the papers of the war-office. Under all the circumstances of the case, the probability of its being consumed in the war-office is great. The assignment was delivered with the warrant, and the plat and certificate of survey, to Massie, on the 14th of June 1797. It might be supposed proper to deposit it with those papers in the war-office, for the purpose of obtaining the patent. There *is nothing unreasonable in the supposition, that it was there deposited, and consumed with the other papers of the office. [*156

We think, too, that the length of time which was permitted to elapse before any inquiries appear to have been made respecting this property, furnishes strong evidence of the opinion that Mr. Jouitte had parted with his interest in it. So early as January 1795, between one and two years before the death of Jouitte, Massie claimed a part of the warrant as his own, and made entries on it, in the public office, in his own name, as assignee. It is not probable, that a property which constituted no inconsiderable part of the estates of the officers, should have been neglected by this officer, in the lifetime, or by his family, after his death. Inquiries respecting it would naturally have been made, not by the daughter, who may be supposed to have been an infant, but by her mother, her guardian or other friends. The omission to make these inquires may be accounted for, if it was known that the warrant was assigned: not otherwise, without imputing to those relatives of the infant, a considerable degree of negligence. We think, that under these circumstances, the non-production of the assignment ought not so to operate against the defendants as to defeat their legal title.

But the plaintiffs deny the validity of the assignment, because it was not made on the warrant, nor annexed to it. The law which authorized the assignment of warrants did not require that it should be made by indorsement, or by any instrument annexed to the warrant. *It is not shown to have been the usage. Under circumstances most generally attending this property, and which actually attended this particular case, the assignment could neither have been indorsed nor annexed, without great inconvenience. The warrant was filed in the office of the surveyor-general, with the entries. This would occur in every case where the entries in whole or in part were made. The original proprietors resided generally in Virginia. The warrants were deposited in the office of the surveyor-general, in Kentucky. These warrants, thus deposited, and the entries made on them, [*157

were transferrible. It is obvious, that the transfer, if no law forbade it, would be made on a separate paper. If any particular mode of authentication was necessary, the law ought to have prescribed that mode. This not being done, the mode was left to the parties. The subsequent act of the legislature of Virginia, rather shows the mischief which had grown out of this state of things, and of the practice under the law, than that the practice under the law was contrary to the legislative construction of it.

This is one of those cases in which the equity of the plaintiffs is not, we think, sufficiently proved, to deprive the defendants of their legal title.

Decree affirmed, with costs.

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*158] *Watts *v.* Lindsey's Heirs and others.

Land-law of Ohio.

It is a rule at law, and in equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary's title.[1]

To support an entry, the party claiming under it must show, that the objects called for are so described, or are so notorious, that others, by using reasonable diligence, can readily find them.

The following entry was pronounced, under the circumstances, to be void, for uncertainty: "7th of August 1787, Capt. Ferdinand O'Neal enters 1000 acres, &c., on the waters of the Ohio, beginning at the north-west corner of Stephen T. Mason's entry, No. 654, thence with his line, east 400 poles, north 400 poles, west 400 poles, south 400 poles:" The entry of Stephen T. Mason referred to being as follows: "7th of August 1787, Stephen T. Mason, assignee, &c., enters 1000 acres of land, on part of a military warrant, No. 2012, on the waters of the Ohio, beginning 640 poles north of the mouth of the third creek running in front of the Ohio, above the mouth of the Little Miami river; thence running west 160 poles; north 400 poles; east 400 poles; thence to the beginning."

The Ohio and Little Miami rivers are identified and notorious objects; but the third creek above the mouth of the Little Miami is to be taken according to the numerical order of the creeks, unless some other stream has, by general reputation or notoriety, been so considered.

Cross creek, the stream which the party claiming under O'Neal's entry, assumed for the beginning, to run the 640 poles north from the mouth of the third creek as called for in Mason's, not being in fact numerically the third creek above the mouth of the Little Miami, and there being no satisfactory proof that it had acquired that designation by reputation—the claim was pronounced invalid.

Appeal from the Circuit Court of Ohio.

February 10th, 1882. This case was argued by *Doddridge*, for the appellant, and by *Brush*, for the respondents.

*159] *March 1st. Todd, Justice, delivered the opinion of the court.—This controversy arises from entries for lands in the Virginia military reservation, lying between the Scioto and Little Miami rivers, in the district of Ohio. The plaintiff in the court below (Watts) exhibited his bill in chancery, for the purpose of compelling the respondents to surrender the legal title, acquired under an elder grant, founded on a surveyor's entry, than the one under which he derives his title. The entry, set forth in the bill, and claimed by the plaintiff, is in the following words:

"7th August 1787: Captain Ferdinand O'Neal enters 1000 acres, &c.,

[1] Gilmer *v.* Poindexter, 10 How. 267.

on the waters of the Ohio, beginning at the north-west corner of Stephen T. Mason's entry, No. 654, thence with his line, east 400 poles, north 400 poles, west 400 poles, south 400 poles."

The entry of Stephen T. Mason, referred to in the above entry, is in the following words:

"7th August 1787. Stephen T. Mason, assignee, &c., enters 1000 acres of land on part of a military warrant, No. 2012, on the waters of the Ohio, beginning 640 poles north from the mouth of the third creek running into the Ohio, above the mouth of the Little Miami river; thence running west 160 poles; north 400 poles; east 400 poles; south 400 poles; thence to the beginning."

The respondents, in their answers, deny the validity of O'Neal's entry; allege that it is vague and uncertain, and that the survey made on it includes no part of the land described in the entry, and if properly *surveyed, would not interfere with any part of the land to which [*160
they claim title; that the creek selected by the complainant as the third creek, in the entry of Mason, on which that of O'Neal depends, is not, in truth and in fact, the third creek running into the Ohio above the mouth of the Little Miami river; but that another is. The depositions of several witnesses were taken, and other exhibits filed in the cause. Upon a final hearing in the circuit court, a decree was pronounced dismissing the plaintiff's bill. The cause is now brought into this court by appeal, and the principal question to be decided is, whether from the allegations and proofs in the cause, the entry claimed by the plaintiff can be sustained, upon sound construction, and legal principles arising out of the land laws applicable thereto.

Before we go into an examination of that question, we will dispose of some preliminary objections made by the counsel for the respondents. They were, that attested copies of the entries and patent referred to, and made exhibits in the bill, are not in the record; that there does not appear in the record any assignment, or proof of an assignment, from O'Neal to the plaintiff. Nor does it appear from the plat, where the entry of O'Neal was actually surveyed, nor does it designate the creeks running into the Ohio above the mouth of the Little Miami river, so as to ascertain the third creek. Some of these objections seem to be well founded, and might induce the court to dismiss the bill, but such dismissal should be without prejudice to the *commencing of any other suit the party might [*161
choose to bring; the effect of which would be only turning the parties out of court, without deciding the merits of the cause. We have, therefore, attentively examined the record, and are of opinion, it contains enough to get at and decide the merits.

It has been long and well established, as a rule of law and equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary's title.

In order to uphold and support an entry, it is incumbent on the party claiming under it, to show that the objects called for in it are so sufficiently described, or so notorious, that others, by using reasonable diligence, could readily find them. As O'Neal's entry is dependent on Mason's, if the objects called for in the latter can be ascertained, the position of the former can be precisely and certainly fixed.

The Ohio and Little Miami rivers, from general history, the one having been used before, at and since the time when these entries were made, as the great highway in going from the eastern to the western country, and each of them having been referred to in general laws, and designated as boundaries of certain districts of country, we consider, must be deemed and taken as being identified and notorious, without further proof. The third creek, running into the Ohio, above the mouth of the Little Miami river, is then the only and principal object to be ascertained, to fix the entry of Mason,
*162] with specialty and precision. The plaintiff *has assumed, what is now called Cross creek, for the beginning, to run the 640 poles north from the mouth of the third creek, as called for in Mason's entry. The respondents contend, that what is now called Muddy creek, and sometimes Nine Mile, is "the third creek."

It seems to be admitted, in argument, that Cross creek is not, in truth and in fact, numerically the third creek above the mouth of the Little Miami. But the counsel for the plaintiff contends, that the early explorers of the country, when the entries were made, designated Muddy creek as the second. That streams, then called creeks, have since been degraded into runs, and other streams, then called runs, are now termed creeks. If this argument was supported by the proofs in the cause, it would be entitled to great consideration; but upon a careful and minute examination, there is a great preponderance of testimony against it; there is the deposition of one witness that affords some foundation for it; there are also the depositions of many witnesses who contradict it. But waiving this testimony, and examining this entry upon its face, it is obvious, that subsequent locators and explorers, commencing their researches at the mouth of the Little Miami river, would examine the creeks emptying into the Ohio above, according to their numerical order. The words "the third creek," emphatically applies to that order; nor would they depart from it, unless another stream, by general reputation and notoriety, had been so considered. It has, however, never
*163] been held, that reputation or notoriety *could be established by a single witness; and it may be further observed, that the other witness, whose deposition has been taken on the part of the plaintiff, states, that he had meandered the Ohio, and in his connection, had laid down Muddy or Nine Mile creek, as the third, and that he so considered it, until the year 1806 or 1807, when from the information of the other witness, and an examination of the entries and surveys on the books of the principal surveyor, he was induced to change his opinion. It is also in proof, that the plaintiff and the last-mentioned witness, in searching for O'Neal's entry, claimed a different creek as being the third, and directed the survey to be commenced from it. If then, a locator and deputy-surveyor, who had meandered the Ohio, and designated Muddy creek as the third, and had so considered it for nearly ten years, it is surely a strong circumstance to show negatively, that Cross creek was not in fact numerically, nor by general reputation or notoriety, considered as "the third creek." If an examination of the records in the principal surveyor's office would show that the streams were designated and numbered differently, it was incumbent on the party to exhibit, at least, so much thereof as would conduce to prove the fact. It is incompetent to prove it by parol.

Upon mature consideration of the whole case, it is the unanimous opinion of the court, that the decree of the circuit court be

Affirmed, with costs.

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*Matthews *v.* Zane and others. [*164

Error to state court.—Public lands.—Statute.

A party claiming title to lands under an act of congress, brought a bill for a conveyance, and stated several equitable circumstances in aid of his title; the state court where the suit wat brought, dismissed the bill, and the cause was brought to this court by appeal, under the 25th section of the judiciary act of 1789, upon the ground of an alleged misconstruction of the act of congress by the state court: *Held*, that this court could not take into consideration any distinct equity arising out of the contracts or transactions of the parties, and creating a new and independent title, but was confined to an examination of the plaintiff's title, as depending upon the construction of the act of congress.[1]

The lands included within the Zanesville district, by the act of congress of the 3d of March 1803, § 6, could not, after that date, be sold at the Marietta land-office.

A statute, for the commencement of which no time is fixed, commences from its date.[2]

The decision of this court in Matthews *v.* Zane, 5 Cranch 92, revised and confirmed.

Appeal from the Supreme Court of the State of Ohio, being the highest court of equity of that state, under the 25th section of the judiciary act of 1789, c. 20.

The bill filed by the plaintiff, Matthews, in the state court, was brought for the purpose of obtaining from the defendants, Zane and others, a conveyance of a tract of land to which the plaintiff alleged that he had the equitable title, under an entry, prior to that on which a grant had been issued to the defendants. *The validity of his entry depended on the construction of the act of congress of May 19th, 1800, c. 209, the 6th section [*165 of the act of March 3d, 1803, c. 343, and the act of the 26th of March 1804, c. 388, all relating to the sale of the public land in the territory north-west of the river Ohio.

The case stated, that on the 7th of February 1814, the plaintiff applied to the register of the Marietta district, and communicated to him his desire to purchase the land in controversy. The office of receiver being then vacant, no money was paid, and no entry was made; but the register took a note or memorandum of the application. On the 12th of May 1804, soon after the receiver had entered on the duties of his office, the plaintiff paid the sum of money required by law, and made an entry for the land in controversy, with the register of the Marietta district. In pursuance of the 12th section of the act of the 26th of March 1804, c. 388, and of instructions from the secretary of the treasury, the sale of the lands in the district of Zanesville (which had been formed out of the Marietta district, and included the land in controversy), commenced on the 3d Monday of May 1804, and on

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[1] S. P. Ross *v.* Barland, 1 Pet. 655.

[2] Warren Manufacturing Co. *v.* Etna Ins. Co., 2 Paine 502. Every bill takes effect as a law, from the time of its approval by the president, and then its effect is prospective, not retrospective; the doctrine, that in law, there is no fraction of a day, is a mere legal fiction, and has no application to such a case. Richardson's Case, 2 Story 571; Ankrim's Case, 3 McLean 285; contrà Welman's Case, 20 Vt. 653; Howes's Case, 21 Id. 619. It is not, however, necessary, to the validity of a statute, that the president should affix a date to his approval of it; the time of its actual approval may be shown *aliunde*. Gardner *v.* The Collector, 6 Wall. 499.

the 26th of that month, the defendants became the purchasers of the same land. There were several charges of fraud in the bill, and a contract between the parties was alleged; but as the opinion of this court turned exclusively on the title of the parties, under the act of congress, it is deemed unnecessary to state these circumstances. The state court having determined against the validity of the plaintiff's title, under the act of congress, and dismissed his bill, the cause was brought by appeal to this court.

Doddridge, for the appellant, stated, that the cause depended upon the
*166] construction of three acts *of congress, which he insisted had been misconstrued by the state court. The first of these acts, that of May 10th, 1800, c. 209, established the present system of selling the public lands in districts, and by that statute, the land in controversy was within the Marietta district. The 6th section of the act of the 3d of March 1803, c. 343, created an additional district, and provided that the lands within it should be offered for sale, at Zanesville, under the direction of a register and receiver, to be appointed for that purpose, who should reside at that place. The 12th section of the act of the 26th of March 1804, c. 388, directs the lands in the district of Zanesville to be offered for public sale, on the third Monday of May in that year.

On the first view of the case, difficulties present themselves, on the side of the appellant, in the authority of previous decisions, and especially a decision of this court, between the same parties. *Matthews* v. *Zane*, 5 Cranch 92. But that decision resulted from an incorrect and imperfect statement of facts in the former case. Circumstances which are now disclosed, did not appear in that case. Upon the present record, the following points will be insisted on:

*167] 1. That even by a strict technical construction of *the statutes in question, the power of sale did not cease at Marietta, until after the 12th of May 1804, the date of the plaintiff's purchase.

2. That such was the practical construction given to those laws by executive officers, which ought, in the present case, to be conclusive, because it fulfils every object of the law, preserves the private rights of individuals, and if set aside by a mere technical objection, would open a door for the most extensive litigation and disturbance of titles acquired under the land laws of the United States.

3. That supposing the act of March 30th, 1803, had, in express terms, or by necessary and inevitable implication, taken away the power of sale at Marietta, yet it could not begin to have that effect, until duly promulgated at that place, it not having, in fact, been transmitted to the officers at Mareitta, until after the plaintiff's entry.

The land laws must certainly be considered as forming a part of the contract between the government and each individual who wishes to become a purchaser of the public domain. If contracts between the public and individuals are to be considered in the same light as contracts between individuals, then the principle applies, that a *bonâ fide* and innocent purchaser, from an agent who has not received due notice that his authority is superseded, shall not be injured by the negligence of the principal, is not giving
*168] notice. 4 Hall's L. J. 16; 2 Dall. 320. The rules of interpretation applicable to the present case, are laid down by the elementary *writers

on the construction of statutes, and will be found in the common abridgments of the law. 6 Bac. Abr. tit. Statute, I. c. All these rules necessarily resolve themselves into the intention of the law-maker, which is sometimes to be collected from the cause or necessity of making the statute, and at other times from other circumstances of equal weight. *Vere* v. *Sampson*, Hardr. 208. Sir WILLIAM JONES has asserted the true principles on this subject. (Ld. Teignmouth's Life of Sir W. Jones 267.) "Such is the imperfection of human language," says he, "that few written laws are free from ambiguity; and it rarely happens, that many minds are united in the same interpretation of them." And then, after relating an anecdote of Lord Coke, adds: "I will here only set down a few rules of interpretation, which the wisdom of ages has established, when the sense of the words is at all ambiguous—1. The intention of the writer must be sought, and prevail over the literal sense of terms; but penal laws must be strictly expounded against offenders, and liberally against the offence. 2. All clauses, preceding or subsequent, must be taken together to explain any one doubtful clause. 3. When a case is expressed, to remove any doubt whether it was included or not, the extent of the clause, with regard to cases not so expressed, is by no means restrained. 4. The conclusion of a phrase is not confined to *the words immediately preceding, but usually extended to the whole antecedent phrase. These are copious maxims, and, with half a dozen more, are the stars by which we steer, in the construction of all public and private writings." Letter to J. Macpherson, Esq., Governor-General of Bengal, Sir W. Jones' Life, 267. [*169

So also, this court has laid it down as "a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. It is also true, that when great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed." *United States* v. *Fisher*, 2 Cranch 286.

1. In enforcing the construction we contend for, the further considerations which present themselves under the first point are, that all the land laws passed previous to the act of May 10th, 1800, merged in that act; and by it, the system of selling the public lands in districts, through agents called registers and receivers, was settled; so that, at the passage of the act of March 3d, 1803, that system, in all its relations, was the law; and to all the provisions of the act of May 10th, 1800, and the rights established thereby, that of March 3d, 1803, expressly refers, and for its operative capacity, necessarily depends. The whole system is laid in two important objects—public policy, and the rights of the community generally and individually; both terminating in *the sale of the public lands. The public policy is two-fold—first, revenue; second, national growth and prosperity, by the extension of population and improvement. The right of every individual is, to appropriate to himself any tract of land within the provisions of the system. Words are not necessary to show the importance of the public policy, in both its branches; and the interest felt by the community, in the right to appropriate, is of equal extent, and as strong—as distinctly marked, too, as the policy itself; and though a right peculiar to the American people, is, nevertheless, a general right; requiring, indeed, to be regulated by law; but none will say that the government might, or [*170

could, wholly repress its exercise, any more than wholly to repress the exercise of the general right to carry on trade and commerce.

The second branch of the public policy also—the right to acquire and improve new lands—did not commence with the land laws of the United States; both existed under, and the latter was exercised through, the regulations of colonial and state government, are coeval with the settlement of America; and when the same policy and right fell within the jurisdiction of the national government, laws were immediately passed to regulate them, and have been continued, from time to time, until they all merged in the act of May 10th, 1800; so that the right of every individual in the community to purchase and settle any part of the lands within the provisions of that act, may emphatically be called an existing right.

*171] The first branch of the public policy, revenue, engaged *the attention of the national government, immediately after the termination of the revolutionary war, and has been pursued by it ever since, with an undeviating aim; and it may be here observed, that one condition in the cession from Virginia is, that the lands ceded shall be sold, and the proceeds go in discharge of the public debt. It is not denied, that congress may suspend the sale of the whole or any part of the public lands; but doubtless, in such case, there would appear some distinct and good reason for doing it, as in the act of May 10th, 1800, in order to attain, more effectually, the objects of the whole system; and then the intention was expressed with irresistible clearness in the repealing clause. But where nothing of this kind is pretended, where no object or motive can be perceived leading to suspension, the implication must be strong indeed, to induce a court of justice to suppose a design to depart from every principle of the law in the case.

The constitution and the law show, that the president had no power to establish the Zanesville offices, until after the next meeting of congress; for those offices were not vacancies, to be filled during the recess; and it will not be contended, that he was bound to summon a special meeting of the senate for that purpose. Furthermore, the president had no power to cause sales to commence at Zanesville, until, in some act subsequent to that of March 3d, 1803, the time for opening sales should be appointed; and we shall now endeavor to show the correctness of that position. The words of

*172] the act of March 3d, 1803 (§ 5 and 6), refer, generally, to the act *of May 10th, 1800, and embrace all the regulations prescribed, among which a prominent one is, that all the land must be offered at public sale, before being offered at private sale, and that a day should be appointed by law, when sales are to commence at each office. The object of public sale, when any tract of country is brought into market for the first time, is, principally, the enhancement of price above the legal limitation, by means of competition for the most valuable tracts; but it has another, of some importance, that is, settling in this way the preference between competitors.

The fair inference from these considerations is, that no sale of any part of the unappropriated lands in the military tract could legally take place, either at Zanesville or Chillicothe, under the bare provisions of the act of March 3d, 1803; that some further legislative provision was necessary, appointing the time when sales should commence. This provision is found in the act of March 26th, 1804. It is true, that in another act, passed also

the 3d March 1803, "regulating the grants of land, and providing for the sale of the public lands south of Tennessee," the time when sales are to commence is left with the president; but it is to be by proclamation, giving due notice. This is a modification only of the practice under the same principle and policy.

But it may be said, the act of May 10th, 1800, excepts from public sale a part of the Marietta district, and all the Steubenville district. This is true; and the reason for this exception is not readily perceived. The only probable one is, that all the part excepted in the Marietta district was known to be a *rough, hilly country, therefore, no prospect of sales being immediately effected in it. The distinction, on any other account, [*173 between the west of the Muskingum, including the township intersected by it, and the lands lying east of those townships, seems to be idle. With respect to the Steubenville district, all the most valuable lands in it had been sold in New York, in 1787, and at Pittsburgh, in 1796; therefore, the competition to be expected at public sale was not thought of sufficient importance to be secured by statutory provision. But whatever may have been the reason for excepting these lands from public sale, the principle of fixing by law the time when the private sale of them shall commence, is still preserved; thus securing the equitable mode of settling by lot the preference between applicants for the same tract, provided for in the act of May 10th. In fine, the reference of the act of March 3d, 1803, to that of May 10th, 1800, is general, therefore, embraces the general provisions only; and the correct conclusion from a whole view of this matter is, that the act of March 3d, 1803, was inchoate, inoperative of itself, in respect to sales at Zanesville, and therefore, it would be absurd to give to it a constructive repeal of the preceding statute.

All that has been urged against suspending sales at Marietta, until the operative organization of the Zanesville district took place, applies with equal force to the act of March 26th, 1804, as to that of March 3d, 1803. The absurdity is just as great in principle; the only difference is, its effects are not of so long continuance. Besides, the act of March 26th, *1804, [*174 appoints the time when sales shall commence at Zanesville, and thus removes the only objection of the register of the Zanesville district to the construction for which we contend.

There is no difference, in regard to construction, between a law which definitively appoints the time when a certain thing is to be done in future, and a law which leaves indefinite the future time when that certain thing is to be done; and practically, there is less reason to give the subsequent statute a repealing operation from the day of its passage, in the latter, than in the former case, because, there is less inconsistency in suspending the existing rights of individuals, and the public interest and policy for a certain, than for an uncertain time. Resting with some confidence in this position, we shall here introduce a case precisely in point, to show, that the repugnant words are not alone and abstractedly to be considered. *Whitham* v. *Evans*, 2 East 135. "By a statute passed on the 9th of July, the jurisdiction of a court of requests is enlarged, after the 30th of September following, from debts of 40*s.* to 5*l.*, and it is also enacted, that if any action shall be commenced in any other court, for a debt not exceeding 5*l.*, the plaintiff shall not recover costs: yet from a necessary construction of the

whole act, a plaintiff shall recover costs, in an action commenced in another court, for a debt between 40*s.* and 5*l.*, after the passage of the act, and before the 30th of September. Till then, he could not sue in the court of requests, and therefore, had no other remedy but to sue in another court."

*175] *Here was an attempt made to give to the words "if any suit shall be commenced," &c., an abstract meaning and repealing force, from the day of passing the act; but they were not allowed to suspend the existing right to sue somewhere.

The admission heretofore made, that is, that had the day been appointed when sales were to commence at Zanesville, they might have been continued at Marietta up to such day, seems to render a reference to the above case unnecessary, in respect to former arguments on the other side; but those admissions may not be extended to the present hearing: and besides, the cited case shows, that the same kind of reasoning has been resorted to on other occasions, that it has been put down by the court, and that the whole law and practical reason are the only sure guides to sound construction. In every proposition importing that the lands taken from the Marietta district "shall be sold at Zanesville," these repugnant words must be used; and when the object is to give them an abstract repealing effect, from the moment they are used by the legislature, it matters not when "sold at Zanesville."

2. The second point in our argument is, that the complainant's purchase was made conformable to the practical construction given to the laws in question by the proper executive officers. This relates, principally, to the secretary of the treasury, the superintendant of the whole; but extends also to the register of the Marietta district, who, being without instructions, had to act upon his own discretion.

*176] *The facts in the bill show, that laws affecting the land-offices are received, by the respective officers, through the treasury department, with instructions; it therefore follows, that had the secretary of the treasury construed the act of March 3d, 1803, as suspending sales at Marietta, he would have given instructions to that effect. This deduction flows by such strong implication from the facts and the nature of the case, that direct proof, if susceptible of being had, would be unnecessary: it is, in fact, involved in the acknowledgment of the secretary of the treasury, that his first impressions (that is, that all sales made at Marietta, after the passing of the act of March 3d, 1803, were void, as suggested by the private opinion of the register of the Zanesville district), were erroneous; and without saying anything more than has been said, in relation to the act of March 26th, 1804, we may confidently assume the fact stated as the foundation of this point; and shall now endeavor to show that the conclusion drawn from it is correct.

The true doctrine of executive construction is, that, generally, it is to be considered and respected: for executive officers are officers of the constitution and laws, as well as the judges; and in the performance of their proper functions, the former are under the necessity of putting a construction on the acts of the legislature, as well as the latter: and it may be added, that they are always supposed to act under the advice of a high law-officer,

*177] appointed for that purpose. When, in this necessary exercise of their judgment, they put such a construction on a *statute as promotes

its evident object, preserves all the rights of individuals, and which at the same time becomes a rule by which title to things real or personal is acquired, such construction ought not to be set aside by a rigid criticism of any kind; but where it injures the public interest, or abridges and restrains the rights of individuals, it should be strictly examined and corrected.

When executive constructions and regulations form the rule by which the most interesting of all titles, the title to land, is acquired, all must see and admit the reasonableness of preserving rights growing out of them. Executive construction, in such cases, acquires all the importance, and involves all the consequences, of judicial decisions. Could it be established, that the secretary of the treasury had misconstrued the act of March 3d, 1803, in permitting sales to be made at Marietta, after its passing; and that this was so erroneous as to make void those sales; such a decision would reach, as has before been observed, two valuable interests, *bonâ fide* acquired, as ours was, and long possessed, as ours ought to have been: for their titles cannot, and ought not, to be preserved by the mere refusal of executive officers to act; neither, it is conceived, because the land cannot now be entered in tracts of the same size in which they were offered at public sale, by reason, that the law is modified in this respect; for, should this be admitted, the land-officers might, through ignorance or fraud, entangle titles to any extent. All lands, in fact, unsold at public sale, are liable to be entered at private sale; and all tracts *not legally sold, are still public lands and liable to be entered. [*178

The observations of Sir William Jones, before quoted, go to illustrate and support our reasoning on this point. It may readily be supposed, that a difference might take place in construing the minor provisions of a statute, though all should agree in its main object and intent: when this is attained, the minor provisions are of little moment. Suppose, the act of March 3d, 1803, was actually couched in such ambiguous terms as, taken in their literal and grammatical sense, would raise a doubt whether sales were to continue at Marietta after its passage; but that the secretary of the treasury, in consequence of a construction formed from the exercise of his judgment, on a view of the whole law, had given actual instructions to continue them there. Would a sale made under such circumstances be declared void? We think not; and certainly not in the present case, which stands clear of every literal and grammatical ambiguity—where the necessarily implied construction of the secretary of the treasury runs with the obvious intendment of the whole law.

In closing our argument on this point, we beg leave to press this view of the subject with some earnestness on the consideration of the court; and confidently taking it for granted, that the not instructing the Marietta officers at all, was equivalent to instructions to continue sales there, we again ask, that if actual instructions had been given, to continue sales at Marietta, until a few days before they commenced at Zanesville, giving sufficient time only *for the proper notice to the Zanesville officers; and the register of the Zanesville district had thought proper to disregard these regulations, and sell the land over again, would the court sanction his sales? or, in other words, would it now sanction a sale of the two tracts entered at Marietta, in July 1803? [*179

3. Our third point is, that supposing the act of March 3d, 1803, had, in

express words, or by necessary implication, taken away the power of the Marietta office to sell; yet, that it did not begin to have that effect, until duly promulgated at Marietta, conformable to the usual manner of promulgating such acts, &c., and the same of the act of the 26th of March 1804. The reason of the rule, that, where no day is appointed, statutes begin to have effect from the day of their passage, seems to be this: that it being practically impossible actually to notify every person in the community of the passage of a law, whatever day might be appointed for its taking effect, no general rule could be adopted, less exceptionable. The general rule may, in some instances, produce injustice; but if ignorance of the law was admitted as an excuse, too wide a door would be left open for the breach of it. Where statutes are liable to produce injustice, by taking immediate effect, the legislature will, except through inadvertence, appoint a future day from whence they are to be in force. Mr. Justice BLACKSTONE (1 Bl. Com. 45), after treating of the promulgation of laws, and the duty of legis-
*180] latures to make *them public, says, "all laws should, therefore, be made to commence in future, and be notified before their commencement, which is implied in the term prescribed." The fair inference from this, and indeed, from all that he and other writers have said, in treating on the elementary principles of law, is, that where unjust consequences result from the application of a general rule to a particular case, courts have the power to except such case and bring it under the control of equitable construction; and to ask, "did the law-maker, supposing him to be an upright man, intended to include or except this case?" 6 Bac. Abr. tit. Statute, I, 389.

One feature in the reason of the general rule is, that it would be practically impossible to fix on any time for laws to take effect, so as that each person affected by them, or liable to be affected, could, with certainty, have notice; had such notice been practicable, doubtless, the rule would have been different; and where this part of the reason ceases, according to a maxim of law and reason, so much of the rule ceases also. Now, when a law, under the supposed form of that of March 3d, 1803, should be promulgated at a land-office, every person who could in any way be affected by it, would have actual notice; the applicant would know that he could not purchase, and he could not complain of injury. Lord KAMES's reasoning (Kames' Eq. Introd. ii.) goes to show, that where the claims of equity can
*181] be brought under a general rule, "a court of *equity declines not to interfere." (Ibid.) Promulgation of the law at each land-office is an easy rule, liable to no uncertainty or difficulty, and, besides, had been the usual practice; therefore, no general promulgation can be a substitute for it. The necessity for the usage is manifest; for, if the numerous dependents of the treasury department were permitted to construe the law for themselves, endless contradiction and confusion must be the consequence. The settled course of decision, in relation to deeds which have not been put on record within the time prescribed by law, falls exactly into Lord KAMES's reasoning. Where it can be proved, that the party who holds the second deed, though first on record, had notice of the previous deed, he shall not be permitted to take advantage of the omission to record in the holder of the first deed.

There is a case in Dallas (*Albertson* v. *Robeson*, 1 Dall. 9), precisely in

point, to support the restriction we contend for, on the abstract taking effect of statutes, when the nature of the case affords reason for such restriction. The laws of the colonial legislature of Pensylvania were in force, until revoked by the king and council, and the question was, whether a revocation took effect, at its date in London, or when notified in Philadelphia; and it was held by the court, not until notified to the governor and council, in Philadelphia.

The decision and opinion of this court in the case of *Arnold* v. *United States*, 9 Cranch 104, will not, it is *presumed, be found, on due examination, to impugn the foregoing reasoning on this point. The [*182 question was, so far as that case is analogous, whether double duties should commence throughout the whole country, from the passage of the act, or from its notification at the proper office in each collection district. The double duties were a burden which the whole community ought, in justice, to bear equally; and without making the act take a proper and absolute effect from the day of its passage, this equality of imposition would not be produced; an importation at Washington would have been charged with an impost, from which one at a more distant port would have been exempt. Had the act been for reducing the import duty, no doubt, but the money received at a distance, after the passing of the act, would have been refunded; this, it is believed, was done on the repeal of the internal taxes; and thus a general reciprocity is produced in the operation of laws of this nature. In this case, there was no particular injury set up, but the hypothetical possibility only of injury, and that, not such as would, necessarily, follow the act of importation, but growing out of contracts involved in, and properly referrible to, the general risk of trade. Had the question been, an entire suspension of the existing right to import, without the usual equitable provisions on like occasions, allowing all vessels which had departed, without knowledge of such suspension, to complete their voyages, or with penalties for importation, we may well suppose the taking effect of the law would have been restrained to its due notification at the proper office: *or, to show the same principle in another point of view, it may be asked, whether the penalties of the embargo laws attach [*183 before notice of their passage at the naval offices in the respective districts?

The constitution of the United States has not, in express words, prohibited congress from passing laws impairing the obligation of contracts; but the prohibition is so strongly implied, and such laws, as well as *ex post facto* laws, are so contrary to justice, that it is presumed, an act to that effect would be declared void: such a law, for instance, as should go to resell any tract of land which had been legally sold. That the entry of a tract of public lands forms a perfect contract, will not be denied; neither that under the supposed form of the act of March 3d, 1803, an entry at Marietta, before it was possible that notice could reach there, would come fully within the spirit and meaning of an equitable contract. Now, the established course in her administration of justice, protects equitable contracts, equally with those which are strictly legal. The operation of a criminal or penal law, under the construction contended for on the other side, would render it, in its practical effects, as perfectly *ex post facto*, as one made to take effect before its passage; and by parity of reasoning, that

construction virtually implies a breach of contract, and so is contrary to the constitution of the United States, as well as contrary to reason and justice. The pardoning power of the executive in a criminal case, might afford a remedy for the injustice which would follow: but in a civil one, the only *184] remedy must be found in the reasonable and equitable construction *of the judiciary, "who have authority over all laws, and more especially over statutes, to mould them according to reason and convenience to the best and truest uses." Bac. Abr. tit. Statute, H, 378.

But it may be said, that the general promulgation of all laws, in this country, is sufficient notice; and that from the passage of the act of March 3d, until the plaintiff's entry, or even application in February, there was ample room for notice. It is true, that in this country, all laws have a general promulgation; but it is equally true, that many laws are, notwithstanding, strictly local: such is the act in question, and considering the established usage, and the reason for that usage, the register of the Marietta district cannot be supposed to be bound to have acquired a knowledge of the act in the general way.

A striking analogy exists between the land laws and those for the collection of duties on importations. The two leading points in the public policy are the same in both, that is, national strength and prosperity, and revenue; and however deeply laid in the nature of political society the right to carry on trade and commerce may be, we have, it is conceived, sufficiently shown, that the right to settle and improve new land enters as deeply into the nature of political society in this country; and has, too, all the force of prescription of which the right is susceptible. The government, acting for the people, have no more claim to the price of the public lands, than to a part of the price of merchandise imported, and *185] therefore, have no more exclusive and arbitary control over *the former than the latter; and, repeating what has been before mentioned, an attempt to suppress the settlement of new lands would be as sensibly felt by the community at large, as an attempt to suppress trade and commerce: at the same time, both require to be regulated by law. Now, suppose, some newly-acquired territory were to be brought within the operation of the revenue laws, and for this purpose, it should be found expedient to annex it to a part of a former district, making a new district, and that preparatory measures were necessary before the new district could be organized, and that acts should be passed with analogous provisions to those found in the laws in question; would they be construed to suspend the collection of duties in, and the right to import into, the old district?

We have before mentioned, that the case of *Wilson* v. *Mason*, 1 Cranch 95, was cited at the first trial in the supreme court of Ohio, to show that notice of an illegal act was void; a position which, we also mentioned, was not disputed: but that case, and the opinion of the court in it, suggests some considerations for direct and hypothetical illustration, which we beg leave to introduce. In the opinion, it is said, "but if this opinion should be too strict, if an act entirely equivalent to an entry could be received as a substitute for one, a survey does not appear to be such an act," &c.; and then the opinion goes on to show the reason why; that is, that the entry is *186] the necessary notice of the appropriation of any part of the waste lands and the only way to prevent others, with equal *rights, from being

misled and injured ; that the entry was, in fact, the very remedy the law had provided against a previously existing evil. Now, in the present case, supposing suspension of sales at Marietta somehow entered into the general provisions of the law—an entry at Marietta would be an " entire equivalent " to an entry at Zanesville ; for it is clear, that before sales could begin at Zanesville, notice must be given what tracts had been sold at Marietta. This, too, would have been a general notice ; general, at any rate, to the extent of the object ; not an individual notice merely which the court would not, in the case of *Wilson* v. *Mason*, suffer to take place of the general rule.

A case may readily be supposed, under the land laws of the United States, offering arguments and objections parallel to those in the case of *Wilson* v. *Mason*. Suppose, A. purchases in one district, land lying in another ; discovering his mistake, and that B. is about to enter the same land in its proper district, he gives notice of his previous entry ; here, A. might say, that as between him and the public, a purchase in one district was the same as in another, and that B. had notice. In such case, a court would doubtless say, that to permit entries in one district, of land lying in another, would create confusion ; that a person with equal rights would never know when he made a safe entry, and that a personal exception, notwithstanding personal notice, was inadmissible ; but, as just shown, the objection would not lie in the present case ; so that whatever the " if " in the opinion of the court amounts to, may fairly be placed to our side of the question.

*But the point we propose to illustrate principally, by the case of *Wilson* v. *Mason*, is the right to purchase, by considering that case hypothetically. The right of every individual holding a warrant, to appropriate to himself waste lands, was not more substantially, or forcibly given, by the laws of Virginia, than the right to purchase any vacant tract of the United States land is given, by the act of May 10th, 1800. It is true, that in Virginia, money was advanced on obtaining the warrant, but no priority of claim grew out of the prior date of the warrant, except in the instance of an accidental competition ; and having money to pay, and applying to enter, puts the applicant under the laws of the United States on as good ground, in law and equity, as he stood on, who came forward to enter under the laws of Virginia. Besides, by a provision in the act of May 10th, before noticed, money may be paid to the treasurer of the United States : this corroborates and strengthens our reasons for this equality of right. The right to appropriate extended also over the whole of the waste lands in the state, though the act of appropriation must be performed in some one county. Now, let it be supposed, that the question had been between Wilson and Mason, whether Mason's right to enter, in such county as he thought proper, was to be suspended for fifteen months, in consequence of similar legislative provisions to those found in the acts of March 3d, 1803, and March 26th, 1804, and with constructions and doings of the proper executive officers, paralled to those in the present case ; can it for a moment be imagined, that the better right would have been decreed to Wilson ? [*187

*The phraseology of the laws for the collection of duties on imports is, that the bays, ports, harbors, &c., within certain limits, shall be districts, with some appropriate denomination ; and when any new district is made, that from and after a certain day the harbors, &c., within certain [*188

limits, shall be a district by the name of the district of ———. Here, the language precludes all sophistry in relation to the time when the new district is to go into operation; and its effect on the old district; but suppose, the language was—there shall be a district to be called the district of A., and from and after a certain day the duties shall, &c., be paid at B. This, on every principle of sound construction, would amount to precisely the same thing; and certainly, the words, shall be a district, would not, under this supposition, be construed to stop the power of collection in the old district, until the time they were to be collected in the new one at B.; yet, according to their reasoning, this would take place, for if the verbal repugnance only is to be considered, as before observed, it matters not when the practical repugnance commences.

Hammond, for the respondents.—The first point made for the respondents, is, that this court has no jurisdiction. The alleged contract and fraud of Zane constitute the sole ground for the interference of a court of equity. They are the gist of the plaintiff's case, and in respect to these, this court has no supervising control over the state court. Whether the contract alleged was one, the obligation of which *a court of chancery should recognise; whether it created a trust in Zane, which a court of equity would compel him to execute; whether the fraud was such, that a court of equity would relieve against it; and whether making general propositions of compromise, and delaying more than ten years before a tender of money was made, and a performance specifically required, was such diligence, on the part of the plaintiff, as to entitle him to the aid of a court of equity, are all questions over which the state court has complete control. In a court of equity, the right of the plaintiff to the relief sought depends upon the decision of the questions here enumerated, and not upon the correct construction of the acts of congress.

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Let it be conceded, that the plaintiff's construction of the acts of congress is correct, and the consequence is, that at the time of the sale at Zanesville, he held a legal right, imperfect, to be sure, but purely legal in its character. The allegations in the bill show that the plaintiff lost his right by the misconception or misconduct of the secretary of the treasury, and the officers of the land-office at Marietta, and not in consequence of the alleged agreement with Zane. If the plaintiff had a right, and that right had been duly regarded by the public officers, neither the alleged contract with Zane, nor Zane's subsequent purchase could have impaired it. Upon what principle, then, does he come in to equity to set up that right against Zane and McIntire? Is it, under color of an agreement with Zane, to impeach the conduct of the secretary or register and *receiver? Can it be said, that a decision against the relief sought, in such a case, is a decision against a right or title claimed under an act of congress? Is it not a more rational inference, that the decision was against the party, upon the ground that the contract did not entitle him; or upon the ground, that he could not have relief in equity? or that, if entitled to redress, it must be against the officer, or damages, upon the principle suggested by this court? *McClung* v. *Silliman*, 6 Wheat. 598.

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Suppose, that this court, upon an examination of the case, shall adopt the plaintiff's construction of the different acts of congress, does it follow,

that they must or can reverse this decree? Can they do it, without examining the obligation and extent of the alleged agreement with Zane? Can they do it, without inquiring into the subsequent conduct of Matthews, and determining how far the whole case entitles the party to the aid of a court of equity? It seems to us, that they cannot. And we insist, that in this court, these inquiries cannot be made: the 25th section of the judiciary act expressly forbids it.

Again, upon the construction of the acts of congress insisted on by the plaintiff, the certificate of purchase granted to him by the register of the land-office at Marietta, on the 16th of May, 1804, vested in him a legal right to the possession of the lands in dispute. Such certificates have always been received in Ohio as evidence of title in ejectment. The bill shows no reason why this legal remedy was not pursued. If the party, by his own laches, *has lost his remedy at law, can he come into a court of equity [*191
for relief? Does the bill show any circumstance that prevented him from diligently pursuing his legal remedy, or does it allege that it was lost by the contrivance of the defendants? Can this court examine these allegations, or determine whether, upon this ground, the bill was, or was not, properly dismissed?

But last of all, the case made in the bill shows, that this is the same case, and between the same parties, decided by this court, in 1809. (*Matthews* v. *Zane*, 5 Cranch 92.) That was an ejectment; the facts were agreed; the point submitted for decision was, the true construction of the acts of congress referred to, and the decision was against the plaintiff's purchase. If the true construction of the acts of congress constitutes the essential point to be decided in this bill, then it must be considered as a bill in chancery, brought in the state court, to review the decision of this court, in ejectment. Can it be maintained, that to dismiss such a bill is to decide against a right or title set up under an act of congress? We conceive, that upon an examination of this record, it will be found immaterial, whether the acts of congress separately, or the alleged agreement and conduct of Zane separately, or whether these conjointly, combined with the other circumstances of the case, constitutes its material points; the general dismissal of the bill makes no case upon which the jurisdiction of this court can be made to operate.

The merits are supposed to involve the just construction *of the [*192
acts of 1803 and 1804, referred to in the bill; and what right, if any, the plaintiff can derive from the alleged agreement and conduct of Zane. The act of May 1800, which originated and settled the present plan of selling the public lands, directed that lands, with certain specific boundaries, should be sold at land-offices established at certain places. The uniform understanding and construction of this law has been, that the power to sell at each of the land-offices was confined to the lands directed by law to be sold there. The officers at Chillicothe could not sell lands below the Little Miami, nor lands in the seven ranges. They had no power to effect such sale, and no right could be acquired by a purchase so made. A new and fifth land-office was established at Zanesville, by the 6th section of the act of March 1803; and it was directed, that the lands within the 11th range, and east of it, within the military tract, and all the lands north of the Ohio company's purchase, west of the seven first ranges, and east of the district

of Chillicothe, should be sold at Zanesville. The act containing this provision, consists of eight sections. The first three are intended finally to make provision for settling claims for mililary bounties. The fourth authorizes warrants to be issued to General La Fayette. The fifth provides for surveying the unappropriated lands within the military tract, and directs that so much of these lands as lie west of the 11th range shall be made part of the district of Chillicothe, and shall be sold there, "under the same
*193] *regulations that other lands are within the said district." The sixth section creates the new district at Zanesville, including a large body of lands within the military tract, and a large body also of the lands before that time directed to be sold at Marietta. The seventh section gives longer time to the purchasers of lands within J. C. Symmes' purchase, to complete their payments: and the eighth seetion relates to warrants, and plates and certificates of survey, within the Virginia military tract. This act was approved the 3d of March 1803. No time is fixed for it to take effect; and hence a question is mooted, as to the time when the sixth section commenced its effective operation, so as to put an end to the power of making sales, at Marietta, of the lands formerly within the Marietta district, but directed by the 6th section to be sold at Zanesville.

It is not pretended, but that the act in question, for all its general objects, took effect from its passage. There is nothing in its terms to except the 6th section from the general operation. The other seven sections speak from their passage, from the general taking effect of the act. The 6th section says the lands "shall be offered for sale at Zanesville." When? From this time; for no other time is designated. And it is a settled maxim, that where no time is appointed by the act itself for it to take effect, its operation commences from its passage. We have nothing to do with cases that may be supposed, of acts committed or rights commenced before the passage of a law that affects them was, or could be
194] known. All such cases stand upon their own circumstance, and are exceptions to the general rule. The 6th section directs that the lands shall be sold at Zanesville, and as no time is appointed for commencing the sales there, the act, in the natural import of its terms, according to settled rules of construction, must be understood to direct the sales to commence immediately, and by necessary consequence annuls the power to sell the same lands at Marietta, that existed before the act was passed, from the same period of time. Such being the plain import of the words used, when interpreted by a standard maxim of interpretation, those who undertake to render the 6th section inoperative, for an indefinite time, by connecting it with the preceding laws, and other circumstances, take upon themselves the burden of proof, and are bound to make out their case. It is not maintained by any one that lands within the Zanesville district could be sold at Marietta, after the taking effect of a legal provision directing them to be sold at Zanesville. The true point in dispute then is this—when did this 6th section take effect?

The proposition of the plaintiff, if I have been able to comprehend it, seems to be something like this: The 6th section of the act of March 3d, 1803, ought not to be construed as containing any determinate, positive, operative provision; but should be regarded as merely provisional or inchoative, dependent upon some future act of legislation to give it force and

effect. To sustain this position various arguments are urged, all of which appear to be predicated upon three principles: 1. A construction which would withdraw any *part of the public lands from market is against the public policy. 2. It is against the right of every individual to purchase. 3. It is inconsistent with the practical construction given by the secretary of the treasury. [*195

If the truth of every one of these dogmas were admitted, it would seem a sufficient reply, that the positive provisions of positive law never can be made to yield to any such considerations. When determining upon the construction to be given to an ambiguous provision, they ought to have their influence. But they cannot be legitimately used, first to render a plain provision ambiguous, and then to determine its meaning. The 6th section, as I have already insisted, stands clear of any ambiguity, and to decide that it takes effect from its passage, does not necessarily determine that its operation must be to withdraw any part of the public lands from market.

So far from being merely inchoative, the 6th section was capable of being carried into immediate effect, according to its terms. The officers might have been immediately appointed and furnished with plats and surveys of the unsold lands within the lands taken from the Marietta district; sales might have commenced immediately, and as soon as the military lands were surveyed, they, too, might have been brought into market. Certainly, it cannot be contended, but that the lands within the military tract, attached to the Chillicothe district, by the 5th section, might have been brought into market as soon *as surveyed, without any additional legislative provision. The plaintiff is, therefore, totally mistaken, as to the legitimate consequence of giving to the 6th section an immediate operative effect. Such construction tends to bring the public lands into market, not to shut them out. That the officers were not, in fact, appointed, and that the sales did not commence, are matters that have no bearing upon the argument. The true meaning of a statute must be determined by an examination of its provisions; not by the conduct of those appointed to carry it into execution. This view of the subject is also a satisfactory answer to the allegation respecting the rights of individuals to purchase. If that right exists, in the extent contended for, it could not be impaired by giving the 6th section immediate effect. So far as it was affected, it was by circumstances of a character very different from giving to the law a correct construction. [*196

But the principles assumed, both with respect to the public policy, and the individual right to purchase, are not admitted to be correct. Of the public policy, the legislature are exclusively the judges, and the individual right to purchase is also, before its actual application to any particular tract, entirely subject to legislative regulations. Now, I can well conceive, that it might be deemed good policy to withdraw, for a time, a portion of the public lands from the market. And if the legislature should do so, it is conceived, that their act would be, at once, decisive of the public policy of the measure, and so far must absolutely control the individual right to purchase. *If, then, the just construction of the 6th section should have the effect alleged, of withdrawing from the market a portion of the public lands, that circumstance would furnish no ground whatever upon which a court of justice should, or could, properly interpolate a fanciful con- [*197

struction of their own. They could not rightfully assume a course of policy different from that prescribed in the law, and make their own imaginations a standard of construction.

In fact, it was a part of the public policy, until long after 1803, to withhold a portion of the public lands from market. The three sections in each township reserved for future disposition, were kept back by this policy, and sold at a much higher price, in consequence of it, when actually offered for sale. Can it be pretended, that any citizen had a right to purchase these reserves, until their sale was authorized by law, and the terms of the purchase defined? We are required to examine whether the Zanesville district is erected, established or settled by that section. We maintain, that the Zanesville district was fully and completely established by the 6th section. If it was not, it is not yet established. It is recognised as an existing district by subsequent acts; but is, in no other way, authorized or established. It could not be essential to the existence of the district, that a time for commencing sales should be fixed, or that the register and receiver should be appointed. Indeed, until the district was established, no such appointment could be made. The perplexity in which the plaintiff involves his own propositions; at one time considering the section as designating the *198] *limits of a new district; at another, regarding it as only providing that a new district should be erected, at some time indefinitely future; and again declaring it inchoate and inoperative; telling us, in one breath, that some subsequent legislative provision is required, fixing the time when it should be established, and in the next, fixing that time upon a speculation of his own, without any such legislative act, is, of itself, very strong evidence that he is in error. The terms of the statute are simple and unambiguous. All this glossing is not required, to find out their obvious import. It is not an effort to elucidate, but to establish an hypothesis.

For the defendants, it is contended, that from the passage of the act of March 3d, 1803, the Zanesville district was established, and the power to sell at Marietta determined. We have shown, that this construction involves none of the inconveniences suggested by the plaintiff; but that if they actually existed, it resulted not from the provisions of the law; but from other causes. Our interpretation is founded upon a plain, palpable and consistent doctrine, in every respect definite and certain—its only possible evil, a suspension, for a short period, of the sales of a small portion of the public land. The construction insisted upon by the complainant is destitute of all certainty, and calculated to involve the whole subject in perplexity and doubt. There is a district, the lands within which must be sold at Zanesville. Was it established by the 6th section of the act of 3d March 1803? No, says the opposite argument, that section only defined the limits to enable *199] the surveyor-general *to prepare the plats and surveys—No, says the opposite argument again, that act was only inchoative and inoperative, it provided that the Zanesville district should be erected at some time indefinitely future Was it established by the act of the 26th of March 1804, appointing the time of the commencement of the public sales? No, again, says the opposite argument, that act "in relation to the present question, only fixes the future time when it shall be established." Was it established by the appoinment of the officers? No, says the complainant, the new district was not established and settled by appointing the officers. And this

negative involves the very singular circumstance, that officers should be appointed for a district not established and settled. By the strict terms of the law, the complainant insists that the Zanesville district was not erected, legally established, and settled until the 19th of May, the Saturday before the sales commenced on the Monday, 21st, following. But by a reasonable construction, he concedes that the Zanesville district might be considered as established and settled after the 12th of May. At what time after, and before the 19th, he has not informed us, and, no doubt, for this very good reason, that after he made his entry, on the 12th of May, he had no interest in the question. We have the voluminous bill and the elaborate argument of the complainant before us, do they show how the Zanesville district was established, and when it was established? There are, undoubtedly, a multiplicity of allegations, to show that it was not established until after the 12th of May, but all the *rest is left in obscurity. We have not been able [*200 to perceive one single sound reason for considering the 12th of May an era of any importance, except that it was the day upon which the plaintiff made his entry. Ought a court of justice thus to depart from the direct and plain import of unequivocal terms?

Another point labored in the bill, and strongly urged in argument, is, that the whole conduct of the secretary of the treasury, as superintendent of the sales of public lands, was in accordance with the hypothesis maintained by the complainant. The act in question, March 3d, 1803, was never specially promulgated at the Marietta offices. No instructions with respect to it were ever sent to the officers; and sales made at Marietta, within the tract directed to be sold at Zanesville, after the passage of the act, were confirmed by the secretary. One general observation must be made with respect to all these allegations. The secretary was the agent of the law, and was subject to its provisions, which he could neither restrain nor extend. If he fell into error, that error can avail nothing in a court of justice, bound to declare their own interpretation, not to adopt that of others.

We think we have shown that the three principal propositions upon which the plaintiff rests his construction of the act of 3d March 1803, are equally unfounded in fact, and untenable in argument; our interpretation of that act is not shaken by them; and it is moreover sustained by the unequivocal decision of the court, in this very case. (5 Cranch 92.)

*It is alleged, that the act of the 3d of March 1803, is a mere [*201 affirmative act, in no respect repugnant to the act of May 1800, until, by an actual commencement of sales at Zanesville, it shall be rendered practically repugnant. Very little examination will show that this is the old question, in a new dress. The power to sell at Marietta was created by the act of May 1800, and depended upon that act for its existence. The act of March 3d, 1803, creates a power to sell the same lands at Zanesville. These two powers are inconsistent with, and repugnant to, each other. Both cannot subsist at the same time. In deciding the question of repugnancy, we are not to inquire only, whether the two powers can be concurrently executed; it is indispensable to determine whether they can exist together. Now, the power to sell at Zanesville, given by the act of March 1803, is a complete, not an inchoative power. Although no time is fixed at which that power shall be executed, yet the power itself is created, and if it exist, then it is repugnant to the previous power given, to sell at Marietta, and repeals

that power. It is impossible, that the court cannot at once perceive the distinction between creating the power to sell, and providing for the immediate execution of that power. It is because the complainant has not regarded the distinctive character of these two circumstances, that he has involved his argument in so much perplexity. And here, if it were essential to the argument, it might be shown, that should it be conceded, that congress did not intend to suspend the sales, and that such is the effect of our construction, yet it results *from the force of the terms used, contrary to the intention. They created a complete and perfect power to sell at Zanesville, and omitted to provide, that the legal effect of that power should be suspended, until measures were arranged for its immediate execution. So that the question still recurs, when was the power to sell at Zanesville, under the act of March 1803, actually created? If, as we contend, that power existed, the moment the act took effect, it was, from that moment, repugnant to the power of making sales of the same lands at Marietta. The two acts are, in no single view, affirmative of each other on this point, although they both relate to the sales of public lands. The legal power to sell at Zanesville must have existed, separately and substantively, before any measure could be taken to carry that power into effect. This consideration alone exposes the fallacy of connecting the power to sell, the appointment of the officers, and the commencement of the sales, as all essential to the erection of the district.

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March 1st, 1822. MARSHALL, Ch. J., delivered the opinion of the court.—This suit was brought in the state court of Ohio, for the purpose of obtaining a conveyance of a tract of land to which the complainant supposed himself to have the equitable title, founded on an entry prior to that on which a grant had been issued to the defendants. The state court decreed that the bill should be dismissed, and that decree is now before *this court, on the allegation that the court of the state has misconstrued an act of congress.

*203]

The plaintiff has stated several equitable circumstances in aid of the title given by his entry; but unless his entry be in itself valid, there can have been no misconstruction of an act of congress, in dismissing the bill, and this court cannot take into consideration any distinct equity arising out of the contracts and transactions of the parties, and creating a new and independent title.

The validity of the plaintiff's entry depends on the land-laws of the United States. In May 1800, congress passed an act dividing an extensive territory, north-west of the river Ohio, into four districts; and establishing a land-office in each, for the sale of the public lands within that district. This act describes the time, place and manner in which the lands of each district shall be offered at public sale; and directs also the manner and terms in which those not sold at public sale, may be disposed of at private sale. The lands of the district comprehending the tract in controversy were to be offered for public sale at Marietta, on the last Monday of May 1801. On the 3d of March 1803, congress passed an act, the 6th section of which creates a fifth district, and enacts, that the lands contained within it, "shall be offered for sale at Zanesville, under the direction of a register of the land-

office and receiver of public moneys, to be appointed for that purpose, who shall reside at that place." This district includes the land in controversy.

*On the 26th of March 1804, congress passed an act entitled, "an act making provision for the disposal of the public lands in the [*204 Indiana territory, and for other purposes." This act comprehends the lands directed to be sold under the acts of 1800 and 1803, as well as the lands in Indiana. The fifth section enacts, that "all the lands aforesaid" (except certain enumerated tracts, of which the land in controversy forms no part) "be offered for sale to the highest bidder, under the direction of the surveyor-general, or governor of the Indiana territory, of the register of the land-office, and of the receiver of public moneys, at the places respectively where the land-offices are kept, and on such day or days as shall, by a public proclamation of the president of the United States, be designated for that purpose."

On the 7th of February 1804, Matthews applied to the register of the Marietta district, and communicated to him his desire to purchase the land in controversy. The office of receiver being then vacant, no money was paid, and no entry was made; but the register took a note or memorandum of the application. The counsel for the plaintiff insists, that the title of his client commences with this application.

The law authorizes the respective registers to sell at private sale all the lands which may remain unsold at the public sales, and says the sales "shall be made in the following manner, and under the following conditions, to wit: *1. At the time of purchase, every purchaser shall, exclusively of the fees hereafter mentioned, pay six dollars for every section, and [*205 three dollars for every half-section he may have purchased, for surveying expenses; and deposit one-twentieth part of the amount of purchase-money, to be forfeited, if within forty days, one-fourth part of the purchase-money, including the said twentieth part, is not paid."

The payment of the money required by the act is obviously indispensable to the purchase. Without such payment, the sale prescribed by law could not be made; and certainly no sale, had the register attempted to make one could be valid, if made in opposition to the law. But the register has not attempted to sell, nor could Mr. Matthews have so understood the transaction. He took a note of the land the plaintiff intended to purchase; and had the receipt of the receiver been produced, might, perhaps, have made the entry. In so doing, he would have acted in the double character of register, and agent of the purchaser. That there was no receiver was undoubtedly not the fault of Mr. Matthews; but this circumstance as completely suspended the power of selling land in the Marietta district, as if there had been neither register nor receiver; as if there had been no land-office. The transactions then between Mr. Matthews and the register, on the 9th of February 1804, may be put entirely out of the case.

On the 12th day of May 1804, soon after the receiver *had entered [*206 on the duties of his office, Matthews paid the sum of money required by law, and made an entry for the land in controversy, with the register of the Marietta district. The 12th section of the act of the 26th of March 1804, directed, that "the lands in the district of Zanesville should be offered for public sale on the third Monday of May." In pursuance of this act, and of instructions from the secretary of treasury, the sale of the lands in the

district did commence on that day; and on the 26th day of that month, the defendants became the purchasers of the land in controversy.

There are many charges of fraud in the bill and a contract between the parties is alleged. But this court cannot look into those circumstances, unless they had induced the court of Ohio to determine against the person having the title under the laws of the United States. As this case stands, the opinion of the state court on the fraud and the contract, is conclusive; and the only question to be discussed here is, the title of the plaintiff under the acts of congress.(*a*) This depends entirely on the validity of his entry made on the 12th of May 1804.

(*a*) The constitution of the United States declares (art. 3, § 2), that "the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, on which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls;" &c. And that, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make."

The judiciary act of 1789, c. 20, § 25, provides, "that a final judgment or decree, in any suit in the highest court in law or equity of a state, in which a decision of the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity," &c., "or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision, is against the title, right, privilege or exception, specially set up by either party, under such clause of the said constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the supreme court of the United States, upon a writ of error," &c. "But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions or authority, in dispute."

Under these provisions, with a view to the questions of jurisdiction in the above case (Matthews *v.* Zane and others), the following points have been determined by this court. In an action of ejectment between two citizens of the same state, in the state court, for lands within the state, if the defendant sets up an outstanding title in a British subject, which he contends is protected by the 9th article of the treaty of 1794, between the United States and Great Britain, and that, therefore, the title is out of the plaintiff; and the highest court of law or equity of the state decides against the title thus set up, it not a case in which a writ of error lies to this court. The words of the judiciary act must be restrained by the constitution, which extends the judicial power to all cases arising under treaties made by authority of the United States. This is not a case arising under the British treaty; and whether an outstanding title be an obstacle to the plaintiff's recovery, is a question exclusively for the decision of the state tribunal. But it must be understood, that this court has appellate jurisdiction, where the treaty is drawn in question, whether incidentally or directly. Whenever a right grows out of, or is protected by, a treaty made under the authority of the United States, it is sanctioned against all the laws and judicial decisions of the respective states, and whoever may have this right under such treaty, is to be protected. Thus, if the British subject in whom was supposed to have been vested the outstanding title protected by the treaty, or his heirs, had claimed in the cause, it would have been a case arising under the treaty. But as neither his title, nor that of any person claiming under him, could be affected by the decision, it was held not to be a case

Matthews v. Zane.

*This question has already been decided in this court. *The plaintiff brought an ejectment against the defendants, for the lands in controversy; and the judgment of the state court being against [*208 him, the cause was brought by writ of error into this court. *In February 1809, the judgment of the state court was affirmed, this [*209 court being of opinion, that the erection of the Zanesville district suspended the power of selling the lands lying within that district, at Marietta. The counsel for the plaintiff contends, that several material circumstances which are now disclosed, did not appear in that case. But the court is of opinion, that the additional circumstances relied on in argument can, in no degree, affect the point decided in that case, which was, that the power of selling at Marietta ceased, when the new district was established, so far as respected the land in that district.

This point has been re-argued with great labor and talent, and has been re-considered by the court. The result of that re-consideration is, that the original opinion is correct. We still think, that on the passage of the act by which the district of Zanesville was created, and the land within it directed to be sold at that place, the power of selling the same land at Marietta necessarily ceased. It is, we think, impossible to look at these acts, without perceiving that the lands lying in one district could not be sold in any other. Their words and their policy equally forbid it. The land in controversy might have been sold at Marietta, by the register and receiver of that place, previous to the *3d of March 1803, because it lay in the [*210 district, the lands of which were directed by law to be sold at that place by those officers. Had the land been out of that district, it could never have been sold at that place, or by those officers. When, by law, a new district was formed, comprehending this land, and its sale was directed at a different place, and by different persons, the land is placed as entirely without the district of Marietta, as if it had never been within it. The power of the officers of the land-office at Marietta to sell, is expressly limited to the lands within the district; and land which ceases to be within the district, is instantly withdrawn from that power.

That the effect of this construction is to suspend the sales of land in the new district, until the proper officers should be appointed, does not, we think, operate against it. An immense quantity of land was in the market; and the laws furnish no evidence in support of the opinion, that the eagerness to keep the whole continually within the reach of every purchaser, was

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arising under a treaty. Owings *v.* Norwood, 5 Cranch 344. But where the decision is against the validity of the treaty, or against the title, specially set up by either party to the cause, under the treaty, this court has jurisdiction to ascertain that title, and determine its legal validity, and is not confined to the mere abstract construction of the treaty itself. Smith *v.* State of Maryland, 6 Cranch 286; Martin *v.* Hunter, 1 Wheat. 304, 357. The last clause in the 25th section of the judiciary act, which restricts the grounds of reversal to such as appear on the face of the record, and immediately respect the construction of the treaty or statute in dispute, applies only to cases where the parties claim under various titles, and assert various defences, some of which may, and others may not, regard the construction of a treaty or statute, and was intended to limit what would otherwise unquestionably have attached to this court the right of revising all the points in dispute, and to confine it to such errors as respect the questions specified in the section. Martin *v.* Hunter, 1 Wheat. 357.

so great as to hazard the confusion which might arise from any uncertainty respecting the office at which any portion of it might be acquired. If this intention had been so predominant, the legislature would certainly have provided that the lands in the Zanesville district might still be sold at Marietta, until some day to be fixed in the law, by which it might be supposed that the office at Zanesville would come into operation. The omission to make such a provision, forbids the opinion, that congress considered the necessity
*211] of keeping all their lands in *a state to be instantly acquired, as being so urgent, that a court would be justified in construing one of their statutes contrary to its words. The known rule being, that a statute for the commencement of which no time is fixed, commences from its date, the act of the 3d of March 1803, separated this land from the Marietta district, on that day, and withdrew it from the direction and power of the officers of that district. It was legally competent to those who possess the power of appointment, immediately to appoint necessary officers to carry on the sales at Zanesville, and congress did not think proper to provide for continuing the sales at Marietta, until such officers should be appointed.

This court, then, retains its opinion, that, independently of the act of the 26th of March 1804, the entry made by Matthews on the 12th of May 1804, would be invalid. That opinion is still further strengthened by the act last mentioned. That act, considering its 5th and 12th sections together, directs all the lands in the Zanesville district to be sold under the authority of the proper officers, on the third Monday of the ensuing May. Consequently, there could be no power to sell any of the land within that district, at Marietta.

The case of the plaintiff may be, and probably is, a hard one. But to relieve him, is not within the power of this court. We think, the plaintiff is not entitled, under the laws of the United States, to the land he claims; and that the decree ought to be

Affirmed, with costs.

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*212] *Hoofnagle and others *v.* Anderson.

Land-law.—Inception of title.

A patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation.

Courts of equity consider an entry as the commencement of title, and will sustain a valid entry against a patent founded on a prior defective entry, if issued after such valid entry was made; but they never sustain an entry made after the date of the patent.

This case attempted to be taken out of the general rule, upon the ground that the equity of the party claiming under the entry commenced before the legal title of the other party was consummated; but the circumstances of the case, and the equity arising out of it, were not deemed by the court sufficient to take it out of the general rule.

Appeal from the Circuit Court of Ohio.

February 25th, 1822. This case was argued by *Scott* and *Doddridge*, for the appellants, and by *Talbot* and *Brush*, for the respondent.

March 2d. Marshall, Ch. J., delivered the opinion of the court.—This suit was brought by the appellants, who were plaintiffs in the circuit court for the district of Ohio, to obtain a decree for the conveyance of a tract of land, of which the respondent has the legal title.

The land lies within the tract of country reserved by the commonwealth of Virginia, out of her cession to the United States, for the officers and soldiers *of the Virginia continental line. The respondent's [*213 patent is dated on the 9th day of October 1804, and is founded on a warrant for military services, issued from the land-office of Virginia, to Seymour Powell, heir of Thomas Powell, on the 29th day of May 1783, which was entered in the office of the principal surveyor, on the 16th of June 1790, and was surveyed on the 30th of October 1796. The survey was assigned, for a valuable consideration, to the appellee, in whose name the patent was issued.

The entry under which the plaintiffs claim was not made till the 28th day of May, in the year 1806; and was, consequently, eighteen months posterior to the emanation of the defendants' grant. They insist, however, that this grant ought not to stand in their way, because it was obtained contrary to law, being founded on a warrant, which was issued by fraud or mistake. It is admitted, that the service of Thomas Powell was performed in the state, and not in the continental, line of Virginia; consequently, the recital of his military service is erroneous. The warrant ought to have been for services in the state, instead of the continental, line. How far the patent ought to be affected by this error, is the question on which the cause depends.

It is obviously the error of the register of the land-office, because the certificate on which the warrant issued, states the service correctly. There can be no ground for suspecting, that any fraud is mingled with this mistake. At the time the warrant was *made out, its value was precisely [*214 the same, if for services in the state, as if for services in the continental, line. The quantity of acres allowed to the officer was the same; and precisely the same land was subject to be appropriated by each warrant. Virginia considered the services of the continental and state officers as equally meritorious, and had equally rewarded them. There could exist then no possible motive for the erroneous statement on the face of the warrant, that it was issued for services in the continental, instead of the state, line. It was no advantage to Seymour Powell, whose father had performed service which the law deemed a full consideration for a warrant of equal value with that which was given him by mistake. This warrant was assignable, and carried with it no evidence of the mistake which had been committed in the office. It has been assigned for a valuable consideration, and the purchaser has obtained a patent for a part of it, without actual notice that there was any defect in the origin of his title. Should he lose this land, his warrant is lost. There is no longer any tract of country in which it can be located.

The title of the respondent to the particular tract included in his patent, was complete, before that of the appellants commenced. It is not doubted, that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. Courts of equity have considered an entry as the commencement *of title, and have sustained a valid entry [*215 against a patent founded on a prior defective entry, if issued after such valid entry was made; but they have gone no further; they have never sustained an entry made after the date of the patent; they have always rejected such claims. The reason is obvious. A patent appropriates the

land it covers; and that land, being no longer vacant, is no longer subject to location. If the patent has been issued irregularly, the government may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself.

The counsel for the appellants attempt to take this case out of the general rule, because their equity, they say, commenced, before the legal title of the respondent was consummated, and their pre-existing rights were impaired by his intrusion into the military lands reserved for the Virginia continental troops. The officer under whom they claim had a right to elect among all the vacant lands in the reserved territory, and this right of election was narrowed by the respondent's patent. This is a general indefinite equity, not applicable to one tract of land more than to another, and which has, perhaps, never been allowed, under circumstances resembling those which exist in the present case. It is a *scintilla juris*, which we should find much difficulty in supporting against a complete legal title, founded on an original claim of equal merit, of the same character. When it is recollected, that, in their origin, these claims stood equal, and were equally
*216] *capable of appropriating the same land, it might well be urged that the rights of the state officers were not sufficiently respected, when the legislature omitted to insert them, as well as their brethren of the continental line, in the reservation for military warrants; and that the mistake in the land-office has only retained for Mr. Powell rights which he ought never to have lost. The act which authorizes surveys on the north-west side of the Ohio, on warrants granted to the officers and soldiers of the Virginia continental line, likewise authorized the surveying of those which had been granted to the officers and soldiers of the state line. The laws granting these bounties, setting apart this tract of country, and authorizing these surveys, were public laws. They were known, or might have been known, to the government of the Union, when the cession was made and received. This right of election, which the appellants would now set up against a complete legal title, originated in them, and was common to both parties. The equity of the one cannot be so inferior to that of the other, as to justify the court in considering the patent of the one as an absolute nullity, in favor of the other, who has attempted to appropriate the same land, after such patent had been issued.

But this right of election, for which so much efficacy is claimed in this case, has some existence in the common case of treasury-warrants. The holder of such warrant has a right to locate it on any land, and no land can be regularly patented, unless it be first located and surveyed. If a survey
*217] be made on *a place different from the entry, it is as if made without an entry, and the holder of any other warrant has a right to take the land. A patent for this land, not founded on a previous entry, narrows his right of election; yet it has always been held, that such patent, though it must yield to a prior entry, would hold the land against a subsequent entry. The entry, and not the warrant, has always been considered as the commencement of title. The principle is well settled, in other cases, that a patent is unassailable by any title commenced after its emanation; and we perceive no sufficient reason against applying the principle to this case.

It is contended also by the appellants, that as the warrant refers to the certificate of the executive, as the authority on which is issued, it conveys

notice of the contents of this certificate to every purchaser. But this reference to the certificate of the executive appears on the face of every warrant, and contains no other information than is given by law. The law requires this certificate, as the authority of the register; it is considered as a formal part of the warrant. These warrants are, by law, transferrible. They are proved by the signature of the officer, and the seal of office; this signature and this seal are considered as full proof of the rights expressed in the paper; no inquiry is ever made into the evidence received by the public officer. If the purchaser of such a paper takes it subject to the risk of its having issued erroneously, there ought to be some termination to this risk. We think it ought to terminate, when the warrant is completely merged in a patent, *and the title consummated, without having encountered any adversary claim. [*218

The title under this warrant was considered in the case of *Miller* v. *Kerr and others* (*ante*, p. 1). In that case, the claimant under Powell had the junior patent, and the court thought that the equity growing out of a prior entry might be rebutted by the person holding the legal title, by showing any defect in that equity; but nothing was said in that case, which indicates an opinion, that a complete legal title might be overthrown, by an entry made after the consummation of that title.

Decree affirmed, with costs.

Brown and others *v.* Jackson.

Decision of land commissioners.

The decisions of the board of commissioners under the acts of congress providing for the indemnification of claimants to public lands in the Mississippi territory (commonly called the Yazoo lands) are conclusive between the parties, in all cases within the jurisdiction of the commissioners.[1]

This determination reconciled with that of the court in Brown *v.* Gilman, 4 Wheat. 255.

Appeal from the Circuit Court of New York. This suit was brought in consequence of the decision of this court in the case of *Brown* v. *Gilman*, 4 Wheat. 255, *and for the general history of the facts, reference was made to that case. [*219

The bill charged, that on the 13th of January 1795, the state of Georgia was seised in fee of a certain territory, within the boundaries of said state, &c., estimated to contain 11,380,000 acres, and bounded, &c.; that on the same day, by force of an act of the legislature of said state, passed on the 7th of January 1795, George Matthews, the governor, by letters-patent, conveyed said territory to Nicholas Long and others, and their associates, called the Georgia Mississippi company, reserving 620,000 acres for the use of the citizens of Georgia; that afterwards, on the 20th of January 1796, certain articles of agreement were made between the defendant, Amasa Jackson, and William Williamson, authorized by said company to sell, and George Blake and sundry persons, who became the New England Mississippi Land company; that it was stipulated in the said articles, that on or before the 12th of February then next, said Jackson and Williamson should fill up

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[1] S. P. Landes *v.* Brant, 10 How. 348.

and complete to said Blake and others, a deed of conveyance (which had been executed by the Georgia Mississippi company, in Georgia), of all the right and title of the Georgia Mississippi company, derived from the state of Georgia; that said Blake and others agreed, by the articles, to deliver their notes for the payment of two cents for each acre of land by them subscribed for, previous to the first of May then next; and for the further payment of one cent more for each acre, on or before the 1st of October then next; and a further payment of two and a half cents per acre, within twelve months from said 1st of May; and a further payment of two and a
*220] half cents, &c., on the 1st *of May 1798; and a further payment of two cents more, on the 1st of May 1799; in the whole, ten cents per acre, &c. And thereby it was agreed, that as soon as said deed should be prepared, &c., said deed should be delivered by said defendant, Jackson, to some person appointed by said parties, to be held as an escrow, on condition that if the notes or moneys due on the 1st of May, should not be paid, the deed should be re-delivered, and the associates should not be liable for the failure of each other; but if the notes were paid, the deed should be delivered to said Blake, &c., who were then to be severally liable for their own notes. That on the 11th of February 1796, said Blake and others entered into articles of association, by the name of the New England Mississippi Land company, by which it was agreed that Leonard Jarvis, Henry Newman and William Wetmore should be a committee to receive a deed from the defendant, Jackson, and William Williamson, of the said lands, belonging to the Georgia Mississippi company, for the use of the New England Mississippi Land company; and should execute to the several subscribers thereto, deeds of their respective proportions, to hold as tenants in common, and also, a deed of trust to trustees, &c., and a board of directors should be appointed; and it was agreed, the trustees should give each proprietor a certificate, in the form, &c., which should be complete evidence, &c., and transferrible by indorsement. And to carry such articles of agreement into effect, a deed of indenture, dated 13th of February 1796, purporting to be made by said Long and others, of one part, and Wetmore, Jarvis and Newman, of the other, was executed, whereby they conveyed said territory
*221] (excepting *said 620,000 acres) to said Wetman, Jarvis and Newman, and the survivor, in fee; and was delivered to G. R. Minot, as an escrow, with an indorsement. The first payment to be made on the 1st of May aforesaid, was duly made by every member, except, &c.; and the defendant, Jackson, and Williamson, personally delivered said deed to said grantees, and indorsed theron, &c., "free of conditions."

That prior to said absolute delivery, to wit, on the 10th of December 1796, an agreement of two parts was entered into between the associates of the New England Mississippi Land company, and the defendant, Jackson, wherein it was agreed that certain proceedings of certain scrip-holders of the Georgia Mississippi company, being also members of the New England Mississippi Land company, so far, &c., should be void; and that the associates of the New England Mississippi Land company should have no control over papers of the Georgia Mississippi company; but would deliver to the defendant, Jackson, so many of their certificates or scrip, as amount to 103,480 acres, computing the whole at 11,380,000, as an equivalent to the Georgia Mississippi company, for a loss by failure of Seth Wetmore, &c.,

subscriber for 100,000, who had not paid—said defendant, Jackson, to be accountable to said associates for such portion of Wetmore's notes, if recovered, as was equivalent to the debt assumed to be paid, *i. e.*, $10,348; and thereupon, said defendant, Jackson, should deliver said deed of conveyance absolutely, and within, &c., procure from the Georgia Mississippi company a confirmation, and deliver the same to said associates; and the defendant Jackson, covenanted not to negotiate the notes, until the confirmation was procured. And on the 17th of February 1797, said defendant, Jackson, delivered to Wetmore, *Jarvis and Newman, a deed of confirmation from Long and others, reciting, &c., and ratifying said deed of conveyance of said tract of land, excepting said 620,000 acres. That on the 28th of February 1797, an indenture of two parts, between Oliver Phelps and others, of the one part, and Jarvis, Newman and Hull, of the other, was made, wherein, reciting said conveyances, said associates conveyed to Jarvis, Newman and Hull, and survivor, to hold said land in trust, &c., according to articles of agreement constituting the New England Mississippi Land company. That William Wetmore, Jarvis and Newman, still retained their shares of said purchase as subscribed, viz: the said Wetman, 900,000 acres, Newman, 2,000,000, and Jarvis, 500,000, who, to place their shares in the same condition, on the same 28th of February 1797, by deed poll, released to John Peck, their several proportions, being $\frac{3400000}{11380000}$, in trust to convey the same to Jarvis, Newman and Hull, and survivor, to be held by them in trust for same uses as expressed in deed of associates; and on same day, said Peck conveyed the same land to said Jarvis, Newman and Hull, to be held accordingly; by which means Jarvis, Newman and Hull were seised of all said tract; and Hull, the survivor, continued so seised, until his deed to the United States. Trustees delivered certificates to the members of the New England Mississippi Land company, expressing, &c., whereby each became entitled to an equitable interest in his share. [*222

That on the 31st of March 1814, the congress of the United States passed an act for the indemnification of claimants of public land in the Mississippi territory, &c., by which act $1,550,000 were appropriated *for persons claiming under the Georgia Mississippi company. That on the 25th of January 1815, congress made a supplementary act, appointing a board of commissioners, instead of the first, to meet on the 4th Monday of January, &c. That on the third of March 1815, congress passed another act, &c., providing, that in certain cases, the commissioners might allow further time, not over two months from the third Monday in March, and to adjust all such claims as should be, or might have been released, &c., within the time limited; and empowering the president to issue certificates for decided claims. That on the 18th of January 1814, the members of the New England Mississippi Land company authorized their directors to release to the United States the whole claim of said company, under the act of Georgia, and required the trustees to execute deed, &c.; and certificates to be received therefor from the United States should be held by the treasurer, to be disposed of by order of the directors, for the use of the claimants. And on the 24th of November 1814, W. Hull, sole surviving trustee, made a deed poll to the United States releasing, &c., territory described, being the same conveyed by Georgia, as aforesaid, and on the 25th of January, took the oath. And that the directors, on the 7th of [*223

December 1814, made their deed poll, releasing all right of said company and the members thereof to said land; also, all claims to money, &c., to the United States, in fee.

The said directors conformed in all things, &c., and became entitled to the whole indemnity provided, &c., amounting to $1,550,000. Neverthe-
*224] less, said commissioners did decree that certain individuals *holding scrip under the New England Mississippi Land company, to the amount of 2,795,017 acres in all, who personally applied to said commissioners, among whom was said defendant Jackson, who (said Jackson), held scrip to the amount of 691,677 acres, should receive their indemnity directly, without permitting the same to go through the hands of the directors, &c.; and said individuals have received their several proportions accordingly, estimating the same at $13.62 *per* acre, deducting a certain sum for expenses. Whereas, said commissioners did not estimate said expenses correctly, by a sum exceeding $7000, and no provision was made to compel said individuals to contribute to future expenses, or any subsequent diminution of the remaining amount of indemnity, as hereafter stated, which reduces the amount to more than two cents per acre less than the amount received by said individuals. Commissioners did, secondly, decree that indemnity upon 957,600 acres, amounting, at the rate of $13.62, to $130,425.12, should be deducted from claims by the New England Mississippi Land company, on account of certificates issued to its members, who appeared to be in default in payment of purchase-money to the Georgia Mississippi company; and determined said certificates to be bad, and the parties claiming under them not entitled to indemnity; and allowed said sum of $130,425.12 to be issued to the defendant, Jackson, for the benefit of himself and the other members of the Georgia Mississippi company, or to him, for his own benefit, or on pretence that he was entitled to it as being
*225] a creditor of said Georgia Mississippi company, whereby manifest *injustice was done to the New England Mississippi Land company because:—

(1.) No deduction was made or allowed by the commissioners from the said sum of $130,425.12, for expenses incurred in managing the affairs of said company.

(2.) It appears among the notes exhibited by the said Jackson, as given for purchase-money to the Georgia Mississippi company, on which indemnity was claimed as unpaid, there were certain notes of said Seth Wetmore, for $25,760, which, at the rate of ten cents, would have been the price of 257,600 acres; whereas, in truth, said Wetmore was purchaser for 100,000 acres, and no more, as appears by his original deed, so that the greatest part of said notes must have been given for other consideration.

(3.) It appears by the decrees, indemnity was allowed to Jackson for 957,600 acres, and by certificates filed by the commissioners, that there issued certificates to individuals for 2,795,017 acres; and by certificates issued to other original purchasers, and delivered by the plaintiffs to the commissioners, that there is still 7,734,983 acres entitled to indemnity under said acts. But these quantities amount to 11,487,600 acres, which is 107,600 acres more than the whole purchase of 11,380,000; to that 107,600 acres too much have been allowed to the said Jackson, even upon the princi-

ples of the commissioners, amounting at the rate of $13.62 per acre, to $14,655.12.

(4.) The commissioners were wrong in determining, that persons claiming under certificates of purchasers who had not paid, should lose their indemnity. One *Mary Gilman, holder of three scrip certificates, under the New England Mississippi Land company, for 20,000 acres each, the same having been issued to R. Williams, and indorsed, he being assignee and grantee of William Wetmore, an original purchaser in default, whose unpaid notes were before the commissioners, as appears by the 3d decree, which notes entered into the reason of deducting from indemnity to said Jackson, exhibited to the circuit court of the United States for Massachusetts district, her bill in equity; and recovered for the whole amount of her claim against the plaintiff, without deduction on account of the proportion of indemnity she might be entitled to claim of individuals who received indemnity in person, which decree was affirmed in the supreme court. By reason of all which, the plaintiffs were entitled to recover of Jackson the whole $130,425; also, his proportion of the expenses of said company, since said decrees were made, including said $7000 as aforesaid, and also, the costs recovered by M. Gilman, and all future expenses. The bill further stated, that the defendant, Jackson, ought to deliver all the stock or indemnity of said $1,550,000, excepting thereout so much as he is entitled to, as holder of scrip under the New England Mississippi Land company. [*226

The defendant (Jackson) in his answer, admitted the several conveyances set forth in the bill, and that the commissioners, by first decree, decreed to reserve indemnity upon 691,677 acres on account of scrip of the New England Mississippi Land company, then in the hands of the defendant, and did so reserve it; but averred the truth to be, that neither he, nor any other person in his stead, or by his direction, received any part of indemnity for *claims under the Georgia Mississippi company. That the certificates of the New England Mississippi Land company came to his hands as follows: at the time of maturity of several of the notes, such notes being dishonored, or the parties being insolvent previous to maturity, they proposed to defendant (who agreed) to pay such notes by certificates of the New England Mississippi Land company; that accordingly, scrip, to the amount of 691,677 acres, was delivered to him, and notes to equal amount were given up by defendant, and that he never had any other certificates of the New England Mississippi Land company, and these have been given up to the commissioners, and appropriated by them to account of the Georgia Mississippi company. Admitted, that commissioners deducted from indemnity awarded to the individuals, a sum as their proportion of expenses of the New England Mississippi Land company; but averred, that said New England Mississippi Land company produced statements, and litigated before the commissioners as to such expenses, and such sum as was allowed, was allowed after deliberation: but insisted, that the decree as to expenses was conclusive as to the amount, and that any portion of any extra-expenses could not be recovered of him; and that no deduction or provision for payment of future expenses of the New England Mississippi Land company, ought to have been made. Commissioners awarded that indemnity upon 957,600 acres, amounting to $130,425.12, should be deducted from the whole amount claimed by said New England Mississippi Land company, on [*227

account of certificates issued by the company to purchasers who were in default of payment to the Georgia Mississippi company; that they determined such scrip void, and parties claiming under it, *should lose indemnity: but averred, he did not receive certificates for said $130,424.12, on behalf of the Georgia Mississippi company, or himself, as such member; on the contrary, he was not then a member thereof, and never received any part of indemnity or certificates therefor, save for the amount found due him for the balance of his account with the Georgia Mississippi company, as their agent; that, as to said award, there remained, at the time it passed, unpaid notes of members of the New England Mississippi Land company, given for purchase-money, to the amount of $95,760, and the indemnity of $130,421.25, was ordered on account of such unpaid notes: that he delivered up said unpaid notes, being required so to do; that the said company contested the allowance, and are concluded by the decree. That, after said decrees, deducting the amount of the unpaid notes, and also the amount of scrip of said company, taken in payment of other notes, and held by defendant as aforesaid, the members of the company, separately and individually, according to their shares, did apply to the commissioners, and receive certificates entitling them to the indemnity. That the commissioners made no allowance on said $130,425.12, on account of expenses incurred by plaintiffs in managing the affairs of the company, and insisted they did right, and their decree was conclusive. That it appeared from the schedule to the articles of agreement between him, Williamson and Blake, of 26th January 1797, that Seth Wetmore subscribed for 100,000 acres. That between the date of said agreement, and the complete delivery of said notes to him, many changes were made in the amounts and purchasers from those in the schedule: *that it appeared by an account of said notes and scrip, kept by the defendant (a true copy of part whereof was annexed), that defendant received from Seth and Samuel Wetmore, notes to the amount of $25,760, together with scrip of company, to amount of $11,740, making $37,500, which was the purchase-money of 375,000 acres, and therefore, Seth and Samuel were interested in the purchase to that amount. Whether notes were made jointly by them, or as principal and indorser, could not answer, but believed jointly, because, in said amount, in other instances, he distinguished whether drawers or indorsers. That he took an oath before commissioners, that said notes were not taken on any other account than purchase-money of said land. And averred the same in answer; and therefore, whether Seth or Samuel were joint makers, or one drew and the other indorsed, or were reciprocally makers and indorsers for each's part, or whether Seth was really interested to the amount of the notes, could not answer; but insisted, that being in his hands, and given for no other consideration, whether given for his own interest or that of another, was immaterial, and the decree was right. That, after passing the first decree, defendant was summoned as witness before the board, and required to deliver up all vouchers, papers, notes, scrip and accounts, touching purchase by the New England Mississippi Land company; he complied, and the commissioners stated an account between him and the Georgia Mississippi company, leaving a balance of $24,631.90 in his favor. In stating the account, the Georgia Mississippi commissioners credited the New England Mississippi Land company with the total amount of sales to the com-

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pany, deducting *a number of acres of W. Williamson, and debited the company thus:

(1.) For 292 full scrip of said company, which scrip was received by defendant, in payment for part of the purchase-money engaged to be paid by members of the New England Mississippi Land company; and it having depreciated, in consequence of the repeal of the act of Georgia, and purchased by the members of the New England Mississippi Land company, at a low price, was received in payment as aforesaid, by defendant, at their original value.

(2.) For amount of unpaid notes, as delivered to commissioners.

(3.) For said company's proportion of loss on notes of members of the New England Mississippi Land company, consequent to compromise to which he was compelled by said repeal, nine-tenths of which loss only was charged to said company, the other, upon defendant's commissions.

(4.) For amount of scrip of New England Mississippi Land company, delivered up to commissioners.

(5.) For commissions at ten *per cent.* on sales to the New England Mississippi Land company; and that the commissioners, by decree (copy exhibited), awarded said balance to defendant, and issued to him, a certificate for so much indemnity; which sum was the whole amount of the indemnity received by defendant, or any other person for him, on his own account, or the account of any persons or company whatever. Insisted, that said decree was wholly irreversible; and defendant having received the amount of indemnity as agent of the Georgia Mississippi company, could not be called upon to account to complainants. Admitted, that indemnity was reserved upon 957,600 acres, on account of notes unpaid, but never allowed to defendant, as stated in bill. Averred, the same was the true amount of unpaid notes. That according to the *schedule annexed to bill of certificates surrendered by individuals, it was certified, that the total amount so [*231 surrendered was upon 2,795,017 acres; but whether said schedule was a true list, or whether the amount stated was the true amount, defendant was ignorant. As to the amount of certificates by members represented by complainants, defendant was ignorant; but averred, there was no allowance to him, nor was they a reservation of indemnity for 107,600 acres too much, but the excess (if any) between the total amount of acres reserved for individuals, or for unpaid notes, together with the amount represented by plaintiffs, and the original purchase, was owing to error in amount surrendered by individuals, or the amount represented by plaintiffs.

Edward Stow, a witness examined on the part of the plaintiff, testified, that the agent of the Georgia Mississippi company, and the members of the New England Mississippi Land company, agreed, that the deed of the land purchased of the former, should remain, for certain purposes, an escrow, and on the failure of Seth Wetmore to pay his notes of $10,000 for his 100,000 acres of land, the defendant, Jackson, as agent of the Georgia Mississippi company, declined delivering said deed to the New England Mississippi Land company, unless they would agree to deliver him, or some other agent of the Georgia Mississippi company, certificates for 103,480 acres, in the stock of the New England Mississippi Land company; and in consequence thereof, they entered into a contract with the defendant Jackson, on the 10th of December 1796, to deliver

to him, or some other such agent, said certificates ; but as they have never been demanded, the certificates have never been issued. In said contract,
*232] *the defendant, Jackson, stipulated to account with the New England Mississippi Land company, for such sums as he might recover from the notes. The amount of the expenses incurred by the company, when the directors' accounts were exhibited to the commissioners, in 1815, was, in Mississippi stock, $153,030.90, and in specie, $20,744.36 ; but $1500 was by them deducted from the last sum, which had been charged to support the future expenses of the company. In part of such expenses, in Mississippi stock, the company received from their agents, on account of the proportionate part thereof, due from the proprietors who surrendered individually their certificate to the commissioners, $36,355.22$\frac{10}{100}$ in certificates of that stock; and for the debt incurred in specie, $4688.26, in specie. Seth Wetmore, in and by the contract of the 26th January 1896, between the defendant, Jackson, and Williamson, agents of the Georgia Mississippi company, of the one part, and the New England Mississippi Land company, of the other part, signed and executed the same, as proprietor of 100,000 acres of land in said company, and no more ; and a deed was executed to him by the committee of the commissioners, for that number of acres : and he appeared, by the records and books thereof, to be a proprietor of that number, and no more. The number of certificates, on which the indemnity was received from the commissioners, by individual proprietors of the company, was 262, and the number of acres, 2,795,017. The whole number of acres of land in the New England Mississippi Land company was 11,380,000 ; the indemnity on 957,600 acres of which was awarded to Jackson and
*233] others, being $130,445.12. The indemnity on *2,795,017 acres was awarded to certain proprietors of the company who surrendered their certificates individually, being $380,681.31$\frac{54}{100}$. The indemnity on the remaing 7,627,383 acres was awarded to the New England Mississippi Land company, being $1,038,849.56$\frac{46}{100}$; which was on 107,600 acres less than it was entitled to, as the number of acres held by the proprietors represented by the directors, was, at the time said awards were made, and now is, 7,734,983 acres, and there can be no error in the number, as the books have been regularly kept. The witness being interrogated whether, among the notes surrendered to the commissioners by defendant, there were any notes of Seth Wetmore : answered, that at the request of the directors, the secretary of the commissioners of Washington had transmitted to them copies of ten notes, amounting together to $25,760, signed by Seth and Samuel Wetmore ; and it was understood from him, that they made a part of the notes presented by the defendant, Jackson, to the commissioners, and represented by him to have been unpaid by the signers of them ; but whether the notes were received by any members of the New England Mississippi Land company, in payment of the land they purchased of the Georgia company, the deponent could not answer. The expenses of the New England Mississippi Land company, since its accounts were exhibited to the commissioners, exceeded $4000, and were daily accumulating. Besides, the members of the company represented by the directors, had been obliged to pay upwards of $80,000 in Mississippi
*234] stock, out of their own indemnity, to the holders of the certificates *in the company, which were considered bad by the commissioners.

Being cross-examined, the witness stated, that S. Dexter and B. Joy

appeared before the commissioners as agents of the New England Mississippi Land company, and exhibited the accounts of the company, showing the amount of the expenses incurred in the pursuit of its claims, and endeavored to obtain a full proportion of the said expenses from the individual proprietors who had surrendered their scrip, but did not succeed in this endeavor; as in the apportionment of the expense, a manifest error was committed, it being apportioned on 11,380,000 acres, when it ought to have been apportioned on 11,380,000 minus 957,609 acres, viz., on 10,422,400 acres; the commissioners exempting the indemnity awarded to the defendant, Jackson, and others, on account of the said 957,600 acres, from the payment of any part of the expenses incurred by the company. The witness repeated the same statement respecting the proprietary interest of Seth Wetmore, as is contained in his direct examination, with this addition, that Wetmore signed the deed of trust to the trustees of the company, as a proprietor therein, of 100,000 acres only, and did not appear to have been a proprietor in the company at any time, in his own name, nor jointly with Samuel Wetmore, or any other person, for more than said 100,000 acres of land therein, which was in his own name only. Nor did it appear by the records of the company, that Samuel Wetmore, in his own name, or jointly with any other person, was ever *a proprietor, directly or indirectly, of the company, for any land therein. [*235

A decree was entered in the court below, dismissing the plaintiff's bill, *pro formâ*, by consent, and the cause was brought by appeal to this court.

February 19th. *D. B. Ogden*, for the respondent, argued: 1. That there was a defect of parties to the suit, both plaintiffs and defendants. There is no express averment that the plaintiffs are the present directors of the New England Mississippi Land company. Nor are the plaintiffs trustees, in the view of a court of equity, nor the *cestuis que trust*. There is no example of an agent filing a bill, in his own name, for the benefit of his principal. The release to the United States, under the act of congress, left the property a personal fund The association has then become a mere partnership, and all the partners must be before the court. 2 Bro. C. C. 331. So also, as to the defendant; he is a mere agent of the Georgia Mississippi company. His principals ought, therefore, to be made parties defendants: and if it be insisted, that the defendant is personally liable, as having received money to the use of the plaintiffs, an action at law would lie, for money had and received.

2. Even if all the proper parties were now before the court, the decrees of the commissioners, acting within the sphere of their authority, would be conclusive. In the former decision of this court, connected with the same *subject, the true distinction is stated, that, as to the party there suing, and as to the subject-matter of that suit, the decrees of the board were *res inter alios acta*. *Brown* v. *Gilman*, 4 Wheat. 255; s. c. 1 Mason 191. But here, the case was within their jurisdiction, under the very terms of the act of congress; the same parties were heard before them, as to the same controversy; and it would overthrow all sound principles, to permit their decision to be attacked, either directly or collaterally. [*236

Webster, contrà, insisted: 1. That the plaintiffs were sufficiently described in the bill as directors, and that it was within the discretion of a court of equity, where the parties were numerous, to permit some to sue for all. Such is the practice in the familiar case of parishioners, societies, commercial companies, and others of the kind. But here, the plaintiffs are trustees of the fund which has been produced by selling the land. Besides, the equity jurisdiction of the federal courts would be imperfect, and incompetent to the purposes of justice, unless parties merely formal were dispensed with. As all the parties on one side, must be citizens of one state, and all the parties on the other side, citizens of another, this court has held, that the circuit court may dispense with merely formal parties, wherever the real merits of the cause can be determined, without essentially affecting the interest of absent persons. *Russell* v. *Clarke*, 7 Cranch 98.

2. The plaintiffs are not concluded by the decrees of the commissioners. The former decision of this *court proceeded entirely upon the *237] ground, that their decrees were not conclusive, and it cannot be reconciled to the notion of their conclusiveness. *Brown* v. *Gilman*, 4 Wheat. 255. Besides, an accurate examination of the acts of congress will show, that the present case was not within the jurisdiction of the commissioners. Here the learned counsel entered into a minute analysis of the statutes, in order to support this position.

March 5th, 1822. LIVINGSTON, Justice, delivered the opinion of the court. — This suit was commenced in the circuit court for the southern district of New York, where a decree, *pro formâ*, was pronounced, dismissing the bill, from which sentence the present appeal is taken. From the very great and unusual length of the appellants' bill, and the generality of its prayer, which points to no particular relief, it is not easy to say, to what extent they originally contemplated a decree against the respondent.

The material facts of this case are the same with those in the case of *Brown* v. *Gilman*, (4 Wheat. 255). In addition to the detail there given, it appears, that Jackson, who had been agent of the Georgia company, had in his possession, on the 29th of June 1815, certificates of the New England company, to the extent of 691,677 acres, which came into his hands as follows: Several of the notes which had been given by members of the New England company being dishonored, or the parties insolvent, *it was *238] proposed by them to Jackson, and acceded to by him, as agent as aforesaid, that such notes should be returned to the makers, on their transferring to him an equivalent amount in lands of the scrip or certificates of the New England company; such certificates were accordingly transferred to him, for the number of acres just mentioned, whereupon, notes equal in value, computing the land at ten cents per acre, were delivered up by Jackson. For this number of acres, an indemnity was reserved by the first decree of the commissioners, out of the whole indemnity claimed by the New England company, no part of which appears ever to have been received by Jackson, as a person entitled to any portion of the indemnity, as such an indemnity was also reserved for the certificates in the New England company, issued to such purchasers as appeared not to have paid the purchase-money to the Georgia company. The deduction on this account from the

indemnity awarded to the New England company, amounted to $130,425.12, and was made, because the commissioners were of opinion, that such certificates were void, and that the parties claiming under them should lose their indemnity; or, in other words, that the Georgia company had a lien to that extent on the lands which had been sold to the New England company.

It appears further, that neither Jackson, nor any one for him, ever did receive certificates for the said sum of $130,422.12, nor for any part thereof, on behalf of the said Georgia company, *or any of them, or for himself, he not being then a member thereof; and that he never did, [*239 at any time whatever, receive any part or portion of the indemnity provided by congress, nor certificates for any portion thereof, save for the amount due to him on the balance of his account as agent for the Georgia company, which was settled by the commissioners at $24,831.90; that for the amount allowed to the Georgia company, as an equivalent for the unpaid notes aforesaid, and also for the scrip taken back by Jackson, as agent as aforesaid, in payment of other notes, the members of that company who were entitled to the sums so deducted, did separately apply to, and did receive from, the commissioners, certificates entitling them to their respective proportions of the indemnity so awarded in their favor; and that the notes before mentioned, and the scrip received in lieu of those which were given up, were, by the commissioners' orders, delivered by Jackson into their hands.

This suit appears to have been suggested by the judgment of this court in the case of *Brown* v. *Gilman;* and a belief on the part of the plaintiffs, that Jackson had received the whole sum of $130,425.12, awarded to the Georgia Mississipi Land company, on account of the notes which had been given to them, by the members of the New England Land company, and which remained unpaid by them, and also the indemnity for the 691,677 acres aforesaid. Although there be no specific prayer in the bill to have these sums decreed to the complainants, it is difficult to perceive any *other adequate objects of litigation between these parties. As these [*240 grounds of relief were not much insisted on at the bar, the court might be justified in considering them as abandoned, and pass at once to an examination of the appellants' title to the whole or any part of the sum which was awarded to the respondent, and received by him as agent of the Georgia Mississippi company. Bnt as all the facts which exist in the case are probably before us, and as the appellants may expect an opinion on the whole of their bill, which may also prevent future litigation, not only between the parties now here, but between the appellants and the Georgia company, and the individual members of these two companies, it may be useful to inquire, whether the appellants have any remedy either against Jackson, or the members of the Georgia company, collectively or individually, in consequence of any alleged mistake in distribution or apportionment of the sum allowed by government, for the indemnification of claimants of public land in the Mississippi territory. A proper decision of this question will depend, not so much on an examination of the correctness of the several acts and doings of the commissioners, as of the powers conferred on them by law: for as no appeal is given by any of the acts of congress on this subject, to any other tribunal, and as all the parties concerned have submitted to their jurisdiction, this court claims no right to review or disturb any judgment or decision, in any of the cases in which they have acted, within

the authority delegated to them. Considering, indeed, the very great inconveniences *which would result from a different course, and the fruitful source of litigation which would be opened between the parties whose rights have been settled by them, if their decision were not conclusive, the court would feel reluctant, unless in a very clear case, to say that they had transcended the limits prescribed them by the legislature.

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The first law on this subject is that of the 31st of March 1814. By this act, it is declared, that every person or persons, claiming public lands under the act of the state of Georgia, passed 7th of January 1795, who have exhibited the evidence of their claims, to the secretary of state, conformable to a preceding act of congress, shall be allowed until the first Monday of January then next, to deposit in his office a sufficient legal release of all such claim or claims to the United States, and the secretary of state, the secretary of the treasury, and the attorney-general of the United States, for the time being, were thereby constituted a board of commissioners to adjudge and determine upon the sufficiency of such releases, and also to adjudge and finally determine upon all controversies arising from such claims so released, which might be found to conflict with, and to be adverse to, each other. On the 23d of January 1815, a supplemental act was passed, by which the president of the United States was authorized, by and with the advice and consent of the senate, to appoint three persons to act as commissioners under the former law, in place of the two secretaries and the attorney-general, who were to execute all the powers granted to, and to *perform all the duties enjoined upon, the original board of commissioners. The persons thus appointed were, from time to time, to certify and report to the president of the United States, as to the sufficiency of the releases which should be made, and the claims which they should finally adjudge and allow. By a third act, passed the 3d of March 1815, the commissioners are authorized to admit, and finally settle, all such claims as have been, or may be, within the time limited, duly released, assigned and transferred to the United States. And the president is authorized, from time to time, to cause to be issued such certificates of stock as are specified in the first act, and the supplement thereto, to such claimant or claimants, whose claim may be decided and reported by the commissioners, on receiving such report, in relation to such claim, from the commissioners.

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The court will now proceed to examine those proceedings of the commissioners, which are complained of by the appellants, which, it is believed, will be found to be not only within the spirit, but within the letter of the powers expressly delegated to them. One ground of complaint is, that there was detucted from the indemnity allowed to the New England company, a sum equal in value to 691,677 acres, on account of scrip of this company, then in the hands of the respondent, and which had been delivered to him in payment of notes which had been dishonored, or the parties to which had become insolvent. It cannot be a question, that the holders of *this scrip, whether Amasa Jackson, the Georgia company, or any other person, had as just and valid a claim for the quantity of land therein mentioned, upon the indemnity set apart by congress, as the New England company would have had for the same scrip, if they had not been assigned to Jackson. Their returning to the hands of the original vendors, or their agent, could make no difference. The holder or holders, whoever they

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might be, could not but be regarded, within the obvious and plain meaning of the act of the 31st of March 1814, as a person or persons having a claim on the lands in question; and the commissioners could not, without a violation of duty, have refused to take cognisance of it. It might have been a question, whether the stock which was the portion of the indemnity intended for the Georgia company, as the holder of these certificates, should not have been transferred, for their use, to the directors of the New England company; that, however, was a subject on which the commissioners were competent to decide, as well as on the validity of the claim itself. There is nothing in the conduct of the commissioners, in this particular, inconsistent with the act under which they were sitting: on the contrary, the act appears to contemplate a settlement by them of an individual, as well as of a company or joint claim; for the president is to issue certificates to such claimant or claimants, whose claim may be decided and reported by the commissioners. All the commissioners had to do was, to decide on the validity of the claims, however subdivided, and to determine on the sufficiency of the release made by such *claimant to the United States. The court is, therefore, of opinion, that this claim was clearly within the jurisdiction of the [*244 commissioners, and that their award on the subject is final and conclusive.

The next subject or complaint in the appellants' bill, is the award of the commissioners, that the indemnity upon 957,600 acres, amounting to $130,425.12, should be deducted from the amount claimed by the New England company, on account of certificates issued by that company to purchasers who had not paid their notes to the Georgia Mississipi company. This scrip the commissioners determined to be void, and that the parties claiming under them should lose their indemnity. The Georgia company, thinking they had a lien on the lands sold by them to the New England company, to the extent of the same thus unpaid, appear, as well as the New England company, as claimants before the commissioners, who, being of opinion, that the former were entitled to the indemnity, *pro tanto*, decreed accordingly. A decision of this question was also clearly within the power of the commissioners. The act made no distinction between an equitable or a legal claimant. To satisfy the words of the act, it was sufficient, that both parties were claimants, and if these claims were found to conflict with, and to be adverse to each other, as was the case here, the commissioners were to adjudge, and finally to determine on them. On this point also, the court is of opinion, that the decision of the commissioners, as between the New England and Georgia company must be regarded as conclusive.

Nor does this opinion in any degree conflict, as has been supposed, with our decision in *the case of *Brown* v. *Gilman*. It is true, that the court, in that case, did say, that the lands which had been granted [*245 to the New England company were exempt from any lien of the Georgia company, notwithstanding the non-payment of these notes, to which opinion it still adheres; it was not, however, on that ground, nor with any view of disturbing the decision of the commissioners, that it decreed in favor of Mrs. Gilman. This decision proceeded on the ground, not of an error in the commissioners, but of a wrong done to Mrs. Gilman by the New England company, in the distribution which they made of the indemnity awarded to them. This court thought that the sum deducted by the commissioners from the indemnity claimed by the New England company, was chargeable

on the fund generally, and not individually on the share of Mrs. Gilman. Her share was exempted bearing the whole of the loss, because, according to the laws of the association of the New England company, she had received a certificate which, on its very face, purported to be, and was regarded as complete evidence of title, whether the person from whom she had purchased had paid his note or not. After issuing to her a certificate in the form which had been devised, in order to render them more valuable, and to enable the holders the more easily to dispose of their interest, the court thought that whatever the commissioners might think proper to do, as between the two companies, the New England company was bound to let Mrs. Gil-
*246] man in for a proportion of the indemnity awarded to them, notwithstanding *a failure of payment by any person under whom she claimed.

If the court be correct thus far, there is an end of every demand by the appellants on the respondent: for if the commissioners had a right to make the deductions which they did from the indemnity claimed by the New England company, it can be of no importance to them, how the stock, which has thus been deducted, has been disposed of. But even if the commissioners had exceeded their authority, and improperly awarded the sums which they did to the Georgia company, it would be difficult to afford the appellants any relief against the respondent. He has received nothing more than the sum awarded to him for his services, as agent of the Georgia company. Whether this sum was too small or too large, is a matter between him and that company; but it cannot here be a proper inquiry, out of what fund it was paid. If any persons could be liable to the appellants for a mistake of the commissioners, it ought to be shown in whose favor the deduction from the indemnity claimed by the New England company was made, and not those to whom the stock awarded to them may have been transferred, in satisfaction of the debt of the company. This would be giving, what the court would not be disposed to do, even if the proceedings of the commissioners were not conclusive on the New England company, a lien on the stock awarded to the Georgia company, into whosoever hands it may be passed.

It is also stated in the bill, that 107,600 acres have been allowed to Jack-
*247] son, which, even upon the principles *established by the commissioners, were too much, and that this sum amounted to $14,655.12, and this sum, it is alleged, ought to be decreed to the appellant. It is a sufficient answer to the allegation, to say, that there is no proof of such allowance being made to the respondent, and that his answer, which is uncontradicted, denies that he ever received it. As to the allegation of his being liable for $1163.90, for his portion of expenses chargeable on his stock in the New England Mississippi Land company, and for the sum received as indemnity on Seth Wetmore's purchase, beyond the amount of his notes, the same answer may be given. It does not appear, that he ever was a member of the New England company; and by his answer, which stands uncontradicted, the court is informed, that he never received out of the indemnity any other sum than the $24,831.90, which was awarded to him, not as a member of either company, but for his services as agent of the Georgia Mississippi Land company.

The court, however, does not mean to be understood as saying, that the appellants, or those who represent the New England Mississippi Land com-

pany, may not have a remedy against the Georgia Mississippi Land company for a contribution towards the loss which the former has sustained by the decree in favor of Mrs. Gilman, or for other losses of a similar nature. In this respect, as far as the indemnity extended, which the latter received for the scrip which they held, by their agent, Jackson, they must be considered as coming in under the New England *company, and contribute with the other members thereof, in making good what they may lose, in consequence of the demands of individuals, who stand in the predicament of Mrs. Gilman, for their proportion of the indemnity actually awarded to those whose certificates of land on the New England company were adjudged to be valid. [*248

An objection was made by the respondent to the want of parties; but the conclusion to which the court has come renders it unnecessary to give any opinion on this point. The court, however, would have hesitated in making any decree against Mr. Jackson, in the absence of his principals, in whose favor the award was made, and who ought, if its merits were examinable, to have been afforded an opportunity of vindicating the grounds on which it was made.

It is the judgment of this court, that the decree of the circuit court, dismissing the appellant's bill, be affirmed, with costs.

Decree affirmed, with cost

Blunt's Lessee *v.* Smith and others.

Land-law of Tennessee.

The decision of the court below, granting or refusing a motion for a new trial, is not matter for which a writ of error lies to this court.[1]

In Kentucky and Virginia, the rule is, that a court of common law cannot look beyond the patent; but in Tennessee, the courts of law, under their construction of the land laws of North Carolina, permit the parties in an ejectment to go back to the original entry, and connect the patent with it.[2]

*This construction is not limited to a comparison of the dates of the entries, but admits of an inquiry into their legal effect, as they stand in relation to each other. [*249

The statutes of North Carolina, which have been construed to justify a court of law in considering the entry as the commencement of title, are applicable to military warrants as well as other titles.

By the decisions of the courts of Tennessee, the validity of surveys does not depend on the will or directions of claimants; and though the mistakes of surveyors may be corrected, they cannot be corrected so as to injure a subsequent adjoining enterer.

The laws of North Carolina do not require that an entry should express the water-courses and remarkable places, which are remote, but only those which are contiguous, and which may assist in designating the land intended to be acquired.

Notoriety is not essential to the validity of an entry in Tennessee, as it is in Kentucky. The statute of Virginia, which is the land-law of Kentucky, requires, that entries shall be so special and certain that any subsequent locator may know how to appropriate the adjacent residuum; but the land law of North Carolina contains no such provision, and the doctrine which requires notoriety as well as identity, has never been received in Tennessee.

Error to the Circuit Court of West Tennessee. This was an action of ejectment, brought by the plaintiff in error, in the circuit court, against

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[1] Doswell *v.* De la Lanza, 20 How. 29; Warner *v.* Norton, Id. 448; Schuchardt *v.* Allen, 1 Wall. 371; Laber *v.* Cooper, 7 Id. 565; Marshall *v.* Keenan, 18 Id. 342.

[2] Bagwell *v.* Broderick, 13 Pet. 436.

the defendants in error, to recover the possession of lands in the state of Tennessee.

The title of the plaintiff, as spread upon the record, originated in an entry made on the 17th of March, 1785, in the following words: "General Sumner enters 12,000 acres of land, lying east of the upper south road, between the head of Mile creek, Little Harpeth, and Stewart's creek, and on the waters of some of the afore-mentioned creeks, including some deadened trees, marked I. F." The deadened trees were never found. On this entry, a patent was issued by the state of North Carolina, on the 27th day
*250] of April 1793, to which *was attached a plat and certificate of survey, purporting to be made by Thomas Malloy, a deputy-surveyor, on the 20th of November 1786.

The defendants claimed under a patent issued to William Tyrrell, assignee, on the 10th of April 1797. This grant was founded on an entry made in the name of John Gee, on the 1st of June 1785, in the following words: "John Gee, heir of Captain James Gee, enters 3480 acres of land, lying and adjoining the northern boundary of Brigadier-General Jethro Sumner, running west along his line, for complement."

The defendants gave in evidence the record of a former trial in ejectment, for the same land, in which the verdict and judgment were against the plaintiffs, and the testimony of Burkley Pollock, a witness examined at that trial, who was since dead, and who swore that he made the survey for General Sumner, before Gee's entry was made. A copy of the plat and certificate of survey made by Pollock, and recorded in the secretary's office of North Carolina, properly authenticated, was also given in evidence. By the plat and certificate of survey, it appeared, that the land of Sumner was laid off by Pollock, in a parallelogram, the base or first line of which extended from west to east, was 1292 poles, and the side lines 1486 poles. The patent which was issued on the plat and certificate returned by Malloy, had the same base line; but the side line was extended to 1737 poles, and the survey was said to include 2026 acres, belonging to Lieutenant Thomas Pasteur.

*251] *The defendants also gave in evidence copies of a petition presented to the general assembly of North Carolina, at their session held in November 1786, by the guardian of the plaintiff, praying that a separate warrant might be issued to the heirs of General Sumner, for the quantity of land included in his survey, to which Lieutenant Pasteur had a prior title, and the proceedings of the legislature, granting the prayer of the petition The defendants also gave in evidence a certified copy of a certificate granted by the commissioners of West Tennessee to the heirs of General Sumner, for so much land as was equal to the quantity lost by the prior title of Lieutenant Pasteur, and a copy of the testimony on which this certificate was founded. To the admission of all these copies, it was stated in the bill of exceptions, the plaintiff's counsel objected, but his objections were overruled, and the papers were read.

Some testimony was offered by the defendants, to prove that in the survey of Summer's land, by Pollock, a second as well as the first line was run, and corner trees marked at the end of that line, so as to fix the northern boundary of Sumner's land; but other testimony was offered by the plain-

tiff, to prove that only the first line, which established the southern boundary, was run.

After the testimony was closed, the counsel for the plaintiff moved the court to instruct the jury, "that they should not regard the said copies from the secretary's office of North Carolina, and of the proceedings before the commissioners of West Tennessee, as *having any effect in the said [*252 cause; and that the entry in the name of Gee, on which the grant to Tyrrel purported to be founded, could not be located as a special entry to any place, or if to any place, only to the northern boundary of Sumner's land on which the grant was founded, as granted and described in the plat and certificate;" but the judge refused so to instruct the jury, but informed them, that all said documents, except the proceedings before the commissioners, which should have no weight in the cause, should be considered as testimony by them: and that the plat and certificate made by Pollock, if he marked no more of the corners and lines of Sumner's tract, but the southern boundary, and south-east corner and south-west corner, would show, by calculation, where the northern boundary of his tract should be, according to said plat, and locate said Sumner's entry and land to the south of that line, and fix said entry in the name of Gee, to the north of that line, and make it special from the date of the survey made by Pollock for that place; and that the grant to Tyrrel, although founded on a survey made long after the grant to Sumner was issued, should relate back to the date of said entry, and give a good title to those holding under the said grant, to the land north of the north boundary as represented in the plat, &c., made by Pollock, against the title derived from Sumner's grant and entry; and that Sumner's grant should be considered as made on a removed warrant, for all the land north of what is represented in said plate, made by Pollock, as his northern boundary."

*February 25th. *Gaston*, for the plaintiff in error, argued, that the [*253 practice which prevails in the state of Tennessee, of permitting a younger to compete with an elder grantee in ejectment, by reason of the elder and better entry of such younger grantee, was admitted in the Tennessee adjudications to be an usurpation on the part of the courts of law, introduced since the year 1798, and now too long established to be questioned. *Wilson* v. *Kilcannon*, 1 Overt. 205. All agree, that this innovation is not to be carried beyond its ascertained limits. 1 Overt. 409, 411; 2 Ibid. 153–4; 1 Cooke 32; 5 Hayw. 402. To this well-meant, but impolitic, assumption of power in their courts of law, is ascribed, with one voice, the fatal uncertainty of the Tennessee land laws. 2 Overt. 17; 5 Hayw. 102; *Polk's Lessee* v. *Wendell*, 5 Wheat. 302. The eldest grant is esteemed conclusive evidence of title, except in the single case of an elder legal entry. 1 Cooke 133. And every species of evidence to make a younger compete with an elder grant, shall be rejected, except the entry. *Reid* v. *Buford*, 1 Overt. 420. The acts of North Carolina of 1786, c. 20, and 1787, c. 23, are the only statutes authorizing a court of law to go beyond the grant, in the examination of land claims, and under these, the courts have gone far enough, to say the least of it, when they look to the entry. *Lester* v. *Craig*, 1 Cooke 485, 487. Under these statutes, declaring an elder grant founded on a younger entry *void, the Tennessee courts have decided, that [*254 the priority of entries is examinable at law, and that a junior patent,

founded on a prior entry, shall prevail, in an action of ejectment, against a senior patent, founded on a junior entry; but this doctrine has never been extended beyond the cases which have been construed to be within the express purview of these statutes. *Robinson* v. *Campbell*, 3 Wheat. 221.

It must be conceded, that in some of the Tennessee decisions, military grants have been regarded as liable to the application of the same rule of preference, from priority of entry or locations, as had been established in cases of grants founded on ordinary entries. It is difficult to say, when an error shall be deemed too inveterate to be corrected. Perhaps, this may be the case, with respect to the application of this rule to military grants. If it be not, nothing can be more easy than to show, that admitting the rule to be correct, military grants ought not to be brought within the sphere of its operation.

The act of 1777, c. 1, opened a land-office in North Carolina, for the sale of vacant and unappropriated lands. The 4th and 5th sections prescribe, as terms and conditions of the sale, payment by the purchaser of the required price, and a description in writing, specifying the quantity, and defining the situation of the land which he buys. This land-office was shut by the act of 1781, c. 7. It was again opened by the act of 1783, c. 2, entitled, "an act
*255] for opening the land-office, for the redemption of *specie and other certificates, and discharging the arrears due to the army." The 10th and 11th sections of this act require, that the individual wishing to enter a claim for vacant land, shall pay the price for it to the entry-taker, and deliver a writing, signed with his name, setting forth where the land shall be situated; and that the entry-taker shall indorse this written claim (or location) with the name of the claimant, and record it in his entry-book, and in due time, shall issue to the surveyor a warrant, commanding him to survey for the claimant the land described in such entry. When the act of 1777 was passed, an appropriation of lands, as a retribution of military service, had not been contemplated, and the act of 1783, above referred to, expressly excepts from entry (§ 12), all lands lying within the bounds reserved for the officers and soldiers of the continental line. The act of 1779, c. 6, which was also passed before an appropriation of lands for military services, directs the surveyor, where entries interfere (§ 6), to survey the eldest entry first. The act of 1783, above referred to, under which military lands are forbidden to be entered, provides, that all the warrants for entries shall be delivered by the entry-taker, to the surveyor, on certain prescribed days, and that the surveyor shall proceed in his surveys in the order of the numbers and dates of the entries. All these enactments proceed upon the obvious principle, that the first person who has bought and paid for any particular tract of land, shall be entitled to a grant for it. The act of 1786, c. 20, and the act of 1787, c. 23, "from which alone the courts of law claim an author-
*256] ity to go beyond the grant in *the examination of land-claims, and beyond the express purview whereof this doctrine ought not to be carried" (3 Wheat. 221), are each of them, in title—in preamble—in express enactment, definitively restricted, in this respect, to entries of vacant and unappropriated lands, under the acts of 1777 and 1783.

By an act of assembly of May 1780, referred to in the 7th section of the act of 1782, a certain tract of country was reserved, to be appropriated to the purpose of rewarding the bravery and zeal of the continental officers and

soldiers in the service of the state of North Carolina. By the act of 1782, c. 3, entitled, "an act for the relief of the officers and soldiers of the continental line, and for other purposes," it is enacted, that these officers and soldiers shall severally have such a number of acres of land, varying according to rank, in a certain ratio specified in the act, and preliminary measures are directed to be taken for exploring and laying off the lands out of which this military bounty, or rather military debt, shall be satisfied. By the act of 1783, c. 3, entitled, "an act to amend the last-mentioned act," it is declared, that the persons entitled to military grants under the act referred to, shall, on application to the secretary of state, receive from him, warrants of survey for such quantities of land as they are respectively entitled to, "within the limits of the lands reserved for the officers and soldiers," directed to a surveyor appointed for that special purpose. No previous entry is required from a *military claimant, and the warrant of survey [*257
is restricted only by the boundaries of the territory set apart for the satisfaction of military claims. In endeavoring to pay the debt of gratitude due to her brave defenders, the state recognises no priority of merit among them. The consideration for these grants has been received from all, and from all, at the same time. There is no first or second purchaser among them, nor has there been a purchase of any particular lands, but only of specified quantities of land. To prevent disputes which might arise between two or more of them, wishing to have their warrants satisfied at the same place, only two provisions are made: one, that the choice shall be decided by lot, and the other, that he who has assented to his brother soldier's location, shall not afterwards interfere with it. No enactment was ever made, that the warrants of survey should all be delivered at described times, nor that they should be surveyed in the order of their dates or numbers, nor that grants founded on younger warrants should be void. Until the act of sess. 1, of 1784, c. 15, entitled, "an act to amend the act of 1782, c. 3," no mode whatever had been provided, by which a memorandum of the military locations should be preserved. That act directed, that the surveyor to whom the military warrants were directed, should keep a book containing a minute of the name of the military claimant, number of his location, number of his warrant, of the quantity of acres, date and description of his location. The necessity of some such memorial, as a check upon the officers of government, and preventive *of fraud, is too manifest, to require any [*258
other reason to be given for this statutory provision. But to declare, that because such statutory provision is made, that, therefore, the positive and special enactments which have been made in regard to entries in the general land-office, shall obtain in these locations, and that enactments thereafter to be made, restricted in terms to the former, shall be law also in regard to the latter, may pass for anything as well as for judicial exposition.

If, however, this court should consider such judicial exposition as established, the inquiry then distinctly presents itself, can Tyrrel's grant claim a preference over Sumner's grant, to which it is younger, by reason of Gee's better entry? The entry to which is allowed the extraordinary property of causing the grant subsequently issued to have legal operation from the date of the entry, is, on all hands, required to be a "special entry." It has been found a difficult matter to define this "specialty" with precision. The circumstances which make up this specialty are either such as are fitted to

identify the entry, or to give it notoriety; and an entry is not now acknowledged as a special entry, unless notoriety and identity both concur.(a) In regard to the identity of an entry, this must depend on facts existing at the date of the entry, and appearing on its face, or to be collected by plain inference from those which do appear on its face. The notoriety of an entry is a different affair. Occurrences happening after an *entry has been made, may render it very notorious, although but little known before. But no subsequent occurrences can have any effect upon the identity of an entry. The entry is a matter of record, accessible to every individual. It ought to be so definite, that all who are acquainted with the country may be enabled, on an examination of it, to ascertain where it lies, and to avoid interference with it. *Anderson* v. *Cannon*, 1 Cooke 30, 31. No act less authentic in its nature, such as a survey—no act which is not a matter of record, however notorious it may be—is considered as giving this legal notification. Ibid. 32–3; 3 Hayw. 186, 215, 217; *Wilson* v. *Mason*, 1 Cranch 99. In North Carolina and Tennessee, no record is made of surveys. The surveyor returns two plats to the secretary's office, one of which is kept there, and the other appended to the grant. As every individual has it in his power to procure knowledge of an entry, he is presumed to have such knowledge, and if he locate land which has been before entered, he is in the condition of a purchaser, with notice of a prior equitable right, affected with a legal fraud, and trustee for the equitable owner. Land titles must rest on general principles, and the entry, special on its face, and made of record, is not to be supplied by other evidence of an inferior character, but which might be thought reasonably equivalent. *Wilson* v. *Mason*, 1 Cranch 99. It would be an unwarrantable, and a most alarming extension of a principle, already carried too far, to permit an entry, originally wandering, to become *fixed—originally vague, to become specific—by matter *ex post facto*, and from the time of this change of character, to give it the efficacy of retracting the grant to itself. The entry must, on its face, be fixed to some spot. 1 Overt. 407, 411–12; Ibid. 505, 507. It is foreign from the present inquiry, to examine, under what circumstances, a defect of notoriety in an entry, always sufficiently definite, may be remedied by subsequent occurrences, and what shall be the operation of such entry, after it becomes notorious.(a)

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Gee's entry is for 3840 acres, adjoining the northern boundary of "General Sumner, and running west along his line, for complement." It contains no other words of description, and, of course, can only be identified by those. It calls for the northern boundary of General Sumner's—what? The plaintiff contends, of General Sumner's entry. Sumner's entry and Gee's entry are records of the same office, and in the same book. To this book every locator has a right to recur, for the purpose of ascertaining where he may procure lands, without interference with prior appropriations. A locator reads Sumner's entry, dated the 17th of March 1785, and on the next page, meets with Gee's, dated the 1st of June 1785, containing no other description than that it adjourns Sumner's northern boundary. It is impossible, but that he should understand the latter entry as entirely depend-

(a) See Dallam's Lessee *v.* Breckenridge, Cooke 157.
(b) Simm's Lessee *v.* Dickson, 1 Cooke 141; Baird *v.* Trimble, Id. 287, 288.

ing on the former. There *is no intimation to him that a survey has been made of Sumner's entry. Calling for its northern boundary, and to run west along that line, gives no such hint, for all the military entries are required "to be run out at the four cardinal points of the compass, either in a square or an oblong." Act of 1784, c. 15, § 3. If there has been such a survey, he has not the means of seeing it—is uninstructed where to look for it. He is not apprised of the names of those who made it, nor from whom he may learn what lines of it were run. He must understand the reference in Gee's entry, as made to that which is accessible to him which is spread before his eyes—to General Sumner's entry. As the object of a special entry is, to enable those who examine it, to ascertain where it lies, the information with such an entry necessarily conveys to the examiner, must be supposed to be the information which the enterer intended to convey. Had Sumner's entry been, on its face, special, and fixed to a particular spot, it is impossible to deny, but that Gee's entry, by these words of reference, would have been equally definite and special. And if a survey had been made of Sumner's entry, varying from its precise requisition, Gee's entry would still have remained to the spot which the record indicated—would not have followed Sumner's survey in its wanderings, nor lost its claims to specialty and certainty.

To suppose Gee's entry to refer to the northern boundary of Sumner's survey, as ascertained by Pollock's plan and certificate, is full of difficulties. It presumes, that such survey had then certainly been *made, and plat and certificate returned. It presumes, that these, or some of [*262 these, were known to Gee. It presumes, that this plat and certificate, and survey, were so notorious, that every subsequent locator would understand words of reference in a book of entries, as applying, not to an entry, but to a survey. Yet there is nothing to show, that this alleged survey ever became notorious, even to this day. There is nothing to prove, that Gee had any knowledge of this survey, or that the plat had, at the date of his entry, found its way into the secretary's office. Nor is there any testimony to show, that any survey had then been made, except the date of Pollock's certificate, a paper of very questionable character, produced under circumstances of great suspicion, and emanating from one who seems destitute of all claims to credit. The supposition that the words in Gee's entry refer to Pollock's plat, takes for granted facts not proved; accordingly, we find the court instructing the jury, that this plat, if Pollock marked but one line, "would show where, by calculation, the northern boundary of Sumner's tract should be according to that plat—would make Gee's entry special, from the date of Pollock's survey, and would cause Tyrrel's grant to relate back to the date of Gee's entry." Thus, the court undertook to pronounce that Gee's entry was subsequent to the marking of one of Sumner's lines by Pollock, and to the legal completion of Pollock's survey. It is not necessary, and, perhaps, it is not practicable, to clear up the mystery which Pollock's plat throws over this transaction. But it would seem probable, *that Pol- [*263 lock, having made out a plat, presented it to his immediate principal, Malloy, and that Malloy, knowing of its interference with Lieutenant Pasteur's prior right, instead of adopting this plat as his own, made a new plat and certificate, extending the second and fourth lines sufficiently far to comprehend the 12,000 acres, exclusive of Pasteur's land. Malloy's plat

and certificate were duly returned to the office, for on them the grant actually issued; and it is likely, that when he returned them, he gave the information to Armstrong, that Pollock was, in fact, to be credited for the work to which Malloy's name appeared, as it is otherwise unaccountable, that any explanation to that effect should have been given or required. Pollock had, no doubt, in conformity to the ordinary requisities of the law, prepared two plats. The one not delivered to Malloy, afterwards found its way (at what time, or by what means, it is impossible to say) into the secretary's office. It is unfair, to conclude, that it was not there in 1793, or otherwise, Sumner's grant would have conformed to it? The grossest frauds and irregularities have taken place in the military land-office of North Carolina. These have been proclamed by the public statutes of the state. (Acts of 1797, c. 24, and 1798, c. 14.) Pollock, whose certificate has caused all this perplexity, was examined as a witness for the defendants, on a former occasion, to invalidate the plaintiff's claim. He swore to the running of Sumner's second line, and the marking of the third corner, agreeably to this place. *264] Munifee proved, that Pollock did not run *the second line, nor mark the third corner. All the witnesses concurred, that not a marked tree was to be found, after leaving Sumner's first line; and the demonstration of nature was given to prove the falsehood of his allegation about the third corner. There was no evidence to fix the actual running of Sumner's first line, more precisely than to the year 1785 or 1786. Under all these circumstances, was it not, at least, a matter of doubt, whether Pollock's survey had been made—had been ratified by his superior—had been filed in the office, before the 1st of June 1785? And if the construction of Gee's entry, given by the circuit court, presupposed the existence of facts not ascertained, then an important inquiry was decided by the court, which belonged exclusively to the cognisance of the jury.

If Gee's entry rests its claim to certainty upon its reference to Sumner's entry, it can advance no higher pretension than Sumner's, to be regarded as a special entry. No evidence having been given of the deadened trees, marked I. J., Sumner's entry is thus far fixed, "on the east side of the upper south road, between the heads of Mill creek, Little Harpeth and Stewart's creek, and on the waters of some of them," and Gee's is thus far fixed "to adjoin Sumner's, on the north." If the first be vague, so is the second, "fixed in an orb that flies." If the first be sufficiently special, it will apply, as well to that part of the land covered by both grants, as to that covered by Sumner's, and not comprehended within Tyrrel's. Indeed, to have surveyed Sumner's a little further to the north and west, so as to cause it to *265] take in *more of the land covered by Tyrrel's grant, would have more nearly conformed to the entry, than does the survey on which the grant has issued.

Should it be objected on the part of the defendant, that Sumner's grant issued on a second survey, after a former survey made and returned, the objection will avail them nothing. Where the state has authorized the granting of lands, and a grant is made, such grant, notwithstanding any irregularities, is good against future claims. 1 Overt. 322. A survey on which a grant has not issued, is no estoppel to another survey. *White* v. *Crocket*, 3 Hayw. 183, 184. If a surveyor mistake in running out land, it is reasonable, that he may correct that mistake, before a grant issues, so that the

rights of innocent third persons be not thereby injured. 1 Overt. 6. Unless Gee's entry is identified to the land excluded from the first, and comprehended within the second survey, it cannot be pretended, that Gee's rights were injured by such second survey. The survey on Gee's entry was made in 1796, ten years after the survey on which Sumner's grant was founded, and three years after Sumner's grant had issued; and the surveyor of Gee's entry had with him, on the survey, a plat of Sumner's tract, representing the courses and distances as specified in the plat annexed to Sumner's grant.

From some of the facts mentioned in the bill of exceptions, it might be supposed, that the parties intended to raise the question of the statute of limitations. It is believed, however, that is a question on *which this court will not give an opinion. The statute of Westminster the 2d, 13 Edw. I., c. 31, which gave the remedy of a bill of exceptions, emphatically confines the attention of the court of errors to the exception taken, "and if the justice cannot deny his seal, they shall proceed to judgment, according to the same exception as it ought to be allowed or disallowed." It does not appear, that any opinion was given in the circuit court, on the statute of limitations, or that it came into consideration there. The instruction to the jury was founded solely on the supposed relation of Tyrrel's grant to the date of Gee's entry, so as to overreach Sumner's prior grant. A bill of exceptions does not draw the whole matter into examination, but only the points to which it is taken, and of course, must be regarded as stating such facts only as will enable the revising court to judge of the matter excepted to. *Bridgman* v. *Holt*, Show. P. C. 120; Bull. N. P. 316; *Frier* v. *Jackson*, 8 Johns. 495. It may not be amiss, however, to state, that on this question, as presented by the facts appearing on the bill of exceptions, the plaintiff claims to be entitled to recover. The Tennessee adjudications have settled that persons "beyond seas," have eight years after returning to the state, within which to make their entry, or bring their writ (2 Overt. 341); and this court has decided, that the words "beyond seas," are equivalent to "without the limits of the state." *Murray* v. *Baker*, 3 Wheat. 541. In this case, it is explicitly stated, that the lessor of the plaintiff never was within the limits of the state of Tennessee. [*266

*White, for the defendants in error, stated, that before a discussion of the main question presented by this record, the attention of the court ought to be directed to the only bill of exceptions which was either tendered in, or signed by the circuit court. By that it would appear, that no exception whatever was taken to the instructions given to the jury, at any time before the verdict was rendered. If the plaintiff was dissatisfied with the charge, that dissatisfaction ought to have been expressed immediately; remaining silent, until the rendition of the verdict, was a waiver of any exception, which might have availed the party if it had been taken immediately. Bull. N. P. 115. The first error assigned, as to the charge, is upon a motion for a new trial, after the refusal of which, the bill of exceptions was tendered and signed. Whether the court decided correctly or not, in refusing the new trial, is a point which this court will not revise, as it has been so well settled, that it would only be a waste of time to refer to decisions in support of this statement. If these preliminary objections are [*267

well taken, there is no point brought here, for examination, which can admit of any doubt.

It is to be regretted, that, from the bill of exceptions, we are not at liberty to examine the question, relative to the statute of limitations. It is sufficient to say, that only one opinion could be entertained upon it, if it was fairly discussed.

*268] But as it is possible that we may be mistaken, in *supposing that the charge of the judge below is not now before this court. Should that be the case, it is submitted, that the charge was strictly correct. The line E, F, represented on plat No. 3, must be considered, as between these parties, the northern boundary of Sumner: (1) Because the proof shows satisfactorily, that in May 1785, Sumner caused his entry to be surveyed by Pollock: that the corner at A, was made, the lines A, B, and B, E, were then run, and these three corners marked. A plat and certificate of this survey was made, and with the warrant, returned to the secretary's office. The moment these things were done, the surveyor was, as to this transaction, *functus officio*, the boundaries of Sumner's 12,000 acres were fixed, and he who then made an entry, calling to adjoin him on the north, can never be disturbed by any after act of others, changing Sumner's boundary. The defendant's entry was made on the first day of June 1785, and his grant is to be viewed as if issued on that day, because the entry on which it issued is special. The plaintiff is not now at liberty to say, the fact is not as I have stated; although there is a contrariety of evidence upon the fact, whether the line B, E, was run by Pollock, yet as the plaintiff excepted to the charge, the fact is to be taken most strongly against him. Bull. N. P. 117. But if this be not so, still it is insisted, that no one can doubt the running the line A, B, and marking those two corners by Pollock, an

*269] authorized surveyor, in May 1785. This line is now, and *has at all times been, the southern boundary of Sumner's tract. It is, therefore, contended, (2) That on the 1st of June 1785, when the entry of Gee was made, he had a right to include in it any land which Sumner's entry did not notify him was included within Sumner's claim. Of what then was Sumner's entry notice? That Sumner had appropriated 12,000 acres, which was to run north from B, as many poles as would make that quantity, and nothing more. This will stop us at E, and still make E, F, the northern boundary, which Gee calls to adjoin. The officers and soldiers had equal rights; they had each paid the same kind of consideration, and each had a right to appropriate to his own use any vacant land he could find, within the military district; and all was vacant, except that which had been either granted, or so described in an entry, as to afford reasonable notice to all others, of the spot appropriated by such entry. On the 1st of June 1785, when Gee entered, how could he know that Sumner's boundary would be changed, by extending the line from B, so as to include 14,000 acres of land, when his entry called for 12,000 only? It was impossible. Yield to the pretensions on the other side, and suppose the facts to be, as we may well suppose it, that there was a succession of entries, each calling to bound upon the north of the other, and look at the consequences. By changing Sumner's northern boundary, you change the northern boundary of each succeeding entry, and by this means, there is an exchange of tracts to the northern

boundary of the state and the last is pressed into the the adjoining state. *The position is too mischievous to be well founded.

But it has been argued, that the decisions in Tennessee, which [*270 authorize an entry to be noticed as evidence in a court of law, are founded in error, and ought not to be extended. To those who have no knowledge of the peculiar situation of Tennessee, when North Carolina legislated upon this subject, there is plausibility in this argument: but when the situation of that country is understood, and the statutes relative to this point considered, it is believed, there can be found no ground of doubt upon the subject. It has been often examined, and for many years, the point has not only been considered as decided, but decided so often, that it is settled, and settled upon principles which every one will believe correct, who will take the trouble to examine them.

It has been further argued, that if the defendants are permitted to introduce their entry in this case, it will be going further than has been done in Tennessee. The counsel who use this argument have not examined this subject with their usual correctness. The principle settled in every case is, that either party, plaintiff or defendant, may introduce his entry, and if that entry be special, and so describe the land afterwards granted to the enterer, his title shall be considered, as if this grant had issued on the day his entry was made.

It has likewise been insisted, that there is very little pretence for putting grants, founded upon military warrants, upon the same footing with those bottomed *on entries made under the acts of 1777 and 1783. [*271 But the courts have made no distinction, nor ought they to make any, that could benefit the plaintiff. If any distinction can be found, it is that there is more reason for receiving the entry, in the former case, than the latter. In the latter, the entry-office was in North Carolina, remote from the land to be entered. In the former, the office directed to be kept at Nashville, in the military district; to the end that the officers and soldiers might conveniently examine it, and become informed of previous appropriations. Upon inspecting this record, and the facts there disclosed, it must be manifest that Sumner's boundary is the line E, F. If not, how came the plaintiff by the certificate for 1808 acres of land, on account of the interference with Pasteur's? It could not have been procured, because there would have been 12,000 acres, exclusive of Pasteur's claim, and no certificate could have been procured. There is, therefore, the representation to the general assembly of North Carolina, the application to the board of commissioners, the testimony of many respectable witnesses, and the persuasive evidence furnished by the verdicts of three different juries, all concurring in the fact that the line E, F, is Sumner's northern boundary. Why should it be disturbed? The plaintiff now holds, within that line, about 11,000 acres of land, and has a land-warrant, or certificate, for 1808 acres, in compensation for that taken by Pasteur, making in all about 13,000, and that without interfering with the defendants. They ought not to be disturbed, and *the more especially, as the record shows, that many persons are now [*272 dead, who formerly gave material evidence, and upon whose evidence the two first verdicts were founded.

March 5th, 1822. MARSHALL, Ch. J., delivered the opinion of the

court.—This is a writ of error to a judgment in ejectment, rendered in the circuit court of the United States for the district of West Tennessee, which was brought by the plaintiffs in error. After a verdict in favor of the defendants, the counsel for the plaintiff moved for a new trial, which was refused. To the opinion of the judge, overruling the motion for a new trial, and also to his charge to the jury, the plaintiff excepted, and the cause comes on now to be heard on his exceptions.

It is well settled, that this court will not revise the opinion of a circuit court, either granting or rejecting a motion for a new trial; but the exception to the charge of the judge, although taken after a motion for a new trial, may have been, and probably was, reserved, at the time the charge was given, and will therefore be considered. The exception to this charge of the court below, consists of two parts: 1st. To so much of it as admits the copies taken from the secretary's office of North Carolina, as evidence in the cause. 2d. To so much of it as admits the validity of Gee's entry, and gives it the the preference to so much of Sumner's patent, as comprehends land not embraced in Pollock's survey.

*273] *The first point seems not to have been relied on by the plaintiff's counsel in argument; and has, we think, been very properly abandoned. These documents were official copies of papers belonging to the title of the parties, taken from the office in which those papers were kept, and regularly authenticated. We perceive no ground, on which the objections to the admission could be sustained. If the charge of the judge went beyond these official copies, to the proceedings of the legislature, and the record of the former trial, we perceive no error in this. The former trial was between parties or privies, and the petition to the legislature was the act of the party, by guardian, the resolution of the general assembly on which, was a measure of the whole state, the effect of which in this, or any other case, might be controverted, but to which all interested in it might have recourse.

The second part of the charge presents a question of more intricacy, which requires an attentive consideration of the land laws of North Carolina, and of the decisions of the courts of Tennessee. In Kentucky and in Virginia, the rule is, that a court of common law cannot look beyond the patent; but in Tennessee, it is understood to be otherwise. The courts of law, in that state, allow the parties, in an ejectment, to go back to the original entry, and to connect the patent with it. This rule is founded on the land laws of North Carolina, which have been construed, in Tennessee, to permit and require it. But the plaintiffs contend, that this construction has been

*274] limited to the comparison of the *dates of the entries, and admits of no inquiry into their legal effect as they stand in relation to each other.

If the question were to depend merely on its reason, it would be difficult to support the opinion, that a court authorized to compare entries with each other, should not, in the exercise of this power, be permitted to examine their whole legal operation and relative effect. If it were to depend upon a construction now, for the first time, to be given to the acts of North Carolina, we should find great difficulty in maintaining, that they allow the entries to be compared, so far as respects dates, but no further. The act of November 1786, ch. 20, in its preamble, recites, that "whereas it is the intent and meaning of the said act" (the act for opening the land-office), "and of

the act hereby revived and put in force, that the first enterers of the vacant and unappropriated lands, if specially located, therein discribed, shall have preference of all others," &c. The 1st section then enacts, "that every first enterer of any tract of land, specially located, lying in the western parts of this state," &c., shall have a further time for making his surveys, and that grants upon lands previously entered by any other person shall be void. The same act allows a survey to be made on removed warrants, in cases where the warrants were originally located on lands which had been previously entered "as the law directs," by some other person, "provided such lands were, at the time of such survey, actually vacant, and that such survey on removed warrants shall not affect or injure the right of *any lands entered, and specially located, in the office aforesaid, previous [*275 to such survey." The act of November 1787, ch. 23, directs all surveyors to survey lands, according to their priority of entry, and that every grant obtained on a subsequent entry, contrary to the provisions of that act, shall be void. The original act had prescribed the manner of making entries, and those made in pursuance of law, are considered special.

Between special entries, the first is undoubtedly to be preferred; but if one entry be special, and the other vague, as if one should describe the land intended to be acquired, in conformity with the act, and the other should totally omit to give a description which might designate the place, should enter 5000 acres of land, lying in the county of A., without naming any place in the county to which it might be fixed, could it be contended, that, on any fair construction of the acts, this entry would prevail against one which was special, but was subsequently made? We think it could not. The acts of North Carolina appear to us to have been intended to preserve the priority of legal entries, not of those made contrary to law. We do not think that the decisions of the courts of Tennessee establish a contrary principle. Several *dicta* are to be found in the cases, stating the rule to be, that courts will go beyond the grant only to support a prior entry, but these *dicta* were applied to the exclusion of extrinsic matter, not to the exclusion of considerations belonging to the entries themselves. *The title to lands surveyed on removed warrants, has never been carried back [*276 to the entry; and on the same principle, the title to lands surveyed off the entry, can have no date enterior to the patent, so far as the survey does not conform to the entry. (1 Overt. 172, 351, 306, 413.) The effects of entries, then, as well as their dates, is considered by the courts of Tennessee.

It has also been contended, that this principle ought not to be applied to military grants. The acts of North Carolina, which have been construed to justify a court of law in considering the entry as the commencement of title, are not, it is agreed, applicable to military warrants. But the act of 1786, c. 20, on which this construction is supposed to be founded, declares it to have been the intention of the act for opening the land-office, that the first enterers "shall have preference to all others in surveying and obtaining grants for the same." We think the act which prescribes the mode of obtaining military grants, manifests this intention as unequivocally as those which are referred to in the act of 1786, c. 20. It is true, as has been stated in argument by the plaintiff's counsel, that the 3d section of the act "for the relief of the officers and soldiers of the continental line, and for other purposes," directs, that where two or more persons wish or claim to have

his or their warrant located on the same piece of land, the parties contending shall cast lots for the choice. But this section obviously provides for applications made at the same time. The 5th section directs, that
*277] "where a warrant shall be hereafter located, without *any person making objections to such location, that such location shall be good and valid, notwithstanding the claim that may be afterwards set up by any other person." This section, we think, manifests a clear intention, to give priority of right to the prior entry; and we are not surprised, that, under this act, the courts of Tennessee should comprehend military titles also, in that rule which authorizes courts of law to take into view the entries of the parties. At any rate, such is the settled course of the courts of the state, and those of the United States ought to conform to it. We think, then, that the circuit court committed no error in inquiring into the rights of the parties to the land in controvesy, under their respective entries. It is next to be considered, whether, in making this inquiry, that court has decided erroneously.

The entry, as well as the patent of the plaintiff, being the oldest, it must prevail, unless some circumstance has occurred, to defeat the right given by this priority. The defendants rely upon the survey made by Pollock, as confining the entry of Sumner to that survey. Of the existence of this survey, there appears to have been no doubt, and none seems to have been entertained at the trial. The plaintiff objected to receiving the copy of the plat and certificate in evidence; but when that objection was overruled, he contested the survey no further. His object, then, was, to show, that the
*278] second line was never run. *The judge charged the jury, that the plat and certificate made by Pollock, if he marked no more of the corners and lines of Sumner's tract, but the southern boundary, and south-east and south-west corner, would show, by calculation, where the northern boundary of his tract should be. Nothing can be more apparent than the correctness of this charge. The law directs, that "every tract surveyed for officers or soldiers, shall be run out at the four cardinal points of the compass, either in a square or in an oblong." Consequently, when one line of a survey is given, the remaining three lines are found by a calculation which cannot vary. General Sumner's entry was for 12,000 acres of land. A line from west to east, constituting the southern boundary, was run, and measured 1292 poles. Corner trees at each extremity were marked. From the end of this first line, the survey calls for a line, due north, 1486 poles. Had this line been actually run and marked, the tract would have been bounded by the lines actually run, and the corner trees actually marked. But the line not having been run, the tract was bounded by the course and distance called for. Had there been no survey, had Sumner's entry been for 12,000 acres of land, to begin where the survey began, and to run east 1292 poles, and from the ends of that line, north, for quantity, it must have been bounded in the same manner, because a rectangular oblong figure, to contain 12,000 acres, one of which is 1272 poles, must have for its other sides, lines of 1486 poles. Of course, the judge was correct in saying that if the southern
*279] *boundary was given, the northern boundary was to be found by computation.

Was he equally correct in adding, that Gee's land might be located on the north of Sumner's northern line, when thus found? We think he was.

Gee's entry called to lie, "adjoining the northern boundary of Brigadier-General Sumner, running west along his line, for complement." Sumner's northern line was, consequently, Gee's southern line. If, then, Sumner's grant had been issued according to Pollock's survey no interference between him and Gee could have taken place. But a plat and certificate of survey was afterwards made out by Malloy, who was also a deputy-surveyor, which extended the lines constituting the eastern and western boundary of Sumner's land, to 1737 poles; and upon this plat and certificate, his patent was issued. We must, therefore, inquire whether Pollock's survey was legally made; and if it was, whether it could be afterwards changed, so as to affect a person making an entry, in the intermediate time between his first and second survey.

The laws of North Carolina make it the duty of surveyors to survey entries, in the order in which they are made, and do not require the presence or direction of the owners of the land. Pollock was a deputy-surveyor authorized to make this survey. Consequently, it was regularly made, and had all the consequences of a legal survey. Admitting the alteration made by Malloy to be *perfectly justifiable, Gee's entry was prior to that [*280
alteration; and the question is, whether such alteration can affect an appropriation previously made? Upon the principles of reason and common justice, we could feel no difficulty on this point. But we are relieved from considering it by the decisions which have already taken place in Tennessee. In *Blakemore* v. *Chambles* (1 Overt. 3), it was expressly determined, that the validity of surveys "has no dependence on the will or direction of claimants," and that though the mistakes of surveyors may be corrected, "they cannot be so corrected as to injure a subsequent adjoining enterer."

Gee's entry, then, made after Pollock's survey, will, if a valid entry, hold the lands against any subsequent survey made for Sumner. But as Sumner's is the eldest grant, the validity of Gee's entry must be examined. It calls to adjoin Sumner's northern boundary, and to run west along his line, for complement. The laws of North Carolina direct, that an entry shall express "the nearest water-courses, and remarkable places, and such water-courses, lakes and ponds as may be therein, the natural boundaries and lines of any other person or persons, if any, which divide it from other lands." This law cannot be construed, and never has been construed, to require that water-courses, or remarkable places, which are remote, should be expressed in the entry. It requires the expression of those only which are contiguous, and which may assist in showing *the land intended to be acquired. If there be no considerable water- [*281
courses, lakes or ponds within it, the entry cannot express them. The reference to the adjoining land, when we take into view that the law directs entries to be surveyed according to their dates, would always be sufficient to make the entry special, if the line called for could be found. In *Smith and others* v. *Craig's Lessee* (2 Overt. 296), the court said, "Previously to the year 1786, a vague entry was well understood to be one that contained no such specialty as that a majority of those acquainted in its neighborhood, at its date, could, by reasonable industry, find it; a special entry was considered the reverse. How natural is it, then, for us to suppose, that the legislature designed, in the use of this expression, in the act of 1786, to convey such ideas as had by usage and common consent been appropriated to

it." The books are full of cases containing similar expressions. It is impossible to look at all into the subject, without being satisfied, that in the state of Tennessee, such an entry as that of Gee would be deemed special, if Sumner's northern boundary could be found. There could be no difficulty in finding it, since his land had been surveyed when this entry was made.

But the great objection on which the plaintiffs most rely, is, that to constitute a special entry, in the state of Tennessee, the objects called for must be notorious, as well as certain. The entry must be such as to give general information of the precise land it appropriates. Notoriety, as well as
*282] identity, are essential, *it is said, to specialty, and a call for Sumner's line is not good, unless Sumner's survey was notorious. If this proposition be correct, if notoriety as well as identity be essential to the validity of an entry, in Tennessee, as it is in Kentucky, then Gee's entry cannot be sustained. But the law of Tennessee is, in this respect, entirely different from that of Kentucky. The act of Virginia, which is the land-law of Kentucky, requires, that entries shall be so special and certain, that any subsequent locator may know how to appropriate the adjacent residuum. The land-law of North Carolina, which is the law of Tennessee, contains no such provision. The lawyers of Kentucky have made some attempts to transplant into Tennessee the principles which had grown up in Kentucky; but their attempts were unsuccessful. The books are full of cases, in which it is expressly decided, that notoriety is not essential to the validity of an entry. In the case of *Philip's Lessee* v. *Robertson* (2 Overt. 399), the whole subject is reviewed. Judge OVERTON takes a very comprehensive view of the doctrines growing out of the land laws of North Carolina, and shows conclusively, that they do not require, and had never been understood, in Tennessee, to require notoriety, as essential to the validity of an entry. His opinion in this case has, we are informed, been confirmed by the other judges of their supreme court.

If notoriety be not necessary to Gee's entry, it is special, according to the laws of Tennessee, and ought to hold the land it covers, against any
*283] subsequent survey *made of an entry which had been previously surveyed. The judge was correct in saying that such subsequent survey must be considered as if made on a removed warrant.

Judgment affirmed, with costs.

The Santissima Trinidad : and The St. Andre.

Evidence of national character.—Civil war.—Neutrality.—Illegal captures.

The commission of a public ship of a foreign state, signed by the proper authorities, is conclusive evidence of her national character.

During the existence of the civil war between Spain and her colonies, and previous to the acknowledgment of the independence of the latter by the United States, the colonies were deemed by us belligerent nations, and entitled so far as concerns us, to all the sovereign rights of war, against their enemy.[1]

How far, and under what circumstances, the evidence of witnesses, who concur in proof of a material fact, but whose testimony is in other respects contradictory, ought to be credited, in respect to that fact.

The sending of armed vessels, or of munitions of war, from a neutral country to a belligerent port, for sale, as articles of commerce, is unlawful, only as it subjects the property to confiscation, on capture by the other belligerent.

No neutral state is bound to prohibit the exportation of contraband articles, and the United States have not prohibited it.

In the case of an illegal augmentation of the force of a belligerent cruiser, in our ports, by enlisting men, the *onus probandi* is thrown on him to show, that the persons enlisted were subject of the belligerent state or belonging to its service, and then transiently within the United States.

The 6th article of the Spanish treaty of 1795, applies exclusively to the protection and defence of Spanish ships, within our territorial jurisdiction, *and provides only for their restitution, when captured within the same.[2] [*284

The 4th article of the same treaty, which prohibits the citizens or subjects of the respective contracting parties from taking commissions, &c., to cruise against the other, under the penalty of being considered as pirates, is confined to private armed vessels, and does not extend to public ships.

Quære ? Whether a citizen of the United States, independently of any legislative act on the subject, can throw off his allegiance to his native country ? However this may be, it can never be done, without a *bonâ fide* change of domicil, or for fraudulent purposes, nor to justify the commission of a crime against the country, or any violation of its laws.

An augmentation of force, or illegal outfit, does not affect any capture made after the original cruise, for which such augmentation or outfit was made, is terminated.

But as to captures made during the same cruise, the uniform doctrine of this court has been, that they are infected with the character of torts, and that the original owner is entitled to restitution, when the property is brought into our jurisdiction. This doctrine extends to captures by public, as well as private, armed ships.

The Cassius, 3 Dall. 121, commented on and confirmed ; The Exchange, 7 Cranch 116, distinguished from the present case.

The exemption of foreign public ships, coming into our waters, under an express or implied license from the local jurisdiction, does not extend to their prize ships or goods, captured in violation of our neutrality.

The Santissima Trinidad, 1 Brock. 478, affirmed.

Appeal from the Circuit Court of Virginia. This was a libel filed by the consul of Spain, in the district court of Virginia, in April 1817, against eighty-nine bales of cochineal, two bales of jalap, and one box of vanilla, originally constituting part of the cargoes of the Spanish ships, Santissima Trinidad and St. Andre, and alleged to be unlawfully and piratically taken out of those vessels, on the high seas, by a squadron consisting of two

[1] See The Prize Cases, 2 Black 669 ; Williams *v.* Bruffy, 96 U. S. 190.

[2] A capture in neutral waters is valid, as between belligerents; neither a belligerent owner, nor an individual enemy owner, can be heard to complain ; but the neutral sovereign whose territory has been violated, may interpose and demand reparation, and is entitled to have the captured property restored. The Florida, 101 U. S. 42.

armed vessels, called *the Independencia del Sud, and the Altravida, and manned and commanded by persons assuming themselves to be citizens of the United Provinces of the Rio de la Plata.

The libel was filed, in behalf of the original Spanish owners, by Don Pablo Chagon, consul of his Catholic majesty for the port of Norfolk ; and as amended, it insisted upon restitution, principally for three reasons : 1. That the commanders of the capturing vessels, the Independencia and the Altravida, were native citizens of the United States, and were prohibited by our treaty with Spain of 1795, from taking commissions to cruise against that power. 2. That the said capturing vessels were owned in the United States, and were originally equipped, fitted out, armed and manned in the United States, contrary to law. 3. That their force and armament had been illegally augmented within the United States.

A claim and answer was given in by James Chaytor, styling himself Don Diego Chaytor, in which he asserted, that he was commander of the Independencia, that she was a public armed vessel belonging to the government of the United Provinces of Rio de la Plata, and that he was duly commissioned as her commander ; that open war existed between those provinces and Spain ; that the property in question was captured by him, as prize of war, on the high seas, and taken out of the Spanish ships, the Santissima Trinidad and the St. Andre, and put on board of the Independencia ; and that he, afterwards, in March 1817, came into the port of Norfolk, with his capturing ship, where she was received *and acknowledged as a public ship of war, and the captured property, with the approbation and consent of the government of the United States, was there landed for safe-keeping in the custom-house store. The claimant admitted, that he was a native citizen of the United States, and that his wife and family have constantly resided at Baltimore ; but alleged, that in May 1816, at the city of Buenos Ayres, he accepted a commission under the government of the United Provinces, and then and there expatriated himself, by the only means in his power, viz., a formal notification of the fact to the United States consul at that place. He denied, that the capturing vessel, the Independencia, was owned in the United States, or that she was fitted out, equipped or armed, or her force augmented, in the ports of the United States, contrary to law. He denied also, that the Altravida was owned in the United States, or that she was armed, equipped or fitted out in the United States, contrary to law ; or that she aided in the capture of the property in question. He further asserted, that the captured property had been libelled and duly condemned as prize, in the tribunal of prizes of the United Provinces, at Buenos Ayres, on the 6th of February 1818. He denied the illegal enlistment of his crew in the United States ; but admitted, that several persons there entered themselves on board as seamen, in December 1816, representing themselves to be, and being, as he supposed, citizens of the United Provinces, or in their service, and then transiently in the United States ; and that he refused to receive citizens of this country, and *actually sent on shore some who had clandestinely introduced themselves on board.

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It appeared by the evidence in the cause, that the capturing vessel, the Independencia, was originally built and equipped in the port of Baltimore, as a privateer, during the late war between the United States and Great Britain, and was then rigged as a schooner, and called the Mammoth, and

The Santissima Trinidad

was fitted out to cruise against the enemy. After the peace, she was converted into a brig, and sold by her original owners. In January 1816, she was loaded with a cargo of munitions of war, by her new owners, who were also inhabitants of Baltimore, and being armed with twelve guns, constituting part of her original armament, she was sent from that port, under the command of the claimant, Chaytor, ostensibly on a voyage to the north-west coast of America, but in reality to Buenos Ayres. By the written instructions given to the supercargo, on this voyage, he was authorized by the owners, to sell the vessel to the government of Buenos Ayres, if he could obtain a suitable price. She arrived at Buenos Ayres, having committed no act of hostility, but sailing under the protection of the United States flag, during the outward voyage. At Buenos Ayres, the vessel was sold to the claimant and two other persons; and soon afterwards, in May 1816, assumed the flag and character of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres, and the claimant made known these facts to the crew, asserting that he had become a citizen of Buenos Ayres, and had received *a commission to command the vessel, as a national ship; and invited the crew to enlist in the same [*288 service; and the greater part of them, accordingly enlisted. From this period, the public agents of the government of the United States, and other foreign governments at that port, considered the vessel as a public ship of war, and this was her avowed character and reputation. No bill of sale to the government of Buenos Ayres was produced, but the claimant's commission from that government was given in evidence.

Upon the point of the illegal equipment and augmentation of force of the capturing vessels, in the ports of the United States, different witnesses were examined on the part of the libellant, whose testimony was extremely contradictory; but it appeared from the evidence, and was admitted by the claimant, that after the sale at Buenos Ayres, in May 1816, the Independencia departed from that port, under his command, on a cruise against Spain; and after visiting the coast of Spain, put into Baltimore, early in the month of October of the same year, having then on board the greater part of her original crew, among which were many citizens of the United States. On her arrival at Baltimore, she was received as a public ship, and underwent considerable repairs in that port. Her bottom was new coppered, some parts of her hull were re-caulked, part of her water-ways replaced, a new head was put on, some new sails and rigging to a small amount, and a new main-yard were obtained; some bolts were driven into the hull, and the main-mast (which had been *shivered by lightning) was taken out, reduced [*289 in length, and replaced in its former station. For the purpose of making these repairs, her guns, ammunition and cargo were discharged, under the inspection of an officer of the customs; and when the repairs were made, the armament was replaced, and a report made by the proper officer to the collector, that there was no addition to her armament. The Independencia again left Baltimore, in the latter part of December 1816, having, at that time, on board, a crew of 112 men; and on or about the 8th of February following, sailed from the Capes of the Chesapeake on the cruise in which the property in question was captured. During the stay of the Independencia at Baltimore, several persons were enlisted on board her, and the claimant's own witnesses proved, that the number was about thirty.

On her departure from Baltimore, the Independencia was accompanied by the Altravida, as a tender or dispatch vessel. This last was formerly a privateer called the Romp, aud had been condemned by the district court of Virginia, for illegal conduct, and was sold under the decree of court, together with the armament and munitions of war then on board. She was purchased, ostensibly for one Thomas Taylor, but immediately transferred to the claimant, Chaytor. She soon afterwards went to Baltimore, and was attached to the Independencia as a tender, having no separate commission, but acting under the authority of the claimant. Some of her guns were mounted, and a crew of about twenty-five men put on board, at Baltimore.
*290] She dropped *down to the Patuxent, a few days before the sailing of the Independencia, and was there joined by the latter, and accompanied her on her cruise.

The district court, upon the hearing of the cause, decreed restitution to the original Spanish owners. That sentence was affirmed in the circuit court, and from the decree of the latter, the cause was brought by appeal to this court.

February 28th. *Winder*, for the appellant.—1. Argued upon the facts, to show that there had been no such illegal outfit or augmentation of the force of the capturing vessel, in our ports, as would entitle the original Spanish owners to restitution of the captured property, on the ground of a violation of our neutrality by the captors.

2. He argued, that even supposing the claimant, Chaytor, to be a native citizen of the United States, the capture was not invalidated by the circumstance of his commanding the capturing vessel. Being a public ship of a foreign state, this court could not, upon its own principles, inquire into her conduct further than to see that she had a regular commission, signed by the proper authorities of that state. *The Exchange*, 7 Cranch 116. It is perfectly consistent with the law and universal practice of nations, for neutral subjects to take commissions in foreign wars. Vattel, *Droit des Gens*, lib. 3, c. 2, § 13, 14, 16; lib. 3, c. 7, § 228, 230; Bynk. Q. J. Pub. lib. 1, c. 22, Du Ponceau's Transl. p. 175. This court has determined, that an alien may
*291] command a private armed vessel *of the United States, and cruise against their enimy, though it happens to be his own native country. *The Mary and Susan*, 1 Wheat. 57. So also, the prize ordinance of Buenos Ayres declares, that all officers of commissioned vessel or privateers belonging to that state, although they may be foreigners, shall enjoy all the privileges of citizens, whilst thus employed. 4 Wheat. app'x, Note II., 30.

But it may be said, that the Spanish treaty of 1795, renders such an act criminal, and all its consequences void, and therefore, this court cannot listen to the claim of a citizen who has thus violated the supreme law of the land. The answer to this is, that the treaty shows the idea of the contracting parties, that independently of its stipulations, their respective citizens and subjects might take commissions to cruise against each other, without violating the pre-existing law of nations. The sole effect of the treaty is, to subject them to be treated as pirates by the opposite party, if it thinks fit. It excludes them from the protection of their own government, leaves them at the mercy of the opposite party, and excuses the government of the offenders from all responsibility to the other for their misconduct. They

are not made pirates by the treaty, but only made liable to be considered as such, by the party against whom they act. Would not the government in whose service they held commissions, have a right to retaliate, if they were treated as pirates, either by their own government, or by that *against which they acted; since, by the law of nations the belligerent might [*292 grant to them, as foreigners, and they might accept, the commissions?

The treaty operates only between the contracting parties, and cannot interfere with the lawful powers and rights of other nations, under the law of nations; and between the parties, it only operates to give the belligerent, so far as the neutral contracting party is concerned, a right to treat the citizen as a pirate, without complaint from his government. It dispenses the offended party, so far as the other is concerned, from the obligation to observe the rules of civilized warfare, *quoad* a citizen thus implicated; but it can have no effect upon the rights of the other belligerent, *quoad* the officer of that belligerent. The party, whose citizens or subjects they are, is not bound to treat the supposed offenders as pirates, and our courts cannot so treat them, in the absence of an act of congress. The United States are not bound so to treat or consider them. They are simply bound to leave them to the discretion of Spain, and there the effect of the treaty stops. The prohibition of the treaty has its prescribed peril and effect, and cannot, at least, judicially, be extended further. To make the treaty bind the United States to restore a prize, made by one of its citizens, under a commission from a foreign government, would be, to make a treaty stipulation between Spain and the United States operate to interfere with the undoubted rights of a third foreign power, who is no party to the treaty. It would abridge and annul the effect of a commission, which, by the unquestioned law of *nations, he had a right, within his own territory, to grant.

The acts of congress to protect the neutrality of the United States [*293 have nothing to do with it, because none of them extend to, or pretend to extend to, the acceptance of a commission, in a foreign country, by a citizen of this. And the silence of congress on the subject, is a strong legislative exposition of the treaty; for in making provision to preserve the neutrality of the United States, generally, and especially, in relation to the contest between Spain and her colonies, they have not rendered criminal such acceptance of a commission, and as they have manifested a spirit of some severity on this subject, and are silent on such a case, it is strong evidence, that congress did not feel bound to add anything to the treaty; since, if they were bound, they would have done so, in obedience to this treaty obligation of neutrality, as they have done in other cases. Where the law stops, the courts of justice must stop; *expressum facit tacitum cessare.* The plain object of the law was, even in cases within it, to affect the offending citizen; not to affect the foreign government who employs him; or, in other words, not to authorize a judicial interference with its belligerent acts. The statute committed to the judiciary all that the legislature intended to be within their competency. The rest it reserved for national adjustment, by forbearing to submit it to the judiciary. The law must be taken as it is, not expanded by inference; to put a judicial rider upon it, is to legislate. The inference which [*294 *would vacate a capture under the commission, would be a supplement to the law, would be to legislate on a distinct subject, *i. e.*, the effect of a belligerent act by a foreign state. The law is a restraining law, *in ter-*

rorem, aimed at the citizen only. The inference deals with a third party, a sovereign state, who is not subject to our jurisdiction; and acts in a way which the law does not prescribe; for the law authorizes nothing but the punishment of the individual. If more had been intended, more would, and ought to have been, done; for the whole subject was well understood, from 1794 to 1819, when the last act was passed. There is no positive municipal rule, giving judicial jurisdiction as to such a commission, or any commission, even within the law, with reference to the effect of restoring a prize made under it. Every belligerent state has a right to decide upon the means of annoyance, which it organizes against its enemy, within its own territory. If its commission to make war can be subject to ordinary judicial question, in a neutral tribunal, where it cannot be heard, and cannot condescend to appear, it is not a sovereign act. But the granting such a commission is the very highest act of sovereignty, and is peculiarly above ordinary judicial control, in foreign countries. The legality, the force and effect of the commission itself, must defy ordinary judicial inquiry, or the belligerent can only authorize war, so far forth as neutral tribunals shall think fit to suffer it.

A judicial recognition of the legality of the capture in question by a court of prize, at Buenos Ayres, would undoubtedly have put the capture out of
*295] *reach of our court. But the sentence of such a court is no more a sovereign act, than the granting the commission. It does but ascertain the granting of the commission, and gives to it no new force or validity. The belligerent state is just as much answerable for the wrong done to the neutral state, if any there be, in granting the commission, after the sentence, as before. A judicial sentence, in a case of prize, binds, for no other reason, than that it is the act of the state to which the court belongs. That it is a judicial sentence, is of no importance. It is the sovereignty of the state, and its right of decision, which gives to the sentence its conclusive character, in the view of foreign tribunals: and all this applies equally to the act of granting a commission, within the territory of the belligerent.

All the cases of this class, which have been decided in this court, turn exclusively upon the fact of an illegal equipment of the capturing vessel, within our ports, except that of *The Bello Corrunes*, in which the judgment does indeed refer to the national character of the claimant, Barnes, as repelling his right to claim. 6 Wheat. 125, 169. But as the facts of that case will show that it might have been determined on the ground of the illegal equipment of the capturing vessel, without giving an instruction to the treaty, or ascertaining the national character of the claimant, all that is said by the learned judge who pronounced the opinion of the court in that case, on these subjects, may be considered as *obiter dictum*.

*3. But the claimant, in the case now before the court, had ceased
*296] to be a citizen, before he accepted the commission, and made the capture in question. He had expatriated himself, and become a citizen of Buenos Ayres, by the only means in his power, an actual residence in that country, with a declaration of his intention to that effect. This act is countenanced by the general usage of nations, and was not forbidden by any law of his own country. By the British law, not only are privateers and merchant vessels allowed to enlist foreign seamen, but the mere fact of two years' service, during war, makes them British subjects. 5 Wheat. app'x,

Note III., p. 130. A resident neutral in a belligerent country is subjected to the disabilities of the country in which he resides, so far as respects the opposite belligerent, and his trade is considered liable to capture and condemnation as enemy's property. Shall he not then be entitled to the correspondent advantages of his situation? The hostile character is fixed upon him by residence, even if he goes to the belligerent country, with the desire of preserving his neutral character. Shall he not then be entitled to all the advantages of that character, when it is his avowed purpose and object to acquire it? Length of time generally decides the character of the residence of a neutral to be belligerent or not: but it is taken merely as evidence of his intention, and if that intention is unequivocally manifested in any other mode, his character is instantly fixed. Wheat. Dig. tit. Prize, IV.

*4. This capture being made by a public ship, which has come into our ports, together with her prize goods, under the express permission of our government, the court cannot interfere, to restore the captured property to the original owners, upon the ground that the capturing vessel has committed a violation of our neutrality. The ship itself must certainly be exempt from the local jurisdiction. *The Exchange*, 7 Cranch 116. And if the ship be exempt, it is difficult to perceive, how any other property of the same sovereign, which he has acquired and holds *jure coronæ*, can be subjected to the local jurisdiction, by being brought into the territory, under the same permission. Still less can the prizes made by a ship, which is herself exempt from the jurisdiction of the local tribunals, be subjected to that jurisdiction. These prizes are as much the property of the sovereign, *jure coronæ*, as the ships by which they are taken and brought in. [*297

The illegal augmentation of her force by the capturing vessel, in our ports, cannot forfeit the immunity to which she is entitled by the law and usage of nations. Enlistments of men for this purpose, are not presumed to be made with the assent of the belligerent sovereign, and are not to be imputed to him. Vattel, *Droit des Gens*, lib. 3, § 15. It is, therefore, an offence which is not to be visited on the sovereign or his property. Reprisals cannot lawfully be made, until application to him for redress has been made Courts of justice cannot interfere, in such a case, because the sovereign cannot condescend to appear in them, and they have no *regular means of knowing how far he approves of what has been done by his officers. But upon remonstrance and diplomatic discussion, the whole affair may be heard, and remedies applied, fit for the occasion. Judicial decision, if it can interfere at all, is inflexible; and when the fact is established, must make entire restitution of the captured property, however insignificant may be the augmentation of force by neutral means. Besides, it is bringing into judgment the highest concerns of nations, to be determined by the testimony of the basest of mankind. The enlistment of a single seaman, on board a single ship of a large squadon, may draw after it the restitution of a whole enemy's fleet. The only safe course then is, to leave matters of this sort to negotiation, or, at least, not to take cognisance of them in courts of justice, unless upon the application of the offended state, as in the analogous case of a capture within neutral territory. *The Anne*, 3 Wheat. 435. [*298

5. But at all events, the condemnation of the prize goods, which took place at Buenos Ayres, in a court of the captor, is conclusive to preclude

this court from taking jurisdiction of a question which has already been determined in a competent tribunal.

Tazewell, contrà, stated, that three principal errors were alleged by the appellant in the decrees of the court below: 1. That the facts assumed
*299] by those courts did not warrant the decrees. 2. That *the condemnation in the tribunal of prizes, at Buenos Ayres, precluded the courts of this country from inquiring into the legality of the capture. 3. That our courts have no authority to make that inquiry, because the facts of the case involve the sovereign rights of an independent state.

As to the first objection, it is not necessary to discuss it, until the last is disposed of. Jurisdiction must be shown to exist, before its rightful exercise can be proved. He would, therefore, invert the order of the argument, and examine the last-mentioned proposition, before the others. It would be shown to be the only question of real difficulty in the cause.

The argument on this proposition concedes to the neutral sovereign or state, the very right which it denies to the neutral judiciary. Now, to the belligerent sovereign, the effect is precisely the same, whether the interference with his rights be by the executive and legislative departments, or by the judiciary alone; in either case, his rights are examined into, and he may be deprived of them. To the neutral state also, the effect is the same, in both cases, so far as foreign states are concerned; since, in both, the nation is equally responsible for the act done. It is no answer to the reclamation of a foreign sovereign, to say, that he has been injured by the judiciary only. To him, all the departments of the government make but one sovereignty; this is represented by the executive, of which the judiciary is regarded but as an emanation. It may be, and undoubtedly is, a matter of
*300] great moment to the *neutral state itself, that its powers be legitimately exercised by those only to whom they have been confided by the municipal constitution. But this is a mere domestic inquiry, in which no foreign state has any concern, nor ought to be permitted to enter. Is it not strange, then, that it should now be presented to us in a litigation between two foreign subjects?

The question being raised, however, it must be discussed; not for the sake of the parties, but of the court itself. Let us then concede, what the argument asserts, and it has no application to the cause. For justice is blind, and knows not of the existence of the sovereign, or of his rights, until made manifest by its own record. Nor will it notice even what its own record may disclose, unless the matter be therein duly and orderly set forth, *i. e.*, by proper parties, in proper time, and in proper form. How, then, is this fact of sovereign right to be duly and orderly disclosed, so as to be made manifest to the courts of justice, and to shut the judicial eyes to every other fact in the cause? This, although apparently a mere technical question, is one of great importance, especially, on account of the practice which has been hitherto pursued by the courts of the United States, in cases of this sort. And at the very threshhold of the inquiry, it is plain, that the sovereign who denies the authority of the court to decide, must not answer. If he does, he voluntarily submits to, nay, invites the exercise of the very
*301] authority which he denies can be exerted. His averments, too, may be traversed, and issue being joined on the *traverse, must be decided

in some way; and so his sovereignty denied by judicature. Neither can he plead in abatement, or any dilatory exception; for he may be decreed to answer over. Neither may he protest; for the question cannot be raised by a naked protest; and if he couples his protest with an answer, if he does not so overrule his protest, his answer leaves him as before. If he adopts the practice pursued in the case of *The Cassius*,(*a*) and suggests his exemption upon the record, he will be met, as in that case, by a replication to his suggestion, and it becomes a mere plea in abatement; for whatsoever one party may affirm, the other may deny.

These are the only known modes of defence, and none of them can the foreign sovereign adopt, without abandoning the exemption claimed for him by the argument. What then must he do? He must not defend himself in judicature at all; he must apply to the sovereign of that tribunal where his rights are drawn in question, and refer to his accountability. This sovereign, if he sees fit, will suggest for him; if he does not, he will refuse to do so, and meet the consequences. To a suggestion coming from this quarter, there can be no replication; for he who makes it is no party in interest. Nor is proof necessary to establish it; for it comes duly authenticated. Such was the course pursued in the memorable case of *The Exchange*, 7 Cranch 116, where a suggestion of the sovereign rights of the Emperor *Napoleon was made by the executive government; although proof [*302
of the commission of the commander of the vessel was unnecessarily superadded. This is the only proper mode in which the matter of sovereign right can, duly and orderly, be set before the court. It avoids all the technical difficulties of pleading and practice, and places the matter where, according to the argument, it ought to rest, with the sovereign.

This course has not, however, been adopted here; and therefore, the court will not take judicial cognisance of the fact of sovereign right, involved in the determination of the cause: and the argument insisted on, even if abstractly true, has no application to the cause, as presented upon the record. The matter is reduced to a mere question of practice, settled by the form of the pleadings, which it is now too late to amend.

Suppose, however, it were *res integra*. The court must contrive some proper form in which subjects of this sort may be brought before it. In adjusting this form, it is a sound and a safe rule to be followed, to attain the object by known, rather than by untried means; to adhere to ancient forms, so far as may be done; and, if possible, to alter nothing. If this be so, whatever may be the rule adopted by the court, the case will still be found exposed to the objection before stated: for the record will not show any information derived from our sovereign, but the very reverse. It is only important, then, to examine the question, whether the information of the sovereign or executive government be the proper and only *standard [*303
to which the court must refer, in matters wherein, not our own people, but foreign states are concerned. Whatever the theory may be on this subject, all know that, in point of fact, courts of justice do and must decide upon the rights of sovereigns, and that, even in governments the most absolute. For these courts must necessarily decide upon the rights of private individuals and corporations, and these are oft-times so interwoven

(*a*) United States *v.* Peters, 3 Dall. 123.

with the rights of their sovereigns, that to decide upon the one, is to decide upon the other, not only in form, but effect also. Treaties and war create and destroy rights; and nations as well as individuals, derive their rights from these public transactions, which, therefore, the tribunals of justice must pass upon. Such, among many others, was the case of *The Amiable Isabella*, where the sovereign rights of Spain and the United States were involved, and were determined by this court. 6 Wheat. 1, 50. The rights of sovereigns must then be settled by courts, and may be settled in different modes. This supposition constitutes a part of our complex system of government. Sovereign rights may be settled, not only in the federal courts, but in the state courts: and to guard against the effects of a conflict of opinion in such cases, between the different local tribunals, appeals are brought from the state courts to this court. It would be in vain, however, to translate a cause here from the state courts, if this court might decide it differently from the other departments of the government. This must not be, however. The
*304] *people, although sovereign, can have but one will; and that will must be spoken by all their agents, or our government is a many-headed monster. The question, then, at last results in this—In what department of the government does this will, in relation to foreign states, reside? For wherever it does reside, that will must be uttered here, or we shall have two conflicting wills on the same matter. Now, I care not where it resides, if it resides anywhere: and the argument and necessity both prove that it must reside somewhere. If then it resides here, in this court, the argument is radically defective: for then it follows, that judicature may decide on sovereign rights. And if it resides not here, but elsewhere, it must be communicated from thence hither, and constitute the law of the court; or our government is a monstrous anarchy. Some mode of communication between the executive government and the judiciary must be contrived. The only doubt is, how this communication is to be made. And whatever course may be a proper one, none has been adopted in the present case, and the court cannot, therefore, take notice that any sovereign rights of Buenos Ayres are involved in the cause. You cannot know the fact, and must proceed as if it did not exist. This does not impugn judicial independence; the judiciary are not independent of the law; they utter the legislative will of the people, when declared by the legislature: they pursue its executive will when communicated by the executive department. All nations have felt the necessity of some such course; the only question is, as to the form, which must
*305] depend upon the municipal *constitution and the practice of each particular country. Thus, in England, all rights of prize are originally vested in the crown; hence, the courts of prize take their law from the king's instructions; the captors cannot proceed to adjudication, against the will of the crown. Hence, in the case of the Swedish convoy, the condemnation of the captured property, for resistance to the exercise of the right of search, was limited to the merchant vessels, although the same penalty would have been applicable to the convoying frigates, had not the crown interposed its prerogative, and from reasons of state, caused the latter to be restored to the foreign sovereign. *The Maria*, 1 Rob. 340.

Heretofore, the subject has been examined as a technical question of pleading and practice merely. Let us now examine it as one of evidence. Of whom, then, is this exemption from judicial investigation affirmed? A

sovereign state. But is Buenos Ayres a sovereign state? This court has repeatedly decided, that it will not undertake to determine who are sovereign states; but will leave that question to be settled by the other departments of the government, who are charged with the external affairs of the country, and the relations of peace and war. *Rose* v. *Himely*, 4 Cranch 241, 292; *Gelston* v. *Hoyt*, 3 Wheat. 246, 224; *United States* v. *Palmer*, 3 Ibid. 610, 634. It may, however, be said, that both the judiciary and the executive have concurred in affirming the sovereignty of the Spanish colonies, now in revolt against the mother country. *But the obvious answer to this objection is, that the court, following the executive department, have merely declared the notorious fact, that a civil war exists between Spain and her American provinces; and this, so far from affirming, is a denial of the sovereignty of the latter. It would be a public, and not a civil war, if they were sovereign states. The very object of the contest is, to decide whether they shall be sovereign and independent, or not. All that the court has affirmed is, that the existence of this civil war gave to both parties all the rights of war against each other. But belligerent rights are not regalian rights. Now, in the case last cited, *United States* v. *Palmer*, 3 Wheat. 635, the court decided, that the seal of this supposed sovereign state might be proved like any other matter *in pais*. If it were really a sovereign state, the seal would prove itself. The more the subject is examined, the more apparent will it be, what confusion and mischiefs must flow from the judicial department assuming the right to acknowledge the existence of other sovereignties, especially, in the present mutable state of the world. Cases of depositions and restorations are continually occurring, of revolutions and counter-revolutions, which present the most complicated questions of strict right and political expediency, the determination of which must be left to the other departments of the government. [*306

But if it were true, in fact, and well pleaded, that the *res* now in controversy is a sovereign's right; still, it would not be correct, to say, that *all* sovereign *rights are exempt from judicial examination; there must be some exceptions to the universality of the rule. The exemption only applies to the regalian rights of the sovereign; those which are necessary to maintain his faith, dignity and security, and to none else. Such are his august person, his ministers, his armies and fleets. These are protected from the interference of foreign judicatures, because they are essentially necessary for these purposes; they make up sovereignty itself. And nothing else, which is not within the reason, is within the rule of exemption. Suppose, a royal stag or horse escapes into a foreign state, and is there sold in *market overt* as an estray; or suppose, the ship of a foreign sovereign is wrecked on our coasts, and a claim for salvage of the materials interposed. Would you stay your hand, from a dread of the sacredness of the subject-matter? The privilege of sovereignty cannot protect these cases. No authority can be shown to prove it; on the contrary, the authorities are clearly the other way. Thus, all prizes made in war are the property of the sovereign, *jure coronæ*, and this, whether the prize be taken by a public or a private ship. But it is not to be argued (in this court at least), that such prizes may not be taken out of the hands of the captors (whose possession is that of their sovereign), and restored by the neutral tribunal, within whose jurisdiction they may happen to come, if made by privateers, in violation of [*307

neutral territory or of neutral rights. And if so, why may not prizes made by public ships be restored under like circumstances? They both come
*308] *within the same reason, and therefore, should fall within the same exception to the general rule. The rule, then, if true at all, must be limited as I have stated; and if so, it will not apply to the present case. It may, indeed, protect the public ship herself, but not her prize goods. These are not the regalian rights of the sovereign; they are a mere accidental, military possession, which are not indispensably necessary to maintain his faith, dignity or security.

Again, the argument which asserts exemption for sovereign rights, does not confine itself to the rights of a belligerent, but equally applies to all sovereigns, whether in peace or war. But if a wrong-doing sovereign may claim this exemption, what becomes of the rights of the injured sovereign? Must he submit, or hold his hand, and ask redress of the offender? Every objection which applies to the one, exists, in equal effect, as to the other; and if the *tortfeasor* may not pursue this course, he must not, by his own act, constrain the injured party to adopt it. To guard against this conflict of dignities, the public law has wisely settled the rule, that each sovereign is supreme at home; all are equal on the high seas, except in war, and then the comity of nations, and the necessity of the case, refers it to the *arbitrium* of the captors. But this rule of comity protects not violators of the neutral territory, within which its sovereign is supreme; for the implied pledge given to a foreign state, of exemption from the local jurisdiction, is violated, the moment it infringes our laws, treaties and sovereign rights. The fiction
*309] of *extra-territoriality only applies to the peaceful observers of this implied pledge. The implication is repelled, and the pledge forfeited, by abusing the rights of hospitality and asylum. This exception to the rule is recognised distinctly by the court in the case of *The Exchange*, 7 Cranch 116, and it was upon this ground, that the court has interfered, in the whole class of captures made by means of illegal armaments in our ports.(*a*) The question in every one of these cases was not as to the character of the wrong-doer, but as to the nature of the act done, and the *locus in quo* it was committed. No inquiry was ever made, whether the capturing vessel was public or private; but only whether our neutrality had been violated. And the principle to be extracted from them all is, that the neutral tribunal may properly restore any prize brought within its territory, which has been made in violation of neutral laws, or rights or obligations. Within this principle the present case is found; and therefore, it is not universally true, that the rights of sovereigns are exempt from judicial examination.

The argument we are discussing concedes, that the injured sovereign himself may restore, although it denies the power of making restitution to his courts. But the effect to both parties is precisely the same, whether the restitution be made by sovereign or court, as has been already shown.
*310] Still, granting that it may be done by the sovereign only; *who is sovereign here, *quoad hoc?* It must be the judiciary: since, wherever individual rights are involved, whether arising under war, or treaty, or municipal regulations, the judiciary in this country must decide.(*b*)

(*a*) The Divinia Pastora, 4 Wheat. 52, and cases collected in note to p. 65.
(*b*) See 3 Dall. 13.

Where, indeed, no case is made upon which the judiciary can act, then the executive may interfere, as it did in the commencement of the European war in 1793, in the case of *The Grange*. But even here, the genius of our institutions requires, that the preliminary inquiry should be made through the judiciary, which is the proper tribunal to make such examinations, in which private rights are for the most part involved. Such was the course pursued in the case of *Thomas Nash* alias *Robins*. The parties, one of whom was the king of Great Britain, could not appear in court; the executive acted, therefore, by judicial means, and the facts being judicially ascertained, it proceeded to carry into effect the treaty.(*a*) If then the sovereign must submit to his co-equal sovereign, as the argument concedes, and the judiciary is invested with this portion of sovereignty, the case is clear, and the argument has no application to it. Nor does this reasoning exclude the executive action, but yields to it, in every instance where no case is made adapted for judicial determination; and even where such a case is made, the executive may interpose by suggestion, by which the court will be bound, as they would by an act of the legislature, in a case fit for the exertion of legislative power.

*But suppose, the judiciary not to be sovereign as to this matter. Yet, whoever be the sovereign, as to it, he need not act directly; but [*311 may delegate his power of decision and action to another: still, it is the sovereign who acts. If the executive be sovereign, this delegation is effected by suggestion, or the want of it, as the case may be. If he means that the judiciary should decide for him in a particular way, he suggests it. But if he is content to take the lead from the judiciary, and to adopt its construction, he declines to suggest. In the latter case, the judiciary acts according to the sovereign will, because he adopts theirs; in the former, the same thing is effected, for the judiciary adopt his. By this means, that harmony is produced, which can be effected by no other.

But if it be thought, that the legislature is the true sovereign, *quoad hoc*, then, the legislative will has been distinctly expressed in the neutrality act of 1794, c. 226. It is in vain to contend, that this statute does not apply to public or national ships. For not only are its terms sufficiently copious to embrace any ship, but their context plainly shows that they were designed to apply especially to such ships. Here, the learned counsel analyzed the act, in order to show that it extended to public, as well as private armed ships; and insisted, that this construction was confirmed by the consideration, that both the cases were equally within the mischief intended to be provided against, which was the violation of our own territory, and of neutral relations and obligations. Nor was there any weight in the argument which *would confine the authority of the court, under [*312 the act, to captures made within our territorial jurisdiction. For although the 6th section expressly gives cognisance over that class of cases, the history of the law on the subject plainly proves, that this was merely an affirmative position. and was not meant as an exclusion of judicial authority in other cases. The provision was meant to define the territorial jurisdiction of the Union, and to settle a supposed doubt with the courts, which did not exist in fact. It was, therefore, merely declaratory of the law in

(*a*) Speech of Mr. (now Chief Justice) MARSHALL, 5 Wheat. app'x.

that case, and could not be intended as a restriction upon the general authority of the courts. If this were not so, what would become of the cases, occurring before this statute was passed? or of the numerous cases, since decided, of captures without our limits, by means acquired within them? This series of adjudications manifestly shows that the courts exercise their power independently of the statute, the sole effect of which is (of the 6th section, at least) to recognise an existing authority in a particular case, and not to limit it to that case only.

But even if this be not so, what is a capture within our waters? Is it not, to all legal purposes, made within our territory, when the captor is within and the prize without, the potential force being exerted within? or where the actual force is exerted without, by boats sent from within? And if so, it proceeds solely on the ground, that the *locus in quo* is to be fixed, not by the place of seizure, which in both the supposed cases is without, but by the source from whence the exerted force proceeds. Consequently, a cap-
*313] ture *made actually on the high seas, by means acquired here, is a capture within our territory.

It is clear, then, upon principle, that the property even of a sovereign, acquired in war, within a neutral territory, or by means therein illegally obtained, may be subjected to judicature, and restored: and this, whether the prize is made by a public or a private cruiser. Nor is the dignity of sovereigns injuriously affected by such a proceeding, which being *in rem*, the sovereign is not constrained to defend himself before the courts of justice, but may properly apply to the other sovereign for redress, by whose suggestion, duly made, the judiciary must be bound.

That which is thus clear upon principle, is equally established by authority. In the history of transactions of this nature, it will be found, that wherever the neutral state interferes to vindicate its own neutrality, no distinction is made whether that neurality be infringed by a public or a private
*314] ship.(*a*) Both *France and England restore the property of their subjects, found on board of prize ships, sent into their ports by the

(*a*) Lee on Capt. 116, 121, 123, edit. of 1803. "In the year 1654, a captain of a Dutch man-of-war met with an English ship at sea, running into the port of Leghorn, and seized her, even when she was coming to anchor; the Duke of Tuscany complained of this to the States-General, but without redress. He, however, showed his resentment of it, by condemning the ship which had taken the Englishman." p. 121.

This book (Lee on Captures), which is called in the preface, "an enlarged translation of the principal part of Bynkershoek's *Quæstiones Juris Publici*," is, in fact, little more than a very poor translation of that treatise. In the original text of Bynkershoek, it by no means appears, that it was a public ship which had taken the Englishman in a neutral port. His words are: "*Ex factis, quæ postea inciderunt, etiam hæc videntur probasse Ordines Generales*; *quum enim anno* 1654, Navarcha Hollandus *navem Anglicam, in mari deprehensum et ad pertum Liburnensem fugientem, occupasset, etiam tunc, cum navis Anglica jam funem in terram projecerat, Dux quidem Tusciæ ea de re questus est ad Ordines Generales, sed nequicquam questum esse legimus. Vide tamen, an non ipse Dux id postea vindicaverit; publicatæ nempe nave, quæ opportunitatum præ buerat occupandæ istius Anglicæ* (Q. J. Pub. lib. 1, c. 8, p. 64, Edit. Lugd., Batav. 1752); which Mr. Du Ponceau, in his elegant and accurate translation, thus renders: "From facts which afterwards took place, the States-General appear to have approved thus much; for when, in the year 1654, a Dutch commander met an English vessel on the high seas, and pursued her, flying into the port of Leghorn,

vessels of other powers, and that whether the capturing vessels are public or private. Ord. de la Mar. art. 9, *des Prises*, 15 ; 2 Sir L. Jenkins' Life 780. During the beginning of the war of the revolution, the prizes sent into France by the Alliance frigate, were restored by the tribunals of that country, if the property of her friends. In the case of the Swedish convoy, in the English high court of admiralty, the crown declined proceeding against the Swedish frigates, as has been before mentioned ; otherwise, Sir W. Scott declared, that he would have condemned *even those public ships. 1 Rob. 377. But how could he, unless they were subject to judicature ? It may be said, that they were regarded as *qua* belligerent, having forfeited their neutral character by attempting a resistance to the right of search. Be it so. Then we may, *vice versâ*, condemn a public ship, or her prizes, for unneutral conduct, by which they lose their extra-territorial character, conferred on them by a fiction, which ought no longer to be regarded than it subserves the purposes of justice. There are numerous examples to show that there is nothing so sacred in the rights of sovereigns as to prevent judicature from dealing with them, both directly and incidentally. In the case of *Duckworth* v. *Tucker*, the sovereign rights of Portugal were determined by the English court of C. B., in a private controversy between two British admirals about prize-money. 2 Taunt. 33. In the *Canton of Berne* v. *Bank of England*, that state appeared as an actor in the high court of chancery, which had the control of the fund, which the government of Berne laid claim to, as a part of its public treasure. 9 Ves. 347. As to the case of *The Exchange*, in this court, it must be repeated, that it does not go on any extravagant notion of the exemption of sovereign rights from judicial scrutiny ; but on the ground of preserving the national faith, and that the ship entered, under the pledge of an implied license which she had not forfeited by any misconduct. Had she done so, she *would have been condemned as unhesitatingly as the most insignificant privateer. It is only necessary to recur to the case of *The Cassius*, a public armed ship of the French republic, and to the words used by the court respecting that case in *The Invincible*, 1 Wheat. 253, to show, that it never has recognised any distinction in this respect between public and private armed ships.

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The learned counsel then proceeded to examine the testimony in the cause, to show that it clearly established the fact of an illegal outfit and augmentation of force, by the capturing vessels, in our ports; and lastly, answered the argument attempted to be drawn from the alleged condemnation at Buenos Ayres, by stating, that the decree was not established in proof, and that, if it were so, it could not avail as a bar to the present proceedings, as the property was at the time in the custody of our court, and had been actually sold by consent of the claimant, who now sets up the decree in the foreign tribunal.

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where he took her, at the moment she was going to anchor, the Grand Duke of Tuscany complained of it to the States-General, but we read that he complained in vain. He, however, afterwards, took satisfaction, by condemning the Dutch vessel that made the pursuit and occasioned the capture of the English one." Du Ponceau's Bynk. p. 63.

Webster, on the same side, argued: 1. That there was no force in the general objection set up by the captors, that the ship which made the capture being a public ship, we could not examine into her acts, because it would be to interfere with the sovereign rights of the state to which she belongs. He denied, that there was any such general principle, and no
*317] book, or case, or even *dictum* could be found, to *support it. Judicature deals with sovereign rights perpetually, in our courts, in England, and in every country, and in every case, where the government is a party to the suit. Is it meant, that judicature cannot deal with sovereign rights, either domestic or foreign? All history shows the contrary. If it were so, no sovereign could come into court. The great political powers of government, as those of peace and war, cannot indeed be submitted to judicial decision; but proprietary interests, in which the public are concerned, are settled everywhere by the tribunals of justice, as in the familiar instances of inquests of office, and writs of intrusion. So, an ejectment may be brought for the crown lands, the most favorite fief. And nothing can be more sovereign than the right of prize, *jure belli*; it is a great branch of the prerogative; yet everybody may contest it, and the king must claim, and if he cannot make out a title, he must lose it. Any jewel in any king's diadem may become the subject of judicial discussion. The extent and rights of the prerogative are discussed in every court in England; and all the powers of this government are discussed in this court, and in all the state tribunals. The governments of the United States, and of the states, are sovereign, and cannot be sued; but in a contest between individuals or corporations, the sovereign rights of the Union and the several states may be decided.

Judicature may then deal collaterally with sovereign rights, and wherever the sovereign himself is actor; wherever he brings the suit. The true
*318] proposition, *therefore, must be, that the prince cannot personally be sued in his own courts, or in foreign tribunals. As to the domestic *forum*, two reasons are given why the king cannot be summoned or arrested in any civil or criminal suit. The first is, his supereminency; and the second, that justice is administered by him, and in his name. These reasons do not apply to a foreign country. He has no supremacy there, nor is justice administered in his name. Sovereignty is local; and when the sovereign transcends the limits of his land, he transcends the limits of his prerogative. The reason why he is not amenable to the foreign tribunal, grows out of international law, and does not spring from the municipal code. It is not for want of jurisdiction ample enough to reach him; but that having come into the territory of another sovereign, under his permission, either express or implied, it would be a violation of the public faith, to subject his person to any kind of restraint. The same immunity is extended to his ambassador, for the same reason; and to support this immunity, the fiction of extra-territoriality has been invented, and applied to the cases of the army or navy, or single ship, of a sovereign coming into the territory of another. Being there under the license of the local soverign, they are at liberty to remain and depart unmolested. Not that the foreign sovereignty exerts itself within the territory of another state, but that the local sovereignty is suspended, from motives of comity, and a regard to the plighted faith of the
*319] nation. The exemption probably extends even to private merchant *vessels; which proves clearly that it does not rest on any right

of sovereignty. But the permission may be withdrawn, both as to these, and as to public vessels, if the indulgence be abused, to the injury of the power by which it is granted. No neutral nation is bound to admit the belligerent ships of war within its waters, unless under treaty stipulations; and it may concede the privilege, on such terms and conditions as it thinks fit. The presumption or fiction under which the license was granted, ceases, the moment the license is revoked; and the license is revoked, as soon as the terms and conditions on which it was granted are violated. Still less, can a mere general permission to the ships of a foreign state to come into our waters, be construed into a license to violate our laws, and treaties, and neutral obligations. Nor is it necessary here even to contend, that the ship herself is subject to the local jurisdiction. We proceed against her prize goods, found within our territory. It is alleged, that they are held by the right of a foreign sovereign, or under a sovereign, and it is impossible to avoid inquiring into the foundation of this right. It is the inherent vice of the opposite argument, that it concedes this position; and in making that concession, it yields the inevitable corollary, that this sovereign right is not exempt from judicature.

2. If we proceed, then, to examine into the foundation of the right, we shall find, that the Spanish consul here claims, in behalf of his fellow-subjects, their property, which has been taken from them by a cruiser sailing under the flag of the enemy of Spain, *but equipped in our ports, and manned with our citizens, contrary to our municipal laws and the 6th [*320
and 14th articles of our treaty with Spain. The true interpretation of the 6th article raises our national duty, wherever a capture is made by our citizens, of Spanish property, which is afterwards brought within our jurisdiction. We are to endeavor to protect the vessels and effects of Spanish subjects, which shall be within the extent of our jurisdiction, "by sea or by land," as an act distinct from that of using our "efforts to recover and cause to be restored to the right owners their vessels and effects, which may have been taken from them, within the extent of said jurisdiction." It is a reciprocal duty of both states, and without invoking the aid of this article, we should find it difficult to maintain our claim upon Spain for the property of our citizens, carried into her ports by French cruisers, and condemned by French tribunals within her territory. As to the 14th article, it is pretended, that it attaches a mere personal penalty to the offending party, and operates merely to abandon our citizens, who may violate it, to be punished as pirates at the will of Spain. But the mutual prohibition to the citizens or subjects of each power from taking commissions to cruise against the other, makes such conduct unlawful to every intent and purpose. The penalty of being punished as pirates, is merely superadded, as a consequence which would not necessarily have followed from the prohibition, without a special provision to that effect. But the invalidity of the captures made under a commission thus unlawfully taken, is a necessary *and inevitable consequence of the prohibition itself. This article cannot, therefore, be considered [*321
as merely monitory: the words are promissory; they express the undertaking of the two governments and their reciprocal duty. Nor is it confined to captures made by private armed vessels. It is true, that the first clause of the article speaks of "any commission or letters of marque, for arming any ship or ships to act as privateers." But in the Spanish counterpart of the

second clause, these last words *que obren como corsarios* are dropped, although they are retained in the English. The Spanish counterpart speaks generally of "*patente para armar algun buque ó buques con el fin de persequir los subditos de S. M. Catolica*," which obviously extends to public as well as private cruisers. As to our municipal laws, they are not confined to acts done within the limits of the United States. They are full of provisions making it unlawful for our citizens (without those limits) to fit out and arm, or command and enter on board of, a foreign cruiser intended to be employed against powers in amity with us. Act of 1797, c. 1; Act of 1817, c. 58, § 2; Act of 1818, c. 83, §§ 4, 10. Whether, therefore, the offence in this case was committed within or without the United States, the illegal equipment or augmentation is within the statutes, and consequently, the property acquired under it must be restored to the true owners.

3. What gives additional strength to this national obligation, is the fact that the claimant in the present cause, and those for whom he claims as
*322] captors, *are citizens of the United States, who claim a title to property acquired in violation of the laws and treaties of their own country, in a court of that country.

But it is said, that the claimant, Chaytor, has ceased to be a citizen of this country, by what is called an act of expatriation (but which ought rather to be called emigration), and has become a citizen of Buenos Ayres. Now, it cannot, and certainly ought not to be, denied, that men may remove from their own country, in order to better their condition, or to avoid civil and religious persecution. But it does not follow, that under all circumstances, and for all possible reasons, a person may shake off his allegiance to the land which gave him birth. The slavish principle of perpetual allegiance growing out of the feudal system, and this fanciful novelty of a man being authorized to change his country and his allegiance, at his own will and pleasure, are both equally removed from the truth on this subject. Whatever doubtful cases may be supposed, this much may be affirmed with certainty, that there must be an actual change of the party's domicil, and that this must be done, not merely with the intention of remaining in his adopted country, but it must not be coupled with a design fraudulently to evade the laws of his native country. No act whatever of a foreign government can dispense with the allegiance of a citizen, and authorize him to violate our penal code or our treaties with other nations. This is a prior, paramount obligation, which must be first fulfilled, before he assumes any new and inconsistent duties. Even if there
*323] had been, in this case, an actual *bonâ *fide* change of domicil, *animo manendi*, so as to entitle the claimant to all the privileges of commercial inhabitancy, under the law of prize or the revenue laws, it does not follow, that he can with impunity levy war against the United States or their friends. And even if it be admitted, that he might defend his adopted country, it does not follow, that he may attack his native country, or those whom she is bound to protect. Can it be sufficient, to legalize such an act, that he has made his election, and that the foreign government has ratified it? Is it not manifest, that it was done, *cum dolo et culpa*, for no other purpose than to evade and violate our laws? In this respect, it is impossible to distinguish between the neutrality acts, and other laws, such as the statutes of treason, or any other

the most intimately connected with the national safety and existence. But it is unnecessary to dwell upon this point, as it is the settled doctrine of this court, that a citizen of the United States cannot claim in their courts the property of foreign nations in amity with them, captured by him in war, even if the capturing vessel be in other respects lawfully equipped and commissioned (*The Bello Corrunes*, 6 Wheat. 159, 162) ; and that an act of expatriation cannot be set up to justify such a capture, where the removal from his own country, was with the fraudulent intent of violating its laws. *Talbot* v. *Jansen*, 3 Dall. 133, 153, 164.

Even admitting that foreign armed vessels may, in the absence of any express prohibition, enter our ports for the purpose of refreshment, or of making repairs, and will not thereby be subject to the local *law and judicature, it does not, therefore, follow, that they may make extraordinary repairs, so as to be transformed in the species. The implied license may extend to a mere replacement of the original force ; but it cannot extend to such an augmentation of the force, as would be inconsistent with the neutral character of the power granting the license. It cannot extend to acts done subsequently to the vessel entering the neutral port ; in other words, to a violation of the license itself. The vessel may remain in the same condition as she came, but she may not increase her capacity for war, by the addition of neutral means, either in munitions or men. Nor does it follow, in any supposable case, that because the capturing ship herself cannot be made answerable to the jurisdiction of the local tribunals, for violating the laws and treaties of the neutral state, that her prizes are entitled to a similar exemption. They do not stand on the same principle or reason. The ship of war ought not to be detained from the public service of the sovereign to whom she belongs ; neither his dignity nor safety will permit it. But neither the prize vessels or goods captured by her are necessarily connected with his military power. [*324

5. As to the facts of the illegal equipment and augmentation of the force of the capturing vessels in our ports, they are sufficiently established by the testimony. Although there may be some discrepancies in their evidence, as to certain immaterial circumstances ; yet, as they all concur in proof of the material facts, and their testimony is uncontradicted, even by the claimant's witnesses, as to some of the *most important, they are entitled, in this respect, to credit. Their testimony, taken in connection with the *res gestæ*, which are admitted on all hands, satisfies the rule which the court has laid down in this class of causes, that the fact of illegal equipment in violation of our neutral duties, must be proved beyond all reasonable doubt. [*325

6. Lastly, as to the pretended condemnation at Buenos Ayres. Independent of the objection which has already been stated to it, the question which has been here raised as to the capture having been made by military means, obtained within our neutral territory, could not possibly have occurred in the course of the prize proceedings in the court of the belligerent state. The goods being confessedly the property of its enemy, and liable to capture and condemnation as prize of war, the plea that the capture was made in violation of our neutrality, could not be set up by the Spanish owner. Being an enemy, he had no *persona standi in judicio* for that purpose. The government of the United States must have interposed a claim upon this ground, or have authorized the Spanish claimant to interpose it.

Unless this were done, the goods were clearly liable to condemnation as prize of war, as they would be, in the analogous case of a capture actually made within the neutral territory itself; where, unless the objection is made by authority of the neutral government, it cannot be made by the enemy owner, who, in his character of enemy, is not injured by it. We need not, therefore, directly impeach the validity of the condemnation at Buenos
*326] Ayres, so far as the rights *of the two belligerents merely are concerned. We only repudiate the claim of one of our own citizens, who comes into our court, and sets up the foreign sentence, which was obtained by him, in fraud of our laws, as an excuse for the violation of those laws. To the prize court of Buenos Ayres it was sufficient that, as captor, he had a right to stand upon his commission issued by that state, and to insist upon the condemnation of his prize taken *jure belli.* But in this court, that very commission disables him from claiming any title acquired under it, for reasons which could not be urged in the prize court of Buenos Ayres, where the Spanish owner could not appear at all, unless by authority of the government of the United States. It is not, therefore, a *res adjudicata.* Nor is the claimant a *bonâ fide* purchaser of the prize goods, ignorant of the fraudulent and illegal conduct of the party by whom they were captured and sold to him. The claimant, Chaytor, is himself that party, and he can no more set up the sentence of condemnation for his protection, than he can the pretended act of naturalization, to cover his crime in confederating with one of the belligerents to violate the laws and treaties, and most solemn obligations of his own country.

D. B. Ogden, for the appellant, in reply, stated, that he should, for the purposes of the argument, take it for granted, that the capturing vessel, the Independencia, was, in point of fact, a public ship belonging to the government of Buenos Ayres. The flag and commission are conclusive evidence of
*327] that fact. *It is contended, on the other side, that the court is bound to interfere, and restore the captured property to the original Spanish owners, because it is said, that, though the rights of a sovereign are involved, yet as he cannot appear in a court of justice to claim, these rights must be determined, without hearing one of the parties, who is most materially interested in asserting them. And it is said, that the foreign sovereign must state his claim to the executive government, and that it must be brought to the notice of the court by a suggestion from the latter. So, that, according to this doctrine, the courts of this country could never listen to the complaints of foreign states, who had no minister to represent them here; and their property may be condemned, and their most sacred rights violated, without their being present or heard. But we never meant to contend, that sovereign rights could not be discussed and determined in a court of justice, and that this suit could not be maintained, because the sovereign rights of Buenos Ayres might be incidentally drawn in question: but because this was a public armed ship of that state, coming into our waters, with her prize goods, under the express or implied permission of our government; and while here, she was exempt from the jurisdiction of he local tribunals.

But we are told, that Buenos Ayres has not yet been acknowledged by the government of this country, as an independent state; that she is a mere revolted colony of Spain, and her cruising vessels cannot be entitled to the

privileges and immunities of the public ships of an old-established sovereignty. The answer to this position is, that *though the independence of the South American provinces has not yet been acknowledged [*328
by our government, the existence of a civil war between these revolted colonies and the mother country has been acknowledged, and this court has followed the executive government, in considering them entitled to all the rights of war against their enemy. Such is the consequence which the writers on the law of nations attribute to a civil war between two portions of an empire. It is assimilated to a public war. They are belligerents in respect to each other; and all other powers, who take no part in the contest, are bound to all the duties of neutrality towards both. Whether, therefore, Buenos Ayres be a sovereign state, in the strict sense of the term, is quite immaterial for the present purpose. It is sufficient, that she is a belligerent, entitled to use against her enemy every species of military means. Among these, are the armed and commissioned ships of war, sailing under the public authority of that country, and admitted into the ports of this, with the same privileges as are enjoyed by the national ships of Spain. Being at war, the colonies are belligerents, and as belligerents, they are entitled to all the rights of war, and we are bound to all the correspondent duties of the neutrality we profess to maintain. In the case of the *United States* v. *Palmer*, 3 Wheat. 636, this court lays down the principle, that "when a civil war rages in a foreign nation, one part of which separates itself from the established government, the courts of the Union must view *such newly-constituted government, as it is viewed by the legisla- [*329
tive and executive departments of the government of the United States. If the government of the Union remains neutral, but recognises the existence of a civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy." Why can they not consider these acts of hostility as criminal? Because war authorizes then, and they are directed by the new government against its enemy? In other words, because they are lawful: and if they are lawful for one purpose, it is difficult to understand, how they can be unlawful for any other. If these acts are authorized by the laws of war, they must produce all the consequences of legal acts. They must vest a good title, *jure belli*, in the prizes taken by authority of the new government from its enemy. And that this is the necessary consequence of the principle is apparent, from the words used by the court in *The Divina Pastora*, 4 Wheat. 52, which was itself a case of prize, and where the proprietary interest acquired in war came directly in judgment. The court there says, that "the government of the United States having recognised the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which the new governments in South America may direct against their enemy." Here, the question was not, whether the *existence of the civil war would excuse from the penal- [*330
ties of piracy, those who might act under the authority of the new government, but whether a capture made under that authority was valid by the law of nations. So also, in the case of *The Estrella*, 5 Wheat. 298, the validity of the commission was explicitly recognised by the court, and of course, the authority of the government by whom it was admitted.

In the case now in judgment, it is insisted, on the part of the respondent, that the court is bound to restore the property to the original Spanish owner, by the true construction of the treaty of 1795. As to the 6th article, it is certainly a very forced interpretation, which makes it imply our duty to restore all Spanish ships and goods which may happen to be found within our territory, although the title may have been changed by a previous capture, *jure belli*, on the high seas. The article is evidently confined to wrongful acts done within our territorial limits. We are "to endeavor to protect the vessels and effects of Spanish subjects, which shall be within the extent of our jurisdiction," but we are not to restore vessels and effects which have ceased to be Spanish, by a lawful capture in war, without the extent of our jurisdiction. Nor have the United States insisted upon such an interpretation of the article as against Spain. We claim indemnity from Spain for condemnation of our vessels and effects by the French consuls in her ports, because to exercise the authority of a prize tribunal, is the highest act of sovereignty, and Spain having permitted it to be done by foreigners, within her territory, it is the same thing as if her *own national tribunals *331] had inflicted the wrong. The provision in this article is merely declaratory of the pre-existing law of nations, which always considers every sovereign as bound to protect the property of his friends, within his territorial jurisdiction, and as responsible for whatever injuries he permitted to be there inflicted upon them. As to the 14th article, it is manifestly confined to privateers, and was not intended to extend to the case of a person entering the public military, or naval, service of one of the contracting parties, to commit hostilities against the other, and still less, to authorize the seizure of a public ship of war or her prizes. This article was evidently intended to abridge a pre-existing right; and that it was a pre-existing right, appears from the uniform practice of the whole civilized world. But it is confined in its terms to privateers and letters of marque, and by no fair rule of construction, can it be extended to public ships.

Nor is the court bound to restore, because the claimant, Chaytor, is a citizen of this country, and has violated its laws. Here, the learned counsel entered into a minute analysis of the neutrality acts, to show that they were merely penal against the party or the capturing vessel. But here, the penalty would begin and end with the person of the captor, for the capturing vessel being a public ship, belonging to a foreign state, she could not be forfeited, without its being considered an act of reprisals in the nature of war against that state. Once being admitted, with her prizes, into our ports, she may remain as long as the executive government thinks proper to allow it. *In this respect, there is no distinction between the public *332] ship herself and her prizes. Here, the prize goods taken by her from the enemies of the state, under whose commission she was cruising, were landed and deposited in the custom-house stores, by the express permission of the government. It is novel doctrine, that prize ships and prize goods are no part of the regalian possessions of a sovereign. They may be, and frequently are, absolutely necessary to his safety. They may be the principal means by which he is enabled to carry on the war, and a chief source of his revenue. How is it, then, that they are not equally exempt from the jurisdiction of the local tribunals, with the guns, and spars and rigging of the ship herself, which may be landed in the same manner for the purpose

of making repairs? Are they not brought within the territory, under the same permission, express or implied? If an army had a right of passage through a neutral territory, can it be doubted, that it would extend to its military chest, and its booty previously acquired? If the fiction of extra-territoriality will protect the ship, which is the principal, why will it not protect the prize goods, which are the incidents? The permission to enter may, indeed, be qualified, by any condition the neutral state thinks fit to impose; such, for example, as that contained in the law of France, that prize goods which may have been taken from the subjects of the state, or its allies, should be restored. But this court has expressly repudiated that principle in the case of **The Invincible*, 1 Wheat. 238, and it is for the [*333 executive and legislative departments to impose such restrictions as they think fit, upon the admission into our ports of armed vessels, public of private, with their prizes. In the case of *The Exchange*, which has been so often referred to, the court in summing up its opinion says: "It seems, then, to be a principle of public law, that national ships of war, entering the ports of a friendly power open to their reception, are to be considered as exempted by the consent of that power from its jurisdiction." The ship herself being exempted from the local jurisdiction, she remains a part of the territory of her own country, and if she brings in with her prize ships, or prize goods, they are to be considered as in the possession of that country. That they are so, is apparent, from the established doctrine of this court, that prize ship or goods, though lying in a neutral territory, may be condemned in a competent court of the belligerent state, by whose cruisers they were captured. Indeed, the writers on the law of nations expressly state the privilege of bringing in their prizes to be a part of the permission. Vattel, *Droit des Gens*, lib. 3, c. 7. But how can this be, if the immunity does not extend to everything on board? Here, the goods were taken *jure belli*. Whether they are good prize, depends upon the adjudication of the captor's court, which is the only competent tribunal to determine that question. They are in his possession, for the purpose of proceeding to adjudication, *even while they are locally whithin the neutral territory. Either the condemnation at Buenos Ayres is a sufficient adjudication or not. [*334 If it be so, then the appellant is entitled to the goods under it. If it be not, still he is entitled to the possession of the goods, in order that he may proceed against them in the most regular manner, which he has been hitherto prevented from doing by this very suit.

March 12th, 1822. STORY, Justice, delivered the opinion of the court.—Upon the argument at the bar, several questions have arisen, which have been deliberately considered by the court; and its judgment will now be pronounced. The first in the order in which we think it most convenient to consider the cause, is, whether the Independencia is, in point of fact, a public ship, belonging to the government of Buenos Ayres. The history of this vessel, so far as is necessary for the disposal of this point, is briefly this: She was originally built and equipped at Baltimore, as a privateer, during the late war with Great Britain, and was then rigged as a schooner, and called the Mammoth, and cruised against the enemy. After the peace, she was rigged as a brig, and sold by her original owners. In January 1816, she was loaded with a cargo of munitions of war, by her new owners

(who are inhabitants of Baltimore), and being armed with twelve guns, constituting a part of her original armament, she was dispatched from that port, under the command of the claimant, on a voyage, ostensibly to the
*335] north-west coast, but in reality to Buenos Ayres. *By the written instructions given to the supercargo on this voyage, he was authorized to sell the vessel to the government of Buenos Ayres, if he could obtain a suitable price. She duly arrived at Buenos Ayres, having exercised no act of hostility, but sailed under the protection of the American flag, during the voyage. At Buenos Ayres, the vessel was sold to Captain Chaytor and two other persons; and soon afterwards, she assumed the flag and character of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres: and Captain Chaytor made known these facts to the crew, and asserted that he had become a citizen of Buenos Ayres; and had received a commission to command the vessel, as a national ship; and invited the crew to enlist in the service; and the greater part of them accordingly enlisted. From this period, which was in May 1816, the public functionaries of our own and other foreign governments at that port, considered the vessel as a public ship of war, and such was her avowed character and reputation. No bill of sale of the vessel to the government of Buenos Ayres is produced, and a question has been made, principally from this defect in the evidence, whether her character as a public ship is established. It is not understood, that any doubt is expressed as to the genuineness of Captain Chaytor's commission, nor as to the competency of the other proofs in the cause, introduced to corroborate it. The only point is, whether, supposing them true, they afford satisfactory evidence of her public character. We are of opinion, that they do. In general, the commission of a
*336] public ship, signed *by the proper authorities of the nation to which she belongs, is complete proof of her national character; a bill of sale is not necessary to be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them, in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far, at least, as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral, as of belligerent sovereigns. The commission in the present case is not expressed in the most unequivocal terms; but its fair purport and interpretation must be deemed to apply to a public ship of the government. If we add to this, the corroborative testimony of our own and the British consul at Buenos Ayres, as well as that of private citizens, to the notoriety of her claim of a public character; and her admission into our own ports as a public ship, with the immunities and privileges belonging to such a ship, with the express appro-
*337] bation of our own government, it does not seem too much to assert, whatever may be the private suspicion of a lurking American *in-

terest, that she must be judicially held to be a public ship of the country whose commission she bears.

There is another objection urged against the admission of this vessel to the privileges and immunities of a public ship, which may as well be disposed of in connection with the question already considered. It is, that Buenos Ayres has not yet been acknowledged as a sovereign independent government by the executive or legislature of the United States, and therefore, is not entitled to have her ships of war recognised by our courts as national ships. We have, in former cases, had occasion to express our opinion on this point. The government of the United States has recognised the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum, and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concern us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere, to the prejudice of either belligerent, without making ourselves a party to the contest, and departing from the posture of neutrality. All captures made by each must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports, under the law of nations, must be considered as equally the right of each; and as such, must be recognised by our courts of justice, until congress shall prescribe a different rule. This is the *doctrine heretofore asserted by this court, and we see no reason to depart from it. [*338

The next question growing out of this record, is, whether the property in controversy was captured, in violation of our neutrality, so that restitution ought, by the law of nations, to be decreed to the libellants. Two grounds are relied upon to justify restitution: First, that the Independencia and Altravida were originally equipped, armed and manned as vessels of war, in our ports; secondly, that there was an illegal augmentation of the force of the Independencia, within our ports. Are these grounds, or either of them, sustained by the evidence?

If the cause stood solely upon the testimony of the witnesses who have been examined on behalf of the libellants, we should have great hesitation in admitting the conclusions which have been drawn from it. The witnesses, indeed, speak directly and uniformly either to the point of illegal equipment, or illegal augmentation of force, within our ports. But their testimony is much shaken by the manifest contradictions which it involves, and by declarations of facts, the falsity of which was entirely within their knowledge, and has been completely established in proof. It has been said, that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony. That position may be true, under circumstances; but it is a doctrine which can be received only under many qualifications, and with great caution. If the circumstances *respecting which the testimony is discordant, be immaterial, and of such a nature, that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief, that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect [*339

to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood ; and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim *falsus in uno, falsus in omnibus.* What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood ? The contradictions in the testimony of the witnesses of the libellants have been exposed at the bar, with great force and accuracy ; and they are so numerous, that, in ordinary cases, no court of justice could venture to rely on it, without danger of being betrayed into the grossest errors. But in a case of the description of that before the court, where the sovereignty and rights of a foreign belligerent nation are in question, and where the exercise of jurisdiction over captures made under its flag, can be justified only by clear proof of the violation of our neutrality,
*340] there are still stronger reasons for abstaining *from interference, if the testimony is clouded with doubt and suspicion. We adhere to the rule which has been already adopted by this court, that restitution ought not to be decreed, upon the ground of capture in violation of our neutrality, unless the fact be established beyond all reasonable doubt.

But the present case does not stand upon this testimony alone. It derives its principal proofs altogether from independent sources, to the consideration of which the attention of the court will now be directed. The question as to the orignal illegal armament and outfit of the Independencia may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres, on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war, during the voyage, she would have been justly condemnable as good prize, for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure, which no nation is bound to prohibit ; and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bonâ fide* sale (and there is nothing in the evidence before us to contradict it), there is no pretence to say, that the original outfit on the
*341] *voyage was illegal, or that a capture made after the sale was, for that cause alone, invalid.

The more material consideration is, as to the augmentation of her force, in the United States, at a subsequent period. It appears from the evidence, and, indeed, is admitted by Captain Chaytor, that after the sale in May 1816, the Independencia sailed for Buenos Ayres, under his command, on a cruise against Spain ; and after visiting the coast of Spain, she put into Baltimore, early in the month of October of the same year, having then on board the greater part of her original crew, among whom were many Americans. On her arrival at Baltimore, she was received as a public ship, and there underwent considerable repairs. Her bottom was new coppered, some parts of her hull were re-caulked, part of the water-ways were

replaced, a new head was put on, some new sails and rigging to a small amount, and a new main-yard was obtained, some bolts were driven into the hull, and the main-mast, which had been shivered by lightning, was taken out, reduced in length, and replaced in its former station. In order to make these repairs, her guns, ammunition and cargo were discharged, under the inspection of an officer of the customs, and when the repairs were made, the armament was replaced, and a report made by the proper officer to the collector, then there was no addition to her armament. The Independencia left Baltimore, in the latter part of December 1816, having then on board a crew of 112 men ; and about the 8th of January following, she sailed from the Capes of the Chesapeake on the cruise on which *the property in question was captured, being accompanied by the Altravida, as a [*342 tender or dispatch vessel. It will be necessary, hereafter, to make more particular mention of the Altravida ; but for the present, the observations of the court will be confined to the Independencia. It is admitted by the claimant, that during her stay at Baltimore, several persons were enlisted on board the Independencia, and his own witnesses prove that the number was about thirty.

The first observation that occurs on this part of the case is, that here is a clear augmentation of force, within our jurisdiction. The excuse offered is, that the persons so enlisted, represented themselves, or were supposed to be, persons in the service of Buenos Ayres; of this, however, there is not the slightest proof. The enlistment of men being proved, it is incumbent on the claimant to show, that they were persons who might lawfully be enlisted ; and as the burden of proof rests on him, the presumption necessarily arising from the absence of such proof is, that they were not of that character. It is not a little remarkable, that not a single officer of the Independencia has been examined on this occasion. They are the persons who, from their situation, must have been acquainted with the facts ; and the total omission to bring their testimony into the cause, can scarcely be accounted for, but upon a supposition extremely unfavorable to the innocence of the transaction.

Another observation which is drawn from the predicament of this case is that if, as the claimant asserts *the original voyage to Buenos Ayres was a mere commercial adventure, the crew must have been composed [*343 principally of Americans or residents in our country. They enlisted, at Buenos Ayres, on board the Independencia, as officers and seamen, for the purposes of warfare, and there is no evidence in the case, as to the length of time of their engagements, or of the place where the cruise was to terminate. Why are the documents on this subject, for documents must exist, in the possession of the claimant ; why are they not produced ? If the cruise was to terminate at Buenos Ayres, or at a specific period of time, the fact would have a material bearing on the merits of the cause. Yet, though the pressure of this point must, at all times, have been forcibly felt, there has not, up to the present moment, been the slightest effort to relieve it from the darkness which thus surrounds it. Under such circumstances, the natural conclusion would seem to be, that the crew were to be discharged, and cruise to terminate at Baltimore. This was their native or adopted home, the place where they first embarked on board the Mammoth, and that to which most of them must be supposed solicitous to return. The conduct of

the vessel indicated the same intent. She underwent general repairs, some of which could hardly be deemed of great necessity, and must have been induced by the consideration that Baltimore was a port peculiarly well fitted for naval equipments. During the repairs (a period of two months), the crew were necessarily on shore; and it is scarcely to be supposed, that
*344] they were held together by *any common bond of attachment, or that they had so far lost the common character of seaman, as not to be easily led into some other employment or enterprise, which should yield immediate profit. What proof, indeed, is there, that the same crew which came to Baltimore sailed again in the Independencia on her new cruise? It is stated only as hearsay, by one or two of the claimant's witnesses, who had no means, and do not pretend to any means, of accurate knowledge of the fact. If true, it might have been proved by the officers of the ship, by the muster-roll of the crew, and by the shipping-articles; and these are wholly withdrawn from the cause, without even an apology for their absence. It would certainly be an unreasonable credulity for the court, under such circumstances, to believe that the actual augmentation of force was not far greater than what is admitted by the party, and that there was either an innocence of intention or act in the enlistments. The court is, therefore, driven to the conclusion, that there was an illegal augmentation of the force of the Independencia, in our ports, by a substantial increase of her crew; and this renders it wholly unnecessary to enter into an investigation of the question, whether there was not also an illegal increase of her armament.

If any doubt could be entertained as to the Independencia, none can be as to the predicament of the Altravida. This vessel was formerly a privateer, called the Romp, and was condemned for illegal conduct by the district court of Virginia; and under the decree of the court, was sold,
*345] together with the armament *and munitions of war then on board. She was purchased, ostensibly by a Mr. Thomas Taylor, but was immediately transferred to Captain Chaytor. She soon afterward went to Baltimore, and was attached as a tender to the Independencia, having no separate commission, but acting under the authority of Captain Chaytor. Part of her armament was mounted, and a crew of about twenty-five men were put on board, at Baltimore. She dropped down to the Patuxent, a few days before the sailing of the Independencia, and was there joined by the latter, and accompanied her on a cruise, in the manner already mentioned. Here, then, is complete evidence, from the testimony introduced by the claimant himself, of an illegal outfit of the Altravida, and an enlistment of her crew within our waters, for the purposes of war. There is no pretence, that the crew was transferred to her from the Independencia, for the claimants own witnesses admit, that a few only were of this description. The Altravida must be considered as attached to, and constituting a part of the force of the Independencia, and so far as the warlike means of the latter were increased by the purchase, her military force must be deemed to be augmented. Not the slightest evidence is offered, of the place or circumstances under which the enlistment of the crew took place. It consisted, according to the strong language of the testimony, of persons of all nations; and it deserves consideration, that throughout this voluminous record, not
*346] a *scintilla* of evidence exists, to show that any person on board of either vessel was a *native of Buenos Ayres. We think, then, that the

fact of illegal augmentation of force, by the equipment of the Altravida, is also completely established in proof.

What, then, are the consequences which the law attaches to such conduct, so far as they respect the property now under adjudication? It is argued on the part of the libellant, that it presents a *casus fœderis*, under our treaty with Spain. The 6th and 14th articles are relied upon for this purpose. The former is, in our judgment, exclusively applicable to the protection and defence of Spanish ships, within our territorial jurisdiction, and provides for the restitution of them, when they have been captured within that jurisdiction. The latter article provides, that no subject of Spain "shall apply for, or take any commission or letter of marque, for arming any ship or ships to act as privateers," against the United States, or their citizens, or their property, from any prince or state with which the United States shall be at war; and that no citizen of the United States "shall apply for, or take any commission or letters of marque, for arming any ship or ships, to act as privateers" against the king of Spain, or his subjects, or their property, from any prince or state with which the said king shall be at war. "And if any person of either nation shall take such commission or letter of marque, he shall be punished as a pirate." In the Spanish counterpart of the treaty, the word "privateers" in the first clause has the corresponding word "*corsarios*;" but in the second clause, no such word is to be found. But it is obvious, *that both clauses were intended to receive, and ought to receive, the same construction; and the very terms of the article confine the prohibition to commissions, &c., to privateers. It is not for this court to make the construction of the treaty broader than the apparent intent and purport of the language. There may have existed, and probably did exist, reasons of public policy which forbade an extension of the prohibition to public ships of war. It might well be deemed a breach of good faith in a nation, to enlist in its own service an acknowledged foreigner, and at the same time, subject him by that very act, and its own stipulations, to the penalty of piracy. But it is sufficient for the court, that the language of the treaty does not include the case of a public ship, and we do not perceive that the apparent intention or spirit of any of its provisions, justifies such an interpolation. The question, then, under the Spanish treaty, may be dismissed without further commentary. [*347

This view of the question renders it unnecessary to consider another, which has been discussed at the bar, respecting what is denominated the right of expatriation. It is admitted by Captain Chaytor, in the most explicit manner, that during this whole period, his wife and family have continued to reside at Baltimore; and so far as this fact goes, it contradicts the supposition of any real change of his own domicil. Assuming, for the purposes of argument, that an American citizen may, independently of any legislative act to this effect, throw off his own allegiance to his native country, as to which we give no *opinion, it is perfectly clear, that this cannot be done without a *bonâ fide* change of domicil, under circumstances of good faith. It can never be asserted, as a cover for fraud, nor as a justification for the commission of a crime against the country, or for a violation of its laws, when this appears to be the intention of the act. It is unnecessary to go into a further examination of this doctrine; and it [*348

will be sufficient to ascertain its precise nature and limits, when it shall become the leading point of a judgment of the court.

And here we are met by an argument on behalf of the claimant, that the augmentation of the force of the Independencia, within our ports, is not an infraction of the law of nations, or a violation of our neutrality; and that so far as it stands prohibited by our municipal laws, the penalties are personal, and do not reach the case of restitution of captures made in the cruise, during which such augmentation has taken place. It has never been held by this court, that an augmentation of force or illegal outfit affected any captures made after the original cruise was terminated. By analogy to other cases of violations of public law, the offence may well be deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the same cruise, the doctrine of this court has long established, that such illegal augmentation is a violation of the law of nations, as well as of our own municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character *of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct. *349]
It does not lie in the mouth of wrongdoers, to set up a title derived from a violation of our neutrality. The cases in which this doctrine has been recognised and applied, have been cited at the bar, and are so numerous and so uniform, that it would be a waste of time to discuss them, or to examine the reasoning by which they are supported; more especially, as no inclination exists on the part of the court to question the soundness of these decisions. If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction, could be asserted by private persons, or in any other manner than by a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign, asserted in his own courts, or the courts of the power having cognisance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required, before cognisance of the wrong could be taken by our courts. But the practice from the beginning, in this class of causes, a period of nearly thirty years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent *for congress to apply at its pleasure the proper remedy. *350]

It is further contended by the claimant, that the doctrine heretofore established has been confined to cases of captures made by privateers; and that it has never been applied to captures by public ships, and in reason and policy ought not to be so applied. The case of *The Cassius*, in 3 Dall. 121, has been supposed at the bar to authorize such an interpretation of the doctrine. That was the case of a motion for a prohibition to the district court to prohibit it from exercising jurisdiction on a libel filed against the Cassius, a public armed ship of France, to obtain compensation in damages *in rem*, for an asserted illegal capture of another vessel, belonging to the libellants, on the high seas, and sending her into a French port for adjudica-

tion as prize. The libel alleged that the Cassius was originally equipped and fitted for war, in a port of the United States, contrary to our laws, and the law of nations. But there was no allegation that she had been originally fitted out by her present commander, or after she became the property of the French government. The principal question was, whether our courts could sustain a libel for compensation *in rem*, against the capturing vessel, for an asserted illegal capture as prize, on the high seas, when the prize was not brought into our ports, but was carried into a port *infra præsidia* of the captors. The court granted the prohibition; but as no reasons were assigned for the judgment, the only ground that can be gathered, is that which is apparent on the face of the writ of prohibition, *where it is distinctly asserted, that the jurisdiction in cases of this nature exclusively belongs to the courts of the capturing power, and that neither the public ships of a nation, nor the officers of such ships are liable to be arrested to answer for such captures in any neutral court. The doctrine of that case was fully recognised by this court in the case of *The Invincible* (1 Wheat. 238), and it furnished a rule for the exemption of a public ship from proceedings *in rem*, in our courts, for illegal captures on the high seas, in violation of our neutrality; but in no degree exempts her prizes, in our ports, from the ample exercise of our jurisdiction. [*351

Nor is there, in reason or in policy, any ground for a distinction between captures in violation of our neutrality by public ships, and by privateers. In each case, the injury done to our friend is the same; in each, the illegality of the capture is the same; in each, the duty of the neutral is equally strong to assert its own rights, and to preserve its own good faith, and to take from the wrongdoer the property he has unjustly acquired, and reinstate the other party in his title and possession which have been tortiously divested. This very point was directly asserted by this court in its judgment in the case of *The Invincible*. Mr. Justice JOHNSON there said, "as to the restitution of prizes, made in violation of neutrality, there be no reason suggested for creating a distinction between the national and the private armed vessels of a belligerent. Whilst a neutral yields to other nations the unobstructed exercise of their sovereign or belligerent rights, her own dignity and security *require of her the vindication of her own neutrality, and of her sovereign right to remain the peaceable and impartial spectator of the war. As to her, it is immaterial, in whom the property of the offending vessel is vested. The commission under which the captors act is the same, and that alone communicates the right of capture, even to a vessel which is national property." We are satisfied of the correctness of this doctrine, and have no disposition to shake it. In cases of violation of neutral territorial jurisdiction, no distinction has ever been made between the capture of public and private armed ships: and the same reason which governs that, applies with equal force to this case. [*352

An objection of a more important and comprehensive nature has been urged at the bar, and that is, that public ships of war are exempted from the local jurisdiction, by the universal assent of nations; and that as all property captured by such ships, is captured for the sovereign, it is, by parity of reasoning, entitled to the like exemption; for no sovereign is answerable for his acts to the tribunals of any foreign sovereign.

In the case of *The Exchange* (7 Cranch 116), the grounds of the

exemption of public ships were fully dicussed and expounded. It was there shown, that it was not founded upon any notion that a foreign sovereign had an absolute right, in virture of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. *But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction. But as such consent and license is implied only from the general usage of nations, it may be withdrawn, upon notice, at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws, in the same manner as other vessels. To be sure, a foreign sovereign cannot be compelled to appear in our courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits. If, however, he comes personally within our limits, although he generally enjoys a personal immunity, he may become liable to judicial process, in the same way, and under the same circumstances, as the public ships of the nation. But there is nothing in the law of nations which forbids a foreign sovereign, either on account of the dignity of his station, or the nature of his prerogative, from voluntarily becoming a party to a suit, in the tribunals of another country, or from asserting there, any personal, or proprietary, or sovereign rights, which may be properly recognised and enforced by such tribunals. It is a mere matter of his own good will and pleasure; and if he happens to hold a private domain, within another territory, it may be, that he cannot obtain full redress for any injury to it, except through the instrumentality of its courts of justice. It may, therefore, *be justly laid down, as a general proposition, that all persons and property within the territorial jnrisdiction of a sovereign, are amenable to the jurisdiction of himself or his courts: and that the exceptions to this rule are such only as, by common usage and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would, indeed, be strange, if a license implied by law from the general practice of nations, for the purposes of peace, should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implication, impose upon those who seek an asylum in our ports. We are of opinion, that the objection cannot be sustained; and that whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality; and if the goods are landed from the public ship, in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge, that if illegally captured, they shall be exempted from the ordinary operation of our laws.

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The last question which has been made at the bar, on which it is necessary to pronounce an opinion, is, as to the effect of the asserted condem-

nation of the *property in controversy, at Buenos Ayres, during the pendency of this suit. Assuming, for the purpose of argument, that the condemnation was regularly made, and is duly authenticated, we are of opinion, that it cannot oust the jurisdiction of this court, after it had once regularly attached itself to the cause. By the seizure and possession of the property, under the process of the district court, the possession of the captors was divested, and the property was emphatically placed in the custody of the law. It has been since sold, by consent of the parties, under an interlocutory decree of the court, and the proceeds are deposited in its registry, to abide the final adjudication. Admitting, then, that property may be condemned in the courts of the captor, while lying in a neutral country (a doctrine which has been affirmed by this court), still, it can be so adjudicated only while the possession of the captor remains ; for if it be divested, in fact, or by operation of law, that possession is gone, which can alone sustain the jurisdiction. *A fortiori*, where the property is already in the custody of a neutral tribunal, and the title is in litigation there, no other foreign court can, by its adjudication, rightfully take away its jurisdiction, or forestall and defeat its judgment. It would be an attempt to exercise a sovereign authority over the court having possession of the thing, and take from the nation the right of vindicating its own justice and neutrality.

Upon the whole, it is the opinion of the court, that the decree of the circuit court be affirmed, with costs.

Decree affirmed.

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*Evans *v.* Eaton. [*356

Patents.— Witnesses.

A party cannot entitle himself to a patent for more than his own invention ; and if the patent be for the whole of a machine, he can maintain a title to it, only by establishing that it is substantially new in its structure and mode of operation.

If the same combination existed before, in machines of the same nature, up to a certain point, and the party's invention consists in adding some new machinery, or some improved mode of operation, to the old, the patent should be limited to such improvement, for if it includes the whole machine, it includes more than his invention, and therefore, cannot be supported.

When the patent is for an improvement, the nature and extent of the improvement must be stated in the specification, and it is not sufficient, that it be made out and shown at the trial, or established by comparing the machines specified in the patent with former machines in use.

The former judgment of this court in the same case (3 Wheat. 454), commented on, explained and confirmed.

A person having an interest only in the question, and not in the event of the suit, is a competent witness.

In general, the liability of a witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question and does not exclude him.

Evans *v.* Eaton, 3 W. C. C. 443, affirmed.

Error to the Circuit Court of Pennsylvania. This is the same case which was formerly before this court, and is reported 3 Wheat. 454 ; and by a reference to that report, the form of the patent, the nature of the action, and the subsequent proceedings, will fully appear. The cause was now again brought before the court, upon a writ of error to the judgment of the circuit court, rendered upon the new trial, had in pursuance of the mandate of this court.

Upon the new trial, several exceptions were taken *by the counsel for the plaintiff, Evans. The first was to the admission of one Frederick as a witness for the defendant, upon the ground of his interest in the suit. The witness, on his examination on the *voir dire*, denied that he had any interest in the cause, or that he was bound to contribute to the expenses of it. He said, that he had not a hopperboy in his mill at present, it being then in court; that it was in his mill, about three weeks ago, when he gave it to a person to bring down to Philadelphia; and that his hopperboy spreads and turns the meal, cools it some, dries it, and gathers it to the bolting-chest. Upon this evidence, the plaintiff's counsel contended that Frederick was not a competent witness; but the objection was overruled by the court.

Another exception was to the refusal of the court, to allow the deposition of one Shetter to be read in evidence by the plaintiff, which had been taken according to a prevalent practice of the state courts, instead of being taken pursuant to the provisions of the act of congress. But the principal exceptions were to the charge by the circuit court, in summing up the cause to the jury, which it is deemed necessary here to insert at large.

WASHINGTON, Justice.—This is an action for an infringement of the plaintiff's patent, which the plaintiff alleges to be, 1. For the whole of the machine employed in the manufacture of flour, called the hopperboy. 2. For an improvement on the hopperboy.

The question is, is the plaintiff entitled to recover upon either of these
*358] claims? The question is stated *thus singly, because the defendant admits that he uses the very hopperboy for which the patent is, in part, granted, and justifies himself by insisting, 1st. That the plaintiff was not the original inventor of, but that the same was in use prior to the plaintiff's patent, the hopperboy as patented. 2d. That his patent for an improvement is bad; because the nature and extent of the improvement is not stated in his specification; and if it had been, still, the patent comprehends the whole machine, and is, therefore, too broad.

1st. The first is a mixed question of fact and law. In order to enable you to decide the first, it will be well to attend to the description, which the plaintiff has given of this machine, in his specification, a model of which is now before you. Its parts are: 1. An upright round shaft, to revolve on a pivot in the floor: 2. A leader or upper arm: 3. An arm set with small inclining boards, called flights and sweepers: 4. Cords from the leader to the arm to turn it: 5. A weight passing over a pully, to keep the arm tight on the meal: 6. A log at the top of the shaft to turn it, which is operated upon by the water-power of the mill. The flights are so arranged as to track the one below the other, and to operate like ploughs, and at every revolution of the machine, to give the meal two turns towards the centre. The sweepers are to receive the meal from the elevator, and to trail it round the circle, for the flights to gather it to the centre, and also to sweep the
*359] meal into the bolt. *The use of this machine is stated to be, to spread any granulated substance over a floor; to stir and expose it to the air; to dry and cool it, and to gather it to the bolt.

The next inquiry under this head is, when was this discovery made? Joseph Evans has sworn, that in 1783, the plaintiff informed him, that he was engaged in contriving an improvement in the manufactory of flour, and

had completed it in his mind, sometime in July of that year. In 1784, he construced a rough model of the hopperboy, but having no cords from the extremities of the leader to those of the arm, it was necessary, in making his experiment, to turn around the arm by hand. In 1785, he set up a hopperboy in his mill, resembling the model in court, and the machine described in his specification. The evidence of Mr. Anderson strongly supports this witness, and, indeed, the discovery, as early as 1784 or 1785, is scarcely controverted by the defendant.

The defendant insists, that a hopperboy, similar to the plaintiff's, was discovered, and in use, many years anterior even to the year 1783, and relies upon the testimony of the following witnesses: Daniet Stouffer, who deposes, that he first saw the Stouffer hopperboy in his father's, Christian Stouffer's mill, in the year 1764. In the year 1775 or 1776, he erected a similar one, in the mill of his brother Henry, and another in Jacob Stouffer's mill, in 1777, 1778 or 1779. *Philip Frederick swears, that in 1778, [*360
he saw a Stouffer hopperboy in operation in Christian Stouffer's mill, and in the year 1783, he saw one in Jacob Stouffer's mill, and another in U. Charles's mill, and that it was always called Stouffer's machine. George Roup stated, that in 1784, he erected one of these hopperboys in the mill of one Braniwar; and that in 1782, Abraham Stouffer described to him a similar machine, which his father used in his mill. Christopher Stouffer, the son of Christian, has sworn, that his father, having enlarged his mill, in the year 1780, erected a new hopperboy of the description above mentioned, which is still in use in the same mill, now owned by Peter Stouffer. If these witnesses are believed by the jury, they establish the fact asserted by the defendant, that the Stouffer hopperboy was in use prior to the plaintiff's discovery.

The next inquiry is, into the parts, operation and use of the Stouffer hopperboy. This consists of an upright square shaft, which passes lightly through a square mortice in an arm, underneath which are fixed slips of wood, called flights, and the arm is turned by a log on the upper end of it, which is moved by the power which moves the mills. The arm, with the flights, operates as it turns upon the meal placed below it, and its use is, in a degree, to cool the meal and to conduct it to the bolt.

It will now be proper to compare this machine with the plaintiff's. They agree in the following particulars. They each consist of a shaft, or log, to turn it by the power of the mill, and an arm *with flights on the under [*361
side of it. They each operate on the meal below the arm, to cool, dry and conduct it to the bolt. In what do they differ? The plaintiff's shaft is round, and consequently, could not turn the arm, into which it is loosely inserted, if it were not for the cords which connect the extremities of the arm to those of the leader. The shaft of the Stouffer hopperboy is square, and therefore turns the arm, without the aid of a leader or of cords. It has neither a weight nor pulley, nor are the flights arranged in the manner the plaintiff's are, and consequently, it does not, in the opinion of most of the witnesses, cool or prepare the flour for packing as well as the plaintiff's.

The question of law now arises, which is, are the two machines, up to the point where the difference commences, the same in principle, so as to invalidate the plaintiff's claim to the hopperboy, as the original inventor of it? I take the rule to be, and so it has been settled in this, and in other courts,

that if the two machines be substantially the same, and operate in the same manner, to produce the same result, though they may differ in form, proportions and utility, they are the same in principle; and the one last discovered has no other merit than that of being an improved imitation of the one before discovered and in use, for which no valid patent can be granted, because he cannot be considered as the original inventor of the machine. If the alleged inventor of a machine, which differs from another previously patented, merely in form and proportion, *but not in principle, is not *362] entitled to a patent for an improvement, which he cannot be, by the 2d section of the law, he certainly cannot, in a like case, claim a patent for the machine itself.

The question for the jury then is, are the two hopperboys substantially the same in principle? not whether the plaintiff's hopperboy is preferable to the other. Because, if that superiority amounts to an improvement, he is entitled to a patent only for an improvement, and not for the whole machine. In the latter case, the patent would be too broad, and therefore, void, when the patent is single. If you are of opinion, that the plaintiff is not the original inventor of the hopperboy, he cannot obtain a verdict on that claim, unless his is an excepted case. The 1st, 2d, 3d and 6th sections of the general patent law conclusively support this opinion.

But the judgment of the supreme court in this case (3 Wheat. 519), is relied upon by the plaintiff's counsel to prove that this is an excepted case; insomuch that the plaintiff is entitled to a verdict, although you should be satisfied that he is not the original inventor of the hopperboy. But we are perfectly satisfied, that the interpretation put upon the last clause of the judgment by the plaintiff's counsel is incorrect; and that for the following reasons. 1. The question of priority of invention was not before the supreme court; and it is, therefore, incredible, that any opinion, much less a judgment, would have been given upon that point. The error in the charge, which *this part of the judgment was obviously intended to correct, *363] is stated by the chief justice in the following words: "The second error alleged in the charge, is, in directing the jury to find for the defendant, if they should be of opinion, that the hopperboy was in use prior to the improvement alleged to be made thereon by Oliver Evans. This part of the charge seems to be founded on the opinion, that if the patent is to be considered as a grant of the exclusive use of distinct improvements, it is a grant for the hopperboy itself, and not for an improvement on the hopperboy" (p. 512). It contradicts what is stated in p. 517, where it is said, that the plaintiff's claim is to the machine "which he has invented," &c. Now, if he did not invent the hopperboy, he has no claim to it; and if so, could the court mean to say, that he was nevertheless entiled to recover under that claim? Such a decision was certainly not called for by the terms of the "act for the relief of Oliver Evans," but would seem to be in direct violation of it. The act directs a patent to issue to Oliver Evans, not for his hopperboy, elevator, &c., but "for his invention, discovery and improvement in the art, &c., and on the several machines which he has discovered, invented and improved." Now, if the hopperboy was not invented, &c., by Oliver Evans, this act, without which Oliver Evans could not have obtained a patent, did not authorize the secretary of state to grant him one *364] for that machine; or if granted, it is clear, that it was *improvi-

dently done. If, indeed, the supreme court had been of opinion, that the fact of Oliver Evans's prior invention was decided, and could constitutionally have been decided by congress, there might have been more difficulty in the case; but the argument of counsel, which pressed that point upon the court, was distinctly repudiated. We conceive, that the meaning of that part of the opinion is, that this court erred in stating to the jury that O. Evans was not entitled to recover, if the hopperboy (that is the original hopperboy) had been in use prior to the plaintiff's alleged discovery of it; because, if the plaintiff was entitled to claim an improvement on the hopperboy, which this court had denied, and which the supreme court affirmed, this court was clearly wrong, in saying to the jury, that the plaintiff could not recover for his improvement, which, in effect, was said. Upon the whole, then, the court is of opinion, that O. Evans is not entitled to a verdict in his favor, as the inventor of the hopperboy, if you should be of opinion, that another hopperboy, substantially the same as his in principle, as before explained, up to the point, where any alteration or improvement exists in his hopperboy, was invented, and in use, prior to the plaintiff's invention or discovery, however they may differ in mere form, proportions and utility.

2d. The plaintiff's next claim is to an improvement on a hopperboy, which claim, we were of opinion, in another case, has received the sanction of the supreme court. His counsel contend, that his improvement is, (1) on the original method of supplying the *bolt, by manual labor; (2) on his own hopperboy; and (3) on some hopperboy, invented by some other person. Let this position be analyzed. [*365

1. It is said to be an improvement on the original method by manual labor. But it is obvious, that if this be the invention, it is of an original machine, because wherever the patent law speaks of an improvement, it si on some art, machine or manufacture, &c., and not on manual labor, which was applied to the various arts long before the invention of machinery to supply its place.

2. An improvement on his own discovery. But where is the evidence of such invention? It is true, that Joseph Evans has stated that the plaintiff constructed, in 1784, a rude model of a hopperboy; but it was no substitute for manual labor, because without the cords or leading lines, the arm could not move, and it was, therefore, turned by hand. It was, in fact, in an incomplete state; in progress to its completion, but not given out, or prepared to be given out, to the world, as a machine, before 1785, when the cords to turn the arm were added.

3. An improvement on a former machine. This is a fair subject for a patent; and the plaintiff has laid before you strong evidence, to prove that his hopperboy is a more useful machine than the one which is alleged to have been previously discovered and in use. If, then, you are satisfied of this fact, the point of law which has been raised by the defendant's counsel, remains to be considered, which is that the plaintiff 's patent for an improvement is void, because *the nature and extent of his improvements are not stated in his specification. [*366

The patent is for an improved hopperboy, as described in his specification which is referred to, and made part of the patent. Now, dees the specification express in what his improvement consists? It states all and each of the parts of the entire machine, its use and mode of operating, and claims

as his invention, the machine, the peculiar properties or principles of it, viz., the spreading, turning and gathering the meal, and the rising and lowering of its arm, by its motion, to accommodate itself to the meal under it. But does this description designate the improvement, or in what it consists? Where shall we find the original hopperboy described, either as to its construction, operation or use; or by reference to anything, by which a knowledge of it may be obtained? Where are the improvements on such original stated? The undoubted truth is, that the specification communicates no information whatever upon any of these parts. This being so, the law, as to ordinary cases, is clear, that the plaintiff cannot recover for an improvement. The 1st section of the general patent law speaks of an improvement as an invention, and directs the patent to issue for this said invention. The 3d section requires the applicant to swear or affirm, that he believes himself to be the true inventor of the art, machine or improvement, for which he asks a patent; and further, that he shall deliver a written description of his invention, in such full, clear and exact terms, that any person acquainted with the art, may know how to construct and use
*367] *the same, &c. That it is necessary to the validity of a patent, that the specification should describe in what the improvement consists, is decided by Mr. Justice STORY in the cases referred to in the appendix to 3 Wheaton's reports, and in the cases of *Boulton* v. *Bull*, *Boville* v. *Poor*, *McFarlane* v. *Price*, *Harmer* v. *Playne*, and perhaps, some others. What are the reasons upon which this doctrine is founded? They are to guard the public against an unintentional infringement of the patent, during its continuance, and to enable an artist to make the improvement, by a reference to some known and certain authority, to be found among the records of the office of the secretary of state, after the patent has run out. But it is contended by the plaintiff's counsel, that the law would be unreasonable, to require, and that it does not require, this to be done, unless the improvement is upon a patented machine, a description of which can be obtained by a reference to the records of the secretary of state's office; that it might often be impossible for the patentee to discover, and consequently, to describe, the parts of a machine in use, perhaps, only in some obscure part of the world. The answer to this is, that an improvement necessarily implies an original, and unless the patentee is acquainted with the original which he supposes he has improved, he must talk idly, when he calls his invention an improvement.

If he knows nothing of an original, then his invention is an original, or nothing: and the subsequent appearance of an original to defeat his patent, is one of the risks which every patentee is exposed to, under
*368] *our law. As to the supposed distinction between an improvement on a machine patented, and one not so, there is nothing in it. In both cases, the improvement must be described, but with this difference: that in the former case, it may be sufficient to refer to the patent and specification, for a description of the original machine, and then to state, in what the improvements, or such original consists: whereas, in the latter case, it would be necessary to describe the original machine, and also the improvement. The reason for this distinction is too obvious to need explanation.

If the general law upon this subject has been correctly stated, the next question is, is this an excepted case? It is contended by the plaintiff, that

it is so. 1st. In virtue of the act for the relief of Oliver Evans; and 2d, by the decision of the supreme court.

1. Under the private act: That declares, that the patent is to be granted in the manner and form prescribed by the general patent law. What constitutes the manner and form in which a patent is granted by the law? The obvious answer is, the petition; the patent, with the signature of the president and the seal of the United States affixed to it; the oath or affirmation; the specification, or description of the invention, as required by the 3d section; the drawings and models, if required. Will it be contended, that a patent would be granted, in the manner and form prescribed by this law, if there were no description whatever of the invention? and if it would not, which is taken for granted, where is the difference between the total absence of a specification, and one which has no reference *at all to the invention for which the patent is granted? This is not the case of an [*369 imperfect or obscure description; but of one which relates exclusively to the whole machine; whereas, the invention for which the patent is granted, is for an improvement.

2. The opinion of the supreme court, which states, "that it will be incumbent on the plaintiff, where he claims for an improvement, to show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists." 3 Wheat. 518. But how is it to be shown? The court has not pointed out the manner, and we, therefore, think, the only fair implication is, that it must be shown as the statute of the United States and the general principles of law require, *i. e.*, by the patent and specification. If it may be shown by parol evidence to the jury, as the plaintiff's counsel contend it may, then it may be fairly asked, *cui bono?* what sort of a showing would that be, so far as it would be productive of any useful purpose? As to the defendant, the evidence comes too late, to save him from the consequences of an error innocently committed. As to the public at large, with a view to caution, during the continuance of the patent, and to information of the nature of the improvement, after its termination, the evidence given in this cause must be evanescent and totally useless.

We feel perfectly convinced, that the meaning of the supreme court, as to this point, is again misunderstood by the plaintiff's counsel, not only for the reasons above mentioned, but because the extent and *construction of the plaintiff's patent, and not the validity of it, in relation to [*370 any one of the machines, were the questions before that court; and none others (in reference to the charge) were argued at the bar, or reasoned upon by the chief justice, in delivering the opinion. Upon the whole, we are of opinion, that the plaintiff is not entitled to a verdict for the alleged infringement of his patent, for an improvement of the hopperboy.

Whereupon, a verdict and judgment thereon were rendered for the defendant in the circuit court, and the cause was again brought by writ of error to this court.

March 4th. *C. J. Ingersoll*,(*a*) for the plaintiff, premised a review of

(*a*) Some part of his argument is applicable to the points of evidence in the subsequent case of Evans *v.* Hettich.

Evans's inventions and improvements as in proof in the cause, originating in 1783, and perfected, as regards the hopperboy, in 1785, the grants from the legislatures of Delaware, Maryland and Pennsylvania, in 1787; the first patent of the plaintiff, under the federal government, in 1790, and the second in 1808, by virtue of the special act of congress for the relief of Oliver Evans. The great utility of those improvements was now universally acknowledged, while the patentee was deprived of all their advantages. It was a singular misfortune for him, among others, to be under the necessity of bringing his patent a second time before this court, for revision, in the same case, in which much of the matter in dispute was the construction of
*371] the opinion formerly pronounced, reversing that of the *circuit court of Pennsylvania, which that court had occasion to review. It was the earnest hope of the plaintiff that a full and final decision would now take place, so as to put the subject at rest. With respect to the matters of evidence, he contended:

1. That David Aby was incompetent as a witness, because he was sued *in pari delicto*, and of course, disposed to vacate the patent he had himself infringed. Interest in such a question is equivalent to interest in the cause. Perhaps, even the verdict might be given in evidence, under the 6th section of the act of 1793, c. 11, which enjoins it on the court to declare the patent void, in the event of a verdict for the defendant. The plaintiff's answer to this objection is, that as the patent is for several machines and improvements, the court could not annul such a patent, but on the foundation of a verdict against all the claims. But why not? Why not declare it void *pro tanto?* Every principle applicable to common cases applies to this. Nay, it is even more necessary, in so complicated a monopoly, to guard the public against imposition or vexation, by demands founded on any part of it, tried and abrogated.

2. It was objected to David Aby, as a witness, that he and six others, including the defendants in these cases, as was ascertained on his *voir dire*, combined to defeat the suits, and for that purpose contributed a common purse to bear the expenses of defending them. If any surplus remained, it was to be returned by the witness, who acted as treasurer—if any deficiencies, it was to be raised by further levies from the contributors. This was
*372] breaking down all distinction *between bias and interest. It amounted, perhaps, to maintenance. 5 Burr. 2730; Phil. on Ev., ch. 5, p. 49.

3. David Aby was suffered to prove the existence of the Stouffer original hopperboy, when the notice was that evidence would be given of the existence of the improved hopperboy. The notice is in 3 Wheat. 470. By this, a complete surprise was inflicted on the plaintiff. The defendant's position was, that for this purpose, he waived the notice of special matter, and gave the evidence, under the general issue, as proof of non-user. But as the notice is equivalent to a special plea, was it competent to the defendant, after putting it in, to abandon it on the trial? There, no doubt, are cases when the defendant might avail himself of the general issue. 3 Wheat. app'x, 27. But this was a case of special matter, tending to prove that the specification does not contain the whole truth, or that the thing was not originally discovered by the patentee. The decisive proof of this position is, that the defendant was allowed to use the same evidence, to show that the plaintiff was not original with his hopperboy, which he used to show

that the defendant did not use the hopperboy. It was an evasion of the wholesome provisions of the sixth section of the act of 1793,(*a*) calculated to destroy a patent by means which a patentee never could possibly controvert. It was an aggravation of these objections, that the court charged the jury, that after a witness was ruled by the court to be competent, the jury could not *disqualify him, on the ground of discredit, but must believe him, unless otherwise contradicted. By this course of proceeding, the defendants were their own witnesses, and the plaintiff was not allowed to discredit them. [*373

4. The court should have suffered the plaintiff to prove that the son of one of the Stouffers, and the executors of another, purchased Evans's improvements. On the former occasion, similar evidence was sanctioned as to the Stouffers themselves, the alleged originators of the hopperboy. 3 Wheat. 495, 505. And why not the acknowledgment of their descendants and legal representatives? It was treated before, as evidence of opinion. If so, why not the opinion of one generation as well as another? But it was more than opinion. It was traditionary history of the invention and improvements.

5. The court should have suffered the defendant's witness, Philip Frederick, to be asked whether Daniel Stouffer was subject to fits of mental derangement. Stouffer was the defendant's principal witness; and that was a most material circumstance in his faculty to bear credible testimony as to remote periods and obscure circumstances. Besides, the witness, Philip Frederick, if he had denied the fact, might have been contradicted by other testimony; in which respect, it was a very important inquiry to be made of him, with a view to Frederick's credit.

6. The deposition of Michael Forner was overruled, after that of John Shetter had been received, under precisely the same circumstances. Neither of them was taken according to the act of congress, which is inconvenient and *unfair in its operation. Rules for depositions were entered by both parties; both parties took depositions under these rules. When the defendant offered to read Shetter's deposition, no objection was made, and it was laid before the jury. But when the plaintiff offered to read Forner's, taken in the same manner, and under the same rules, it was objected to, and overruled. The clerk testified, that for 20 years, the practice had been, to take depositions by rule, on notice, instead of taking them under the act of congress, which requires no notice, where the witness lives more than 100 miles from the place of trial. There was, therefore, evidence of mutual consent and understanding between the parties, deducible both from the invariable practice, and from the rules entered and acted on in these cases. Yet the court rejected the plaintiff's proof, and suffered the defendant's to remain, as received, in force. Thus, the plaintiff was most unexpectedly deprived of some of his most material testimony, while the defendants themselves were their own witnesses. [*374

The main matter in dispute was on the court's construction of the word improvement, which it imputed to the patent. This radical difficulty escaped notice, when these cases were before discussed in the circuit and supreme courts.

1. It was a misapprehension, to suppose, that the word exists at all in

(*a*) Act of 1793, c. 11, § 6; 3 Wheat. 504.

the patent or specification, in connection with the hopperboy. The patent is for improvements in the art of manufacturing flour, and for certain other machines, one of which is denominated an improved hopperboy. But the
*375] distinction is obvious, between *something patented as an improvement of a hopperboy, and something patented as an improved hopperboy. The latter was so called, as substituting mere machinery for manual labor. It might be so called, as a *caveat* against unknown but possibly existing originals, which, in the strong illustration of the court, would avail a defendant, if he could prove their existence in the mountains of China. It might be so called, as meaning nothing more than a melioration of the inventor's own original essays. Evans's hopperboy was a great and most beneficial improvemnt, which he called an improved hopperboy. But it had no original. Even the bolt-filler, ascribed to Stouffer, alleged to be of earlier origin, was as different in principle, as it was inferior in practice, to the plaintiff's machine.

2. It was a second error of the court, to take it for granted, that the improved hopperboy was not so described in the specification, as to distinguish it from all things before known or used, and to enable a person skilled in the art to make it. It is so described. [Here the counsel went into a specification of the peculiar structure and properties of the hopperboy.] No one skilled in the art could misapprehend this description, or be misled by it. The error of the court was, in condescending to consider itself skilled in the art of which this is a branch. The law does not require of patentees to describe new and old, but merely to distinguish new from old. Otherwise, a patent would be more complex and voluminous than a Welsh pedigree. Take a boat, for instance ; must every species, from the ark down-
*376] wards, *be described? The peculiar properties of the improved hopperboy are perfectly explained. It is not a mere change of form and proportions, but a combination of well-known materials, on new principles, essentially set forth in the specification, so as to prevent all interfering claims, during the exclusive term, and to impart the rights to the public afterwards. The authorities were misunderstood by the court in this respect. They all require, to be sure, a discrimination, when the subject-matter is an improvement : but they require only an essential improvement ; not a recapitulation of the particulars of both the old rudiments, and the new combinations, in detail, distinguishing them in terms.

3. This, however, was a question of fact to have been submitted to the jury, instead of being, as it was, exclusively assumed and determined by the court. How can a court decide, whether a person skilled in the art could understand a description, and copy a machine? The cases are uniformly so. 8 T. R. 95 ; 11 East 101 ; 2 Marsh. 211 ; Starkie 199 ; 3 Meriv. 622 ; 1 Gallis. 438 ; 2 Ibid. 51 ; 1 Mass. 182, 452 ; 3 Wheat. 514, app'x, 17. In all these cases, the court left this inquiry as a fact to the jury. Indeed, the 6th section of the act of 1793, c. 11, treats it not only as matter of fact, but of fraud. It must appear, that the specification is untrue, either deficient or redundant, in order to deceive the public. It is matter of concealment. Can the court infer this *scienter?*

4. Indeed, it may well be doubted, whether any discrimination is neces-
*377] sary, where, as in this case, *there is but one patent in existence. The second section of the law speaks of the case of a prior patented

machine. The court would have the third section to be substantive, without association with the second and sixth. But how can a patentee describe what he never saw? If not before patented, how could he see or know? If he knew, but concealed his knowledge, is it not matter of fraud? The cases, when examined, will be found to have most of them referred their reasoning to the point of conflicting patents. Such is the fact in *Harmer* v. *Playne*, *Bovill* v. *Moore*, and *Lowell* v. *Lewis*. Which explanation is all-important to a correct understanding of those cases.

5. The special act of congress for the relief of Oliver Evans, vouchsafes him from all technical obstacles. His improvements, by that time, were universally acknowledged. Congress did not mean to forestall the ascertainment of their originality, which any citizen might try, if he chose, nor their utility. But the relieving act dispenses with specification, oath, fee, and all the other pre-requisites of common cases. It was not designed merely to prolong the term of monopoly, but to relieve it from vexations and frivolous embarrassments. Accordingly, it uses the term improvements, in addition to the terms applied to such subjects by the act of 1793; and confers on Oliver Evans an exclusive right in his discoveries, inventions, machines and improvements, in general, and specifically. The obvious design of this act of grace, was to relieve the grantee from all the formalities to which patentees in common are subjected, *leaving the question of priority or originality alone open to inquiry by the country. [*378

6. But even this inquiry was not competent to these defendants, who are citizens of Pennsylvania. The act of assembly of that commonwealth, in 1787 (P. L. 312), confers on Evans the exclusive right in his hopperboy, and inflicts penalties on all infractors of it. To this act, the defendants directly acceded and contributed by their representatives: and it is a well-settled principle, that they are bound by their legislation. 10 East 536; 3 Johns. Ch. 598. Nor is this position at all affected by the 7th section of the act of 1793, c. 11.

Sergeant, contrà.—A patent is intended to secure to an inventor the exclusive right, for a limited time, to his invention. At the expiration of the period, the thing thus secured is to become public property, which any one is at liberty to use. In the meantime, every one is to abstain from using the thing patented, at the peril of a severe responsibility in damages. The provisions of the patent law have a view to these several objects, all of which are to be promoted so far as possible, and reconciled with each other, the public security and the benefit being protected, as well the interests of the inventor. He is to enjoy the fruits of his ingenuity, upon terms and conditions, which are compatible with the safety, the peace and the interests of other citizens.

A patent, therefore, in the first place, can only be *for an original invention. It is of no importance, that a man really believes himself [*379 to be the inventor, or is the true inventor, having made the discovery himself, without even the knowledge, that the thing he supposes himself to have invented, was known or used before, or described in some public work. However honest he may be, he has no merit, as respects the rest of the community, in discovering what was already known and open to common use, nor will he be allowed to appropriate the thing to himself, because he has

made a mistake. The truth of his invention, though not an original one, will protect him against a summary proceeding to set aside his patent under the 10th section of the act of 1793, c. 11 ; but it will not avail him to enforce his claim, in an action against an individual. The want of originality, proved by showing that the thing was used or known before, or described in some public work, is, in every case, a valid and conclusive defence.

Again, an invention may be of a machine, or of an improvement on a machine ; of something that was entirely unknown before, or of an addition to, or alteration in, what was previously known, so as to make it more useful. Each of these is a patentable object ; but the patent, as to both, is to be for the invention only, and the laws that govern it, thus understood, will be found to be exactly the same. Novelty is an essential part of the merit, and it is only what is new, that is to be secured by the patent. A mistake is just as fatal to the patentee, in the one case as in the other ; and if he should
*380] really believe *himself to have invented an improvement, when in truth it was known, used or described before, he could not give legal effect to his patent. There is, however, one peculiarity in the case of patents for improvements. Improvement being a relative term, presupposes the existence of something to which it refers, known to the inventor at the time of making the supposed improvement. If he does not know of it, he cannot know he has improved upon it ; and if he does know of it, he can readily describe the improvement he has made, that is, his own invention. A man who has never heard of a time-keeper, might suppose himself the inventor of one ; but it is impossible to conceive, that a man who has never heard of such a thing, should believe himself to be the inventor of an improvement upon the time-keeper.

A patent for an entire machine covers the whole—a patent for an improvement, on the contrary, covers only the improvement, and necessarily supposes there are parts which are not patented. It is the line between these, and the parts which are patented, that defines the respective pretensions of the patentee and the public ; and unless that line be somehow marked, it is impossible to say, where the one terminates, and the other begins. Confusion, uncertainty, extortion, fraud and litigation would be the inevitable consequence.

It is the business and duty of the inventor, then, at the time of applying for his patent, and before he can receive a patent, to deliver a " written description of his invention, and of the manner of using, or process of com-
*381] pounding the same, in such full, clear *and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound and use the same," &c., § 3. This specification is to remain in the office of the secretary of state, and a copy of it is everywhere made evidence. The design of this provision is manifest ; it is to secure to the public the use of the invention, after the expiration of the period for which the patent is granted ; and to enable individuals, in the meantime, to know what it is that is intended to be secured, so that they may avoid interference, or, if they think proper, dispute the claim of originality. For both these purposes, it was necessary that there should be authentic and recorded evidence, accessible to all, and

remaining unchangeable and unchanged. Without a specification, the patent would be void. A specification which does not comply with the requirements of the act of congress, is to all legal intents, no specification, and the patent would be equally void, as if there were literally no specification.

In the present case, the patent is to be regarded, either: 1. As a patent for the whole machine: or, 2. As a patent for an improvement on an old and known machine. The utmost that can be contended, is, that the patentee has an election to consider it as the one or the other: and that is a very liberal concession, inasmuch as it is founded upon the ambiguity of his own specification, from which, generally, a man ought not to be permitted to derive an advantage. *But it is clear, that it cannot be a patent for both; that would be a legal absurdity, involving a plain contradiction in terms. [*382

1. As a patent for the whole machime, including the plaintiff's alleged improvement, it is void, because the plaintiff was not the original inventor of the machine. The fact, that a hopperboy, known by the name of an S. or Stouffer hopperboy, having all the essential parts of the plaintiff's machine, and applied to the same uses and purposes (whether more or less perfectly, is not material to inquire), existed, and was in use, before the date of the plaintiff's earliest alleged discovery, has twice been proved to the satisfaction of intelligent juries, in each of these cases, and is now to be taken for granted, as conclusively established. At the former trial, the learned judge who presided (Mr. Justice WASHINGTON) instructed the jury, if they should be of opinion, that Oliver Evans was not the original inventor, to find for the defendant; which they did accordingly, being fully satisfied of the fact. Upon error to this court, the judgment was reversed, on the ground that the patent was not for the machine, but for an improvement; the phrase "improved hopperboy," being, after much hesitation, deemed equivalent to "improvement" on a hopperboy. But the opinion of the court distinctly admits, what indeed cannot be questioned, that if, as respects the hopperboy, the patent had been for the whole machine, the direction of the learned judge would have been right.

In giving to the plaintiff the benefit of the alternative, the case was put in the most favorable view *for him. He might claim as inventor of the whole machine, or he might claim as inventor of the improvement; but, under this patent, he could not claim for both: and in claiming for either, he must, of course, abide by the settled principles of law, applicable to the construction of the patent thus adopted. Each must be taken singly. The two could not be confounded, so as to entitle him, upon the one, to the benefit of principles belonging to the other. If the patent be for the whole machine, it is void, if he is not the original inventor; and that he is not, has been fully established. [*383

It is intimated, however, and will probably be insisted upon hereafter, that admitting the S. or Stouffer hopperboy to have been previously known and used, the two machines are so entirely different, that Mr. Evans might well be entitled to a patent for the whole. As a question of fact, that has been decided by the verdict of the jury, and the identity of the machine must now be taken for granted, unless the jury were led to the conclusion by an erroneous charge from the court. What constitutes identity, and what diversity, is frequently a question of great difficulty. It was the right

and the duty of the judge, to inform the jury what were the principles to guide their deliberations in deciding it, and this he has done with admirable clearness, and in conformity with the best authority upon this abstruse part of the law. "Where a specific machine already exists" (says Mr. Justice STORY), "producing certain effects, if a mere addition is made to such
*384] machine, to produce the same effects in a better manner, *a patent cannot be taken for the whole machine, but for an improvement only." *Whittemore* v. *Cutter*, 1 Gallis. 450. And the same learned judge says, "the material question, therefore, is not whether the same elements of motion, or the same component parts are used, but whether the given effect is produced substantially by the same mode of operation, and the same combination of powers, in both machines." *Odiorne* v. *Winkley*, 2 Gallis. 54. The identity here is perfectly apparent upon the description, and still more so, upon inspection of the models. The object of both is the same—to dispense with manual labor, and supply the hopper—to supply it gradually, in small, successive, regular portions, by means of the power that moves the mill; substituting mechanical contrivances for human agency. The effect is the same —to turn, stir and cool the flour, and thus prepare it for bolting, before it is delivered. The construction of the machines, as to "the mode of operation," and "the combination of powers," is the same. In both, there is an upright shaft, with a cog, turned by the power that moves the mill; an arm, resting lightly on the meal, and turned by the upright shaft; something on the under part of the arm, whether flights or sweepers, to gather in the meal to the hopper. So far, they are the same. Now, for the differences. The plaintiff's machine has a round shaft, instead of a square one; it has leading lines, which are necessary, in consequence of the shaft being round, and a weight to balance the arm. These may all be improvements, but they are only improvements, and do not make a different machine. The name itself
*385] bespeaks *identity: the old machine was called a bolt-filler, or hopper-boy; and the plaintiff's is called an improved hopperboy."

But if the machines be so entirely different, as to entitle the plaintiff to a patent for the whole, though the S. hopperboy was previously known and used, then it would necessarily follow, that even if the plaintiff were the original inventor of the improved machine, and that was the first invention, yet any one might, with impunity, make and use such a machine as the S. hopperboy; that is to say, by stripping off some of the parts, he might entitle himself to use the residue. This is a proposition too monstrous to be maintained. If it be sound, it decides this case, without any regard to the question of original invention, for the defendant Eaton used only the S. hopperboy.

A sure test, however, of the identity, is to consider what parts are indispensable to both machines. They are, the upright shaft, with a cog in it, the arm, and the sweeps. With these, the machine will work; without them, it will not. These parts are common to both machines. What is it that the plaintiff has added? What is not indispensable, but perhaps better. That is exactly the definition of an improvement. Can he, in his improved machine, dispense with any one of the parts that belong to the old machine? The answer is clear—he cannot. Can we dispense with any of his additions? Yes, with all of them. The machine is complete, an efficient agent for its purpose, without them; the evidence even leaves it doubtful whether, apart

from the elevator, it is not the better of the two. It is certainly *in use, and is the very machine for the use of which Mr. Eaton is sued. There can be no serious doubt, that if the plaintiff has any claim, it is only for an improvement.

2. As a patent for an improvement, it is void, because the specification does not show in what the improvement consists, or, in other words, what it is that the plaintiff claims as his invention: "the nature and extent of the improvement are not stated in his specification." This was the precise ground of the decision below. The counsel for the plaintiff who opened the argument, was understood to concede, that if the patent be for an improvement, and there be nothing in the circumstances of this particular case, to make it an exception from the general rule, the law was correctly laid down. And certainly, there can be no doubt of this, whether we consider the spirit and terms of the act of congress, the decisions in England, or the adjudged cases in the United States.

The current of authority, of every sort, is uniform, to establish, that the invention to be patented must be described in such full and exact terms as to "distinguish the same from all things before known." The 2d section of the act has no relation to this question. That provides for the case, where one man has a patent for a machine, and another for an improvement, declaring that the one shall not be at liberty to use the invention of the other, and thus precisely limiting their respective rights. Does it follow, that if a machine has not been patented, he who improves upon it has a right to appropriate the whole to himself, and withdraw *what was before public property from the public use? That no one can afterwards make use of the old and known machine, without the license of the patentee? The section was made with a different view, and leaves what is not provided for upon the same footing on which it before stood. What was common property remains so; the patentee of the improvement is at liberty to use it, because it is common, and no legislation was necessary to enable him; but he is not allowed to appropriate it to himself, to the exclusion of others, any more than to appropriate the invention of prior patentee. The 6th section, which makes it a good defence, that the patentee has stated more or less than the truth in his specification, "for the purpose of deceiving the public," has no relation to the question. There is no allegation here, that the machine will not produce the described effect, or that more or less has been stated, for the purpose of deceiving or misleading the public. Nor is this, the court will recollect, a summary proceeding to set aside the patent under the 10th section. [*387

But the question, and the only question, is, whether in an action by a patentee, against a person charged with infringing his patent, it is not necessary for the plaintiff to show in what his invention consists. In the former argument of this case, this court have laid it down expressly, that "in all cases where his claim is for an improvement, it will be incumbent on him to show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists. 3 Wheat. 518. How is this to be *shown? The answer is obvious—it is to be shown from the specification. That such was the meaning of the court is evident, from their adopting almost the very words of the act of congress, which are employed to describe the office of the specification, "so that a [*388

person understanding," &c. That nothing else could be their meaning is evident, for such, it cannot be denied, is the clear design of the act of congress, and such is the established law as collected from authoritative decisions. The patent must not be more extensive than the invention ; therefore, if the invention consists of an addition or improvement only, and the patent is for the whole machine or manufacture, it is void. Bull. N. P. 76 ; *Boulton* v. *Bull*, 1 H. Bl. 463. In England, the specification is not annexed to the patent, but is enrolled in chancery. Yet the specification is a part of the patent, for the purpose of ascertaining the nature end extent of the alleged intention, *Boulton* v. *Bull ; Hornblower* v. *Boulton*, 3 T. R. 95. In this country, it is filed in the department of state. An authenticated copy of it is always annexed to the patent, and forms a part of the patent, absolutely essential, because the patent, properly so called, in fact, gives no description, referring for that to the specification. The established *formula* used in all patents, and to be found in the present patent, is, "the said improvement, a description whereof is given in the words of the said Oliver Evans himself, in the schedule hereto annexed, and is made a part of these presents."

*389] Now, what should the patent *comprehend ? Where the combination of a certain number of the parts has existed, up to a certain point, in former machines, the patentee merely adding other combinations, the patent should comprehend such improvements only. *Boville* v. *Moore*, 2 Marsh. 211. And the cases that have been already referred to, clearly decide, that if the invention be of an improvement only, it is indispensable, that the patent should not be broader than the invention ; and the specification should not be drawn up in terms than do not include anything but the improvement. It is essential, to point out what is new and what is old, so as to show precisely the extent of the alleged improvement. "The patentee ought, in his specification, to inform the person who consults it, what is new and what is old. He should say, my improvement consists in this, describing it by words, if he can, or, if not, by reference to figures. But here, the improvement is neither described in words nor figures ; and it would not be in the wit of man, unless he were previously acquainted with the construction of the instrument, to say what was old and what was new. A person ought to be warned by the specification against the use of a particular invention. *Per* Lord Ellenborough, *McFarlane* v. *Price*, 1 Stark. 199. It need not be denied, that this description might be sufficiently given by reference ; as to some other patented machine, or to some well-known machine in familiar use. For instance, to use the illustration employed by Lord Ellenborough,

*390] *if we should say, take a common watch, and add or alter such and such parts, describing them. All that is contended, and that is fully supported by authority, and by the reason of the case, is, that the specification must, in some way or other, distinguish the new from the old, the improvement from what was known before, so as to show what the patented invention is, or else the patent is broader than the invention, and void. The decided cases in the United States are to the same effect. If the inventor of an improvement obtain a patent for the whole machine, the patent being more extensive than the invention, is void. *Woodworth* v. *Parker*, 1 Gallis. 439; *Whittemore* v. *Cutter*, Ibid. 475 ; *Odiorne* v. *Winkley*, 2 Ibid. 51. The cases are brought together, well digested, and the principle stated in the Appendix to 3 Wheat. 13.

How else can the extent of the improvement be shown? Shall it be by evidence at the trial? Then, the design of the act would be entirely defeated, and the specification useless. The argument of the court below, upon this point, is perfectly conclusive. To say that the patent may be for the whole machine, and the claim for as much as the plaintiff can prove to be original, or rather the defendant cannot disprove, is to make the right depend, not upon the patent, nor even upon the fact of originality, but upon the evidence the party may have it in his power to produce, and his intelligence and skill in applying it. The right, instead of being uniform every-*where, might be one thing in one state, another in another. In different courts of the same state, it might be different. And even in [*391 the same court, at different times, as the particular evidence happened to vary, it would be more or less extensive. The patent would, in effect, be nothing but an outline, large enough, of course, to be filled up as occasion might serve. This is an absurdity, and what is worse, a great temptation to fraud. Besides, under this supposition, how is any man to inform himself, what it is that is patented, so that he may avoid the danger of infringement? It is too late, at the time of trial, to answer any good purpose to the defendant. And how are the public to be informed, at the expiration of the time, or how is a person of skill to be able to make the improvement; in short of what use is the specification, unless it be to define, with precision, the extent and nature of the improvement? The act of congress emphatically refers to the specification, and to that alone, as furnishing everything, without extrinsic aid, and so it must do. If it be broader than the invention, the patent is void.

But it is objected here, that this was a question for the jury, and not for the court. Whether the specification is broader than the invention, may, perhaps, in some cases, be a question of fact, or a mixed question of fact and of law, the construction of the written instrument of specification being for the court, and the other evidence in the case for the jury. But if it be "incumbent upon the plaintiff to show the extent and nature of his improvement," and that is to be shown from the specification, then it is plainly incumbent upon him, to show from the specification, *where he claims [*392 for an improvement, that he has described an improvement, as distinguished from a known machine. And that, it is submitted, being exclusively a question arising upon the face of the instrument, is a question for the court. Let us examine the specification. Is there anything in it, which even professes to describe an improvement, as distinguished from a machine known or used before? Does it not, plainly, and in terms, include the whole machine? That is evidently a question of law, upon the face of the instrument, and it may be confidently pronounced, that it does include the whole, and that no man can so read the specification, as to ascertain which parts are claimed by the plaintiff, and which are not; or that there are any parts which are not claimed by him. But it is due to the court, further to say, that the charge in this respect, must, as in all other cases, be understood with reference to the allegations and to the evidence. If there had been an attempt to prove, or even an assertion, the most distant intimation, that men of skill in mechanics, bringing to the study of this difficult specification, the aid of peculiar knowledge, could discern in it a line between new and old, or any defined limits of improvement, that would, doubtless, have

been fit to be heard, and whatever matter proper for the consideration of a jury might have arisen, would have been submitted to the jury. But no such evidence was offered—the record shows it. No such suggestion even was made; it was not pretended—the charge shows it; for the part excepted to was itself a reply by the court to an argument of the plaintiff's
*393] counsel, *which admitted that the specification did not show in what the improvement consisted, by contending for the extravagant position, that it was competent to show it by evidence at the trial, which is, in effect, to say, that the plaintiff was entitled to whatever the defendant had not disproved.

It has been said, however, and to our very great surprise, that the court below erred, in dealing with this patent as a patent for an improvement; that it is not for an improvement, but for an improved hopperboy. When this case was formerly before the circuit court, that court dealt with the patent as a patent for a hopperboy, and not for an improvement. Upon error to this court, one error principally relied upon was, that the court below had thus construed it to be a patent for the machine. 3 Wheat. 486, 502. And it was contended, that an "improved hopperboy," and an "improvement on a hopperboy," were one and the same. "This," says one of the counsel, "was a patent for an improvement on the particular machine in question, and not for its original invention." And of that opinion were the court, after much deliberation. 3 Wheat. 517. And can it now be contended, in the same court, and by the same party, that this is not to be dealt with as a patent for an improvement? But the truth is, it has been treated in this case as a patent for both the machine and the improvement, so as to give the plaintiff the full benefit of either construction. The real
*394] aim of the argument is, to maintain, *that a patent for the whole may be expounded as a patent for each of the parts, and legally covering as many as the patentee may be able to prove he has invented; that it may be a patent, in words, for one thing, and in law, for another; that it may have a sort of elastic ambiguity, capable of contraction, if not of expansion, so as to adapt itself to whatever it may be found convenient, at any given time, to embrace. This is against all settled principles; it is against good policy; and it is against the words and the spirit of the act of congress.

Such being, unquestionably, the established law upon the subject of patents in general, it remains only to inquire, whether the case of Oliver Evans is, on any account, an exception. And it is insisted here, that the special act for his relief makes it an exception. The history of that act is sufficient to show, that its only object was, to authorize a new patent to be issued, by reason of the first having been declared void for irregularity of form, attributable to the officers of the government. This gave an equitable title to relief. The appropriate relief was an extension of the time, so that the inventor might enjoy the privileges of a patent, for the same time that he would have enjoyed them, if the irregularity had not occurred, that is to say, the same privileges. This was sufficiently liberal, for the first patent had actually expired, before the new one was granted. The new patent, too, was made retrospective, and gave to Oliver Evans an exclusive right for eight and twenty years, double the usual period; yet it was contended,
*395] formerly, that this special act, liberal as it *confessedly was, went the further length of dispensing altogether with the necessity of proving

he was the inventor, and even precluded all right to question the invention, which was, in effect, to say, that the exclusive privilege was secured to him, whether he was the inventor or not. That was overruled by this court, upon the plainest grounds. 3 Wheat. 513. And the whole scope of the opinion then delivered distinctly establishes, that except the extension of time, and the union of different inventions in the same patent, which otherwise, perhaps, could not be regularly joined, the patent to be issued, was to be, in all respects, conformable to the general law, and subject to the same regulations as other patents. Such was the interpretation of the plaintiff himself: he applied in the usual manner, by petition, with a specification and oath. Such was the interpretation of the officers of government: the patent underwent the usual examination, and is in the usual form. Such is, at this moment, the interpretation: for it is upon the adoption of the general law, by reference, that the jurisdiction of the federal courts, in cases growing out of this patent, entirely rests. If that law be not applicable, this court has no power to adjudicate the cause. It is needless to pursue this further, being already decided by the former decision of this court. For the terms and conditions upon which the patent was to be granted, the jurisdiction to attach to it, the rules to govern it, the special act makes no provision, but by reference to the existing laws; and *but for this reference, we could not advance a single step in the inquiry. [*396

All that has been said of the act of the legislature of Pennsylvania passed in the year 1787 (P. L. 312), may be disposed of in a single word. What its provisions were, does not appear, and if it did, the right they conferred, whatever it may have been, was surrendered, by accepting a patent under the law of the United States. The seventh section of the act of congress is express.

In conclusion, then, it is confidently submitted, that the patent of Oliver Evans must be considered as a patent, either for the machine or for the improvement. That if it be for the machine, it is void, because it is fully proved that he was not the original inventor, but the machine was known and used before. That if it be for an improvement, it is void, because it is broader than his invention, and does not specify in what his improvement consists, so as to distinguish it from what was known and used before.

The learned counsel also argued the points of evidence in this and the next following case (*Evans* v. *Hettich*), but as they are so fully noticed in the opinion of the court, it is not thought necessary to report that part of his argument.

Harper, in reply, observed, that in the opinion of the circuit court, two propositions were distinctly affirmed: 1. That Evans's patent of the hopperboy was a patent for an improvement, and not for an original invention or discovery: and 2. *That being for an improvement, it was void, because the specification did not in terms distinguish the improvements from the original machine, called the Stouffer hopperboy. Both these propositions were indispensable for supporting the judgment below. He denied them both, and should endeavor to show, that they were equally void of foundation. If he could succeed in overthrowing either, the judgment of the circuit court must be reversed, and the patent-right of the [*397

plaintiff supported; but he believed, and should endeavor to show, that both were wholly unfounded.

And first, is the patent of Oliver Evans a patent for an improvement, or for an original invention? The decisions of the circuit court maintained the former. He should endeavor to demonstrate the latter. In the outset of this investigation, it would be proper to remark, that the specification makes part of the patent; and he had the authority of this court, in the former decision in this case (3 Wheat. 507), for saying, that in order to ascertain what Oliver Evans obtained by his patent, one of the proper points of inquiry was, what did he ask for? what was it his wish and intention to obtain? This question may be satisfactorily answered, by referring to that part of his specification which relates to the hopperboy. This specification is printed at length in a note to 3 Wheat. and the part of it now in question is found at p. 468. The description of the machine is very full,
*398] *minute and clear; and it concludes with this declaration: "I claim as my invention the peculiar properties or principles which this machine possesses: viz., the spreading, turning, and gathering the meal, at one operation, and the using and lowering its arms by its motion, to accommodate itself to any quantity of meal it has to operate on." This was what he claimed as his invention. For this he asked a patent. Not for the machine which he had thus improved, but for the principle on which it was made to operate. He has not very accurately expressed himself, or distinguished between the object to be obtained, and the mode of proceeding for its attainment; between the end and the means; the result and the *modus operandi* by which it is produced. But still, his meaning is obvious. The object, the end to be obtained, the result, was the "spreading, turning and gathering the meal, at one operation." The principle of the machine, the *modus operandi*, by which the object was to be accomplished, in a new and better way, was the power of the machine to raise and lower its arms by its own motion, so as to accommodate itself to any greater or less quantity of flour on which it may have to operate. This, then, is his invention or discovery, which he claims as his own, and for which he demands a patent. His demand is complied with: he gets what he asked. This is what the grantors intended to give him; and I appeal again to the former decision, for the doctrine, that in order to ascertain what is given, we must look to the request of the receiver, and the intention of the giver.

*399] *It is, then, a patent for the peculiar principle of his machine, for for its new mode of operating, that Oliver Evans asked for and received. That a new *modus operandi*, by a new combination of old instruments or machines, so as to produce either a new effect, or an old effect in a new way, is the proper subject matter of a patent, appears from numerous authorities, and may be considered as a settled principle of the patent law. It was on this principle, that Watt's patent for his improvements on the steam-engine, which made so much noise in Westminster Hall, and produced such important effects, was finally supported and established.

The English law of patents, though different from ours in its origin, was, probably, the same in its principles. Indeed, our act of congress was a mere enactment of the principles and system which the English courts had established. That system grew out of the ancient prerogative of the crown, in England, to grant monopolies. This power, long and often most oppres-

sively exercised, was abolished in the early part of James the first's reign, by an act of parliament, which was one of the earliest fruits of the increase of knowledge, the progress of correct ideas, and the improvement in the condition of society, which, at that time, had begun to appear. But, for the encouragement of industry and ingenuity, a proviso was introduced into the statute, that the king might still grant a monopoly "of any manner of new manufactures," to the first inventors, for any term not exceeding fourteen years.(*a*) Upon this short proviso, this apparently *scanty foundation, the whole structure of the English patent law, was raised by the English government and courts. The system which they thus established was adopted by our act of congress. This system required a specification. Nothing is said of it by the statute; but the government required it, by an express clause of every patent. The principle on which it was required, was this: the statute conferred a benefit on the inventor, by giving him a monopoly of his invention, for a limited time. For this benefit conferred on the patentee by the community, it was thought just, that he should make a return. That return consisted in the knowledge and free use of his invention, which, by his specification, he should enable the community to obtain, after the expiration of his monoply. This principle enables us not only to understand the origin and object of the specification, but also its nature and character, as its object was to put the public in possession of the invention, after the monopoly had ceased, so as to enable all persons to use it beneficially; it was indispensable, that the invention should be so fully and clearly explained, as to enable persons skilled in the same art to make and use it. This was all that was to be effected by the specification, and consequently, all that it was required to contain. The very same certainty of description which would enable persons skilled in the art to make and use the invention, after the monopoly should expired, would enable them to avoid making and using it, so as to subject themselves to penalties or loss, during the continuance of the monopoly. [*400

*In the same manner, it was established, that improvements in old machines or processes, might be combined as "new manufactures," and become the subject of patents. This principle was also incorporated into our act of congress, in express terms. And here, the same rule was adopted with respect to the specification. The "new manufacture," whether it consisted in a machine or process entirely new, or in the improvment of an old one, was to be described with such certainty, as to enable persons skilled in the art, to make and use the invention, after the monopoly should expire, and to avoid it, while the monopoly should exist. The principle and object were the same in both cases, and the same rule was adopted in both, by our act of congress, as well as by the English decisions. [*401

We shall now be able to perceive the application of the case of Watt's patent (8 T. R. 95), to the point under consideration; which, let it be considered, is to ascertain how far the discovery of a new *modus operandi*, so as to produce a new effect, or an old one, in a new way, is the proper subject of a patent, as a useful invention, and not as an improvement. The expansive power of steam had been many years before discovered by the

(*a*) See the case of Hornblower *v.* Boulton, 8 T. R. 105, Opinion of Mr. Justice LAWRENCE.

Marquis of Worcester, who applied it, though very imperfectly, to various mechanical purposes. Among the rest, he employed it to put machines in motion, by communicating to them the movement which the steam was made to produce on beams and levers. Thus was laid the foundation of that
*402] wonderful invention, the steam-engine. *Various machines of this kind, more or less perfect, were, from time to time, brought into use; and at length, Newcomen made a steam-engine, which was long considered as having attained the utmost point of perfection. It consisted of a cylinder or large tube or iron, made perfectly smooth and uniform within, and completely closed at the bottom, but open at the top. Inside of this cylinder was placed, horizontally, a thick strong plate of iron, so fitted at the edges to the inner surface of the cylinder, as to be air-tight, and yet to play easily up and down. Into the centre of this plate was fitted a strong upright stem of iron, of the length required; and the stem and plate together made what is called the piston. The upper end of the piston stem was fastened by a joint to a horizontal beam, which was made fast by a joint, near the centre or at the farthest end, so as to allow its near end to play up and down with the piston to which it is attached. At the bottom of the cylinder, under the piston, was introduced a pipe or tube, leading from the boiler, where the steam was generated, into the cylinder, and furnished with a valve. When this valve was opened, it let the steam, through the pipe, into the lower part of the cylinder, under the piston, which was thus raised up by the explosive power of the stream, and raised with it the end of the horizontal beam to which it was attached. When the piston, and with it the beam, had been raised as high as was intended, the valve in the steam pipe was shut, by the motion of the machine, and at the same moment, a valve was opened, by the same means, in a pipe, which connected the
*403] *cylinder with a vessel of cold water. A quantity of this water was then introduced into the cylinder, under the piston, where it condensed the steam, more or less completely, and created a vacuum more or less perfect; in consequence of which, the piston was pressed down by the weight of the atmospheric air resting upon it, and carried down with it the end of the horizontal beam to which it was attached. When it had subsided as low as was desired, it opened the steam valve, and let in the steam under the piston, which was raised as before, and again pressed down by the weight of the air, on the stream being again condensed by the introduction of cold water. This operation went on continually, and thus an ascending and descending motion was produced, which was communicated by the horizontal beam to the whole machinery.

The defect of this engine at length began to be observed. It consisted in the cooling of the cylinder by the cold water let in to condense the steam. The cylinder being thus rendered colder than steam, a considerable portion of the steam introduced was condensed by this coldness, while the piston was rising; and was thus destroyed, before it had done its office. This rendered a greater generation of steam necessary, and of course, a greater consumption of fuel. The steam, too, was not suddenly or perfectly condensed, so as to let the piston descend with sufficient rapidity or force; by which the power and effect of the machine were diminished. The water also,
*404] into which the steam had been converted by condensation, remained in the bottom of the *cylinder, and further impeded the descent of

the piston. These defects were seriously felt, in a country where fuel was dear, and became continually more and more so. At length, they threatened to render the engine entirely useless, by creating a greater expense in fuel, than could be compensated by the labor-saving power of the machine.

Then Watt arose, who, after long reflection and many experiments, conceived the happy idea of condensing the steam in a vessel different from that in which it was to perform its office. This he effected, by connecting with the machine another vessel called a connector, which was connected with the cylinder by a pipe with a valve in it. This valve being opened by the motion of the machine, at the same moment when the piston had ascended to its greatest height, the steam rushed through it into the conductor, where it met a stream of cold water, introduced by the same means which had been before employed for letting it into the cylinder. This cold water condensed it as fast as it came in; and a pump was also contrived, to work by the motion of the machine, and drew out of the conductor all the steam that remained uncondensed, and all the water produced by the condensation. Thus, a most perfect vacuum was created in the condenser, and consequently, in the cylinder connected with it; the piston descended with freedom, rapidity and force; and the cylinder, not being touched or affected by the cold water, retained a heat equal to that of steam: so that no portion of the steam introduced into it, was condensed too soon.

This was the great improvement; but others were *employed to increase its effect. The cylinder was surrounded by a case the best [*405
calculated to retain heat, and the space between this case and the cylinder was kept full of steam or boiling water. Thus the cylinder was kept in the hottest possible state; the state best adapted to the preservation of the steam, while performing its office: and as steam thus preserved was found to be more effectual than atmospheric air in bringing down the piston, the top of the cylinder was closed, and steam was introduced above the piston as well as below it. The steam was conducted into the condenser, and there condensed and pumped out, in the same manner with that introduced below: and thus, the piston being alternately pressed up and down, by the elastic power of steam, in its most efficacious condition, gave a most powerful, steady and uniform motion to the engine. Oily substances were employed instead of water, in keeping the vessels air-tight; especially, the top of the cylinder, where the steam of the piston played through it. Thus the machine was rendered as perfect as it seems capable of becoming.

Now, in what does this machine differ from the steam-engine of Newcomen, which was in use before? Both had a boiler to produce the steam, and a cylinder to receive it. The piston was the same in both, and connected in the same manner with the horizontal beam, for the purpose of communicating the motion to the rest of the machinery. In both, the piston was raised by the expansive power of the steam; this steam, after its office had been performed, was condensed by cold water, so as to create a *vacuum in the cylinder, and permit the piston to descend; and in [*406
both, pipes and valves of the same construction was used, for introducing alternately the steam and the cold water. In what, then, did they differ? Merely in a new *modus operandi*, by which, with the addition of

another vessel, the cold water was prevented from cooling the cylinder, while it condensed the steam; and the steam was made to operate in forcing the piston down, as well as in forcing it up. In this new *modus operandi*, produced by a different arrangement and construction of the old machines, with the addition of one new vessel, to receive and condense the steam, consisted the great invention of Watt; for which he obtained his patent, avowedly as for a new invention, or in the language of the British statute, a "new manufacture," and not for an improvement. His specification is inserted at length in 8 T. R. 96, note *a*, where it will appear, that he speaks of his discovery as a new invention, and not as an improvement, and never once mentions or alludes to the old machine.

In what did this new discovery consist? I answer, with the two judges of the common pleas in England, who were in favor of this patent, and one of whom was Lord Chief Justice EYRE, *Boulton* v. *Bull*, 2 H. Bl. 463, and with the four judges of the king's bench, who were unanimous on the point, 8 T. R. 95, that it consisted in the new principle on which the steam was condensed, and which was carried into effect, by a new combination of the
*407] old machinery, with the addition of one new instrument. *The word "principle," as used in relation to this subject, is not taken in its general philosophical sense, where it means a law of motion, or a property of matter; but in what may be termed its mechanical sense, in which it signifies a method of doing a thing, or of effecting a purpose, in other words, a *modus operandi*. It is, therefore, established, by this solemn and elaborate decision of six English judges against two, after repeated arguments and great consideration, that a new principle, or *modus operandi* carried into practical and useful effect, by the use of new instruments, or by a new combination of old ones, with or without the addition of one or more new ones, is an original invention for which a patent may be supported, without reference to any former invention or machine, for performing the same or a similar operation. This may be taken as a maxim which the cases referred to will be fouud fully to support.

Let us now apply this maxim to the patent of Oliver Evans. We shall soon see, that according to the doctrine thus established, his discovery was not a mere "improvement," as the court below pronounced it to be, but an original invention. The learned counsel here produced two models, one of Evans's hopperboy, and one of Stouffer's, and explained minutely the difference between their principles, or *modus operandi*, which consisted in this: that in Stouffer's hopperboy, the arms, through a square mortice in which the square upright post was made to pass, were carried round by means of the upright post, pressing upon the sides of the square
*408] *mortice, which renders it impossible for the arms to rise and fall of themselves, as the meal under them might increase or diminish; while in the hopperboy of Evans, the upright post is round, and it passes loosely through a round hole in the arms, which are carried round, by two pieces of timber of the proper length, called leaders, which are inserted firmly into the upper part of the post, and attached, at their ends, by lines or small cords, to the corresponding ends of the arms. These lines and leaders being put in motion by the upright post, trail round the arms, which, at the same time, play loosely on the post, and rise and fall of themselves, as

the meal under them increases or diminishes in quantity. And to make them press more lightly on the meal, and rise and fall with more facility, as occasion may require, a weight, a little lighter than themselves, is attached to them, by a cord, which passes over a pulley in the upper part of the post. This weight nearly balances the arms, and enables them to play up and down much more easily and effectually. The counsel also produced a drawing of Evans's machine, from the patent-office, to show that his model was correct, and referred to the facts of the evidence in the record, where the machine of Stouffer is described, and is properties and defects explained. He then proceeded to remark, that the machine of Evans was obviously constructed upon a new principle, that the *modus operandi* was entirely new. The great object of both machines was to conduct the meal into the bolting chest, and to stir, turn, *dry and cool it, on its way thither. The [*409
essential agents in this operation were the arms, which, if they remained stationary on the post, as they must, of necessity, do, in Stouffer's machine, could not possibly perform this operation to advantage. They might sink down on the meal, as its quantity decreased, but could not possibly rise, when it was increased; consequently, when new meal was placed on the floor, the machine must be stopped, and the arms lifted up. Hence, its motion was unequal, and its operation necessarily very irregular and imperfect. It also required a hand, constantly, or frequently, to be present, and thus increased the expense. Thus, the condensation of the steam within the cylinder itself, in Newcomen's steam-engine, cooled the cylinder improperly, wasted steam, made more fuel necessary, and rendered the operation of the machine imperfect, and too expensive. Here, the similarity of imperfection is complete.

Evans removed the imperfection of the hopperboy, not be merely adding to its parts, but by introducing a totally new principle and *modus operandi.* He detached the arms from the upright post entirely, and carried them round, by means of the leaders and lines which have been described, leaving them to play freely up and down on the post, so as to accomodate themselves to the decreasing or increasing quantity of meal under them; and their movement up and down, he facilitated, regulated and rendered perfect, by means of the weight and pulley. The *modus operandi* of the two machines, consisted in the manner of carrying round the arms. This was *the principle of both machines. That of Evans was new, and [*410
infinitely superior. So, Watt remedied the defects of Newcomen's steam-engine, by condensing the steam in a different vessel from the cylinder, and increased the effect, by introducing the steam above the piston, as well as below it. This was a new principle; and here again the resemblance between the two cases is complete.

It being then clear, that Evans had made a new invention as to the hopperboy, and not merely what the law on this subject calls an improvement, and the cases showing that such an invention is the subject matter of a patent for an original invention, it follows, that he might have obtained a patent for his invention, as an original invention, and not merely as an improvement. This leads to the inquiry, for what was this patent granted? Was it for an original invention of his own, or for an improvement on Stouffer's invention? We have the authority of this court, in its former decision

in this case (3 Wheat. 454), for saying, that when we inquire what was granted, it is proper, in the first place, to ascertain what the grantee wished to obtain, and next, what the grantor had the intention and the power to give. What Evans wished to obtain, is fully and most explicitly stated in the concluding sentence of his specification. 3 Wheat. 468, note. After describing, most fully and clearly, the structure, principle, and operation of his hopperboy, he concludes thus, "I claim as my *invention, the peculiar properties which this machine possesses, viz., the spreading, turning and gathering the meal at one operation; and the rising and lowering its arms by the motion, to accommodate itself to any quantity of meal it has to operate on." Here, it is manifest, that he describes the effect intended to be produced, which was the same in both machines; viz., the spreading, turning and gathering the meal at one operation; and his *modus operandi*, for producing this effect, which was entirely new, viz., the rising and lowering the arms of the machine, by its own motion, so as to accommodate itself to the increasing or diminishing quantity of meal. For this *modus operandi*, this property or principle, he claims a patent. It is equally clear, that the grantor of the patent intended to give what he thus asked for; that is, a patent for this new principle. This appears from the special act of congress, on which the patent is founded, and to which it refers; from the terms of the patent itself; and from the specification which is expressly incorporated into it, as one of its constituent parts.

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As a further illustration of this position, the most celebrated and important invention of modern times may be referred to, an invention which was destined to produce more important effects than any other single effort of the human mind. He alluded to the steam-boat; that sublime conception, which had conferred so much glory on its author and his country. What was a steam-boat, but a new combination of these well-known machines, a boat, a steam-engine, *and a flutter-wheel—machines most familiar to all who knew anything of such subjects. But they were so combined as to produce a new and most surprising effect, by a new *modus operandi*. This method consisted in attaching a steam-engine and two flutter-wheels to a boat of proper dimensions and strength, and arranging them in such a manner, that the flutter-wheels were set in motion by the steam-engine, and struck against the water, instead of being struck by it, as they are in a common saw-mill. Thus, striking against the water, they act as oars, or rather as paddles, and propel the boat forward. Now, what was there new in this machine? Not the instruments, but the manner of combining them, and their manner of operating produced by this combination; and yet, no one has denied to the author of this beautiful and sublime idea, the merit of an original invention, or called in question his patent, as a patent for an original invention. He, however, merely combined old machines, changing their forms and proportions so as to suit his new purpose. Evans not only combined old machines, but added new and essential parts, and by means of both produced a *modus operandi* altogether new, and highly useful. Upon what ground, then, can it be said, that he is not an original inventor, when Watt was solemnly adjudged, and Fulton unanimously allowed to be so?

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I therefore contend, that Evans was an original inventor, and not an improver merely; and that his patent is for an original invention, and not

for an improvement. If so, the decision of the circuit *court in these two cases (*a*) must be reversed, and the patent of my client is established.

But if it be not a patent for an original invention, but merely for an improvement, the decision below was erroneous, in declaring that the specification is defective. This defect consists, according to the decision below, in the omission to state particularly, in what the improvement consists, and to distinguish it in terms from the pre-existent machine. Here, a very familiar maxim is applicable: *quod neminem ad vana aut ad impossibilia lex cogit.* The law requires nobody to do that which would be useless, if done, or it is impossible to do. And *cui bono* make this discrimination? how can it be made? and by what provision of the law is it required? On the answer to these three questions, the case must depend. If it can be shown, that such a discrimination would be useless, if made, or is impracticable, and that it is not expressly and positively required by the act of congress, it will follow, that the judgment below must be reversed.

1. And *cui bono* make the discrimination? What good would it, or could it do, to anybody? In order to answer these questions, we must revert again to the object and uses of the specification. The patent law confers a benefit on the discoverer of any artful invention, which consists in a monopoly of his invention for a limited time. The consideration which it requires him to pay for this benefit, is, to put the public in possession of his invention; so as to enable all to use it, after his monopoly shall *expire; [*414
and all to avoid involving themselves in controversies and difficulties, by inadvertently infringing it, while it continues. Hence, the necessity of a specification; and here we find its uses, its extent and its limitations. The British statute said nothing of a specification; but it was introduced by the executive government, as a condition of every patent, and its character, objects and properties have been accurately settled by judicial decisions in England. From those decisions, it was borrowed by our act of congress, and incorporated into its positive enactments. In both systems, its objects and uses, and consequently, its nature and properties, are the same. Its object and use is, to enable the public to enjoy the invention beneficially and fully, after the monopoly shall have expired, and to avoid interference with it, while it shall continue. Now, what is necessary for attaining this object? certainly, nothing more than this, that the invention should be so described in the specification, by writing, and where the nature of the subject will permit, by drawings and models, as that any one competently skilled in the art or science to which it relates, may be enabled to understand, make and use it. This is what the English decisions have established as the necessary properties of the specification; and what our statute expressly, and in terms, requires.

Now, it is obvious, that in the case of an improvement, the principle is exactly the same as in that of an original invention. The invention, that is, the thing in its improved state, must be accurately and fully described; by writing always, and by drawings and models, where the nature of the case will *permit. When this is done, it is manifest, that any one who can [*415
understand the improved thing, so as to make and use it, may, in every possible case, distinguish the improvement from any and every

(*a*) The present case, and the subsequent case of Evans *v.* Hettich.

original or antecedent thing of the same sort. Take these two hopperboys as an example, and inspect the models which I hold in my hands. Cannot any man, who has sufficient mechanical skill to make a hopperboy, and understand its use, see at one glance, in what these two machines differ from each other? Does not the court see it? Cannot any such mechanic, therefore, make and use the hopperboy of Stouffer, if he should think proper, and avoid all interference with the improvement of Evans? It cannot be doubted, that he may. And so may a person sufficiently skilled in the art or science to which an improvement relates, in every possible case. When he has the improvement, or the improved thing sufficiently described, as the hopperboy of Evans is admitted to be, and is informed of any pre-existing machine, or thing of the same general nature, which he wishes to make, sell or use, he can look at that thing, compare it with the improved machine, or with the description, drawings and models in the patent-office; see the difference, and make and use the original or old one, without the least danger of interferring with the improvement. Where, then, is the use of describing the original, or old invention, in the specification of the improvement; and of discriminating, in terms, between them? It is manifest, that such a discription would be perfectly useless and vain; and *neminem ad vana lex cogit.*

*416] *2. But admitting that it might be of some use, would it be possible? This is the next head of inquiry: and I contend that it would not. And here let it be remembered, that this doctrine of discrimination is not confine to such inventions as are express or avowed improvements, on particular inventions. It extends necessarily to all inventions, which improve anything that existed before. In the present case, there happened, so far, at least, as is now known, to be but one hopperboy, that of Stouffer, in use before Evans's. But suppose, there had been twenty, of as many different kinds? would they not all have been original with respect to Evans's, or antecedent to it? Undoubtedly: and every man, notwithstanding Evans's patent would have had a right to use them all, or any of them. What reason or principle could require the description of one, in the specification of Evans, which would not equally apply to all? There certainly is none. Let us take the example of a patent for an improved stove for increasing the heat, or for any other object. How many millions of stoves, of what an endless variety of constructions, are used in the world. Must the patentee of this improved stove, or of this improvement on stoves, describe them all in his specification, and point out, in terms, the different between each of them, and his invention? It is manifest, that he must, according to the doctrine of the circuit court: and it is equally manifest, that he could not possibly do it. His specification would constitute a library of itself, which no man would or could read, and which the patent-office could hardly contain. So also, im-

*417] proved *chimneys, improved carriages, and all the multitude of other improvements, real or imaginary, on things in general use, for which patents are obtained, having pre-existent things of the same nature, and used for the same general purpose, must be described in each specification; which if it were possible to write it, as it would very seldom be, would be far too voluminous to be understood or read.

Thus, it is manifest, that the discrimination contended for, would be impossible, as well as useless, in relation to improvements on unpatented

machines. Where, indeed, a machine is already patented, it is very easy to describe it, in the specification of the improvement, and point out all the particulars in which they differ from each other. The original specification is in the patent-office, and may be referred to: the drawings and model are there, and may be seen. Here, the rule requiring a discrimination, in terms between the original invention, and the improvement would not be unreasonable; and it might be useful; by tending to prevent disputes between the different patentees. The mistake of which we complain, has probably arisen from not discriminating between improvements on patented and unpatented inventions. In the latter, the discrimination is manifestly impossible, as well as useless. In the former, it would be easy, and might be of some use. It might be proper to require it, in one case, whether the law positively enjoins it or not; to require it, in the other, would be to make the law require what is both useless and impossible. This can never be done, by the construction merely of a statute, which must *always be [*418
reasonable. But it may be said, that the statute positively enjoins it. If so, we must submit. When the legislature has clearly express its will, the court have no duty but to obey. This brings us to the question, what has the legislature enjoined on this subject?

3. All that can be supposed to relate to it, is contained in the 2d and 3d sections. The second speaks of improvements; the third, of specifications. It points out the object of the specification, and directs what shall be done for its attainment. The object is, to put the public in complete possession of the invention, whether an improvement or an original discovery; so that interference with it may be avoided, while the patent continues, and its benefits may be fully enjoyed by the public, after the patent expires. To this end, it enjoins that the applicant for a patent "shall deliver a written description of his invention, and of the manner of using, or process of compounding, the same; in such full, clear and exact terms, as to distinguish the same from all other things before known; and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound and use the same." This is the directory part. The thing is to be described, "so as to distinguish it from all other things before known." How distinguish it? By describing all the things before known, and pointing out in terms in what it differs from them all? Certainly not; but by giving a description of it, so complete and accurate, as "to enable any person skilled in the art, &c., to make, compound and use *the same." Is the discrimination contended for, but [*419
not mentioned in the statute, necessary for this purpose? By no means. Any person skilled in the art or science, in order to make, compound and use the new invention, has but to look to the description of the invention itself. He need not know how nearly it resembles, or how widely it differs, from any other thing before known. With these he has no concern. And if, on the other hand, he wishes to use nothing before used and known, and to avoid interfering with the patented invention or improvement, he has only to compare the thing which he so wishes to make or use, with the description of the patented invention or improvement, contained in the specification; and he will immediately see wherein they differ, and be enabled to avoid the latter, while he uses the former.

This section (the 3d) further directs, with a view to the same objects, that

the applicant, the inventor, "in case of any machine," shall "fully explain the principle, and the several modes in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions." Here, as in the rest of the section, nothing is said about improvements, as distinguished from original discoveries. They are all treated equally as "inventions," and are placed precisely on the same ground. They are all to be so described, as that they may be distinguished in their principles and *modus operandi*, as well as in their construction and composition, from other inventions: and this is to be effected by means, not of a
*420] formal discrimination, in terms, between them, and any *other thing or things of the same general nature; but of a full and accurate verbal description, aided by drawings, models and specimens; where the matter is of such a nature as to admit their use. In all this, nothing is said or hinted about "improvements," as contradistinguished from "original discoveries." All are treated alike as "inventions," and the same means of enabling all concerned, to distinguish them from things before used or known, are provided in relation to both.

In fact, what is an "improvement," but a new invention? Everything that is made better is improved; and everything that makes another thing better, or does it in a better way, is an improvement. If it be new, it is an invention, so far as it goes. The greater the improvement, the greater is the invention: and any improvement differs from any other, or from an original discovery, if there be any such thing, not in nature, but in degree. They may be greater inventions or less; more or less ingenious, or more or less useful; but so far as they are, so they are all inventions, and are treated precisely alike, by this portion of the patent law; which I again repeat, makes no mention, and gives no hint of a discrimination, in the specification of an improvement, between the improvement, or the thing as improved, and the original thing on which the improvement is made. Treating them all alike as "inventions," it requires, with respect to all, that they shall be so described, as clearly to distinguish them, that is, as to enable all concerned to distinguish them, from all other
*421] things of the same nature, *before in use or known. To construe the statute, so as to make it require a description not only of the new invention, but of all things of the same general nature, before known, and a discrimination in terms between them, would be as unreasonable in the case of an improvement, as of an original discovery, and would be perfectly unreasonable in either. It would make the statute do that which its terms do not indicate, and which the law can never be presumed to intend. It would make it require, what it is not only impossible, in a great variety of cases, to do, but what, if done, would, in every case, be wholly useless and vain. This it cannot be so construed as to require: for *neminem ad vana aut ad impossibilia lex cogit.*

The counsel then adverted to the 2d section, where it was supposed, he said, that something might be found to support this doctrine of discrimination. That section spoke particularly of improvements, as to which the third was wholly silent. It said nothing whatever of the specification, its objects or motive. It made two provisions, both useful as declarations of the law, to put persons on their guard and prevent mistakes, but both undoubtedly law, without any such declarations. The first was

that the discoverer and patentee of an improvement in anything before patented, should not be entitled to make, use or vend the original; nor the inventor and patentee of the original to make, use or vend the improvement. Here again, they were both considered as inventors, and both put on the same footing. It was declared, for general information, and to prevent *doubts and mistakes, that one should not be entitled to the invention of the other: but nothing was said about [*422 the manner of distinguishing these inventions one from the other. That was left to the third section; where it was done, without the least mention or hint of the formal discrimination, in terms, contended for in the judgment below. It was manifest, that this discrimination could derive no countenance from this branch of the second section. It obviously could derive none from the other branch, which merely, for giving information to the public, and preventing mistakes, declared, "that simply changing the form or proportions of any machine or composition of matter, in any degree, shall not be deemed a discovery." This merely amounts to saying, what would clearly have been the construction of law, without any such declaration, that to constitute a patentable discovery, either original or by improvement, there must be a new principle or *modus operandi*, and not merely a change of form or proportion. If the change of form or proportion should be such as to produce a new principle or *modus operandi*, then it would be a discovery or invention, whether it amounts to an original or an improvement only: and here again, improvements were treated as inventions, equally with original discoveries; the distinction between them being not in nature, but merely in degree.

But the point under consideration has been expressly settled, by the former decision in this case: the same objection, for want of this discrimination, was made in the court below, on the first trial; and the same doctrine on the subject expressly laid down *by the circuit court: this doctrine formed one of the grounds of objection, distinctly stated in [*423 the argument of the former case in this court, and was distinctly noticed by the court: and with this part of the opinion below, and the objection to it, distinctly in view, this court decided this patent, on this same specification, to be valid, notwithstanding its want of a discrimination in terms, between the improvement and the original invention; which was an express decision on this point, in favor of the plaintiff in error. He referred to various parts of the report of the former case of *Evans* v. *Eaton*, 3 Wheat. 454, to support these positions; remarking, that although the court certainly was not bound absolutely by its own decisions, and ought to overrule them, when satisfied of their incorrectness; yet they were the great landmarks of the law, and ought not to be overturned or shaken, without the strongest and clearest reasons.

The learned counsel also cited the authorities cited in the margin, as to the objection to the charge of the court below, upon the ground, that it had invaded the proper province of the jury, in respect to the sufficiency of the specification, and to the nature of the patentee's invention, as an improvement or an original discovery.(*a*)

(*a*) 2 H. Bl. 478, 484, 497; 8 T. R. 99, 101, 103; 1 Gallis. 481; 1 Mason 189, 191.

March 20th, 1822. STORY, Justice, delivered the opinion of the court.—
*424] This is the same case which was formerly before *this court, and is reported in 3 Wheat. 454, and by a reference to that report, the form of the patent, the nature of the action, and the subsequent proceedings, will fully appear. The cause now comes before us upon a writ of error to the judgment of the circuit court, rendered upon the new trial, had in pursuance of the mandate of this court.

Upon the new trial, several exceptions were taken by the counsel for the plaintiff. The first was to the admission of a Mr. Frederick, as a witness for the defendant. It is to be observed, that the sole controversy between the parties at the new trial was, whether the plaintiff was entitled to recover for an alleged breach of his patent by the defendant, in using the improved hopperboy. Frederick, in his examination on the *voir dire*, denied that he had any interest in the cause, or that he was bound to contribute to the expenses of it. He said, he had not a hopperboy in his mill at present, it being then in court; that it was in his mill, about three weeks ago, when he gave it to a person to bring down to Philadelphia; and that his hopperboy spreads and turns the meal, cools it some, dries it and gathers it to the bolting-chest. Upon this evidence, the plaintiff's counsel contended, that Frederick was not a competent witness, but the objection was overruled by the court. It does not appear from this examination, whether the hopperboy used by Frederick was that improved by the plaintiff, or not; but assuming
*425] it was, we are of opinion, that the witness was *rightly admitted. It is perfectly clear, that a person having an interest only in the question, and not in the event of the suit, is a competent witness; and in general, the liability of a witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question, and does not exclude him. If nothing had been in controversy in this case, as to the validity of the patent itself, and the general issue only had been pleaded, the present objection would have fallen within the general rule. But the special notice in this case asserts matter, which if true, and found specially by the jury, might authorize the court to adjudge the patent void, and it is supposed, that this constitutes such an interest in Frederick, in the event of the cause, that he is thereby rendered incompetent. But in this respect, Frederick stands in the same situation as every other person in the community. If the patent is declared void, the invention may be used by the whole community, and all persons may be said to have an interest in making it public property. But this results from a general principle of law, that a party can take nothing by a void patent; and so far as such an interest goes, we think, it is to the credit and not to the competency of the witness. It is clear, that the verdict in this case, if given for Evans, would not be evidence in a suit against Frederick, but Frederick would be entitled to contest every step in the cause, in the same manner as if no such suit had existed. *Non constat*, that
*426] Frederick himself will ever be sued by the plaintiff, or that if *sued, any recovery can be had against him, even if the plaintiff's patent should not be avoided in this suit. It, therefore, rests in remote contingencies, whether Frederick will, under any circumstances, have an interest in the event of this suit, and the law adjudges the party incompetent, only when he has a certain, and not a contingent interest. It has been the inclination

of courts of law, in modern times, generally, to lean against exceptions to testimony. This is a case which may be considered somewhat anomalous; and we think it safest to admit the testimony, leaving its credibility to the jury.

Another exception was, to the refusal of the court to allow a deposition to be read by the plaintiff, which had been taken according to a prevalent practice of the state courts. It is not pretended, that the deposition was admissible, according to the positive rules of law, or the rules of the circuit court; and it is not now produced, so that we can see what were the circumstances under which it was taken. No practice, however convenient, can give validity to depositions which are not taken according to law, or the rules of the circuit court, unless the parties expressly waive the objection, or, by previous consent, agree to have them taken and made evidence. This objection, therefore, may at once be dismissed.

The principal arguments, however, at the bar have been urged against the charge given by the circuit court, in summing up the cause to the jury. The charge is spread *in extenso* upon the record, a practice which is unnecessary and inconvenient, and may give rise to minute criticisms and observations *upon points incidentally introduced, for purposes of argument or illustration, and by no means essential to the merits of the cause. [*427 In causes of this nature, we think, the substance only of the charge is to be examined; and if it appears, upon the whole, that the law was justly expounded to the jury, general expressions, which may need and would receive qualification, if they were the direct point in judgment, are to be understood in such restricted sense.

It has been already stated, that the whole controversy at the trial, turned upon the use of the plaintiff's hopperboy; and no other of the inventions, included in his patent, was asserted or supposed to be pirated by the defendant. The plaintiff, with a view to the maintenance of his suit, contended, that his patent, so far as respected the hopperboy, had a double aspect. 1. That it was to be as a patent for the whole of the improved hopperboy, that is, of the whole machine as his own invention. 2. That if not susceptible of this construction, it was for an improvement upon the hopperboy, and he was entitled to recover against the defendant for using his improvement. The defendant admitted that he used the improved hopperboy, and put his defence upon two grounds: 1. That if the patent was for the whole machine, *i. e.*, the improved hopperboy, the plaintiff was not the inventor of the improved hopperboy so patented. 2. That if the patent was for an improvement only upon the hopperboy, the specification did not describe the nature and extent of the improvement; *and if it did, still the patent comprehended the whole machine, and was broader than the invention. To the examination of these points, [*428 and summing up the evidence, the attention of the circuit court was exclusively directed; and the question is, whether the charge, in respect to the matters of law involved in these points, was erroneous, to the injury of the plaintiff.

We will consider the points in the same order in which they were reviewed by the circuit court. Was the patent of the plaintiff, so far as respects his improved hopperboy, a patent for the whole machine, as his own invention? It is not disputed, that the specification does contain a good

and sufficient description of the improved hopperboy, and of the manner of constructing it ; and if there had been any dispute on this subject, it would have been matter of fact for the jury, and not of law for the decision of the court. The plaintiff, in his specification, after describing his hopperboy, its structure and use, sums up his invention as follows: "I claim as my invention, the peculiar properties or principles which this machine possesses, in the spreading, turning and gathering the meal, at one operation, and the rising and lowering of its arms, by its motion, to accommodate itself to any quantity of meal it has to operate upon." From this manner of stating his invention, without any other qualification, it is apparent, that it is just such a claim as would be made use of by the plaintiff, if the whole machine was, substantially, in its structure and combinations, new. The plaintiff does not *429] state *it to be a specific improvement upon an existing machine, confining his claim to that improvement, but as an invention substantially original. In short, he claims the machine as substantially new in its properties and principles, that is to say, in the *modus operandi.*

If this be true, and this has been the construction strongly and earnestly pressed upon this court by the plaintiff's counsel, in the argument at the present term, what are the legal principles that flow from this doctrine? The patent act of the 21st of February 1793, ch. 11, upon which the validity of our patents generally depends, authorizes a patent to the inventor, for his invention or improvement in any new and useful art, machine, manufacture or composition of matter, not known or used before the application. It also gives to any inventor of an improvement in the principle of any machine, or in the process of any composition of matter which has been patented, an exclusive right to a patent for his improvement ; but he is not to be at liberty to use the original discovery, nor is the first inventor at liberty to use the improvement. It also declares, that simply changing the form or the proportion of any machine or composition of matter, in any degree, shall not be deemed a discovery. It further provides, that on any trial for a violation of the patent, the party may give in evidence, having given due notice thereof, any special matter tending to prove that the plaintiff's specification does not contain the whole truth relative to his discovery, or contains more than is necessary to produce the effect (where the addition *430] or concealment shall appear to have been to *deceive the public), or that the thing secured by the patent was not originally discovered by the patentee, but had been in use, or had been described in some public work, anterior to the supposed discovery of the patentee, or that he had surreptitiously obtained a person's invention ; and provides that in either of these cases, judgment shall be rendered for the plaintiff, with costs, and the patent shall be declared void. It further requires, that every inventor, before he can receive a patent, shall swear or affirm to the truth of his invention " and shall deliver a written description of his invention, and of the manner of using, or process of compounding, the same, in such full, clear and exact terms, as to distinguish the same from all things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound and use the same ; and in the case of any machine, he shall fully explain the several modes in which he has contemplated the application of the principle, or character by which it may be distinguished from other inventions."

From this enumeration of the provisions of the act, it is clear, that the party cannot entitle himself to a patent for more than his own invention; and if his patent includes things before known, or before in use, as his invention, he is not entitled to recover, for his patent is broader than his invention. If, therefore, the patent be for the whole of a machine, the party can maintain a title to it, only by establishing that it is substantially new in its structure and mode of operation. If the same combinations existed before, *in machines of the same nature, up to a certain point, and the party's invention consists in adding some new machinery, or some [*431 improved mode of operation, to the old, the patent should be limited to such improvement, for, if it includes the whole machinery, it includes more than his invention, and therefore, cannot be supported. This is the view of the law on this point, which was taken by the circuit court. That court went into a full examination of the testimony, and also of the structure of Evans's hopperboy, and Stouffer's hobberboy, and left it to the jury to decide, whether, up to a certain point, the two machines were or were not the same in principle. If they were the same in principle, and merely differed in form and proportion, then it was declared, that the plaintiff was not entitled to recover; or, to use the language of the court, if the jury were of opinion, that the plaintiff was not the inventor of the hopperboy, he was not entitled to recover, unless his was a case excepted from the general operation of the act. We perceive no reason to be dissatisfied with this part of the charge; it left the fact open for the jury, and instructed them correctly as to the law. And the verdict of the jury negatived the right of the plaintiff, as the inventor of the whole machine. The next inquiry before the circuit court was, whether the plaintiff's case was excepted from the general operation of the act. Upon that, it is unnecessary to say more, than that the point was expressly decided by this court in the negative, upon the former writ of error. And we think the opinion of this court, delivered on that occasion, is correctly understood *and expounded by [*432 the circuit court. It could never have been intended by this court, to declare, in direct opposition to the very terms of the patent act, that a party was entitled to recover, although he should be proved not to have been the inventor of the machine patented; or that he should be entitled to recover, notwithstanding the machine patented was in use prior to his alleged discovery. There is undoubtedly a slight error in drawing up the judgment of the court upon the former writ of error; but it is immediately corrected, by an attentive perusal of the opinion itself. And we do not think that it can be better stated or explained, than in the manner in which the circuit court has expounded it.

We are then led to the examination of the other point of view in which the plaintiff's counsel have attempted to maintain this patent. That is, by considering it, not as a patent for the whole of the machine or improved hopperboy, but as an improvement of the hopperboy. Considered under this aspect, the point presents itself, which was urged by the defendant's counsel, viz., that if it be a patent for an improvement, it is void, became the nature and extent of the improvement is not stated in the specification. The circuit court went into an elaborate examination of the law applicable to this point, and into a construction of the terms of the patent itself, and came to the conclusion, that no distinct improvement was specified in the

patent ; that such specification was necessary, in a patent for an improvement, and that for this defect, the plaintiff was not entitled to recover, sup-
*433] posing his patent to be for an improvement *only of an existing machine. It may be justly doubted, whether this point at all arises in the cause ; for the very terms of the patent, as they have been already considered, and as they have been construed at the bar by the plaintiff's counsel, at the present argument, seem almost conclusively to establish, that the patent is for the whole machine, that is, for the whole of the improved hopperboy, and not for a mere improvement upon the old hopperboy. But, waiving this point, can the doctrine asserted at the bar be maintained, that no specification of an improvement is necessary in the patent ; and that it is sufficient, if it be made out and shown at the trial, or may be established by comparing the machine specified in the patent with former machines in use ? That there is no specification of any distinct improvement in the present patent, is not denied ; that the patent is good without it, is the subject of inquiry. Let this be decided by reference to the patent act.

The third section of the patent act requires, as has been already stated, that the party " shall deliver a written description of his invention, in such full, clear and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art or science, &c., to make, compound and use the same." The specification, then, has two objects : one is to make known the manner of constructing the machine (if the invention is of a machine), so as to enable artizans to make and use it, and thus to give the public the full benefit of the discovery, after the ex-
*434] piration *of the patent. It is not pretended, that the plainiff's patent is not, in this respect, sufficiently exact and minute in the description. But whether it be so or not, is not material to the present inquiry. The other object of the specification is, to put the public in possession of what the party claims as his own invention, so as to ascertain if he claims anything that is in common use, or is already known, and to guard against prejudice or injury from the use of an invention which the party may otherwise innocently suppose not to be patented. It is, therefore, for the purpose of warning an innocent purchaser, or other person using a machine, of his infringement of the patent ; and at the same time, of taking from the inventor the means of practising upon the credulity or the fears of other persons, by pretending that his invention is more than what it really is, or different from its ostensible objects, that the patentee is required to distinguish his invention in his specification. Nothing can be more direct than the very words of the act. The specification must describe the invention, " in such full, clear and distinct terms, as to distinguish the same from all other things before known." How can that be a sufficient specification of an improvement in a machine, which does not distinguish what the improvement is, nor state in what it consists, nor how far the invention extends ? Which describes the machine fully and accurately, as a whole, mixing up the new and old, but does not, in the slightest degree, explain, what is the nature or limit of the improvement which the party
*435] claims as his own? It seems to us perfectly clear, that such a specification *is indispensable. We do not say, that the party is bound to

describe the old machine ; but we are of opinion, that he ought to describe what his own improvement is, and to limit his patent to such improvement. For another purpose, indeed, with the view of enabling artizans to contruct the machine, it may become necessary for him to state so much of the old machine as will make his specification of the structure intelligible. But the law is sufficiently complied with, in relation to the other point, by distinguishing, in full, clear and exact terms, the nature and extent of his improvement only.

We do not consider that the opinion of the circuit court differs, in any material respect, from this exposition of the patent act on this point ; and if the plaintiff's patent is to be considered as a patent for an improvement, upon an existing hopperboy, it is defective, in not specifying that improvement, and therefore, the plaintiff ought not to recover.

Upon the whole, it is the opinion of the majority of the court, that the judgment of the circuit court ought to be affirmed, with costs.

LIVINGSTON, Justice. (*Dissenting.*)—At this late period, when the patentee is in his grave, and his patent has expired a natural death, we are called on to say, whether his patent ever had a legal existence, and it may seem not very important to the representatives of the patentee, what may be the decision of this court. But understanding that many other actions are pending for a violation of this part of the patent-right, and that infractions have taken place for which actions may yet be commenced, and believing *that the decision we are about to make will have a very extensive, if not a disastrous bearing on many other patents for improvements, [*436 and will, in fact, amount to a repeal of many of them, I have thought proper to assign my reasons from dissenting from the opinion just delivered. In doing this, my remarks will be confined principally to the charge of the court, so far as it applies to the claim of Evans for an improvement on a hopperboy.

I was much struck with the argument of the plaintiff's counsel, in favor of the patent being for an original invention, and not for an improvement ; nor would it, in my opinion, be a forced construction, to regard it as a patent for a combination of machines, to produce certain results, and not for any of the machines, nor the different parts of which the whole is composed. But considering it as a patent for an improvement on a hopperboy, in which light it had been regarded, as well by the circuit as by this court, when this cause was here before, I proceed to examine the charge, so far as it relates to this part of the subject.

The court, after stating in what particulars the plaintiff's counsel contended that his improvement consists, which is unnecessary to repeat here, proceeds—"The plaintiff has laid before you strong evidence to prove that his hopperboy is a more useful machine than the one which is alleged to have been previously discovered and in use. If, then, you are satisfied of this fact, the point of law which has been *raised by the defendant's [*437 counsel remains to be considered, which is, that the plaintiff's patent for an improvement is void, because the nature and extent of his improvement is not stated in the specification. The patent is for an improved hopperboy, as described in the specification, which is referred to and made part of the patent. How does the specification express in what his improvement

consists? It states all and each of the parts of the entire machine, its use and mode of operating; and claims, as his invention, the peculiar properties or principles of the machine, viz., the spreading, turning and gathering the meal, and the raising and lowering of its arms, by its motion, to accommodate itself to the meal under it. But does this description designate the improvement, or in what it consists? Where shall we find the original hopperboy described, either as to its construction, operation or use, or by reference to anything by which a knowledge of it may be obtained? Where are the improvements on such originals stated? The undoubted truth is, that the specification communicates no information whatever upon any of these points." After some further reasoning on the subject, and showing that the plaintiff's case is not excepted from the general rule of law, by the act which was passed for his relief, the court declares, that for this imperfection or omission in the specification, the "plaintiff is not entitled to recover for an alleged infringement of his patent for the improvement on the hopperboy." This was equivalent to saying, that for this defect in the specification, the *438] patent for the improved hopperboy was void, and *of course, that no action at all, whatever might be the state of the evidence, could be maintained for the use of it. It left nothing, as it regarded the improved hopperboy, for the jury to decide. Such is the charge, and it is delivered in terms too plain to be misunderstood.

The objections to it are now to be considered. In doing this, it will be shown, 1st. That the specification is not defective, and that although it does not discriminate in what particulars the machine in question does differ from other hopperboys in use, yet, if from the whole of the description, taken together, the machine is specified so minutely, and so accurately, as to be directly and easily distinguished from all other hopperboys antecedently known, everything has been done which the law requires, and the patent is good. 2d. That if the specification be vicious in the points mentioned, the patent ought not to be considered as absolutely void; but it is enough, and the public interest is sufficiently guarded, if care be taken that it shall not be extended to create a monopoly in any other machine, which may or may not be mentioned in the patent, which was previously known or in use. And 3d. That if a patent must be set aside for such defect in the specification, it should be left to the jury, on the evidence before them, to decide whether the improvement patented be not set forth with all necessary precision.

1. I have said, the specifiation is not defective. In determining this *439] question, it would seem but *natural and just, that the validity of a patent, granted under a particular act of congress, should be tested by the terms there used, and by the decisions of our own courts, so far as they are of authority, and that we should be extremely cautious in adopting the rules which have been introduced into other countries, and under laws not in every respect like our own, however respectable the tribunals may be which may have prescribed those rules; and this, the more especially, as most of the decisions in England, which are generally cited, and seem to have been implicitly followed in this country, are of a date long subsequent to the revolution, and many of them posterior to the passage of the patent laws in this country, and which could not, therefore, have been in the contemplation of congress at the time. Besides, there is somewhat of

hardship in constantly applying to a patentee in this country, adjudications made on a British act of parliament very unlike our own, and with which decisions he has no means of becoming acquainted, until long after a knowledge of them can be of any service. Already have we extended to patents for improvements on old machines, several recent decisions in England, although it was long doubted in that country, and as late as the year 1776, whether by the act of the 21 James I., c. 3, there could be a patent for an addition only. When the English courts decided in favor of such patents, they also made rules for their construction, as cases arose; there being no direct provisions in the statute on the subject. As we have provided by law, not only for the security of inventions entirely new, but also for the *protection of those who may discover any new and useful improvement on any art, machine, &c., not known or used before, and have [*440 prescribed the terms on which patents under it may be obtained, it would seem, if all those terms are complied with, and the invention be really new and useful, that no court can have a right to add any other terms, or to require of a patentee anything more than what the law has enjoined on him.

Let us now try the patent before us by this rule: The act of the 21st February 1793, c. 11, after stating in what cases letters-patent for inventions may issue, and how they are to be obtained, requires, *inter alia*, that the inventor, before he receives his patent, shall take a certain oath, and shall deliver a written description of his invention, and of the manner of using the same, in such full, clear and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make and use the same. And in the case of a machine, he shall fully explain the principle, and the several modes in which he has contemplated the application of that principle, or character by which it may be distinguished from other inventions; and he is to accompany the whole with drawings and written references, where the nature of the case admits it; and a model of his machine, if required by the secretary of state, is also to be delivered.

In the present case, the patent is for an improved hopperboy; a particular description of which, and its uses, will be found in 3 Wheat. 466. It is *not pretended, that this machine, if made in conformity with the description given by Mr. Evans, could not, in fact, be distin- [*441 guished from everything else before known, when brought into comparison with it, nor that a skillful person, from its description, would not be able to make one like it; which would seem to satisfy every requisition of the law. But the defendant's counsel say, this is not enough. It should not only, in its organization and aggregate, be different from everything else, but every respect in which it differs in its construction or operation from other machines, should be minutely stated in the specification; or, in other words, that other machines heretofore used for similar purposes, should be either described or referred to therein, and the differences between the patented machines and those in former use, be carefully designated. The answer to this is, that the law does not require it—that it is impracticable, and would be of no use.

We have seen already, that the law prescribes no precise form of specification, which would have been impracticable, and imposes no obligation to

describe, in any particular mode, the machine in question. Not a word is said as to showing in what particulars the improvement patented differs from all other machines for the same purpose then in use. If, on the whole description, taken together, the machine of the plaintiff can be distinguished from other machines, when compared with his, the words and the objects of the law are satisfied. The law appears to have nothing else in view, in
*442] requiring a specification, than the instruction *of the public; that is, to guard them against a violation of the patented improvement, and to enable them, when the letters-patent expire, from the specification filed, to make a machine similar to the one which had been patented. The only inquiry, therefore, ought to be, whether this obvious intention of the legislature has been answered, by the particular specification which may be the subject of litigation; and if enough appears, either to prevent a person from encroaching on the right of the patentee, or to enable a skilful person to make a machine which shall not only resemble the one patented, but produce the like effect, more ought not to be required. Whether these ends be attained by a particular description of every part of the improved machine, or by describing in what respect it differs from other machines, can make no difference. The information to the public is as valuable and intelligible, if not more so, in the former case, than in the latter. If it be, taken altogether, an improved machine, for the purpose of producing certain results, and so described, that it may be distinguished from other machines, and that others may be made on the same model, it is a literal compliance with all that the law requires. If the different parts of the machine, and their combination or connection, be accurately described or intelligibly set forth, why should it not be supported, although no reference be made to other machines, dissimilar in construction, and which, although applied for the same purpose, are inferior in the beneficial results produced by them.

*443] To the objection, that it does not precisely appear in *what the patent hopperboy differs from those antecedently in use, the answer is, and it ought to be conclusive, that the patentee does not mean to abridge or restrain the public from using those or any other machines, so that they differ from the one described by him; and that any mechanic, on having his specification before him, can avoid an interference with his invention. To confine our examination to the only hopperboy which was produced on this trial, and which was called Stouffer's hopperboy, and of which a model has been exhibited to the court, together with a model of Evans's improved hopperboy, can a doubt be entertained, for an instant, that they are very dissimilar, and that any mechanic would not, in a moment, point out the distinctions between them, either from the specification or the model—or that he would not be able to make a Stouffer hopperboy, or the improved hopperboy of Evans, as he might be directed; and in like manner, he would be able, when brought together, to discriminate between any other hopperboy and that of Evans, provided they were different, so that those who were desirous of having a hopperboy, on an old construction, and of not interfering with the rights of Mr. Evans, would labor under no difficulty whatever.

But inasmuch as Evans himself has not discriminated, or exhibited in his specification, all the points of difference between his and other hopperboys,

it is supposed, that his patent is for some hopperboy already in use, as well as for his improvement thereon. The very terms of his specification precluded every supposition of that kind. If there *were a thousand of [*444
those machines, on different constructions, in use before the date of his patent, he leaves to the public the undisturbed enjoyment of them. He meddles not, nor does he pretend to interfere, with any of them, until they make or use one constructed, in all its parts, upon his model. That form, and that form alone, he claims as his invention or improvement. It would not have been difficult, even from British authorities, to show that this specification was sufficient; but I prefer recurring to our own law, as the only proper criterion of the validity or invalidity of the specification in question. My opinion is, that it has all the certainty which is required by law.

Such a specification as is required by the circuit court, is not only not prescribed by law, but, to me, it appears to be one extremely difficult, if not impracticable. If the inventor of an improved hopperboy is to discriminate in his specification between his improvements and any particular hopperboy, which may be produced on the trial, and is to be nonsuited for not having done so, however correct and distinguishing it may be, in every other respect, he must do the like as to all other hopperboys; and if he must describe any, he must describe all others with which he may be acquainted; and after all, some one may be introduced at the trial, of which he had never heard, or which he had never seen; and inasmuch as he had not stated in what respects it was improved by his machine, although this would immediately be seen on inspection, he must not *only fail of recovering damages for a mani- [*445
fest violation of his right, but must have his patent declared void by the court, without a trial by jury, and be deprived of the fruits of a most valuable improvement, not because he was not the *bonâ fide* inventor—not because he had not described his improvement with sufficient certainty according to the act of congress—but because something more was required of him, of which he had no means of information. The only hopperboy which made its appearance on this trial, except the plaintiff's, was that known by the name of the Stouffer hopperboy; but *non constat*, that there may not have been a hundred different kinds in use, and some entirely unknown to the plaintiff. If he could have described them all, which would not have been an easy task, and stated in what particulars his hopperboy differed from them all, his specification would have extended to an immoderate length, and after all, have been less intelligiable and satisfactory, than a full description, such as is given here, of all the parts of which his consisted, and of the manner in which they were put together. There may be cases in which an improvement may be so simple as to describe it at once, by reference to the thing or machine improved, as in the case of an improvement of this kind on a common watch. But even in the case of a watch, if the improvement pervades the whole machine, it would be a compliance with the terms of the law, if the patentee described every part of his improved watch, with its principle, without discriminating particularly in what respect his different wheels, &c., varied from all other watches *then in use. Many pat- [*446
ents have been obtained for improvements on stoves, locks, &c.; but has it ever been required of the patentee, in such cases, not only to describe in what manner his stove or lock is constructed, and the benefits resulting

from such construction, but to point out every particular in which they differ from those already in use? This, to say the least, would be a work of great labor, and of little or no use to the public, who would be at liberty to use a stove or lock of any construction, not interfering with the one described in the specification of the patentee.

A few observations will show that such a description as the defendant's counsel contend for, would be of no greater use than the one which Mr. Evans has adopted. After all the pains to discriminate had been taken, the question would still recur, how is the improved hopperboy to be constructed? and if, from the specification, that could not be ascertained, then, and then only, ought it to be pronounced defective. But if, from the description, the improved hopperboy could be made by a skilful mechanic, then, the public is informed, not only of what has been patented, but of what still remains common as before, and if an action be brought for a violation of the patented right, and it should appear, that the hopperboy used is not of such construction, the plaintiff must fail in his suit. It cannot be said, with any justice, that if the discrimination be not made, the patent includes not only the improvement, but the old machine on which the improvement is engrafted. *The old machine still remains public property; may be used by every one; nor can any person be considered as infringing on the patent-right, until he adds to the machine already in use, the improvements of the patentee, or in other words, until he makes a machine resembling, in all its parts, the one which is described in the specification.

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2. But if the specification be defective in the points which have been mentioned. is the patent, therefore, necessarily void? This is a question of vital importance to every patentee. I am aware, that it has been said, in England, that the patent must not be more extensive than the invention; therefore, if the invention consists in an improvement only, and the patent is for the whole machine, it is void. But I am not aware, that it has ever been decided there, that when a patent is for an "improved machine," and is taken out only for the machine thus improved, and not for the machine as before used, that such patent is void. But whatever may have been some of the late decisions in that country, I prefer, and think it the better course, to consider this question also under our own act, which, in this respect, is different from the English statute, and will, therefore, afford us more light, and be a safer guide than either that statute or the judgment on it. In what part, then, of our act, may it be asked, is an authority given to the federal courts to declare a patent void, for a defective specification, however innocently made, and which, in its consequences, can injure no one? I state the question in this way, not because I think it necessary to show, that if injurious consequences *might flow from an imperfect specification, a patent must necessarily be declared void, but because I think it must be admitted, that there is no evidence whatever in this cause, to induce any one to believe, that Mr. Evans either intended to take, or that he did receive a patent for anything beyond his invention, which was the hopperboy in the improved condition in which he describes it. To declare a patent for a highly useful improvement absolutely void, merely for a defective specification, if this be one, is a very high penalty, and should not be lightly inflicted, unless rendered absolutely necessary by law; the more especially, as without recurring to so harsh a measure, a court and jury will always be

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able to confine a remedy on the patent, to violations of the improvement actually secured, and if the patentee should be so foolish, or ill-advised, as to attempt to bring within its reach the machine in its unimproved state, or any other machine before common, he would do it, not only with no prospect of success, but with the certainty of a defeat, attended with a very heavy expense. So long, therefore, as he could maintain no action, but for his improvement, it is not perceived, why he should be visited with so heavy a denunciation, as the forfeiture of his improvement, merely because, by some construction of his specification, which might, after all, be a mistaken one, he had included in his invention, something of ever so trifling a nature, which was already known.

But if such be the law, and such the frail tenure on which these rights are held, however hard it may apply in particular cases, it must have its course. But *I cannot think it our duty, or that we have any right [*449
to pronounce a patent void on this account; but that this important office is exclusively confided to a jury. Whether we have this right or not, will now be examined. If such summary authority were intended to have been conferred on the federal courts, the patent law ought to have been, and would have been, explicit. This is so far from being the case, that in the patent law, a provision, but of a different kind, is inserted on this very subject, which is not the case in the statute of James. It was foreseen, that it must sometimes happen, either from the imperfection of language, or the ignorance of a patentee, that defective specifications would be made; it was also foreseen, that an imperfect specification might be made from design, and with a view of deceiving the public. We accordingly find it provided by law, that among other matters which the defendant may rely on, in an action for infringing a patent-right, is, "that the specification filed does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the described effect, which concealment or addition, must fully appear to have been made for the purpose of deceiving the public." If judgment is rendered for the defendant on this ground, the patent is to be declared void. This section applies as well to patents for an improvement on an existing machine, as for an invention entirely new; and was intended to protect the patent, in either case, against an avoidance for an imperfect and innocent specification of the invention patented. If, therefore, the defect which is alleged, *really exists in the specification of [*450
the patented improvement, the court is not authorized, on its mere inspection, to declare it imperfect, and the patent, on that account, void. Both questions are clearly questions of fact, and are so treated by the legislature. The party has a right to insist with the jury, not only that his specification is perfect, but that if it be otherwise, no deception was intended on the public; and on either ground, they may find a verdict in his favor. So, if, on the allegation, that the thing secured by patent was not originally discovered by the patentee, a verdict passes against the plaintiff, he loses his patent. In like manner, in this case, if it had appeared that the "improved hopperboy," which was the thing secured by patent, had not been originally discovered by Mr. Evans, and a verdict had passed against him on that ground, there would have been an end of his patent. From the tenth section also, an argument may be drawn against the right of a court to declare a patent void, on mere inspection, for redundancy or deficiency

in a specification. This section provides a mode of proceeding before the district court, where there may be reason to believe a patent was obtained surreptitiously, or upon false suggestions; and if, on such proceeding, it shall appear, that the patentee was not the true inventor, judgment shall be rendered by such court for a repeal of the patent. This is the only case in which a power is conferred on a court, to vacate a patent, without the intervention of a jury. If a proceeding of this kind had been instituted, before
*451] the proper tribunal, against Mr. Evans, the court would *have examined witnesses, and have formed its opinion on their testimony; and it is not clear, that even in this case, a jury might not have been called in. This section has been taken notice of, to show that it could never have been the intention of the legislature, that a patent should be avoided, on any account whatever, on the opinion of the court alone, without some examination other than that of the specification, whatever might be its excess or poverty of description. If it had been intended to vest so important a power in the court, it would not have been left to mere implication, but would have been conferred in terms admitting of no doubt. My opinion, therefore, on this part of the charge, is, that the court erred, in taking upon itself to pronounce the patent void, even if the specification had been defective or imperfect, in not particularly describing what the improvements of the patentee were; this being a power expressly delegated to a jury, who, under all the circumstances of the case, are to decide both questions of fact; that is, whether the specification be deficient, or superfluous, and the intention with which it was made so. I repeat once more, that whatever may have been the decisions in England, which are not admitted to be contrary to the view which has here been taken of the subject, they are not of authority, and are upon an act so very different in its structure from our own, as to afford little or no useful information on the subject. One great and important difference in the two laws is—that the statute of James I. has not prescribed a mode in which a patent for a
*452] vicious specification is to be set aside. *The patent is granted on condition that a specification be enrolled.

I give no opinion on the questions which arise from the admission of certain witnesses, who were supposed to be disqualified, on the score of being interested; for if the patent for the hopperboy be void, for a defect in its specification, and that question is not to be referred to the jury, and such I understand to be the opinion of four of the judges, it is very unimportant, whether any error was committed in this respect by the court, before which the cause was tried; as a verdict must ever be rendered against the representatives of the patentee, on this ground, whatever may be the state of the evidence.

JOHNSON and DUVALL, Justices, also dissented.

Judgment affirmed, with costs.

*Evans *v.* Hettich.

Witnesses.—Depositions.

It is no objection to the competency of a witness, in a patent cause, that he is sued in another action for an infringement of the same patent.

The 6th section of the patent act of 1793, c. 156, which requires a notice of the special matter to be given in evidence by the defendant, under the general issue, does not include all the matters of defence, which the defendant may be legally entitled to made. And where the witness was asked, whether the machine used by the defendant was like the model exhibited in court of the plaintiff's patented machine, *held*, that no notice was necessary to authorize the inquiry.

Where a deposition has once been read in evidence, without opposition, it cannot be afterwards objected to, as being irregularly taken.

It is no objection to the competency or credibility of a witness, that he is subject to fits of derangement, if he be sane at the time of giving his testimony.

Evans *v.* Hettich, 3 W. C. C. 408, affirmed.

Error to the Circuit Court of Pennsylvania. This was an action for the infringement of the same patent as in the preceding case of *Evans* v. *Eaton*, and was argued by the same counsel. The points involved will be found to be fully discussed in the argument of that case, to which the learned reader is referred. The following is the charge delivered to the jury in the court below, which it is thought necessary here to insert.

After stating the evidence on both sides, Washington, Justice, proceeded as follows:—The facts intended to be proved by the evidence given in this cause, may be arranged under the following heads: *1. Such as respect the value of the plaintiff's hopperboy: 2. The time of its discovery: 3. The kind of machine used by the defendant: 4. The time of its discovery and use. [*454

1. As to the first, the court has no observations to make, except that if you should find a verdict for the plaintiff, you will give the actual damages which the plaintiff has sustained, by reason of the defendant's use of his invention, which the court will treble.

2. The evidence applicable to this head, if believed by the jury, proves, that in 1783, Oliver Evans commenced his investigation of the subject of an improvement in the manufactory of flour; and in the summer of the same year, he declared, that he had accomplished it. In 1784, he made a model of his hopperboy, which had no cords, weight or pulley; and consequently, the lower arm was, for the sake of the experiment, turned by the hand. In 1785, it was in operation in a mill, in as perfect a state as it now is.

3. If the witness who was called to prove the kind of machine used by the defendant, is believed by the jury, it consists of an upright square shaft, with a cog that turns it, and which is moved by the water-power of the mill. This shaft is inserted into a square mortice, in an arm or board somewhat resembling an S, with strips of wood fixed on its under side, and so arranged as to turn the meal below it, cool, dry and conduct it to the bolting-chest. This arm slips, with ease, up and down the shaft, and must be raised by hand, and kept suspended until *the meal is put under it. It has no upper arm, pulley, weight or leading lines; and the strips below [*455 the arm are like the rake, as it is called, in the plaintiff's hopperboy. This machine has acquired the name of the S. or the Stouffer hopperboy.

4. The witnesses examined to prove the originality and use of the defendant's hopperboy, if believed by the jury, date it as early as about the year

1765; and its erection and actual use in mills, in 1775 and 1778; and progressively, to later periods. Objections have been made, on both sides, to the credit of some of the witnesses who have been examined, not on the ground of want of veracity, or of character, but of interest, short of that which can affect their competency. These objections have been pressed so far beyond their just limits, as to require from the court an explanation of their real value. Where the evidence of witnesses, opposed by other witnesses, is relied upon, by either side, to prove a particular fact, the jury must necessarily weigh their credit, in order to satisfy their own minds on which side the truth is most likely to be; and in making this inquiry, every circumstance which can affect the veracity of the witnesses, whether it concern their moral character, or whether it arise from some interest which they may have in the question, or from feelings favorable to one or the other of the parties, should be taken into the calculation. But if the fact in controversy may exist, without a violation of probability, and the proof is by witnesses exclusively on that side, there is nothing to put into the opposite scale, against which to weigh the credit of those witnesses;
*456] *and if the objection to their credit be worth anything, it must be to the full extent of rejecting their testimony altogether, or else it is worth nothing. The jury cannot compromise the matter, or halt between two opinions—they must decide that the fact is so, or is not so; and if the latter be cause of objection to the credit of the witnesses, it would amount to the confounding of the questions of competency and credibility; for the effect would be the same, whether the court refused to permit the witnesses to testify, on the ground of incompetency, or the jury should reject their testimony, when given, on that want of credibility. I have thought it proper to submit these general observations to the consideration of the jury.

We come now to the question of law, which arises out of these facts, which is—what are the things in which the plaintiff alleges, and has proved, he has an exclusive property, which he asserts the defendant has used, and which the defendant denies? The first claim is for an improved hopperboy, which the plaintiff insists is granted by his patent, which has received the sanction of the supreme court; and which the defendant acknowledges. This being, then, conceded ground, the court will proceed to examine it; and the inquiry will be, whether the plaintiff is entitled to a verdict for an infringement of his patent for his improved hopperboy. The objection relied upon by the defendant is, that the plaintiff has not set forth in his
*457] specification what are the improvements of which he claims to be *the inventor, so that a person skilled in the art might comprehend distinctly in what they consist. This objection, in point of fact, is fully supported. Neither the specification, nor any other document connected with the patent, states, or even alludes to, any specific improvement in the hopperboy. Taking this as true, how stands the law? The 3d section of the patent law declares, that "before an inventor can receive a patent, he shall deliver a written description of his invention, in such full, clear and exact terms, as to distinguish the same from all other things before known, and to enable a person skilled in the art, &c., of which it is a branch, &c., to make and use the same."

What, then, is the plaintiff's invention, as asserted by his counsel, con-

ceded by the defendant, and sanctioned by the supreme court in the case of *Evans* v. *Eaton?* The answer is, an improvement of the hopperboy, or an improved hopperboy, which that court has declared to be substantially the same. If this be so, then the above section of the law has declared, that he must specify this improvement in full, clear and exact terms. If he has not done so, he has no valid patent on which he can recover. The English decisions correspond with the injunctions of our law. *Boulton* v. *Bull*, *Boville* v. *Moor*, *McFarlane* v. *Price*, *Harmen* v. *Playne.*(*a*) The American decisions, so far as we have any reports of them, maintain the same doctrine. Mr. Justice STORY, in the case of *Lovel* v. *Lewis*, lays it down, *"that if the patent be for an improvement in an existing machine, the patentee must, in his specification, distinguish the new [*458 from the old, and confine his patent to such parts only as are new, for if both are mixed together, and a patent taken for the whole, it is void." What is the reason for all this?

In the first place, it is to enable the public to enjoy the full benefit of the discovery, when the patentee's monopoly is expired; by having it so described on record, that any person skilled in the art, of which the invention is a branch, may be able to construct it. The next reason is, to put every citizen upon his guard, that he may not, through ignorance, violate the law, by infringing the rights of the patentee, and subjecting himself to the consequences of litigation. The inventor of the original machine, if he has obtained a patent for it, and all persons claiming under him, may lawfully enjoy all the benefits of that discovery, notwithstanding the improvement made upon it by a subsequent discoverer. If he has not chosen to ask for a monopoly, but abandoned it to the public, then it becomes public property, and any person has a right to use it. The inventor of an improvement may also obtain a patent for his discovery, which cannot legally be invaded by the inventor of the original machine, or by any other person. These rights of each are secured by law, and there is no incompatibility between them. But if a man, wishing to use the original discovery, and honestly disposed to avoid an infraction of the improver's right, is unable to discover, from any certain and known standard, when the original invention ends, and *the improvement commences, how is it possible for him to exercise his own acknowledged right, freed from the danger of [*459 invading that of another? And to what acts of oppression might not this lead? Might not the patentee of this mysterious improvement obtain from the ignorant, the timid, and even the prudent, members of society, who wish to use only the original discovery, the price he chooses to ask for a license to use his improvement, and in this way compel them to purchase it, rather than incur expenses and inconveniences far greater than the sum demanded? If this may happen, then the improver enjoys, in a degree, the benefit of a discoverer, both of the original machine, and also of the improvement. In short, the patentee of the improvement may, to a certain extent, keep men at arm's length, as to the use of the original invention, or make them pay him for it, in derogation of the rights of the inventor of the original machine.

If the law, as applicable to cases in general, be rightly laid down, the next inquiry is, is the present an excepted case? The plaintiff's counsel

(*a*) See 3 Wheat. app'x, 21.

have not directly asserted it to be so; but they have referred, with some emphasis, to what is said by the supreme court, in the case of *Evans* v. *Eaton*, 3 Wheat. 518. The expressions are, "in all cases where the plaintiff's claim is for an improvement on a machine, it will be incumbent on him to show the extent of his improvement, so that a person understanding the subject, may comprehend distinctly in what it consists." This decision *460] does not state, in what way the extent *of the plaintiff's improvement is to be proved; nor did the case require that the supreme court should be more explicit. The obvious conclusion is, that the court left that matter undecided, and meant that the extent of the plaintiff's improvement should be shown according to rules of law. A contrary construction would be most unfair and unwarranted.

It is impossible to believe, that if the supreme court intended to decide, contrary to the provisions of the 3d section of the patent law, and of the English and American decisions, that this was a case without the influence of that law, and those decisions, that such intention would have been expressed in such general terms? This cannot be admitted: neither can the private act for the relief of Oliver Evans warrant the argument, that this case is freed from the restrictions contained in the 3d section of the patent law; because, except as to the extent of the grant, it refers to, and the supreme court in the before-mentioned case, considers it as within, the provisions of that law. Is it likely that the supreme court could have meant, that the plaintiff might cure the defects of his specification, by proving to the jury, in what his improvement consisted? If so, then, as to the present defendant, such an explanation would be unavailing to save him from the consequences of an error, against which the sagacity of man could not have guarded him. He has sinned already, if he has invaded the plaintiff's right, and it is too late to convince him of his error, if he must be a victim of it, for the want of that light, which is now shed upon the act, long after his *461] supposed transgression. But of *what avail would that explanation be, after the expiration of the plaintiff's monopoly? The parol evidence given in a court of justice, being seldom recollected with accuracy, it affords the most unsafe notice of facts, particularly, when they respect matters of art, that can well be supposed. What man, who wishes not to invade the plaintiff's patent, would venture to erect a hopperboy, merely upon the information which he could gather from this trial? He could obtain none upon which he could safely rely; nor could any artist, after the expiration of the plaintiff's right, be enabled, from such a source, to know how to construct the improved hopperboy. But even if the extent of the improvement could be proved in this way, the plaintiff has not attempted to prove it, and what is more, his counsel, though repeatedly called upon to point it out, have not been able to do it.

Can the jury, without evidence, and without the aid of the plaintiff, or his counsel, say in what those improvements consist? If they had never seen another hopperboy, supposed to be the original, this would be impossible. If, having seen the Stouffer hopperboy, they can do so, by comparing with it the plaintiff's improved hopperboy, then the consequence seems almost to be inevitable, that the Stouffer hopperboy is the original one; the the point which, under the next head, is denied by the plaintiff. But if the specifiation had stated in what the plaintiff's improvement consisted, still he

is not entitled to a verdict for a violation of his patent, unless he has proved, to your satisfaction, that the defendant has infringed it.

*Upon the whole, then, this patent, so far as it is for an improvement, cannot be supported; and as to any claim founded on this right, the plaintiff is not entitled to your verdict. [*462

2. The plaintiff contends, that he is the original inventor, not only of the improved hopperboy, but of the whole machine; that his patent grants him the exclusive right for both; and that this claim has received the sanction of the supreme court. Whether, in point of fact, he is the original inventor of the hopperboy, will be attended to hereafter. Neither shall I stop to inquire, whether the plaintiff's patent grants him the right, because if the supreme court has sanctioned the claim, that is law to this court. The part of the decision of that court, relied upon by the plaintiff's counsel, is found in 3 Wheat. 517, where the chief justice says, "the opinion of the court, then, is, that Oliver Evans may claim under his patent the exclusive use of his inventions and improvements in the art of manufacturing flour and meal, and in the several machines which he has invented, and in his improvements on machines previously discovered." It would seem almost impossible to misunderstand this positive declaration of the court. If appears to be the result of the previous reasoning. It states that the plaintiff may claim: 1. The exclusive use of his improvements and inventions, in the art of manufacturing flour. 2. In the several machines which he has invented. 3. In his improvements on machines previously discovered.

As to the 1st, there is no dispute *in the cause. The 3d has been already disposed of; and the 2d will now be examined. It is contended [*463 by the defendant's counsel, that this is not the correct construction of the above sentence of the court, because it is inconsistent with the pretensions of the plaintiff's counsel, and with the argument of the chief justice, throughout the opinion, which led to the above conclusion. This supposed inconsistency may, in the opinion of this court, be explained by the following observations: The exceptions taken to the charge of this court, in the case of *Evans* v. *Eaton*, were, 1st, that Oliver Evans's patent was only for the combined effect of all the machines mentioned in his patent, and 2d, in directing the jury to find for the defendant, if they should be of opinion, that the hopperboy was in use prior to the improvement alleged to be made by Oliver Evans. These were the only questions presented to the view of the supreme court, upon which it was deemed proper by the court to give an opinion. The reasoning of the chief justice, therefore, is intended to prove, and correct these errors in the charge, by showing that Oliver Evans was entitled, by his patent, and the accompanying documents, not only to the general combination of the different machines, but to an improvement on the hopperboy, one of the machines used in combination. If he had a right to an improvement on the hopperboy, then this court was clearly wrong, in directing the jury to find a verdict for the defendant, if they should be of opinion, that the hopperboy was in use prior to the plaintiff's improvement; because it was unimportant who was *the original discover of the hopperboy, provided the plaintiff had a patent for an [*464 improved hopperboy, and the defendant used that improvement, and the charge precluded that inquiry. But whilst the chief justice aims to prove that Oliver Evans was entitled to this double claim, he does not exclude any

other claim. There is an expression relied upon by the defendant's counsel, as having this appearance ; but it is more likely that the word relied on, is a typographical error, than that the court should both deny and affirm the plaintiff's right, as an original inventor of the hopperboy. When the court came to state, definitively, what were the plaintiff's claims under this patent, the whole are distinctly stated. The act for the relief of Oliver Evans authorizes a grant to him of his improvement in the art of manufacturing flour, and in the several machines which he has invented, and in his improvements, &c. The court says, that "the application is for a patent co-extensive with the act," &c. 3 Wheat. 508.

If, then, in this enumeration of the plaintiff's rights under the patent, those to the machines had been omitted, it might have been supposed that it was not recognised by that court, and it is consequently introduced, in order to prevent a conclusion against its validity, although it had not been brought into view in the previous argument, because a matter not in dispute. This course of reasoning is, we think, strongly fortified, by what the court says, p. 518, "In all cases where his claim is for an improvement," &c.
*465] Now, if his claim was confined to an improvement, *produced by the combined operation of all the machines, and if an improvement in the separate machines, why should the court have stated, hypothetically, that which was to be proved, in case the plaintiff claims for an improvement? The sentence following immediately that which has been relied on by the defendant's counsel, seems to explain it, and to fortify the construction, which we have given to it. Upon the whole, we are of opinion, that the question, who is the original inventor of the hopperboy? is left open by the supreme court, and is now to be decided by the jury. If, then, the jury should be of opinion, upon the evidence, that the hopperboy which the defendant uses, was invented, and was in use, prior to the discovery of Oliver Evans, then your verdict ought to be for the defendant. But to this construction there are objections made, which it is proper to notice.

1. It is contended, that the judgment of the supreme court in *Evans* v. *Eaton*, 3 Wheat. 519, where it is said, that there is error in the proceedings below, in this, that in the charge the opinion is expressed, "that Oliver Evans was not entitled to recover, if the hopperboy in his declaration mentioned had been in use previous to his alleged discovery," entitles the plaintiff to a verdict, although the jury should be of opinion, that he is not the original inventor of the hopperboy. That the court did not mean this, is most obvious, from what is said in page 517, that Oliver Evans may claim the exclusive use in the several machines which he has invented? Could
*466] the supreme court *intend to say, immediately after, that he is entitled to a verdict for a machine which he has not invented? Can it be supposed, that the court meant to ride over the 3d section of the patent law, and set up a different rule, to govern this case, without having stated the reasons for so extraordinary a distinction? This is altogether inadmissible. It is also worthy of remark, that the words "in his declaration mentioned" in the judgment of the supreme court, are not in the charge of the circuit court, as stated by the chief justice ; and it is the insertion of those words in the judgment, which produces all the difficulty. Leave them out, and then the judgment is consistent with the whole reasoning of the chief justice, which condemned the charge of the circuit court, because it pre-

cluded Oliver Evans from obtaining a verdict for his improvement, if he was not the original inventor of the elementary parts of this machine. Retain them, and it follows, that if Oliver Evans was proved not to be the inventor of the hopperboy in his declaration mentioned, still the defendant was not entitled to a verdict. This would be in such direct opposition to the 6th section of the patent law, that we cannot suppose this was the meaning of the supreme court.

2. The next objection to the construction is, that the act of the legislature of Pennsylvania, of 1787, conveyed to Oliver Evans the original hopperboy, and consequently, the existence and use of the Stouffer hopperboy, at a period prior to the plaintiff's discovery, cannot now be urged to invalidate his patent. It is by no means to be admitted, that the act operates to make such a *transfer. But if it did, still, the plaintiff cannot recover, if he appears not to be the first or original discoverer of the hopperboy. His claim is not derivative either from the state or from an individual. His suit is founded on his patent, and unless he was himself the original inventor of the hopperboy, he cannot recover. [*467

3. Another objection stated by the plaintiff's counsel is, that the Stouffer hopperboy, although the jury should believe it was in use in many mills, before the plaintiff's discovery, had fallen into disuse, and therefore, cannot be urged to invalidate the plaintiff's right of recovery. The answer to this is, that whether it fell into disuse or not, if it was used before the plaintiff's discovery, the plaintiff could not obtain a patent for it, so as to exclude the defendant from using it, if he choose to do so.

4. The last objection is, that the use of the Stouffer machine cannot affect the plaintiff's patent, unless it was public. Whether that hopperboy was in public use or not, the jury will judge from the evidence. It was erected and used in four or five mills, if the defendant's witnesses are believed. But this argument has no foundation in the act of congress, which does not speak of public use. It is immaterial, whether the patentee had notice of the prior invention or not. If it was in actual use, in any part of the world, however unlikely or impossible that the fact could come to the knowledge of the patentee, his patent for the same machine cannot be supported. *A verdict was rendered for the defendant, and exceptions being taken to the above charge, the cause was brought by writ of error before this court. [*468

March 20th, 1822. Story, Justice, delivered the opinion of the court.—This case is an action for an infringement of the same patent as in *Evans* v. *Eaton* (*ante*, p. 356), and many of the remarks in that case are applicable to this; and therefore, the opinion now delivered will refer to such points only, as are not completely disposed of by the opinion already delivered. The evidence in this case does not establish, that the defendant used the plaintiff's improved hopperboy; but the hopperboy used by the defendant, is asserted to be Stouffer's hopperboy. At the new trial, a Mr. Aby was offered as a witness by the defendant, to prove the nature and character of the hopperboy used by the defendant; the plaintiff objected to his testimony, as incompetent, because he was sued by the plaintiff for an infringement of his patent-right, under circumstances similar to those alleged in proof against the defendant. The court overruled the objection; and the witness was then sworn on the *voir dire*, as to his interest in the suit; but upon a

full examination, it did not appear that he was really interested; and the court, therefore, permitted him to be sworn in chief. The plaintiff took an exception to this decision of the court. The objection to the competency of
*469] Aby, so far as he has an interest from being sued, cannot *be distinguished, in principle, from that already overruled in the case of *Evans* v. *Eaton*. There is this additional circumstance in this case, that Aby was not called as a general witness, but to establish a single fact, viz., the nature and character of the hopperboy used by the defendant. The other objection, upon his answers on the *voir dire*, is disposed of by the single remark, that he purged himself of any real interest in the event of the suit.

A question was asked of this witness, on his examination in chief, whether the hopperboy in the defendant's mill was like the model exhibited in court of the plaintiff's patented hopperboy; the plaintiff objected to the question, because such testimony could not be given in this case, for want of notice thereof. But the objection was overruled by the court; and, in our judgment, with perfect correctness. No notice was necessary to authorize the inquiry; and if the plaintiff meant to rely on the notice required by the sixth section of the patent act, in certain cases, it is only necessary to say, that this was not within the provision of that class of cases. The question was perfectly proper, under the general issue. Similar objections were taken to other witnesses; but it is unnecessary to remark on them.

An inquiry was proposed by the plaintiff, to one of the witnesses, whether one Peter Stouffer had paid the plaintiff for a license for his mill; but the court refused to allow the question to be asked; and we see no reason why it should have been allowed, for it merely referred to an act among
*470] strangers, which ought not to prejudice the defendant. A *similar question was proposed to be asked of the same witness, whether the executors of Jacob Stouffer had paid the plaintiff for a license for the mill of Jacob; the court overruled the question; and for the same reason, it was rightly overruled.

The deposition of one John Shetter was read in evidence by the defendant, without opposition, and afterwards the plaintiff moved to have the same rejected, because not taken according to the rules of the court; but the court refused to reject it; and, in our judgment, rightly, because it having been once introduced, with the acquiescence and consent of the plaintiff, he could not afterwards avail himself of the objection.

The plaintiff then proposed to ask a question of a witness, whether Daniel Stouffer was subject to fits of derangement, and whether the witness had said so; but the court overruled the question. It does not appear distinctly in the record, that Daniel Stouffer was a witness in the cause; but if he was so, the question was properly overruled, because a person being subject to fits of derangement, is no objection either to his competency or credibility, if he is sane at the time of giving his testimony.

The next objection of the plaintiff's counsel, is to the charge of the court, in summing up the cause to the jury; but the points on which that charge materially depends, have been so fully discussed in the opinion just delivered in *Evans* v. *Eaton*, that it is unnecessary to examine them at large.

Upon the whole, it is the opinion of the majority of the court, that the judgment ought to be affirmed, with costs.

Judgment affirmed.

*The Gran Para : The Consul-General of Portugal, Libellant.

Prize.—Breach of neutrality.

Prizes made by armed vessels which have violated the statutes for preserving the neutrality of th United States, will be restored, if brought into our ports.

This court has never decided, that the offence adheres to the vessel, under whatever change of circumstances that may take place, nor that it cannot be deposited, at the termination of thee cruise, in preparing for which it was committed ; but if this termination be merely colorable, and the vessel was originally equipped with the intention of being employed on the cruise, during which the capture was made, the *delictum* is not purged.

Appeal from the Circuit Court of Maryland. This was a libel filed in the district court of Maryland, by the consul-general of Portugal, alleging that a large sum of money, in silver and gold coins, had been, in the year 1818, taken out of the Portuguese ship Gran Para, then bound on a voyage from Rio Janeiro to Lisbon, by a private armed vessel called the Irresistible, which had been fitted out in the United States, in violation of the neutrality acts ; that the said sum of money had been brought within our territorial jurisdiction, and deposited in the Marine Bank of Baltimore ; and praying that the same might be restored to the original Portuguese owners.

A claim was filed by one Stansbury, as agent for John D. Daniels, master and owner of the Irresistible, stating him to be a citizen of the Oriental Republic, which was at war with Portugal, and that he was cruising under the flag *and commission of that republic, at the time the capture was made, as set forth in the libel, and insisting on his title to the money, as lawful prize of war. [*472

By the proofs taken the cause, it appeared, that the capturing vessel was built in the port of Baltimore, in the year 1817, and was, in all respects constructed for the purposes of war. On the 17th of February 1818, after being launched, she was purchased by the claimant, Daniels, then a citizen of the United States. A crew of about fifty men were enlisted in Baltimore, and she cleared out for Teneriffe, having in her hold 12 eighteen-pound gunnades, with their carriages, and a number of small arms, and a quantity of ammunition, entered outwards as cargo. The vessel proceeded directly for Buenos Ayres, where she remained a few weeks, during which time the crew was discharged. Having obtained a commission from the government at that place to cruise against Spain, a crew was enlisted, consisting chiefly of the same persons who had come in the vessel from Baltimore, and she sailed in June 1818, on a cruise, under the command of the claimant. The next day after she left the port, a commission from General Artigas, as chief of the Oriental Republic, was produced, under which the claimant declared that he intended to cruise, and that granted by the government of Buenos Ayres was sent back to that place. During this cruise, several Portuguese vessels were captured, and the money, the restitution of which was prayed for by the libellant, was taken out of them. In September 1818, the Irresistible returned to Baltimore, *and a large sum of money, captured during the cruise, was deposited in the bank. [*473

Decrees were entered in the district and circuit courts, restoring the property to the original owners, and the cause was brought by appeal to this court.

February 20th. *Winder*, for the appellant and claimant, made the following points :—1. That the manner in which the Irresistible left the United States, on her voyage to Buenos Ayres, was not in violation of the statutes of congress, or the neutral obligations of the United States by the law of nations. 2. It was not contrary to the law of nations, for the Oriental Republic, finding the Irresistible in the river La Plata, under the circumstances in which she was, to take her into their service as a cruiser against their enemies. 3. That the conduct of Daniels, and any others who went out in her, in entering into the service of the Oriental Republic, was not contrary to the law of nations, nor in violation of the duties of neutrality imposed on the United States by the law of nations. 4. But even if the appellant's counsel should be mistaken in this respect, yet there is no evidence in this cause, to show that the money attached was taken from the ship Gran Para, nor that any such ship was captured by the Irresistible.

D. Hoffman, contrà, after commenting on the testimony to establish the American ownership, and the illegal outfit at Baltimore, of the privateer, *474] argued : *1. That the neutrality and laws of this country having been violated by the captors, this court will decree restitution on that ground, though the commissions under which they acted were wholly unimpeachable ; a fact which is not admitted in this case, as the commissions of Artigas stand upon grounds essentially different from those which justify the commissions of Buenos Ayres, the Republic of Colombia, &c. The law on this subject has become too well-settled and familiar, to justify much reference to, or comment on, authorities. It was at one time supposed, that neutral nations were, in all cases, obliged by their amity and neutrality, to rescue the captured and his property from the power of his enemy, who had brought them *infra præsidia* of the neutral country, and to award restitution by a species of *jus postliminii*. This was, certainly, at one time, the doctrine of the English courts and jurists, and obtains in some countries on the continent of Europe. 2 Azuni 222, 223, 250, 261 ; Marten's Priv. 44 ; 1 Molloy 58, 60, 66, 76, 87, 100 ; 6 Vin. Abr. 515, 517, 519, 534 ; 16 Ibid. 347, 350 ; Beawes, Lex. Mer. 241, 243, 244 ; 2 Bro. Civ. & Adm. Law 214, 215. The rule, however, of the courts of this country, has been established to be exactly the reverse. As a general rule, a neutral court has no such power. The inquiry as to the validity and efficiency of a belligerent capture, is referred to the courts of the captors ; and the restoring power, exercised on various occasions by the courts of this country, springs from *475] *certain exceptions, which have been engrafted on the general rule. This court will inquire into every seizure on the high seas, for the purpose of ascertaining whether the taking were lawful or piratical ; for if there be no commission, the seizure is piracy *de facto* and *de jure*, and renders the captors responsible *civiliter et criminaliter*. If there be a commission which, at the time of taking, was amortised, or abused *animo depredandi*, they would be responsible certainly *civiliter*, perhaps *criminaliter*. If the commission were granted by an incompetent power, every presumption would be in their favor, in a criminal proceeding against them ; but they

would be civilly responsible, before any tribunal administering the *jus gentium*. Every such tribunal, therefore, will inquire, first, into the fact of the existence of a commission; secondly, the competency of the power granting it; both of which are essential in order to distinguish capture from piracy, and the commission issued by a state or nation from that which is granted by a few associated persons, or an isolated individual, who have assumed the exercise of sovereign power. *Talbot* v. *Jansen*, 3 Dall. 133; *The Invincible*, 1 Wheat. 258; *Rose* v. *Himely*, 4 Cranch 241. With regard to the exceptions to the general rule which refers the question of prize or no prize to the courts of the captors, and repudiates the right in a neutral to restore the *res capta* to those from whom it has been taken, it is said, that there are now only two: first, where the capture was made within the *neutral territory (Grotius, *de Jure Belli ac Pacis*, lib. 3, c. 4; Bynk. *Q. J. Pub.* lib. 1, c. 8; Vattel, *Droit des Gens*, lib. 3, c. 7, § 132; 5 Rob. 15, 373; Bee 204); and secondly, where the capturing vessel was, in the whole, or in any part, owned or equipped, or her force in any degree augmented, within the dominion of such neutral state, and this by the general principles of international law, independently of all statutory inhibitions of such ownership, equipment, &c. Pres. Messages, vol. 1, pp. 21, 24, 27, 36, 42, 47, 48, 56, 61, 62, 72, 73, 78, 82, 87, 95; 9 Cranch 365; 4 Wheat. 310, 311. The uniform series of decisions of the American courts awards restitution to the original owners, of property thus taken, and the facts of the present case will be found, it is presumed, much stronger than in most others which have occurred. Bee 9, 11, 28, 60, 73, 114, 292, 299; 3 Dall. 285, 307, 319; 2 Pet. Adm. 345; *The Alerta*, 9 Cranch 359; *The Divina Pastora*, 4 Wheat. 53; *The Estrella*, 4 Ibid. 298; *The Nuestra Senora*, Ibid. 695; *The Amistad de Rues*, 5 Ibid. 385; *The Bello Corrunes*, 6 Ibid. 152; *The Nueva Anna*, Ibid. 193; *The Conception*, Ibid. 335. [*476

2. This court is competent to restore property to the respondent, by the general principles or maritime and international law, without any reference to the proof that the neutrality and laws of this country have been violated by the captors, but on the sole ground that the taking was not *jure belli*, but wholly without commission; as Artigas does not represent a state or nation competent to grant a commission to war against Portugal. The principles established by *the cases recently decided by this court, do not impugn the doctrine contended for, as they occurred in the case of commissions granted by such of the South American provinces, as our government, in the opinion of the court, had recognised to be in a civil war with Spain, the mother country, and which commissions only operated against such parent state. Our government and this court having, in no instance whatever, recognised Artigas as engaged in a war, even with Spain, the mother country, and certainly not with Portugal, he is wholly incompetent to issue commissions of prize, as much so as any other individual in the Spanish provinces. This court, therefore, is competent, as an instance court, to decree restitution and damages, as in ordinary cases of maritime tort, and to decide (negatively) that the Banda Oriental is not a state or nation invested with the attributes of sovereignty, the former or ancient state of things being presumed to remain *de facto*, as well as *de jure*. The government of the United States has, in no instance, recognised Artigas as engaged in a civil war with Spain, or in a war of any kind with Portugal. [*477

If we refer to the documents recognising the South American provinces, as engaged in a civil war with Spain, we shall find no mention made of such a war by Artigas, or the Banda Oriental. 9 Niles' Reg. 393, 396; Letter Sec. State, 19th January 1816; Mess. 17th November 1818, 4 Wheat. App'x, 23; Mess. 17th December 1819; Mess. 8th March 1822. The general
*478] expression, "South American provinces," is *qualified by the express mention of Buenos Ayres and Venezuela. But if the Banda Oriental, as modified by Artigas, might be embraced under such a general recognition of the South American provinces being engaged in a civil war with Spain, still it would be incumbent on the claimant, to prove that this country ever was a province of Spain: it may have been a part of a province: we have no historical or geographical account of the country that is by any means satisfactory; and if Artigas, and his wretched and savage followers be recognised as qualified to wage war, then may every township, district, city, village, hamlet or individual, claim the same high prerogative. If Artigas, and a few adherents, can segregate themselves from the common cause, and constitute themselves a state or nation, competent to wage either a civil or public war, may not every individual in the Spanish provinces claim the same right? Where is the boundary, or clear line of demarcation? By what principle, can such a right be regulated, except by requiring that the power claiming the right should be possessed of the elements or constituents of a nation, such as a fixed domain, a national treasury, a national force, a code of laws (Sir L. Jenk. 424, 791; Bynk. Q. J. Pub. lib. 1, c. 17; Grot. lib. 1, c. 3, § 34; lib. 3, c. 3, § 1, 2; Cic. Phill. 4, cap. 4); and perhaps, in order to wage a maritime war, sea-ports? Nor will Grotius, or his enlightened commentator, allow a company or horde of men to be a state or nation, although they may observe some kind of government and equity among
*479] themselves. *All that we know of Artigas and his adherents, proclaims him a mere adventurer, and them a lawless band to whom he is the sole tie of union. Artigas is mentioned by these documents to be engaged in a contest with Buenos Ayres; but it is nowhere stated, that he is the chief magistrate of a province engaged in a civil war with Spain. The only executive notice of the Banda Oriental, is in the president's message of the 17th November 1818. On submitting to congress the documents furnished him by our commissioners, he states, that "it appears from these commnications, that the government of Buenos Ayres declared itself independent, in July, 1816; that the Banda Oriental, Entre Rios and Paraguay, with the city of Santa Fé, all of which are also independent, are," &c. This, surely, is not a recognition of their independence; for the executive, I presume, has no power to make such recognition; nor is it a recognition of the existence of a civil war between the Banda Oriental and Spain. It will also be observed, that in the late message of the president, 8th March 1822, no mention whatever is made of the Banda Oriental.

But if it be admitted, *argumenti gratia*, that the Banda Oriental was a South American province, engaged in a civil war with Spain, the mother country, would such a partial recognition clothe its chieftain with the power of waging war against a nation in no way connected with Spain? The sound doctrine, perhaps, is, that a colony, though competent to disenthral itself
*480] from the despotism of an unnatural *parent, and therefore, to wage a civil war, does not thereby become a nation or state, invested with all

the high privileges of sovereignty. What would be the consequences of a contrary doctrine? Every minute division of an empire might *per saltum* become a nation, claiming and asserting all the prerogatives of free and independent states. These new-fledged, self-constituted, unorganized hordes of people, perhaps, only half civilized, might then well assert their claim to sit in the councils of the great family of nations. They would claim the rights of embassy, of establishing consuls, and of inflicting all the rigors of public wars, as blockades, visitation and search, impressions, seizure and confiscation of contraband. Such an individual as Artigas, whom no one knows, might, under this doctrine, claim to exercise every belligerent right, and, in waging his triple war, might capture, under the right of blockades, the vessels of every nation presuming to enter Buenos Ayres, Maldonado, Lisbon or the mouth of the Tagus, though he possessed not a single seaport, or a single vessel of his own. It is, therefore, presumed, that every colony recognised as engaged in a civil war for the assertion of its independence, must rigidly restrict itself to the contest with the parent country and its allies; and cannot wage a distinct and independent war with other nations. If, therefore, the Banda Oriental be regarded as on the same footing with Buenos Ayres or Venezuela, it cannot war against Portugal: for no alliance is pretended between Spain and Portugal, and if it were *asserted, it must be proved. 1 Ves. 283, 292. The contest between Artigas and [*481 Portugal originated in a special cause, and was prosecuted for a special purpose, viz., the recovery of Monte Video, which had been taken possession of by the Portuguese, because Spanish supremacy having ceased to operate there, the Spaniards had carried on a series of the most vexatious depredations on the adjoining Portuguese provinces, which it became the imperious duty of Portugal to check and terminate. Spain, on the other hand, was engaged in a war with some of its provinces, for general, and very different objects: the conflict, therefore, between Portugal and Artigas, could not, by implication, make the former an ally of Spain. If the government recognition be a limited and partial one (as it certainly is), so should the effects of such recognition be partial. The fact recognised by this government, is, that a civil war rages between Spain and her South American provinces. In regard to Buenos Ayres and Venezuela, this was certainly the fact: but government did not mean, thereby, to acknowledge the independence of these provinces. The effect of this recognition is defined by the court, in *Palmer's case*, and that of *The Divina Pastora*, to be, that the courts of this country will not regard as criminal, those acts of hostility which the province may direct against its the enemy; nor will they undertake to judge of the validity of captures made under their commission, unless the maintenance of our laws and neutality should require it. *The acknowledged [*482 competency, therefore, of these provinces, to wage a civil war, does not clothe them with any powers beyond the sphere of the necessary operation of this right: they have no right to war with other nations, nor to claim the attributes and powers of sovereign state. If this be sound in regard to the known provinces, it must be emphatically so in relation to the Banda Oriental and its chieftain; who claims not only to war with Spain and her provinces, but with Portugal likewise, which is no way connected with either.

Again, there having been no express recognition of the existence of a

civil war between Jose Artigas and Spain; can this court imply such recognition, from any circumstances? It would seem not. The power to regard a people emerging from barbarism to civilization and government; or from a colonial to an independent state, is a prerogative exclusively of the government. 9 Ves. 347; 10 Ibid. 353; *Rose* v. *Himely*, 4 Cranch 272; *Gelston* v. *Hoyt*, 3 Wheat. 289, 295, 324. Courts are bound to regard the ancient state of things as remaining, until there be a recognition by the proper authority, and therefore, though it be competent for courts to declare that a people do not constitute a state, they cannot affirmately declare, that they are a state. Nor is it competent for this court to recognise the existence of a civil war: this also is a government power, and if there be no such express recognition of the fact of a civil war between the Banda Oriental and Spain, this court will not infer it, from the use a general
*483] *expression, such as, "South American provinces." The doctrine laid down by this court in *Palmer's case*, 3 Wheat. 610 (in which a distinction was taken between an unqualified recognition of the independence of a people, and a partial recognition resulting from the admission of the existence of a civil war between a colony and the parent state), is in no degree at variance with the principle established in the previous cases of *Rose* v. *Himely*, and *Gelston* v. *Hoyt*, "that courts do not possess the power of first recognising the national character of a people." Whether the recognition be unqualified or partial, the government must speak distinctly; otherwise, the courts will regard the ancient state of things; and all acts done on the high seas, under the authority of such separated people, will be looked on as wholly unauthorized and null.

3. The claimant, Daniels, is a citizen of the United States, and appears before this court as a claimant for property procured through means forbidden by the laws of the country, and the duties and obligations of a good citizen. He is an unworthy claimant, and as such, will not be permitted to claim the result of his own wrongs and illegal acts. "A claim," says Sir William Scott, "founded on piracy, or any other act, which, in the general estimation of mankind, is held to be illegal or immoral, might, I presume, be rejected in any court, on that ground alone." *The Diana*, 1 Dods. 95, 100.
*484] And Mr. Justice Johnson, in the case of **The Bello Corrunes*, expresses himself emphatically to the same effect. 6 Wheat. 172.

4. With respect to there being no proof as to the seizure of the Gran Para, from which the money libelled is alleged to have been taken, it is presumed, that this is altogether immaterial. The libel states the fact of the seizure of the Gran Para, and other Portuguese vessels; the answer expressly admits the taking of the money in controversy, and other money, from Portuguese vessels, and the inquiry is, whether it be the Portuguese property, and if so, whether it were rightfully taken.

Winder, in reply, insisted, that the court would confine its interference to such cases of illegal capture, as would make the United States responsible to the injured foreign country, by the law of nations, or to such acts as are in violation of our statutes of neutrality; restraining their operation to such provisions as are required and justified by the public law. He compared this case to the analogous one of carrying contraband. The neutral nation was not responsible. The building of ships for sale was a lawful

branch of commerce, and even if they were armed and equipped for war, they could only be considered as contraband; and though they might be subject to the penalty of confiscation, if taken in their transit to a belligerent, yet, if once incorporated into the mass of his military marine, they could be considered by neutrals, in no other light than the rest of his naval force.

But even supposing the original *outfit in the ports of the United States to have been illegal, the vessel was not commissioned as a [*485
privateer, nor did she attempt to act as one, until her arrival in the river La Plata, when a lawful commission was obtained, and the crew re-enlisted. Even if she had made captures on her outward voyage, the *delictum* would be purged by the termination of that voyage, according to the analogies of the maritime law in other cases. This court has never yet determined, that the original offence is indelible, and that it adheres to the vessel, whatever changes may have taken place, and that it cannot be deposited at the termination of the cruise, in preparing for which, the offence was committed; and as the Irresistible made no captures on her passage from Baltimore to the river La Plata, and even if she had, the offence was deposited at the latter port, the court cannot connect her subsequent cruise with the transactions at Baltimore, or those which might have happened on her outward voyage.

The learned counsel also argued, that the Banda Oriental was a sovereign state *de facto*, which had been acknowledged by the executive government of this country, as one of the parties to the war between Spain and her colonies, and which was engaged in an incidental contest with Portugal, which gave it the rights of war in respect to that power. He also insisted on such of the points in his argument, on a former day, in the case of *The Santissima Trinidad*, as were applicable to the present. But as they will be found reported *at large in that case (*ante*, p. 290–96), it is not [*486
deemed necessary to repeat them in this place.

March 13th, 1822. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—The principle is now firmly settled, that prizes made by vessels which have violated the acts of congress, that have been enacted for the preservation of the neutrality of the United States, if brought within their territory, shall be restored. The only question, therefore, is, does this case come within the principle?

That the Irresistible was purchased, and that she sailed out of the port of Baltimore, armed and manned as a vessel of war, for the purpose of being employed as a cruiser against a nation with whom the United States were at peace, is too clear for controversy. That the arms and ammunition were cleared out as cargo, cannot vary the case. Nor is it thought to be material, that the men were enlisted in form as for a common mercantile voyage. There is nothing resembling a commercial adventure in any part of the transaction. The vessel was constructed for war, and not for commerce. There was no cargo on board but what was adapted to the purposes of war. The crew was too numerous for a merchantman, and was sufficient for a privateer. These circumstances demonstrate the intent with which the Irresistible sailed out of the port of Baltimore.

*But she was not commissioned as a privateer, nor did she attempt [*487

to act as one, until she reached the river La Plata, when a commission was obtained, and the crew re-enlisted. This court has never decided, that the offence adheres to the vessel, whatever changes may have taken place, and cannot be deposited at the termination of the cruise in preparing for which it was committed; and as the Irresistible made no prize on her passage from Baltimore to the river La Plata, it is contended, that her offence was deposited there, and that the court cannot connect her subsequent cruise with the transactions at Baltimore. If this were to be admitted, in such a case as this, the laws for the preservation of our neutrality would be completely eluded, so far as this enforcement depends on the restitution of prizes made in violation of them. Vessels completely fitted in our ports for military operations, need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crew, to become perfectly legitimate cruisers, purified from every taint contracted at the place where all their real force and capacity for annoyance was acquired. This would, indeed, be a fraudulent neutrality, disgraceful to our own government, and of which no nation would be the dupe. It is impossible, for a moment, to disguise the facts, that the arms and ammunition taken on board the Irresistible, at Baltimore, were taken for the purpose of being used on a cruise, and that the men there enlisted,
*488] though engaged, in form, as for a *commercial voyage, were not so engaged in fact. There was no commercial voyage, and no individual of the crew could believe that there was one. Although there might be no express stipulation to serve on board the Irresistible, after her reaching the La Plata, and obtaining a commission, it must be completely understood that such was to have been the fact. For what other purpose could they have undertaken this voyage? Everything they saw, everything that was done, spoke a language too plain to be misunderstood.

The act of June 1794, c. 296, declares, that "if any person shall, within the territory or jurisdiction of the United States," "hire or retain another person to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince or state as a soldier, or as a mariner or seaman, on board of any vessel of war, letter of marque or privateer, every person so offending, shall be guilty of a high misdemeanor," &c. Now, if the crew of the Irresistible were not enlisted in the port of Baltimore, to cruise under the commission afterwards obtained, it cannot, we think, be doubted, but that they were "hired or retained to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered" into that service. For what other purpose were they hired in the port of Baltimore, for the voyage to La Plata?

The third section makes it penal for any person, within any of the waters
*489] of the United States, to be *"knowingly concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise," &c. It is too clear for controversy, that the Irresistible comes within this section of the law also.

The act of 1817, c. 58, adapts the previous laws to the actual situation of the world, by adding to the words, "of any foreign prince or state," the words, "or of any colony, district or people," &c. The act of April 1818, c. 83, re-enacts the acts of 1794, 1797 and 1817, with some additional provi-

sions. It is, therefore, very clear, that the Irresistible was armed and manned in Baltimore, in violation of the laws and of the neutral obligations of the United States. We do not think that any circumstances took place in the river La Plata, by force of which this taint was removed.

To the objection, that there is no proof that any part of the money was taken out of a vessel called the "Gran Para," it need only be answered, that the allegation of the libel is, that she was called the "Gran Para, or by some other name."

Decree affirmed, with costs.[1]

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*The Santa Maria: The Spanish Consul, Libellant. [*490

Prize.—Proprietary interest.

A question of fact respecting the proprietary interest in prize goods, captured by an armed vessel fitted out in violation of the statutes of neutrality of the United States. Restitution to the original Spanish owners decreed.

Appeal from the Circuit Court of Maryland. This was a libel filed in the district court of Maryland, by the consul of his Catholic majesty for the port of Baltimore, in behalf of the Spanish owners of certain goods alleged to have been captured on the high seas, and taken out of the Spanish ship Santa Maria, by the privateer Patriota, illegally armed and equipped in the United States.

The evidence in the cause established the fact, that the capturing vessel was owned by citizens of this country, and that she was armed, equipped and fitted out, in violation of the laws and treaties of the United States. But there was some contrariety in the testimony, as to the identity of the property, which the claimant, Burke, insisted upon his title to hold, as a *bonâ fide* purchaser, under a condemnation and sale in some prize tribunal at Galveston. There was also some evidence tending to show that Burke was a part-owner of the capturing vessel. The district court dismissed the libel, and ordered the property to be restored to the claimant, but this decree was reversed by the circuit court, and the cause was brought by appeal to this court.

*February 20th. *Winder*, for the appellant, argued upon the facts, in order to show that there was a defect of evidence of proprietary interest in the Spanish subjects, for whom the claim was given, and that there was no proof that the goods in question were taken out of the Santa Maria, or any other Spanish ship. He, therefore, insisted, that even if there was no proof on the part of the claimant and appellant, of a lawful condemnation of the goods as prize, he had a right to stand upon his title as an innocent purchaser, until some better title was shown in others. [*491

D. Hoffman, for the respondent, argued: 1. That the evidence in the cause sufficiently established that the privateer Patriota, which plundered the Santa Maria, was owned and equipped in Baltimore. All captures made under the taint of an illegal outfit, or American ownership, have invariably been declared by this court to be illegal, and the property taken has been

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[1] For a further decision in this case, see 10 Wheat. 497.

restored to the original owners. *The Alerta*, 9 Cranch 359; *The Divina Pastora*, 4 Wheat. 52; *The Estrella*, Ibid. 298; *The Bello Corrunes*, 6 Ibid. 52; *La Conception*, Ibid. 235.

2. All the cases cited were captures *jure belli*, under the sanction of commissions granted by South American provinces, acknowledged by our government to be engaged in a civil war with Spain. In these cases, the court would have left the captors, and the courts of their country, in full possession of the *res capta*, had there been no American ownership, or equipment of the vessel effecting the seizure. *The Nuestra Senora de la Caridad*, 4 Wheat. 495. But this will not be the case, where there is no commission *to legalize the capture. In the absence of a commission, every court administering the *jus gentium*, will regard the taking as tortious at least, and, according to circumstance, piratical. Every violent dispossession on the high seas is *primâ facie* tortious; and a taking as prize does not necessarily render it a capture *jure belli*. *The Two Friends*, 1 Rob. 283; *Hallett* v. *Novion*, 14 Johns. 273. It lies upon the claimant in this case to show the commission under which the taking is justified: if this be not shown, the court, in the exercise of its general powers, will restore the property, unless the claimant can establish his right on some other ground.

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In this case, no commission is produced; but Burke claims to hold this property rightfully, as a *bonâ fide* purchaser, wholly ignorant of the circumstances stated in the libel. If there were any truth in this defence, in point of fact, it might be well to inquire, how far even a *bonâ fide* purchaser, in this case, could protect himself by such a purchase. It might be urged, that the doctrine of *market overt* is unknown to the *jus gentium;* that it is of peculiar and local origin, known only in England, and never recognised in the courts in this country; that the doctrine *à piratis et latronibus capta dominium non mutant*, is the received opinion of the most enlightened civilians and publicists; that as no right to the spoil vests in them, no right can be derived from them; that even if the doctrine of *market overt* were otherwise applicable, it could not obtain, inasmuch as a condemnation is essential, and this could not be of **bona piratorum* (2 Bro. Civ. & Adm. Law 55, 461–62; 2 Wooddes. 429; 3 Binn. 228; 1 Johns. Cas. 471; 1 Tyler 338); that if the purchase was *bonâ fide*, the claimant only succeeded to the right of the vendors; a sale, *ex vi termini*, importing nothing more than a succession of the vendee, in consideration of money, to the rights of the vendor; and finally, that the title of the claimant cannot be broader or more extensive than that of the pirates themselves, or those to whom they may have sold the property. But all this inquiry is unnecessary, if the proofs in this cause establish that the claimant was the active and principal owner of the Patriota, which seized and plundered the Santa Maria. On this point, the circumstantial evidence comes strongly in support of the positive testimony. But there is, in the answer itself, a singular inconsistency, which throws a dark shade of suspicion over the character of this claim. The claimant first denies all knowledge of the capture of the Santa Maria, and of every fact stated by the libellant in relation to the Patriota, but subsequently relies on a purchase of this property, by his agent, Novion, in regular course of trade, after it had been duly condemned! It was, no doubt, his intention, at the time of filing his claim, to produce an authenticated record of condemnation, which was subsequently abandoned,

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no doubt, from a knowledge that Aury's commission (the only one he could venture to produce) was a nullity, and that the tribunals of prize at Galveston, where wholly incompetent to adjudicate (*The Nueva Anna*, 6 Wheat. 193), even *if a condemnation of a competent court could avail in such case. After this conclusive testimony, establishing the falsity [*494 of the claim and answer filed by Burke, need it be asked, whether he is a worthy claimant? He is a citizen of the United States, calling on this court to confirm to him the possession of goods, taken by a vessel fitted out by him, in contravention of our laws, neutrality and solemn treaties: and this, too, not even under the color of a commission from any power, acknowledged or unacknowledged.

Harper also argued, upon the same side, on the facts respecting the proprietary interest, and upon the question of law arising from the supposed condemnation at Galveston. The substance of his argument upon the latter point will be found in the case of *The Nereyda*, where the same question arose more distinctly, but which was ordered to further proof, and will be reported in the next volume.

March 14th, 1822. LIVINGSTON, Justice, delivered the opinion of the court, and after stating the case, proceeded as follows:—In a case of so palpable a fitting out and arming in an American port, and proceeding thence directly on a cruise (whether with or without a commission, is in this case immaterial), the counsel for the claimant and libellant was right in not attempting to justify the capture. He has, therefore, confined his endeavors to show the insufficiency of the evidence to establish *any [*495 title in the libellant, or in those whom he represents, to the merchandise in question.

The allegation of the libel is, that the property was part of the cargo of the Spanish ship Santa Maria, which was captured by the Patriota, in the year 1817. The appellant says, there is no adequate proof of this fact. Without laying any stress on the register of this ship, which has been sent from the Havana, and to which the appellant has objected, there are four witnesses, and they are the only witnesses in the cause, whose relation is so uniform and particular as to leave no room to entertain doubt on any part of this transaction. Three of them were on board of the Patriota, at the time of her sailing on her illegal cruise. They establish, not only the unlawful armament of this vessel in the port of Baltimore, but the capture of the Santa Maria, and that the sugars libelled are the identical sugars which were taken out of her, and put on board of the schooner Harriet, in which they were brought to Baltimore. The other witness, Causter, although not present at the capture, testifies in the most positive terms, and of his own knowledge, that the sugars libelled were part of the cargo of the Santa Maria. He speaks so much in detail on the subject, and his means of information were so ample, that it is impossible he should be mistaken. Under these circumstances, and when not a single witness has been examined to throw any doubt on the subject, the court preceives no reason for disturbing the sentence of the circuit court, which is affirmed with costs.

Decree affirmed.

*The ARROGANTE BARCELONES: The CONSUL-GENERAL OF SPAIN, Claimant.

Prize.—Restoration of captured property.

This court will restore to the former owners property captured in violation of the neutrality of the United States, where it is claimed by the original wrongdoer, though it may have come back to his possession, after a regular condemnation as prize.

Quære? How far a condemation would protect the title of a third person, being a *bonâ fide* purchaser, without notice, in such a case?

APPEAL from the Circuit Court of Maryland. This was a libel filed by the consul-general of his Catholic majesty, in the district court of Maryland, against the Spanish ship Arrogante Barcelones, and cargo, praying restitution to the original Spanish owners, upon the ground of the same having been captured on the high seas, in violation of the laws, treaties and neutral obligations of the United States, and brought within their territorial jurisdiction. A claim was filed by Joseph Almeida, who insisted upon his title as a *bonâ fide* purchaser, under a capture made by the Buenos Ayres privateer, Louisa, and a regular sentence of condemnation in the prize court at Juan Griego, in the Island of Margaritta, within the territory of a co-belligerent.

It appeared, by the proofs taken in the cause, that the capturing vessel was a prize to the Buenos Ayrean privateer El Congresso, and was purchased by the claimant, Almeida, armed and equipped by him, at Ensenada, *497] and in April 1818, came to Baltimore *to be refitted. She was there refitted, and sailed from that port, in August 1818, under the command of the claimant, ostensibly bound on a sealing voyage to the North-west coast of America, with a crew of ninety-six men, principally citizens of the United States; and armed with ten guns and some small arms. The ship anchored off Patuxent, and there received a considerable addition to the armament. Before the crew left Baltimore, they had signed the usual ship's articles for the voyage; but after they had been at sea some days, the claimant produced privateering articles, which he required them to sign. Some of them refused, and were put in irons, and two were put on board another vessel. The crew finally signed the articles, and proceeded to cruise off Lisbon, where, on the 9th of September 1818, they captured the Spanish ship Arrogante Barcelones and cargo, and proceeded with them to the port of Juan Griego, in the Island of Margaritta, where proceedings were instituted, under which the ship and cargo were condemned in the court of admiralty, as Spanish property and good prize of war, and purchased by the claimant at public auction. The copy of the sentence produced in evidence was certified by the notary or secretary of marine, and his signature was verified by the certificate of Lino Clemente, deputy of the republic of Colombia to the United States, but who had not then been received in that capacity by our government.(*a*) Decrees of restitution to the original *498] Spanish *owners were entered, *pro formâ*, in the district and circuit courts, and the cause was brought by appeal to this court.

February 22d. *Winder*, for the appellant and claimant, argued: 1. That

(*a*) See 4 Wheat. App'x, p. 49.

it was the settled rule of this court, not to interfere in a doubtful case of this description (*The Amistad de Rues*, 5 Wheat. 385), and that the evidence in the present case was too dubious to justify the court in depriving the captors of the possession which they had acquired in war.

2. That even supposing he was mistaken on this point, this was a capture by a lawfully-commissioned cruiser of Buenos Ayres, the title under which had been confirmed by a regular condemnation in the prize court of Venezuela, an ally of Buenos Ayres in the war against Spain. It may be stated as an universal proposition, which has never yet been doubted or denied, that a sentence of condemnation by a competent court, is conclusive, as to the proprietary interest in the *res capta*, and upon the mere question of prize or no prize; whatever doubts may have been suggested as to the collateral effect of such sentences. And a condemnation in the court of an ally or co-belligerent is equally competent for this purpose with that of the captor's country itself.(*a*) This court, as a neutral tribunal, is, *therefore, precluded from all inquiry into the previous circumstances under [*499 which the capture was made, and whether the capturing vessel had been armed and equipped in violation of our neutrality. There must be some limit to such inquiries, and there is none so fit as a regular sentence of condemnation, which, by the universal law and usage of nations, quiets the title acquired in war. And even if a decree of restitution, in the present case, would not directly impugn the sentence, it would so far affect the general doctrine of conclusiveness, as to disturb the safety of neutral purchasers.

D. Hoffman, contrà, insisted: 1. That there was no sufficient legal evidence of the existence of the condemnation set up in this case. We have a mere dry sentence of the court of Juan Griego, contained in a few lines, stating that the property is Spanish, and condemned as legal prize. The character of the capturing vessel, by whom commanded, commissioned, or owned and equipped, the authority of the court to adjudicate on the subject, the nature of the connection (if any) between Venezuela and Buenos Ayres, or any power by whom the commission may have been granted, do not appear: every ground is withheld, which could enlighten this court, now virtually called upon *to enforce this decree. In a case like the [*500 present, the court will require the most satisfactory information that can be furnished. Where a case is free from suspicion and difficulty of any kind, and when the sentence itself, however concise, necessarily involves the point in discussion before another tribunal, it might be sufficient to produce the sentence, as evidence of the condemnation relied on; but the court is pressed, on this occasion, with many necessary inquiries which do not usually occur. If the condemnation is to operate as a conclusive bar against the

(*a*) Wheat. on Capt. 261; 2 East 473; 2 Bro. Civ. & Adm. Law 257, 281. "What has been said, does not extend to ships carried into the ports of an ally in the war, and there condemned, or while the ship is there, condemned in the captor's country; and therefore, in the present war, a sentence of condemnation at Bayonne, of a ship taken by the French, and carried into St. Sebastian,[1] and lying there at the time of the sentence, has been held valid; and this decision agrees with Bynkershoek's opinion, Qu. Jur. Pub. cap. 4."

[1] The Christopher, 2 Rob. 209.

exercise of the restoring power of this court, so essential to the maintenance of the laws, treaties, neutrality and morals of the country, it has a right to to be informed, whether their violation was ever the subject of inquiry before the court which pronounced the condemnation: it has a right to ascertain, whether there was a commission, and by whom the commission was granted; for if granted by an individual, or a people neither recognised as a sovereign state, nor as engaged in a civil war, the condemnation would, on these grounds alone, be wholly inoperative. In such a case, the court will require the entire prize proceedings to be exhibited; but if not, then, at least, the libel, in addition to the sentence. Here is neither the libel, nor an abstract of proof, and the sentence itself is uncommonly bald. The rule on this subject formerly was, that the entire proceedings should be set forth: now, however, if the libel and sentence are satisfactory, the court dispenses with anything further. *Marine Ins. Co.* v. *Hodgson*, 6 Cranch 207, 220.

*501] The libel, it would *appear, is essential. In *Fernandis* v. *Da Costa*, Park on Ins. 177–78, Lord MANSFIELD dispensed with the libel, only because the plaintiff had, by an unequivocal act of his own, made it unnecessary to be exhibited. So also, in the case of *Beake* v. *Tyrrel*, Comb. 120, the necessity of furnishing the court with the material grounds of the prize proceedings, is strongly urged by Lord Chief Justice HOLT. If we advert to the general principles of the common law on this subject, we shall find it an established principle, that wherever a record is relied on, all that concerns the matter in question must be produced. The authorities cited are pointed to this effect. 3 Inst. 173; Trials per Pais 166; 2 Bac. Abr., Evid. F. p. 611, 613. No case can well be imagined, in which the necessity of showing the grounds and extent of the proceeding more strongly applies, than in the present: for it does not appear that Almeida had any commission; and if this be the fact, no condemnation would avail, were it ever so well authenticated. 2 Bro. Civ. & Adm. Law 55.

2. But were the condemnation satisfactorily proved, it is contended, that it was pronounced by a court wholly incompetent to adjudicate on the case; that the whole proceeding was *coram non judice*; and that it appertains to all courts to inquire into the jurisdiction of another court, whose jugdments or decrees are relied on. It is presumed, that under the *jus gentium*, an operative sentence of condemnation must be pronounced: either, first, by

*502] a court of the *captor, sitting in the country of the captor; or, secondly, by a court of the captor, held in the country of an ally or co-belligerent of the captor; but that the courts of the ally or co-belligerent are wholly incompetent to hold plea of captures made by any one but themselves. The question is entirely new; and it is believed to be so, only because it was never before attempted by the courts of an ally to pass sentence on captures made by their associates in war. That allies and co-belligerents can co-operate judicially, as well as in a belligerent manner, is a position not to be found in the works or opinions of any writer. Condemnations in the port of an ally or co-belligerent are frequent; but no case can be produced of a condemnation in the court of an ally. No elementary writer mentions this exercise of judicial power of an ally. Dr. Brown (2 Bro. Civ. & Adm. Law 213, 257, 281) has been evidently misapprehended by the appellant's counsel. That sensible, though hasty, and sometimes inaccurate writer, has not expressed himself, in the passages cited, as clearly as he

might have done ; but still he does not speak of the *courts* of an ally condemning property taken by a companion in arms. He speaks of ships carried into the ports of an ally, and there condemned ; but he does not state by whom condemned. It is, therefore, but justice to him, to infer that he meant a court of the captors, established in the territory of the ally in the war ; and that this, and nothing else, is his meaning, is obvious from the authorities which he cites. All the cases in support of the condemnation now in judgment, will be found, on examination, to be decrees *pronounced by courts of the captors, sitting in the country of the ally or [*503 co-belligerent, and therefore, confirmatory of our position. The very silence of the writers on the laws of the admiralty as to this subject, and the absence of all judicial authority, argues the soundness of the doctrine contended for. The case of *The Harmony*, 2 Rob. 174 n., was a condemnation of a British vessel, by the French commissary of marine, sitting in the country of an ally in the war ; and the cases of *The Adelaide*, and *The Betsy Kruger*, were under similar circumstances. *The Cosmopolite*, 3 Rob. 268, presents a condenmation by the French consul, in a Spanish port, Spain then being a co-belligerent with France ; and though the *res capta* was American property, the principle is the same. So likewise, in the case of *Oddy* v. *Boville*, 2 East 474, mainly relied on by the appellant's counsel, we find the condemnation to have been pronounced by a French court, sitting in Spain, than an ally of France, in a war against Great Britain. In fine, all the cases of condemnation in the country of a co-belligerent, are by courts of the captor, sitting within the dominions of the ally.

But it is not alone on the absence of authority, sanctioning prize proceedings in the courts of the ally, that the doctrine now contended for reposes. Every principle and analogy of the law on the subject, are at variance with the exercise of such a power. The principles which introduced condemnation as an evidence of transmutation of property under the laws of war, in lieu of the doctrine of *deductio infra *præsidia*, pernoctation, &c., evince the impropriety of transferring the investigation [*504 *ad aliud examen.* A judicial inquiry into the regularity of prize proceedings is important to the world at large. The capturing nation has an interest in knowing that its prize ordinances are strictly adhered to, and the courts of that nation are the most competent to inquire into this, and to enforce their observance. The nation of the captured belligerent has also some rights in respect to the things taken : as war is a contest by force, to compel the party in the wrong to make retribution for some injury, the principals in the war have an account to settle, and they are reciprocally responsible for the justice and regularity of all hostile acts. No tribunals, therefore, but those of the capturing belligerent, ought to inquire into the validity of captures. Neutrals, likewise, are interested, that the regularity and validity of seizures made from them, should be passed on by the tribunals of that belligerent by whom the taking was effected. A contrary doctrine might deprive them of the benefit of that responsibility to which captors should ever be liable. If the ally passes sentence, it is probable, the neutral would be referred to the capturing nation, for any satisfaction the case of an illegal capture might demand ; and if application were then made to that nation, the neutral might be referred back to the ally who pronounced the sentence. In theory, therefore, and practice, there appears to

be a moral fitness in the rule, which would restrict the power of condemnation to the tribunals of that belligerent by whom the property has been
*505] actually taken. The country *then, of an ally, may be subservient to this purpose, but not the courts, unless where the captures are made by the allies or co-belligerents themselves.

3. In addition to the objections to the mode of authenticating the comdemnation, and the competency of the tribunal pronouncing it, may we not ask for some proof of an alliance or association in arms between Veuezuela, the alleged ally, and the power, whatever that be, under which the claimant pretends to have acted? Even the sentence itself affords no light on this subject, and if it did, the proof should be by matter *aliunde*. As the condemnation is silent as to the power granting the commission, and no commission has been produced, this court has no evidence, that the condemnation was pronounced even by the court of an ally; for the court may justly infer, that there was no commission, and if the inference be not made, but it should turn out that Almeida acted under an Artigas commission, the court might then be of opinion, that no alliance could be formed with the Banda Oriental, or its chieftain, Artigas, as none are capable of maintaining the relation of an ally, who cannot be a sole belligerent. Hence, then, the necessity of proving the alliance, and thus furnishing an additional reason for requiring the production of something more than a naked sentence of condemnation.

4. But should all these objections prove unfounded, we then resort to the ground, that a condemnation by a court of competent jurisdiction does not deprive this court of the power it otherwise would possess, of restor-
*506] ing this property, the exercise of this *power being essential to the maintenance of our laws and neutrality. That this sentence is wholly inoperative, as respects the restoring power of this court, appears to be manifest, from a variety of considerations. As the avowed object of this condemnation was, to close the judicial eye, and paralyze the judicial arm, of this tribunal, it will be proper to inquire into the object and extent of the prize proceeding in the vice-admiralty of Juan Griego, and the jurisdiction and power now required to be exercised by this court. We contend, first, that this court, in vindication of the violated laws of the land, will, if necessary, wholly disregard this condemnation; but, secondly, that restitution may be decreed, without impugning, in any degree, the operation of this sentence, or the general doctrine of the conclusiveness of admiralty decrees. This is not a petitory, but a possessory suit. The title to the property is no way involved in this proceeding. There is but one inquiry: has the claimant acquired the possession of this property by means unlawful, as regards this country? if so, that possession will be restored to those from whom it has been wrested by the instrumentality of our citizens. The possession will be placed *in statu quo*, without any reference to the title which may otherwise have been acquired by the capture and condemnation. If this can hereafter avail the claimant anything, it is well; this court only claims the power of undoing that which has been done in breach of the laws, and only
*507] so far as to place both *parties, in regard to the possession, in their former condition. Were the court deprived of this wholesome power, our citizens and foreigners might violate our laws and most solemn treaties with complete effect. The fruits of their illegal captures, though brought

here, and in the control of our tribunals, might be at once snatched from it, by the production of a condemnation decreed by the very power, and in favor of the very persons, by whom our laws have been infracted. If, during this investigation, the captors, by the pretended necessity of sending a commission abroad, should procrastinate the adjudication, sufficient time would be gained for the production of a well-concocted condemnation, which would never fail to make its appearance in due time ; and thus the violators of our laws would uniformly be confirmed in the possession of the fruits of their own wrong.

In the case of *The Anne*, 3 Wheat. 435, it was decided by this court, that a capture made within neutral territory, is nevertheless valid, as between the belligerents, though it be a nullity as respects the neutral whose territory has been violated. If England, then, and France be a war, and an English privateer captures a French vessel, in the port of Philadelphia, and forthwith proceeds with the prize to sea, carries her *infra præsidia capientium*, where she is condemned, and is then brought back to the port of Philadelphia ; what would probably be the language *of this court, when about to restore the prize, if a condemnation were presented, [*508 with a view of closing all inquiry as to the violation of our territory? We apprehend, it would be to this effect. In regard to France, your enemy, the capture is rightful ; your condemnation pronounces it such ; but in the present inquiry, a third party is interested. Your possession of this vessel was gained by an abuse of our asylum, and an infraction of our territorial jurisdiction : as we have now the possession of the *corpus*, we restore it to those from whom you have, as to this country, illegally taken it. If such would be the language of this court, in the case of a gross violation of our territory, I apprehend, the same reply will be given to Almeida, who has not only violated all the laws enacted for the preservation of our neuarality, but has also grossly abused the asylum accorded to the privateers of the South American provinces. If these vessels, in the use of that asylum, completely equip themselves with our arms, ammunition and men, and all is to be rendered valid, or at least inscrutable, by a formal condemnation, all legislation on the subject of neutrality is but public and solemn mockery. If this condemnation be a conclusive bar against all inquiry as to the violation of our laws, the competency of the power granting the commission, the competency of the person receiving the commission, &c., it is manifest, that Venezuela, Buenos Ayres, or any of these new-formed sovereignties, may compel *us, through the instrumentality of a condemnation, to accord [*509 to them the rights of sovereignty to every extent. In such case, captures made under the commission of Aury, or Artigas, would be equally operative with those granted by powers acknowledged to be independent, or engaged in a civil war, and the doctrine of *Rose* v. *Himely*, and the distinction taken in *Palmer's case*, and that of *The Estrella*, would be of no avail. Nay, even in the case of seizures clearly piratical, the 6th and 14th articles of our treaty with Spain would be effectually annulled.

Again, all inquiry into the fact of the violation of our laws, and its civil as well as penal consequences, belongs exclusively to the tribunals of this country. The courts of other nations have no right to pronounce a binding judgment as to the validity or invalidity of any act against our civil, political or criminal laws : the right to vindicate our own laws is essential and inher-

ent: it is a sovereign right, which we have not parted with to the tribunals of other nations. If the decrees or judgments of those tribunals come in collision with our laws, the courts of this country must pursue their even way, and enforce those laws, without any reference either to the laws or judgments of a foreign state. Passive obedience to the decisions of foreign tribunals has been sufficiently inculcated; but no attempt has ever been made of so exceptionable a character as this: to require this court not only to yield to the demands of foreign violators of our laws and sovereignty, but also to the insolent requisitions of our own criminal citizens. 2 Azuni 252; 1 H. Bl. 123; 2 Ibid. 410. *To give force to this condemnation, is, in fact, to call on this court to enforce the decree of a foreign court. A court, thus called on, always claims the privilege of examining into the jurisdiction of the court pronouncing the decree, the regularity of its judicial proceedings, and the intended extent of its operation.

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It cannot be denied, that if a privateer, or even a public vessel of war, of a foreign power, be fitted out in our ports, her commission can protect neither her nor her prizes from the sanctions of our law. Why then should a condemnation, which is but the exercise of another species of sovereign power, place the property in a state of absolute immunity? The position taken on the other side, that decrees of a court of competent jurisdiction are always binding, and exclude all inquiry, is far from sound. The general doctrine is well known; but its extent and its exceptions are equally well known.

Secondly, but this court may decree restitution, without in any decree impugning the doctrine of the conclusiveness of admiralty sentences. If the postulate be allowed, that the restoring power of this court rests exclusively on the ground of violated neutrality, then the prize court had no right to, and never did, in fact, institute any inquiry relative to the illegality of the equipment, in reference to our laws; that is an inquiry competent for this court solely. There is another inquiry, competent solely for the courts of the captors, viz., the fact of the capture, and its conformity to prize regulations and the *jus belli*. These are distinct rights, in the exercise of *which, neither tribunal is called on to pronounce on any matter not essential to be proved in order to justify a decision. The taking was rightful, in regard to the belligerents, though our laws were violated, and its restitution by this tribunal will be equally so, though the seizure be valid *qua* prize. In this point of view, there is no collision between the two tribunals; the decree of each stands, *valeat quantum valere potest.* No judgment or decree establishes anything beyond what was necessarily proved in order to arrive at the decision. The sentence, at most, proves nothing but its own correctness in regard to the mere question of prize. *Maley* v. *Shattuck*, 3 Cranch 458, 488; *The Mary*, 9 Ibid. 126, 142; 1 Camp. 419; 12 Mass. 291; 2 Bro. Civ. & Adm. Law 121. All the cases, where condemnations are relied on, have a qualification to this extent. The sentence in this case pronounces that the property was Spanish, and is condemned as good prize. It does not state, either affirmatively or negatively, one word about the equipment of the privateer; and it cannot, therefore, be even *primâ facie* evidence, that the privateer had proceeded legally, in regard to the whole world. Where a vessel is captured by a belligerent, for unneutral conduct, a condemnation would be conclusive; she was con-

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demned on this sole ground, and she could not be restored by the courts of the neutral nation, without falsifying the very fact on which the capture and condemnation proceeded. But here, the possession will be restored to the Spanish owners, not *qua* prize, but simply on the ground that the use of our neutral means in making the *capture, was a matter in which the prize court of Juan Griego had no concern. As a capture in violation of neutral territory is still valid, in regard to the contending parties, the capture, in a belligerent court, would be *omni exceptione major*. Spain, in the present case, would in vain have set up the violation of our laws as a defence, and the United States had no *persona standi in judicio*. A suggestion of violated neutrality, on behalf of this country, would not have been regarded. [*512

Adverting, for a moment, to the grounds on which the doctrine of conclusiveness is said to rest, we shall find, that none of them would be impeached, by the restoration of this property. They are said to be three: comity, notice to all the world, and the co-equality of nations. As to the doctrine of comity, it is founded on the supposition of the utmost good faith, and there must be a perfect reciprocity in order to support it. Is it not too much to require of any nation, on the ground of comity, to permit foreign powers to confederate with the worst class of our people, in insulting and trampling on our solemn treaties, neutral obligations, and explicit laws of public policy?

But it is supposed to be a second ground of this doctrine of conclusiveness, that the whole world have notice, and are parties to the proceedings in a prize court, they being *in rem*. This, if true in fact, only applies to those who have a title or interest in the *res ipsa*, and not to those who have such a collateral, incidental, or potential right as that of the United *States. But the notice is itself a mere fiction. 3 Dall. 91; 9 Cranch 144. The United States had no *persona standi* in that court; and if they had, it would have been impossible to assert it, as the libel, condemnation, sale and arrival of the prize in this country, were nearly contemporaneous. It is the nature of fictions to work justice, not palpable injustice: this court, therefore, will not suffer itself to be ousted of its rights, by a forced application of such a fiction. [*513

The last ground on which condemnations have acquired their power, is the admitted co-equality of all nations. This, perhaps, is the true principle. Admitting that the recognised competency to wage a civil war would clothe these provinces with every attribute of sovereignty, the reply is, that the courts of no nation are competent to render this condemnation binding to the extent contended for: this would be at war with the very principle; we should become inferior. The *deductio infra præsidia* does not clothe this court with any power; its jurisdiction originates in its right to maintain our neutral duties, and extends only so far as is required for that maintenance; no power on earth can deprive us of this right. If the sentence of any court be extended thus far, we may say, with Lord KENYON, "it may be throwing a veil over decisions founded on Algerine, or worse than Algerine principles; and if such sentences are to protect their own injustice, redress would be sought in vain:" and it many be added, that the rights of this country, and those of the *most vital nature, would be prostrated, without remedy. If, then, the prize court of Venezuela have powers co-ordinate with this, we should not, however, by asking restoration, impute to this con- [*514

demnation a legal infirmity, but to the capture, a vice antecedent and paramount to the decree, and not cognisable by that tribunal.

Were the doctrine of conclusiveness permitted to rest on its original principles, we should not be inclined to quarrel with it; but where it is extended beyond its known and salutary operation, we cannot regard it but with a jealous eye. If it be invoked by a purchaser under the decree, or to falsify a warranty of neutrality, there are then special reasons of policy, convenience and comity, which sustain it. These special grounds are satisfactorily explained in the case of *Croudson* v. *Leonard*, 4 Cranch 434; but it will be seen, that none of the three grounds there set forth would be impugned by the restitution of this property: for, first, the question of prize is not before this court; secondly, the present inquiry is not in a common-law court, but before a tribunal of the law of nations, and every way competent to make the necessary investigation; and thirdly, the decision of a court of co-ordinate jurisdiction is not re-examined.

But it has been urged, that a restitution of this property to the Spanish owner, though it might not directly impugn the condemnation, would be so far opening admiralty decrees, as to disturb the safety of neutral purchasers generally, and that this would be contrary to the policy of nations. The *515] answer to this *is, that the purchaser under the decree of any court does not necessarily obtain an unimpeachable title. He must take the property *cum onere;* the paramount vices in the title remain; he does not purchase under a general, but under a special warranty. The title gained by the capture, remains; it was illegal in its origin, and, as to the offended power, can never be rehabilitated. *Moodie* v. *The Betty Cathcart*, Bee 299.

5. Lastly, the proof in the present case is positive, that this vessel and cargo were captured by the claimant, for himself and his associates. The condemnation inures to his benefit; the alleged purchase by him was nominal; and, if it were otherwise, he gained his title or possession by a wrong, and no act of his can purge the wrong. Here we may apply the rule of the civilians: that no one can change the cause of his own possession. On this principle is it, in part, that executors, guardians, and all who stand in the relation of trustees, are (as a general rule) incompetent to purchase the trust estate. Almeida's possession was gained by a wrong; he cannot change the character of that possession; he cannot, by his own act, give himself a better title. A defective title may indeed be rendered good, by the purchase of outstanding good titles; but here is no outstanding interest in the subject-matter, but in the United States. The condemnation, then, could only corroborate the title which he had gained, and could not clothe him with a better one.

*516] *Harper* also argued on the same side; but *as the whole of his argument upon the conclusiveness of the foreign sentence will be found reported at large, in the next volume, in the case of *The Nereyda*, in order to avoid a repetition, it is thought expedient to refer the reader to that case, which involved the same question.

Winder, in reply, denied the authority of the supposed rule that a decree or sentence of a court of admiralty cannot be given in evidence, without producing the libel or other proceedings. There can be no necessity for

The Arrogante Barcelones.

producing the libel, if the sentence itself shows what the libel would show: and in this case, the decree sets forth every fact which would appear on the face of the libel, or which is material to establish the conclusiveness of the proceedings. The decree accompanies the possession of the vessel, the essential muniment of the title. This court has never asserted a right to look beyond the sentence of condemnation. It has always admitted its conclusiveness, even as to collateral effects. But even if the sentence be conclusive as to the question of prize only, the right of the original owner is completely divested. And even admitting this to be a possessory action, yet the right of possession depends on the right of property, otherwise, any stranger might claim. As to the competency of the tribunal; the fact of the connection between the different Spanish provinces in the present war is notorious, and courts of justice will always take notice of such facts. Indeed, the president, in his different official communications to congress, has alluded to their being engaged *in a common contest against the mother country. Why then should they not lend each other the aid [*517 of their tribunals to pronounce condemnations, as well as of their ports, to fit out the armaments with which the captures of Spanish property are made? If, according to the original practice of nations, a carrying *infra præsidia* were to consummate the title, would it not be sufficient to carry the prize within the territory of an ally, or co-belligerent? If one co-belligerent can consent to a foreign tribunal sitting within its territory, and condemning prizes made by the cruisers of its ally, why may not the ally permit its captures to be adjudged in the courts of its co-belligerent? But at all events, Venezuela was herself engaged in war against Spain, and this was the property of her enemy, brought into her territory. She had a right to condemn it in her courts, and did condemn it, so as to make it a part of the mass of national property. There is no positive authority which denies the authority of the courts of a belligerent, to condemn prizes captured by its co-belligerent; and in the absence of any case to the contrary, it is sufficient, that no reason of principle or public policy exists to prevent it. The learned counsel also referred to the resolution of congress, during the revolutionary war, authorizing their courts to condemn prizes captured by French cruisers, to show that the opinion and practice of nations had authorized similar proceedings. 5 Wheat. app'x, 123.

*March 14th, 1822. JOHNSON, Justice, delivered the opinion of the [*518 court.—The offence proved upon Almeida in this case is one of a very aggravated nature. He not only violated the neutrality of this government, but effected his purpose, by practising a flagrant fraud, either upon his crew, or upon the revenue officers of the port of Baltimore; or perhaps, partially upon both. Everything in the case proves that the sealing voyage round Cape Horn was a mere pretext; and if it be true, that the crew were kidnapped under that pretext, and forced into belligerent service, after getting to sea, it is a remarkable instance of bold and successful imposition. But who can believe it? The truth, unquestionably, is, that the crew, with, perhaps, the exception of the few who were put in irons, understood perfectly the nature of the enterprise they were embarking in, and were deceived into the belief, that their affected ignorance, or the impudence of the fraud would

screen them from the penalties of the laws which forbade their entering into belligerent service. It cannot, then, be questioned, that Almeida now appears before us in the character of a flagrant offender against the laws and neutral obligations of this country. And there is no shadow of a ground for hesitating to apply to this case, the established rule of this court, in cases of illegal outfit, unless it be the condemnation of this vessel and cargo in the court of Margaritta.

This court will, for the present, waive all expression of its opinion on the questions raised upon the validity of that condemnation, or the sufficiency of the *document produced to prove it. We will put our decision upon a single and independent ground, that the view of this court, with regard to all such cases, may henceforth be distinctly understood. We find the captured property in the hands of the offender, and hold it to be immaterial, through what circuity of changes it has come back to him. It is not for him to claim a right springing out of his own wrong. In the hands of a third person, a valid sentence of condemnation, properly authenticated, would present a very different view of the subject. The offender's touch here restores the taint from which the condemnation may have purified the prize. Although a purchaser, without notice, may, in many cases, hold his purchase free from an interest with which it was chargeable in the hands of the vendor, yet it cannot return into the hands of that vendor, without reviving the original lien. Nor will courts of justice ever yield the *locus standi in judicio* to the suitor, who is compelled to trace his title through his own criminal acts.(a)

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Decree affirmed.

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*520] *The Monte Allegre, and The Rainha de los Anjos : The Portuguese Consul-General, Libellant.

Prize.—Bonâ fide sale.

A question of fact upon the *bona fides* of an alleged sale of Portuguese ships, and their cargoes, which had been captured in violation of our neutrality. Restitution to the original owners decreed.

Appeal from the Circuit Court of Maryland.

March 14th, 1822. These causes were argued by *Winder*, for the appellant and claimant, and by *D. Hoffman*, for the respondent and libellant ; but as the same points were insisted on as in the preceding cases of *The Gran Para* and *The Arrogante Barcelones* (*ante*, pp. 471, 496), it is not thought necessary to report the argument of counsel, in the present case. The facts are stated in the opinion of the court.

(a) In a case of *The Nereyda*, which was argued at the present term, the court was of opinion, that in cases where a condemnation is relied on, the libel as well as the sentence ought to be produced, in order that the court might judicially see that the final tribunal had jurisdiction, and what was the ground of application for condemnation, and the parties by whom it was sought. The court also thought that the claimant ought to show, by competent evidence, that he was a *bonâ fide* purchaser of the property, for a valuable consideration ; and from the defects of the proofs on both points, the cause was ordered to further proof. It has, therefore, been thought fit to omit a report of the case, until its final decision.

The Monte Allegre.

March 18th. MARSHALL, Ch. J., delivered the opinion of the court.—The Monte Allegre was captured by the private armed vessel, called La Fortuna, cruising at the time under a commission from the chief of the Oriental Republic. She was completely fitted out, equipped and manned, in Baltimore, from which port she sailed on her first cruise, in December 1816; owned and commanded by citizens of the United States; but commissioned by the government of Buenos Ayres. She sailed again, on her second cruise, in August *1817, from the port of Baltimore. This cruise terminated at Buenos Ayres, where she was in part dismantled, some of [*521 her rigging and arms being deposited in a store-ship which lay near her; the crew also were discharged. After lying in port four or five weeks, she sailed on her third cruise, having the same armament with which she sailed from Baltimore, and about twenty or thirty of the same crew. Her commander was changed, but was still a citizen of the United States; and she sailed under a commission from the Oriental Republic. On this cruise, the Monte Allegre was taken, and sent into the port of Baltimore, where she was libelled by the consul-general of Portugal. She was claimed by William Foster, the prize-master, in behalf of the Oriental Republic, who alleged, that while she lay in the port of Buenos Ayres, she was purchased by the government of the Banda Oriental. The reality of this sale constitutes the only question which can arise in this case.

The testimony in support of it is found in the depositions of James Brown, James Williams, William Towson and Alexander Towson. They mention the partial dismantling of the vessel, and speak of a report that she was sold, but they give no positive information on the subject, nor did they even hear to whom the sale was made. This testimony would weigh very little, were it even uncontradicted. But the regular transmission of her prizes to Baltimore, her returning to that port, at the termination of her cruise, the depositions taken to show that the original proprietors had not parted with their interest, *are proofs of a continuing American [*522 ownership, which are entirely conclusive. There can, then, be no doubt but that the captures made by the Fortuna are in violation of the laws of the United States, enacted for the preservation of our neutrality, and that they ought to be restored, when brought within our territory.

The Rainha de los Anjos was a Portuguese vessel, captured by the La Fortuna, in the same cruise in which she captured the Monte Allegre. The cases are, in all material respects, the same.

Sentences affirmed, with costs.

Crocket *v.* Lee.

Same *v.* Same.

Decree in equity.

A question on the validity of a certificate for a settlement-right in Kentucky, and of the entry thereof in the surveyor's office.

It is a settled rule, that the decree must conform to the allegations in the pleadings, as well as to the proofs in the cause: therefore, when the question is on the validity of a location, and neither its vagueness nor its certainty are distinctly put in issue by the pleadings, the testimony to that point will be disregarded by this court; but if the merits appear to justify it, the cause will be remanded to the court below, with directions to permit the pleadings to be amended.

Appeal from the Circuit Court of Kentucky.

*523] *These causes were argued by *Sheffey*, for the appellant, citing *Bodley* v. *Taylor*, 5 Cranch 229; 6 Ibid. 148; 3 Ibid. 239; 2 Wheat. 144; 2 Bibb 144; 1 Ibid. 72; 1 Wheat. 141; Ibid. 130; 3 Bibb 623; 5 Wheat. 116; 6 Ibid. 119; 1 Bibb. 228: and by *Clay*, for the respondent, citing 1 Bibb 10, 46, 34, 129, 136; 2 Ibid. 109, 114, 259, 476, 479; Hardin 411; 1 Marsh. (Ky.) 281; Sneed 95; 3 Bibb 148, 149; Wheat. Dig. tit. Local Law, XI.

March 7th, 1822. Marshall, Ch. J., delivered the opinion of the court. —These causes relate to the same title, and depend on the same question. It is the validity of a certificate for a settlement-right granted to Angus Cameron, and of the entry thereof in the surveyor's office. The certificate is in these words:

"Angus Cameron this day claimed a settlement and pre-emption in the district of Kentucky, on account of residing in the country twelve months before the year 1778, lying at the head right-hand fork of Welles's branch, extending south-east to the head of a small run that empties into the north fork of Licking, including the spring, on the head of both branches, about one and a half miles above the war-path that crosses the north fork. Satisfactory proof being made to the court, they are of opinion, that the said Cameron has a right to a settlement of 400 acres of land, to include the above location, and the pre-emption of 1000 acres adjoining, and that a *524] certificate issue accordingly." *The entry in the surveyor's office conforms to the location expressed in the certificate. The right of Cameron, both to his settlement and pre-emption, was regularly conveyed to the appellant, in whose name patents have been obtained.

The appellee claims under junior entries, for which patents have been issued, younger than the appellant's patent on the pre-emption warrant, but elder than his patent on the settlement-right. The appellant, therefore, filed his bill to obtain a conveyance for the land covered by his settlement-right, the legal title to which was in the appellee; and the appellee filed his bill to obtain a conveyance for the land covered by the appellant's patent on the pre-emption right, to which he claimed the equitable title. Pending the controversy, Lee purchased in the right of a person claiming under a patent older than either of those under which Crocket claimed; but as this patent was founded on a junior entry, the validity of Cameron's certificate, was still the question on which the whole case depended.

In the circuit court, Crocket's bill was dismissed; and in the other suit,

he was decreed to convey to Lee the land contained in his patent for Cameron's settlement-right. The decrees were founded entirely on the opinion that Cameron's location was too vague to be supported. In the circuit court, the cause turned almost entirely on this point, and the greater part of the testimony is taken with a view to it. If the validity of Cameron's location be sustained, Crocket must succeed, because his right is prior in time, and superior in dignity, to any title conflicting *with it. If Cameron's entry be invalid, then the decrees are right, either because Young's [*525 entry is good, or because the legal title was in Lee, when they were made.

The testimony which has been taken in these causes, certainly is very strong in support of the decrees of the circuit court; but the counsel for the appellant contends, that so much of this testimony as respects the vagueness of Cameron's location must be disregarded, because neither its vagueness nor its certainty has been put in issue. Lee has not averred in his bill, nor alleged in his answer, that this location is vague, nor has he anywhere, or in any manner, questioned its validity. The principle advanced by the appellant's counsel cannot be controverted. No rule is better settled than that the decree must conform to the allegations, as well as to the proofs in the cause. The location being set out in the pleadings, the court can undoubtedly notice any intrinsic apparent defect. If it be void in itself, no testimony can sustain it, and it would be deemed void, on a demurrer to the bill. But if it be not void in itself, if its validity depends upon facts to be proved in the cause, then its validity ought to be put in issue.

The counsel for the appellee does not directly controvert this principle, but endeavors to withdraw his case from its operation, by contending, that terms are used in the pleadings which are equivalent to a direct allegation that Cameron's location is too vague to be sustained. If in this he is correct, the consequence he draws *from it will be admitted; for it [*526 will certainly be sufficient, if the matter to be proved be substantially alleged in the proceedings. How, then, is the fact?

In his answer to Crocket's bill, he says, that he does not "admit that the survey has been made agreeable to location or to law." This allegation certainly questions the survey. If it vary from the entry, if it be chargeable with any fatal irregularity, if it be in any respect contrary to law, such defects may be shown, and the party may avail himself of it, to the extent justified by his testimony, and by the law. But this allegation is confined to the survey; it does not mount up to the location, nor does it draw that into question. It gives no notice to Crocket, that his entry was to be controverted.

The bill filed by Lee, is equally defective in this respect. After setting out his own title, he states that of his adversary; and after reciting the certificate granted to Cameron, subjoins, that Crocket claimed the land "in dispute, by virtue of the said improvement, and having caused the same to be surveyed, contrary to location, and to law, and was to interfere with" his (Lee's) claims, had obtained a prior patent, &c. This allegation, like that in the answers, draws into question only the survey; it does not controvert the location or entry.

The counsel for the appellant says, it would be monstrous, if, after the parties have gone to trial on the validity of the entry, and have directed all their *testimony in the circuit court to that point, their rights [*527

should be made to depend in the appellate court on a mere defect in the pleadings, which had entirely escaped their observation in the court where it might have been amended, and the non-existence of which would not have varied the case. The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery ; rules which have been established for ages, on the soundest and clearest principles of general utility. If the pleadings in the cause were to give no notice to the parties or to the court, of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited ; if a new case might be made out in proof, differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts. We cannot dispense with it in this case.

But although the entry is not put in issue, the survey is ; and if that be made on ground not covered by any part of the entry, the decrees would, on that account, be affirmed. It must at once occur, that in a case where the entry is in reality attended with much uncertainty, there will be some
*528] difficulty in showing how much a *survey varies from it, unless the survey be made on land entirely different from the entry. That does not appear to be the fact in the present case. Cameron's entry calls for the head right-hand fork of Welles's branch, for the head of a small run that empties into the north fork, and to lie about one and a half miles above the war-path that crosses the north fork. The survey is upon the head-waters of these streams, and lies a small distance above the war-path that crosses the north fork. There is reason to believe, that, were the location to be sustained, the survey would be found to conform to it in part, though not perhaps entirely. This court has no means of ascertaining how far they agree, and how far they disagree, and the decrees of the circuit court must be reversed.

But as this reversal is not on the merits of the case, and the court is rather inclined to the opinion, that the decrees, on the merits, are right, no final decree will be directed in either cause, but each will be remanded to the circuit court, with directions to permit the parties to amend their pleadings.

ANDREW CROCKET, appellant, *v.* HENRY LEE, respondent.

DECREE.—This cause came on to be heard, on the bill, &c., and was argued by counsel ; on consideration whereof, this court is of opinion, that the decree dismissing the plaintiff's bill was erroneous, in this, that the plaintiff is shown to possess the prior and better equitable title, unless his
*529] location, which is the *foundation to that title be void for want of certainty, a point not properly examinable under the pleadings in the cause, as they now stand, because it is not put in issue. This court doth, therefore, reverse the said decree, and doth remand the cause to the circuit court, that the parties may be permitted to amend their pleadings, and that further proceedings may be had therein, according to law.

Macker v. Thomas.

SAME *v.* SAME.

DECREE.—This cause came on to be heard on the bill, &c., and was argued by counsel; on consideration whereof, this court is of opinion, that the decree directing the defendant to convey to the plaintiff the land therein mentioned, is erroneous in this, that the defendant is shown to possess the prior and better equitable title, unless his location, which is the foundation of that title, be void for want of certainty, a point not properly examinable under the pleadings in the cause, as they now stand, because it is not put in issue. This court doth, therefore, reverse the said decree, and doth remand the cause to the circuit court, that the parties may be permitted to amend their pleadings, and that further proceedings may be had therein, according to law.

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*MACKER'S Heirs *v.* THOMAS. [*530

Real action.—Death of party.

In real actions, the death of the ancestor, without having appeared to the suit, abates the suit, and it cannot be revived and prosecuted against the heirs of the original defendant.

If the heirs be made parties, by order of the court in which the suit is brought, and judgment is entered against them, by default, for want of a plea, upon a summons and count against the original defendant, they may sue out a writ of error, and reverse the judgment.

ERROR to the Circuit Court of Kentucky.

March 15th, 1822. WASHINGTON, Justice, delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court for the district of Kentucky. The defendant brought a writ of right in that court, against John Macker, the ancestor of the plaintiff in error, for an undivided moiety in a certain tract of land. After a summons served upon Macker, he died, without having appeared to the suit, and a rule was obtained by the plaintiff below, upon the heirs of the defendant, to show cause why the suit should not be revived against them. This rule being served, and no cause shown to the contrary, the suit, by order of the court, was revived against the heirs, the plaintiffs in error, and at a subsequent term of the court, judgment by default was entered against them, from which judgment this writ of error is prosecuted.

The main question for the decision of the court is, whether the circuit court erred in directing the suit to be revived against the heirs of Macker, and rendering *judgment against them? The court consider this point to have been decided in the case of *Green* v. *Watkins*, 6 Wheat. [*531 260. The question there was, whether, in real actions, the death of either party, after a writ of error sued out, abates the suit? and it was decided, that it did not. But in examining the general principles of law upon the subject of abatement by the death of parties, it was distinctly laid down, that in real and personal actions, the death of either party, before judgment, did, at common law, abate the suit; and that the 31st section of the judiciary act of 1789, c. 20, was necessary to enable the action to be prosecuted by or against the representatives of the deceased party, when the cause of action survived. But this section is clearly confined to personal actions, as the power to prosecute or defend is given to the executor or administrator of the deceased party, and not to the heir or devisee.

It is objected by the counsel for the defendant in error, that the defendants in the court below could not sue out and prosecute a writ of error, because they failed to appear and plead to the suit in that court. No case was referred to in support of this objection, and it is confidently believed, that none can be found to countenance it. Although the plaintiffs in error did not plead to the suit, they were nevertheless made parties to it by the order of the court, and as such, judgment was rendered against them, and that too, upon a summons and count against the ancestor. Being, then, parties to the suit, and affected by the judgment against them, they were *clearly entitled to sue out a writ of error; and although the judgment was entered by default, for want of a plea, they may be injured not less by such judgment, than if it had been entered upon a verdict. If judgment in an action of trespass be rendered against one defendant by default, and in favor of the other defendant upon a plea, the former may alone bring a writ of error. (1 Lev. 225; Hob. 70.) If it should be said, that the appearance of the plaintiffs in error in the circuit court, by an attorney of that court, cured the error committed in reviving the suit against them, the answer is, that by the death of the ancestor, a new cause of action arose against the heirs, and the plea is not in the same condition as it was in the lifetime of the party. *Green* v. *Watkins*, 6 Wheat. 262. The suit having once abated by the death of the defendant, it was out of court, and a new summons and count against the heirs was necessary. Besides, the appearance was not voluntary, but was the consequence of an erroneous order of the court, enabling the plaintiff below to prosecute the suit against the heirs.

*532]

It is objected, in the last place, that if the plaintiffs have a right to prosecute this writ of error, they nevertheless cannot assign for error the order of the court reviving the suit, because they failed in that court to appear and except to the opinion of the court in relation to the order. But an exception to the opinion of the court is only necessary, when the alleged error could not otherwise appear upon the record. The error in this case was, in ordering *the suit to be revived and prosecuted against the heirs of the original defendant, and proceeding to render judgment against them, upon a summons and count against the original defendant, all which sufficiently appears upon the face of this record.

*533]

Judgment.—This cause came on to be heard, on the transcript of the record of the circuit court of the United States for the district of Kentucky, and was argued by counsel for the defendant in error: On consideration whereof, this court is of opinion, that the said circuit court erred, in ordering the suit to be revived and prosecuted against the heirs of the original defendant, and proceeding to render judgment against them upon a summons and count against the original defendant. It is, therefore, adjudged and ordered, that the judgment of the said circuit court in this case be, and the same is hereby, reversed and annulled. And this court proceeding to render such judgment as the said circuit court should have rendered, it is further adjudged and ordered, that the said suit be, and the same is hereby abated.

*Columbian Insurance Company *v.* Wheelright *et al.*

Error.

A writ of error will lie from this court upon the judgment of a circuit court, awarding a peremptory *mandamus*.

Error to the Circuit Court for the District of Columbia.

In this case, which was argued by *Jones*, for the plaintiffs in error, and by *Swann*, for the defendants in error, citing Bac. Abr. tit. Mandamus ; 8 Mod. 27 ; 1 P. Wms. 348 :—The Court determined, that a writ of error would lie, under the act relating to the district of Columbia, which is similar in its provisions to the judiciary act of 1789, c. 20, § 22, to reverse the judgment of the circuit court, awarding a peremptory *mandamus*, to admit the defendants in error to the offices of directors in the Columbian Insurance company, and directed Mr. *Jones* to produce affidavits as to the value of the matter in controversy. But it not appearing that it amounted to $1000, the sum required to give this court appellate jurisdiction from the final judgments or decrees of the circuit court for the district of Columbia, the court afterwards directed the writ of error to be quashed. The court was of opinion, that there was nothing in controversy but the value of the office, and that its value must be ascertained by the salary. *Although, therefore, a writ of error might issue to a judgment awarding a peremptory *mandamus* to restore to office, where the matter in controversy was sufficient to give jurisdiction to the court, it could not regularly issue in this case. [*535

Writ of error quashed.

Blight's Lessee *et al. v.* Rochester.

British treaty.—Estoppel.

British subjects, born before the revolution, are equally incapable, with those born after, of inheriting, or transmitting the inheritance of, lands in this country.

The treaties of 1783 and 1794 only provide for titles existing at the time those treaties were made, and not to titles subsequently acquired.

Actual possession is not necessary to give the party the benefit of the treaty; but the existence of title at the time, is necessary.

Where J. D., an alien and British subject, came into the United States, subsequent to the treaty of 1783, and before the signature of the treaty of 1794, died seised of the lands in question : *Held*, that the title of his heirs was not protected by the treaties.

In what cases citizenship may be presumed, so as to confirm a title to lands.

The doctrine of estoppel, or the principle of legal policy, which forbids a party from denying the title under which he has received a conveyance, does not apply as between vendor and vendee, especially, where the latter has not received possession from the former.[1]

Error to the Circuit Court of Kentucky. This was an ejectment in the court below, brought to recover the possession of lot No. 18, in the town of *Danville, in the state of Kentucky.

It appeared, from the evidence in the cause, that the plaintiffs were the heirs of John Dunlap, who was a citizen of Pennsylvania, and claimed as the heir of his brother, James Dunlap, who died seised of the premises in [*536

[1] S. P. Society for the Propagation of the Gospel *v.* Town of Paulet, 4 Pet. 506–7.

question, in the autum of 1794. James Dunlap was an alien, and a subject of the king of Great Britain, who came to the United States subsequent to the treaty of peace of 1783, and died before the signature of the treaty of 1794. After his death, one Hunter, professing to have purchased of John Dunlap, entered into possession and conveyed to several persons parcels of the lot; and to the defendant, Rochester, one parcel, in 1795, who entered into possession thereof, and had occupied the same ever since; having acknowledged the title of said Dunlap, as that under which he held. Upon this evidence, the counsel for the plaintiffs moved the court to instruct the jury:

1. That if the jury find the defendant obtained possession under James G. Hunter, who obtained possession as the attorney of John Dunlap, or who claimed under an executory agreement with John Dunlap, and that said defendant has held, and occupied under John Dunlap's title, claiming from said Hunter, as the attorney of said Dunlap, or under an executory agreement, or has, since he was in possession, acknowledged the title of said Dunlap, as that under which he held; that then the defendant is not permitted to impeach or controvert the title of said John Dunlap, by parol evidence that James Dunlap was an alien.

*537] *2. That if the defendant, Rochester, acquired the possession, and has continued to hold as above, the possession of the defendant was not such an adverse possession as would toll the right of entry of said John Dunlap, and the statute of limitations does not apply.

3. That if James Dunlap occupied the lot, from the date of his deed, till his death, and said James G. Hunter and the defendant have continued to hold it, under the claim of John Dunlap, his brother, as heir to James; from these facts, connected with the evidence in the cause, and in the absence of any proof of an inquisition or office found as to the alienage of James Dunlap, and in the absence of any grant or other act of the commonwealth or its officers, since the death of said James, in derogation of the title of said James, or of said John, they should presume that said James was a citizen of the United States.

4. That if they believe the evidence, they should find for the plaintiff.

5. That the jury have a right to presume that James Dunlap was a citizen of the state of Virginia, or of some one of the United States, and if so, John Dunlap was his heir, and capable of inheriting.

6. That if James Hunter entered under a parol agreement with John Dunlap, the possession of said Hunter was the possession of said Dunlap.

7. That the inheritance claimed by John Dunlap, as heir to James, is protected by, and within the provisions of the treaty between the United and Great Britain, signed 19th November 1794.

*538] The court refused the 1st, 3d, 4th, 5th, 6th and 7th instructions, moved by the plaintiff; and gave the second, with this qualification, "that if John Dunlap had either title or the actual possession of the premises, after the death of James Dunlap, and before the entry of said Hunter, or of the defendant, then the statute of limitations did not apply.

The defendant moved the instruction, that if James Dunlap was an alien and died before the 19th November 1794, then the plaintiff has made out no title to the land in question, which will authorize them to find for him, which was given by the court, with this qualification, that if the jury find that John

Dunlap had actual possession of the premises, after the death of James Dunlap, and prior to the time when Hunter took possession, in that event, this instruction would not be given.

March 15th. *Bibb*, for the plaintiff, stated: 1. That the first instruction, moved on the part of the plaintiffs, involved the proposition that Hunter, who entered, claiming under John Dunlap, would be estopped from denying John Dunlap's title by parol, and that the defendant, Rochester, who entered under Hunter, stands in the same predicament with his grantor, and is besides precluded by his own acknowledgment from denying the title from which his own is derived. *Jackson* v. *Stewart*, 6 Johns. 34; *Jackson* v. *Reynolds*, 1 Caines 444; *Jackson* v. *Whitford*, 2 Ibid. 215; *Brandt* v. *Livermore*, 10 Johns. 358; *Jackson* v. *Hinman*, Ibid. 292; *Jackson* v. *Bush*, Ibid. 223; *Jackson* v. *McLeod*, 12 Ibid. 182; *Jackson* v. *Graham*, 3 Caines 188; *Phillips* v. *Rothwell*, 4 Bibb 33; *Connelly* v. *Chiles*, 2 Marsh. (Ky.) 242.

*2. The second instruction asked by the plaintiff was given by the judge below, but with a qualification. That qualification involves [*539 the questions discussed on the first instruction, by permitting the defendant to impeach the title of John Dunlap, or by requiring an actual entry by John, after the death of James, and before Hunter or the defendant entered. It is insisted, that the *pedis possessio* of John was not necessary; that the entry of Hunter, claiming under him, inured to his benefit, and was sufficient to enable Hunter, and all claiming or holding under him, after such entry, to show title derived from John Dunlap. *Barr* v. *Gratz*, 4 Wheat. 214; *Jackson* v. *Reynolds*, 1 Caines 444; *Jackson* v. *McLeod*, 12 Johns. 182.

3. The third and fifth instructions prayed for, may be considered together. In withholding both these instructions, the court has denied to the jury the right to infer one fact from another. From the long uninterrupted possession held under the title of the Dunlaps, and as against the defendant, who had acknowledged John Dunlap's title, the jury ought to have been permitted to fill, by intendment or presumption, after the death of both the Dunlaps, the only chasm alleged by the defendant to exist in that title. Before the establishment of a uniform rule of naturalization, under the new constitution, the laws of the different states gave great encouragement to emigration, by conferring the privileges of citizenship on easy terms. The acknowledgment of John Dunlap's title by the defendant, his possession under it, and demand of a deed from John Dunlap, was sufficient *evidence, of [*540 itself, to warrant the jury to find John Dunlap a citizen, if that were necessary to perfect his title. *Omne majus continet in se minus:* the acknowledgment of his title involved the admission of the fact that he was a citizen. Co. Litt. 52 *b*; Noy's Max. 16–17.

4. The fourth instruction may be considered as involving the previous instructions moved; for, if the defendant was stopped to deny John Dunlap's title, and the statute of limitations did apply to the case, then, certainly, the plaintiffs were entitled to recover. As to the statute of limitations, as the defendant claimed under John Dunlap, and looked to him for the perfection of his title, the possession of the defendant is not such an adverse possession as would toll the right of entry of the heirs of the said John Dunlap. Litt. § 396–97; Co. Litt. 242; Bull. N. P. 102, 104. To bar the

plaintiff in ejectment, the possession of the defendant must have been adverse in its commencement, and so continued. 1 Johns. 158; Ibid. 223; 2 Ibid. 22; 4 Ibid. 230; 9 Ibid. 167; 10 Ibid. 435; 12 Ibid. 368; 1 Marsh. (Ky.) 62; 2 Bibb 506. The defendant admitted John Dunlap's title, within twenty years before action brought, and the plaintiffs were residing out of the state of Kentucky, and consequently, within the saving of the statute.

5. The sixth instruction asked is grounded upon the local statute of frauds and perjuries, which is similar to the English statute of frauds, 29 Car. II., c. 3, and avoids "any contract for the sale of lands, &c., unless the agreement, or some note or memorandum *thereof, shall be in writing, and signed by the party," &c. Hunter having entered, claiming under John Dunlap, and showing no agreement between them, the statute applies to avoid any parol agreement; Hunter was, upon his entry, the tenant at will of Dunlap, and the defendant, coming in under Hunter, is in the same predicament.

*541]

7. The treaty of 1794, between the United States and Great Britain, is to be be construed liberally, according to its spirit, and the good faith which ought to be observed between sovereigns. The words, "now hold," as used in the 9th article, do not mean an actual possession. *Harden* v. *Fisher*, 1 Wheat. 300; *Orr* v. *Hodgson*, 4 Ibid. 463. These expressions exclude titles acquired after the signature of the treaty, but embrace all titles before the treaty, not confiscated or annulled by legislative acts, before the signature of the treaty. The latter clause of this article declares, that "neither they, nor their heirs and assigns, shall be regarded as aliens." As to all the cases provided for by that article, the inheritance is provided for, without regard to the common-law requisition of mutual or common allegiance between ancestor and heir; and the capacity to make title as heir, is placed entirely upon the fact of private relationship between American citizens or British subjects, independent of their political relationship to the one or the other of the two governments. The treaty of 1783 had provided against future confiscations. Taking that and the treaty of 1794 together, as made *in pari materia*, the *words "now hold" ought not to be confined to cases of actual occupation by British subjects or American citizens, nor to the exclusion of such as would be heirs, but for alienage, but would apply to all those claims which were not actually seized upon, or confiscated by the respective governments of the United States or Great Britain; and which would, but for the treaty, be liable to be affected by the common-law doctrines in relation to inheritance. If such be the true construction, John Dunlap might inherit the property of James Dunlap, under the treaty of 1794, if James were an alien; because no act of the government has confiscated, escheated or re-granted the premises.

*542]

As to the instructions asked on the part of the defendant, they are substantially involved in those which have already been discussed.

B. Hardin, contrà, argued: 1. That the defendant, Rochester, was not estopped from disputing the title of the plaintiffs. If the doctrine, as applicable between lessor and lessee, be insisted on, the answer is, that the defendant, if a tenant, is a tenant at will, with a parol permission to enter. This cannot estop, for no man is estopped by parol from alleging the truth. There must then be a deed to estop. An estoppel consists only of an

instrument superior in dignity to the evidence offered. Suppose the fact to be, that John Dunlap sold to Hunter, and that Hunter conveyed to Rochester, and it turns out that Dunlap had no title, can he recover? If a lease be made by deed poll, and the lessor having nothing in the premises, the *lessee is not estopped. Co. Litt. 47 *b*; Roll. Abr. 871. It is [*543
on principles of legal policy or moral honesty, and not of estoppel, that a lessee is not permitted to deny the estate of his lessor. The court has some discretion in limiting the rule, because, being adopted to promote the purposes of justice, it is not inflexible. It applies only to a person who enters as tenant, and never to one who enters and claims in his own right. It cannot apply as between vendor and vendee, and certainly not, where the latter never received possession from the former.

2. As to the treaties of 1783 and 1794, it is the settled doctrine of this court, that they were meant to provide only for titles legally existing at the time the treaties were signed, and not to titles subsequently acquired. It is true, that it is not necessary that the parties should have an actual possession of seisin; but it is necessary, that the title should be legally vested in them, at the time the treaty was made. *Harden* v. *Fisher*, 1 Wheat. 310.

March 20th, 1822. MARSHALL, Ch. J., delivered the opinion of the court. —The exceptions taken to the opinion of the circuit court in this case, may be divided into two parts: 1st. Those which respect the actual title of the plaintiffs. 2d. Those which respect the ability of the defendant to contest that title.

1. The title of the plaintiffs. *They are the heirs of John Dun- [*544
lap, who was a citizen of Pennsylvania, and claimed as the heir of James Dunlap, who died seised of the premises in the declaration mentioned, in the autumn of 1794. The defendants allege and prove that James Dunlap, who was an alien, and subject to the king of Great Britain, came into the United States, subsequent to the treaty of peace, and died before the signature of the treaty of 1794, and whose title, therefore, is not protected by either of those treaties. The court having left the fact to the jury, their verdict has found that James Dunlap died previous to the signature of the treaty of 1794, and the question is, whether the court erred in determining that this case was not either within the treaty of peace, or the treaty of 1794.

It has been decided, that British subjects, though born before the revolution, are equally incapable with those born subsequent to that event, of inheriting or transmitting the inheritance of lands in this country. Consequently, the sole inquiry in this case respects the effect of the treaties between the United States and Great Britain. The treaty of peace has always been considered as providing only for titles existing at the time; and as the title of James Dunlap was afterwards acquired, it can derive no aid from that treaty. James Dunlap, therefore, if he continued to be an alien, continued liable to all the disabilities of alienage, one of which is an incapacity to transmit lands to heirs. Consequently, when he died, the next of kin could take nothing by descent. The treaty of 1794, *like that of [*545
1783, provides only for existing rights; it does not give title. Had James conveyed, or devised, the property to John, the title would have

vested in him, subject to the right of the government to seize the land, and the treaty would have confirmed that title; so, if the law would have vested the estate in him by descent. But as the fact is, he had no title, nothing on which the treaty could operate. It has been said, that this court has never supposed actual possession to be necessary to entitle a party to the benefit of the treaty. This is true. But the existence of title, at the time, has always been supposed necessary.

The plaintiffs also insisted, that under the circumstances of this case, the jury might presume James Dunlap was a citizen. The circumstances are the length of time which has intervened since his arrival in this country, and since his first acquisition of real estate, during which there have been no proceedings instituted under the laws of escheat and forfeiture. The weight which might be allowed to this argument, had the property continued in the peaceable occupation of the heirs of James Dunlap, and had this presumption been required, to sustain the title clothed with that possession, is, we think, diminished by the circumstance that the land was, soon after his death, claimed and occupied by a citizen of Kentucky, as a purchaser. In such a state of things, it is not surprising, that no inquiries should be made into his citizenship, and that no person should feel disposed to intermeddle with the affair.

*546] *The alienage of James Dunlap being fully proved, and the laws of Virginia requiring, as indispensable to his citizenship, that he should take the oath of fidelity to the commonwealth, in a court of record, of which the clerk is directed to grant a certificate, we do not think that this fact, which, had it taken place, must appear on record, ought to be presumed, unless there were some other fact, such as holding an office of which citizens alone were capable, or which required an oath of fidelity, from which it might be inferred. In favor of long possession, in favor of strong apparent equity, much may be presumed; but in a case where the presumption would defeat possession, where the equity is doubtful, where the parties rely upon strict law, courts will be cautious how they lean in favor of presuming that which does not appear, and which might be shown by a record.

The circuit court has declined giving the instruction which was required; but, on this point, has given no counter-instruction, and has assigned no reason for refusing that which was required. It may have been, that the presumption in favor of a deed from John Dunlap so entirely balances the presumption in favor of the citizenship of James, as to prevent the allowance of either. If James Dunlap could not be considered as a citizen, at the time of his death, the plaintiffs have no title; and the only remaining question arising on the bill of exceptions, is, was the defendant restrained,

*547] *on the principle of estoppel, or any other principle, from resisting their claim.

It is contended, that he is so restrained, because John Dunlap sold to Hunter, and Hunter has conveyed to the present defendant. It is very certain, that these sales do not create a legal estoppel. The defendant has executed no deed to prevent him from averring and proving the truth of the case. If he is bound in law to admit a title which has no existence in reality, it is not on the doctrine of estoppel that he is bound. It is because, by receiving a conveyance of a title which is deduced from Dunlap, the moral policy of the law will not permit him to contest that title. This principle

originates in the relation between lessor and lessee, and so far as respects them, is well established, and ought to be maintained. The title of the lessee is, in fact, the title of the lessor; he comes in by virtue of it, holds by virtue of it, and rests upon it, to maintain and justify his possession. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims, that the paramount ownership of the lessor shall be acknowledged, during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor, without disparaging his own, and he cannot set up the title of another, without violating that contract by which he obtained and holds possession; and breaking that faith which he has pledged, and the obligation of which is still continuing, and in full operation.

*In considering this subject, we ought to recollect, too, the policy of the times in which this doctrine originated. It may be traced back [*548 to the feudal tenures, when the connection between landlord and tenant was much more intimate than it is at present—when the latter was bound to the former by ties not much less strict, nor not much less sacred, than those of allegiance itself. The propriety of applying the doctrines between lessor and lessee to a vendor and vendee, may well be doubted. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon, in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title, by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this; nor is either the letter or spirit of the contract violated by it. The only controversy which ought to arise between him and the vendor, respects the payment of the purchase-money. How far he may be bound to this, by law, or by the obligations of good faith, is a question depending on all the circumstances of the case, and in deciding it, all those circumstances are examinable. If the vendor has actually made a conveyance, his title is extinguished, in law as well as equity, and it *will not be pretended, that [*549 he can maintain an ejectment. If he has sold, but has not conveyed, the contract of sale binds him to convey, unless it be conditional. If, after such a contract, he brings an ejectment for the land, he violates his own contract, unless the condition be broken by the vendee; and if it be, the vendor ought to show it.

In this case, a sale by John Dunlap to Hunter is stated, and a conveyance from Hunter to Rochester, the defendant, is also stated, but that conveyance does not appear in the record. Whether it contains any reference to the title of Dunlap, or not, is not shown. The defendant then holds, in his own right, by a deed of conveyance which purports to pass the legal title. The plaintiffs show no title in themselves, but allege and prove that the title under which the defendant claims is derived from their ancestor. They, therefore, insist, that the defendant is bound, in good faith, to admit this title, and surrender the premises to them. But the sole principle on which this claim is founded is, that the defendant must trace his title up to

their ancestor, and is bound, therefore, to admit it. But if the deed of the defendant does not refer to their ancestor, and the record does not convey this information, the defendant holds in opposition to the title of John Dunlap, or claims to have acquired that title. If he holds under an adversary title, his right to contest that of Dunlap is admitted. If he claims under a sale from Dunlap, and Dunlap himself is compelled to aver that he does, then the plaintiffs themselves assert a title against this contract. Unless
*550] *they show that it was conditional, and that the condition is broken, they cannot, in the very act of disregarding it themselves, insist, that it binds the defendant, in good faith, to acknowledge a title which has no real existence. Upon reason, then, we should think, that the defendant in this case, under all its circumstances, is at liberty to controvert the title of the plaintiffs.

But it is contended, that this question is settled in Kentucky by authority. There are also several cases quoted from the decisions in New York, which we have not had an opportunity of examining fully. Those we have considered are, we think, distinguishable from this, in some of their circumstances, especially, in this material one, that the vendor gave possession to the vendee. But the decisions of one state, though highly to be respected, are not authority in another, especially, with respect to land-titles. In *Phillips* v. *Rothwell*, in 4 Bibb 33, the defendant, claimed under a conveyance from the tenant of the plaintiff. That case, therefore, was decided on the doctrine applicable to lessor or lessee. The case in 2 Marsh 242, was the case of a purchaser who had not received a conveyance, and who was not allowed to set up an outstanding title in a third person. The report gives us only the opinion of the court, not accompanied by a statement of the case, or the points made at the bar. We, therefore, cannot tell, whether, in asserting his title, the vendor acted in opposition to his contract. We cannot say, that the condition on which the sale might depend had not been
*551] broken. There is, too, a difference between setting *up an adverse title in a third person, to controvert an actual existing title, and resisting a claim made by a person having no title whatever. In the case last mentioned, it would appear, that the plaintiff had a title which was, in itself, sufficient to maintain his action; but there was another, and perhaps a superior title, in a third person, with which the defendant was not connected. The rejection of all evidence of this title does not, we think, prove that the same court would have compelled the defendant to acknowledge a title of which no evidence was given, or have rejected proof of any title in himself; especially, when the vendee received nothing—not even possession, from the vendor.

Judgment affirmed, with costs.

The Irresistible: Daniels, Claimant.

Repeal of penal statutes.

An offence against a temporary statute cannot be punished after the expiration of the act, unless a particular provision be made by law for that purpose.

The proviso in the repealing clause of the neutality act of the 20th of April 1818, did not authorize a forfeiture, under the act of the 3d of March 1817 (which was included in the repeal), after the time when that act would have expired by its own limitation.

Appeal from the Circuit Court of Maryland. This cause was submitted without argument.

March 20th, 1822. Marshall, Ch. J., delivered the opinion of the court. —*This is an appeal from a sentence of the circuit court of the United States for the district of Maryland, dismissing an information filed [*552 in that court against the brig La Irresistible, as forfeited, under the acts of congress made for the preservation of the neutrality of the United States. The offence charged in the information, was committed under the act of 1817, and the only question is, whether the information can be sustained, after the time when that act would have expired by its own limitation?

The act was to continue in force two years after the 3d of March 1817. On the 20th of April 1818, congress passed an act making further provision on the same subject, which repealed all former acts on that subject, and among these the act of 1817, and annexed to the repealing clause the following proviso, "Provided, nevertheless, that persons having offended against any of the acts aforesaid may be prosecuted, convicted and punished, as if the same were not repealed, and no forfeiture heretofore incurred by a violation of any of the acts aforesaid shall be affected by such repeal." The obvious construction of this clause is, that the power to prosecute, convict and punish offenders against either of the repealed acts, remains as if the repealing act had never been passed. It does not create a power to punish, but preserves that which before existed. Now, it is well settled, that an offence against a temporary act cannot be punished, after the expirtion of the act, unless a particular provision be made by law for the purpose.

Sentence affirmed.

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*Holbrook *et al. v.* Union Bank of Alexandria. [*553

Banking capital.

The turnpike-road stock, paid in as a part of the capital of the Union Bank of Alexandria, before its incorporation, became the common property of the association, so as to be subject to be sold and distributed among the members, after the charter, which directed, that the capital stock should consist of money only, was accepted; and those who subscribed the road stock, or their assignees, were not entitled to have the same returned specifically to them.

Appeal from the Circuit Court for the District of Columbia. This was a suit in chancery, instituted in the court below, by Holbrook and

Alexander, against the Union Bank, to recover from the bank certain shares of road stock, which had been originally subscribed to that bank by them, and to have an account of the profits of that stock, and a payment of whatever should be found to be due to them.

The cause was set down for hearing, upon the bill, answer and exhibits, from which it appeared, that a number of persons formed themselves into an association, for the purpose of carrying on the banking business, for a term of years, in the town of Alexandria, under the name of "The Union Bank of Alexandria." That the association adopted certain articles as the basis of their union; by which articles, it was, among other things, agreed,
*554] that the subscribers to the bank *should be permitted to pay one-tenth of their subscription, in the stock of certain incorporated road companies, and the other nine-tenths in money, at certain periods prescribed in the said articles. That in pursuance of these articles, the subscriptions to the bank were filled up, and the stocks of various road companies were subscribed, which stocks were different in their respective values. The articles of association authorized the immediate commencement of the banking business. But they provided for, and contemplated, an application to congress for a charter. The bank commenced its business without a charter, and carried on its business until the year 1817, when an act of congress was obtained, incorporating the bank. This act directed, that the capital stock of the bank should consist of $500,000, to be paid entirely in money. When this act was passed, a question was raised among the stockholders, whether the road stock was to be returned specifically to the subscribers, or whether it was to be blended together into one general mass, and divided among the subscribers, without regard to the value of the respective stocks. The Little River turnpike stock was the most valuable, at the time it was subscribed, and is now much the most valuable stock; and the plaintiffs, Holbrook and Alexander, having subscribed this stock, insisted, that the same should be be specifically returned to them. The court below decided, that they were not entitled to a specific return of this stock, but that it was to be considered the common property of the stockholders, subject to be divided among
*555] *them, without regard to the value of their respective stocks; and the cause was brought by appeal to this court.

March 20th, 1822. The cause was argued by *Swann*, for the appellant, and by *Jones*, for the respondent.

March 21st. MARSHALL, Ch. J., delivered the opinion of the court.—The only question is, whether the road stock paid in as part of the capital of the bank, became the common property of the company, so entirely, that it should be sold and distributed among the members, after the charter of incorporation, which directed that the capital should consist of money only, was accepted; or should be returned specifically to those who subscribed it, or to the assignees of their shares?

The articles of association show that this stock constituted originally a part of the capital; that it was received from each stockholder as so much money; that it constituted the subject on which the bank traded. Each share represented an equal part of the whole capital, comprehending each description of road stock, and of the money paid in; and there was nothing

on the face of the certificate, which was transferrible, indicating that one share was more valuable than another. If, instead of obtaining the act of incorporation, the company had expired or been dissolved by consent, the shares would have been equal, and would have entitled the holders to equal portions of the whole capital. The dividends, during the continuance of the company, must have been *equal. Had the road stock been sold, it must have been carried to the credit of the whole company. [*556

Upon every view we can take of this subject, the road stock can be considered only as a component part of each share, all individual property in which was lost, on its being transferred to the company. It became consolidated with the other part of the capital, and the charter of incorporation did not produce any change in this respect.

Decree affirmed, with costs.

Marbury *v.* Brooks.

Assignment in trust for creditors.

A debtor has a right to prefer one creditor to another in payment, and his private motives for giving the preference, cannot affect the exercise of the right, if the preferred creditor has done nothing improper to secure it.[1]

But any unlawful consideration, moving from the preferred creditor, to induce the preference, will avoid the deed which gives it.

It is not necessary to the validity of such a deed, that the creditors, for whose benefit it is made, should have notice of the execution of the deed, provided they afterwards assent to the provision made for their benefit.[2]

Nor is it any objection to the validity of the deed, that it was made by the grantor, in the hope and expectation, that it would prevent a prosecution for a felony, connected with his transactions with his creditors; if the favored creditors have done nothing to excite that hope, and the deed was not made with their concurrence, and with a knowledge of the motives which influenced the grantor, or was not afterwards assented to by them, under some express or implied engagement to suppress the prosecution.[3]

*Nor will it be invalidated by the fact, that the trustee, to whom the conveyance was made, being the father-in-law of the debtor, received the conveyance with a view of concealing the felony, and preventing a prosecution of his son-in-law, provided, it was not executed with the concurrence of the *cestuis que trust*, and a knowledge on their part of the motives which influenced the trustee, or was not afterwards assented to by them, under some engagement to surpress the prosecution. [*557

Error to the Circuit Court for the District of Columbia. This was an attachment sued out by the defendant in error, Brooks, on the 10th February 1820, to attach the lands, tenements, goods, chattels and credits of Fitzhugh, an absconding debtor, pursuant to the act of assembly of Maryland of November 1795, ch. 56; levied in the hands of the plaintiff in error, Marbury, who was duly summoned as garnishee, on the 11th February 1820. The garnishee appeared and pleaded that he had no effects, &c., of the absconding debtor in his hands, upon which an issue was joined and tried by

[1] S. C. 11 Wheat. 78; Pearpoint *v.* Graham, 4 W. C. C. 232; Lawrence *v.* Davis, 3 McLean 477; Coolidge *v.* Curtis, 7 Am. L. Reg. 334; Tompkins *v.* Wheeler, 16 Pet. 106.

[2] Brown *v.* Minturn, 2 Gallis. 557; Wheeler *v.* Sumner, 4 Mason 183; Halsey *v.* Whitney, Id. 206; Bholen *v.* Cleveland, 5 Id. 174.

[3] See Swope *v.* Jefferson Fire Ins. Co., 93 Penn. St. 251.

a jury; verdict for plaintiff in the attachment, and judgment in due form against the garnishee.

Upon the trial, evidence was produced on the part of the plaintiff, to prove that the said Fitzhugh had, on the 31st December 1819, a store of goods in Georgetown, furniture and other personal property, which came to the hands of the said garnishee, and were afterwards sold and disposed of by him; leaving in his hands, from that time to the present, money and effects of the said Fitzhugh, to a very considerable amount, over and above the debt claimed by the plaintiff in the said attachment; that the said Fitz-
*558] hugh was, at and before the time of the issuing and the *serving of the said attachment, and still continued, indebted to the plaintiff in the said sum of $1421.30. Whereupon the garnishee, in order to prove that the money and effects so being in his hands were not liable to the attachment, produced and read to the jury a paper writing, purporting to be a bill of sale from the absconding debtor to the garnishee, recorded among the land records of the proper county, on the 3d day of June, next ensuing its date, in the words following:

This indenture, made this 31st day of December, in the year 1819, between Richard H Fitzhugh, of the one part, and William Marbury of the other part: Whereas, the said Richard H. Fitzhugh is indebted to the Farmers' and Machanics' Bank of Georgetown, in the sum of $4300; to the Bank of Columbia, in the sum of $2850; to the Union Bank of Georgetown, in the sum of $1550; and to the Branch Bank of the United States, at Washington, in the sum of $7000, all current money; for the payment of which, the said Fitzhugh wishes to provide, and therefore, executes this deed or instrument of writing: Now, this indenture witnesseth, that the said Richard H. Fitzhugh, for and in consideration of the premises, and for the further consideration of five dollars, current money, to him in hand paid by the said William Marbury, the receipt of which is hereby acknowledged, hath given, granted, bargained and sold, and by these presents doth give, grant, bargain and sell, unto the said William Marbury, his executors and
*559] administrators *all the stock of goods and merchandise now in the store on Bridge street, Georgetown, occupied by said Fitzhugh; also all the household furniture, goods and chattels, in the house situate in First street, in the same town, occupied by said Fitzhugh as a dwelling-house; also a negro woman, Maria, a negro woman, Chloe, and her children, Westley, Caroline, John and Nancy, all of which said negroes are now in the possession of said Fitzhugh; and the said Richard H. Fitzhugh doth hereby make over, transfer and assign to the said William Marbury, his executors, administrators and assigns, all his books of accounts, notes, bonds and other securities; to have and to hold all the said goods and merchandises, chattels furniture, negroes, books of accounts, notes, bonds and securities, unto him the said William Marbury, his executors, administrators and assigns for ever: in trust, however, to sell the same, according to the best of his judgment and discretion, and to pay the money thereby arising, as follows: first to pay the expenses of such sale, and after that, to divide the same between the banks, aforesaid, in proportion to the respective amounts due them; and if anything remain, it is to be paid to the creditors of the said Fitzhugh, in proportion to the debts ascertained to be due them. In witness whereof,

the said Richard H. Fitzhugh hath hereunto subscribed his name, and affixed his seal, the day and year before written.

R. H. FITZHUGH. (SEAL.)

Signed, sealed and delivered, in my presence, the word "three," being first interlined in the sixth line of the first page.

THOMAS CORCORAN.

*District of Columbia, Washington County, viz :

On this 31st day of December, in the year 1819, personally [*560 appeared before me, the subscriber, a justice of the peace in and for the district and county aforesaid, Richard H. Fitzhugh, party grantor within named, and acknowledged the aforegoing instrument of writing to be his act and deed. THOMAS CORCORAN.

And after the evidence on both sides had been fully examined, the plaintiff, having offered evidence tending to prove the following facts, prayed the instruction of the court to the jury, if the jury find from the evidence, that the said Fitzhugh, being a merchant and trader at Georgetown, in the county aforesaid, had committed divers forgeries of notes, and indorsements of notes, upon which he obtained money and credit to the amount of from $14,000 to $15,000 ; and that he was *bonâ fide* indebted to the plaintiff and divers other creditors (all of whom are interested, as attaching and general creditors, in the determination of this cause) for goods, wares and merchandises, and for moneys lent and advanced, to the amount of $20,000 or upwards, over and above the said forgeries ; that William Marbury the trustee named in the said deed, and the garnishee summoned in this cause, is the father-in-law of said Fitzhugh ; and that the said Marbury, before the execution of the said deed, being desirous to screen the said Fitzhugh from disgrace and prosecution for the said forgeries, and understanding that the *said forgeries amounted only to about $5000 or $6000, had consented to pay off the same, and take a deed of trust or mort- [*561 gage from the defendant, by way of collateral security for the moneys so to be advanced by him ; and that in pursuance of that arrangement, such a deed of trust or mortgage, by way of collateral security, was actually drawn and executed ; in which was included the same indentical property mentioned and conveyed in and by the deed above given in evidence ; but the said Marbury, discovering that the amount of forgeries was, in fact, so much greater than had been represented, and finding that he would have to pay from $14,000 to $15,000, instead of $5000 to $6000, in order to accomplish his first design of screening said Fitzhugh from disgrace and prosecution, refused to advance any money to take up the forged notes ; and said, "I will not ruin my family for you : now, I advise you to make your escape as soon as you can." Whereupon, the said deed, so executed as aforesaid, was cancelled and torn up, and immediately afterwards, another deed (being the same now produced) was drawn by John Marbury, a witness present at its execution : that the said deed was executed after the noon on the day on which it bears date ; and that on the night of the same day, the said Fitzhugh absconded from the district of Columbia, and was so absconding from that time, until, and at the time, the attachment issued in this cause, and ever since : that the creditors, whose debts the said

deed purports to secure, were wholly ignorant of the execution, and of
*562] *the intent to execute the same, until after the same was executed as aforesaid; and were not in any manner privy or consenting thereto; except that the said William Marbury held stock as a trustee in one of the said banks, and John Marbury, the attorney who drew the same, was a stockholder in another of the said banks; that the whole of said property lay within the county aforesaid, and would have been subject to this attachment, but for the said conveyance: that the said deed includes and conveys the whole of the property, *choses in action*, and estate of every kind, in possession of said Fitzhugh, or to which he was in any manner entitled, at the time of excuting the same: that the whole of the debts, which the said deed purports to secure, stood upon no other foundation than that of notes forged by the said Fitzhugh, and passed by him as genuine, to the banks respectively mentioned in said deed, and discounted by said banks for him, and the money thereupon advanced to him (such notes, however, being all actually signed or indorsed by said Fitzhugh, and he being liable for the payment thereof), to the respective amounts stated in said deed; and that at the time of the execution of the said deed, it was expected and understood, that it comprehended all the cases in which the said Fitzhugh was involved by means of his said forgeries, and was not intended to comprehend any other, except as to the surplus, after satisfying said forged paper; and that said Fitzhugh, the evening before the execution of the said deed, called on C. Smith, the cashier of the Farmers' and Mechanics' Bank,
*563] in said deed mentioned, and a *stockholder in the same, and had conversation with him relative to the said forgeries; and that the said Smith, after being informed that the said forgeries amounted to only about $5000 or $6000, and that he thought he had property enough to pay all his debts, if judiciously managed, said to the said Fitzhugh, that he had no doubt the said Marbury would take up and pay all the said forged notes, and that nothing more would be said about it; and said Fitzhugh begged of said Smith to see said Marbury, and recommend that course to him, which said Smith promised to do the next morning: that when said Smith called for that purpose the next morning, he found said Marbury with said Fitzhugh, and the said John Marbury, Esquire, together at the office of the latter, engaged in drawing a deed: that the said William Marbury declared, in consequence of finding the forgeries amount to so much more than he expected, that he would pay nothing; and the said Smith left the office, before the said deed was executed: that on the day of the execution of said deed above given in evidence, a note to which the said W. Marbury's name had been forged by Fitzhugh, and by him passed for value received to one G. R. Gaither, became due and payable at said Farmers' and Mechanics' Bank, where the same was deposited by the holder for collection, said bank having no interest in the same: that the holder had called at the bank, and expressly ordered the said note to be sent out and presented for payment, in order that the said Marbury might distinctly avow or disavow his signature; and to be protested, if not admitted and paid; and that the said Marbury,
*564] either in the evening of the same day the *deed was executed, and after the execution of the same, or in the morning of the next day, called at said bank and took up said note, after it had been sent out to the notary, and before the return of the protest; that said Marbury, at the same time,

took up another forged note and a check due to the said bank (both being also forgeries of the said Fitzhugh), upon neither of which his (Marbury's) name had been forged; and the said two notes and checks were the whole of the paper forged by said Fitzhugh, which was then due and demandable; and said Marbury took up said notes and check, in anticipation of funds expected to arise from the property conveyed as aforesaid; and took the receipt of C. Smith, cashier of said bank, for the amount so paid on said forged notes and check, in the words following:

"Georgetown, January 1, 1820.

"Received of William Marbury, twelve hundred and fifty dollars forty cents, part of the debt due the Farmers' and Mechanics' Bank of Georgetown, mentioned in the deed of R. H. Fitzhugh to the said Marbury, dated 31st December 1819.

$1250.40. C. SMITH."

That the said Marbury, in a conversation, the day after the execution of said deed, relative to the said deed, and to the circumstances attending the execution of the same, expressed regret at having had anything to do with it; represented that said Fitzhugh had come to him in tears; and entreated him to save him, or screen him from prosecution, and to have the affair hushed up (or words to that effect); and the said Marbury, in that conversation, expressed it as *his wish, that it might be hushed up: and [*565
the said Marbury, in the course of conversation, further remarked, that said Fitzhugh seemed scarcely to know what he was about, and would have done anything to get away: and said Marbury further remarked, in said conversation, that said Fitzhugh had a rich uncle disposed to assist him, and his father was expected in town in a few days, and that if his debts did not amount to too much, they might all yet be provided for; that he (Marbury) did not suppose the loss, upon winding up said Fitzhugh's affairs, would exceed $10,000; that if it did not exceed that sum, his friends would arrange the whole, and he (Marbury) himself would be willing to go as far as $5000, if Fitzhugh's other friends would answer the balance; and the said Marbury further remarked, that if $20,000 would save him (Fitzhugh) from disgrace, he (Marbury) would pay it; that what he had already done, was to save Fitzhugh from prosecution, he (Marbury) having no interest in it; and that said Marbury, in another conversation, speaking of having taken up the said note due to said Gaither, said, he was anxious to get the forged notes out of the way: and that after the execution of said deed, the defendant was unwilling to leave the district, and wished to remain at least a week longer; and that the attorney who drew the said deed, being nearly connected with the parties as the son of the trustee, and brother-in-law of said Fitzhugh, persuaded and advised him to quit the district, and among other reasons urged, *that if all the parties were satisfied to let him remain unmo- [*566
lested, still, Mr. Richard Smith, the cashier of the Branch Bank of the United States (which is one of the banks which the said deed purports to secure), would feel himself compelled to prosecute; and that it would be more than his office was worth to overlook it, on account of the great interest the Bank of the United States felt in prosecuting and bringing to justice persons guilty of forgery: that said William Marbury also urged said Fitzhugh to quit the district, in order to get out of the way of prosecution; and

that said Fitzhugh, in the night of the same day said deed was executed, actually fled from justice, and absconded as aforesaid, with the privity and consent of said William Marbury; and that neither he, nor any person on the part of any of the said banks interested in said deed, did ever move in the said prosecution, or attempt to have the said Fitzhugh arrested and brought to justice; and that it was known to the acting officers and agents of the said banks, before the departure of the said Fitzhugh, that he was guilty of said forgeries:

Then the jury may conclude from the said facts and evidence, that the said deed was devised and executed by the said Fitzhugh, and accepted by the said William Marbury, with the motive and intent of prevailing with the holders of the said forged notes to forego a prosecution for the said forgeries; and also, that upon the facts so given in evidence on the part of the plaintiff as aforesaid, if believed by the jury to be true as stated, the said deed is fraudulent and void as against the plaintiff. Which
*567] instruction *the court gave as prayed. To which the defendant excepted.

And the said garnishee, having offered evidence to prove the following facts, viz: That after the execution of the said deed, the said Fitzhugh was urged by the said John and William Marbury to fly from the district; that the said Fitzhugh made great objections to going away, and wished to remain a week, and upon being told, that he would be in danger of arrest and prosecution, if he did so, the said Fitzhugh replied, that he could not be arrested, until the meeting of the court; but upon being satisfied, that he might be called before a magistrate, and immediately arrested, and the observation before stated being made about Mr. R. Smith, and being told of the punishment to which he was exposed, he consented to go. And he further offered to prove, by the evidence of the said John Marbury, a witness sworn in the cause, that he was not certain, who first proposed the drawing of the new deed; but to the best of his recollection, the proposal came from said Fitzhugh, and that said W. Marbury was requested by said Fitzhugh to become the trustee; to which he consented. That at the time of the execution of the said deed, the said Fitzhugh executed the same voluntarily, and that no expectation was held out to him, either by himself, or by Mr. W. Marbury, or any other person, to the witness's knowledge, either then or at any time before, that by executing the same he would be saved from a prosecution; nor was there any promise or expectation given, that they, the said Marburys, or either of them, would endeavor to prevail
*568] *with the holders of the said forged notes, or any other persons, to forbear arresting or prosecuting the said Fitzhugh: and further, that neither the witness, nor W. Marbury, ever made any such application to any of the said holders, or to any other person: and further, that at the time of the execution of said deed, all expectation of preventing a prosecution, or concealing the said forgeries, was abandoned, and that the only mode pointed out to said Fitzhugh, for avoiding said prosecution, was by an immediate flight: and all the said forged notes still remain in said banks, except the two notes and the check mentioned in the statement of plaintiff's evidence; and upon the evidence, offered as aforesaid, both on the part of plaintiff, and the garnishee, and so stated as aforesaid, the garnishee, by his counsel, prayed the court to instruct the jury:

If the jury believe, from the evidence, that R. H. Fitzhugh, owing the debts mentioned in the deed offered in evidence, executed and delivered the same, voluntarily, and without any threat of prosecution, and without any promise or agreement made to him—that in case of executing it, he would not be prosecuted, then the plaintiff is not entitled to recover. But the court refused to give the instructions as prayed by the defendant, and in lieu thereof, gave the following instructions, to wit:

If the jury believe, from the evidence, that R. H. Fitzhugh, owing the debts mentioned in the deed offered in evidence, executed and delivered the same, voluntarily and *bonâ fide*, and without any threat of prosecution, and without any promise or agreement *made to him, and without any [*569
expectation on the part of said Fitzhugh, raised by the acts of said Marbury, or of some of the persons interested in the said trust—that in case of his executing it he would not be prosecuted, and that possession of the said goods accompanied and followed the execution of the said deed, then the plaintiff is not entitled to recover. To which refusal the defendant excepted; and the plaintiff excepted to the instructions granted by the court.

And the defendant, by his counsel, then prayed the court to instruct the jury, that if they believed from the evidence, that the said R. H. Fitzhugh, owing the debts mentioned in the deed offered in evidence, executed and delivered the same, without any persuasion or threats, and upon his own proposal, and without any understanding with anybody, that by executing the same, he should be saved from prosecution, and that nothing was said or done by any person, for the purpose of influencing him, by any such consideration, to execute the same, and that the previous understanding between him and said Marbury, as to the latter paying and taking up the said forged papers was, before the execution of the said deed abandoned, and that there was no understanding between the said Fitzhugh and the said Marbury, that they, or either of them, should forbear prosecuting him, or should attempt to prevail with the holders of said forged paper to forbear prosecuting him on account of the same, nor any understanding with said holders that they should so forbear, and that no attempt whatever was ever made so to prevail upon the said holders, nor in any manner *to prevent such prosecution; and that said Fitz- [*570
hugh, at the time of executing such deed, asserted that he had property enough, if judiciously managed, to pay the said forged paper and all his other debts also; and that said Marbury and the said holders of said forged notes could have instantly prosecuted the said Fitzhugh for said forgeries, without violating any promise or understanding that had subsisted between them; and that unless he had absconded as aforesaid, he would have been, by the said holders, immediately prosecuted for said offences, and that such prosecution was not in any manner avoided by the execution of said deed, but only by his absconding from the district, then the jury may and ought to presume, that the said deed was executed *bonâ fide* and for a valuable consideration; and that the plaintiff is not entitled to recover; which instruction the court gave. To which opinion and direction, the plaintiff excepted.

And thereupon, the plaintiff prayed the court to instruct the jury, that if, under all the circumstances before given in evidence, the jury shall find,

that the obtaining of impunity or forbearance of prosecution, for the said forgeries, formed no part of the consideration or inducement for the execution of the said deed, with said Fitzhugh, or with any other person, directly or indirectly concerned, still, if the jury find from the evidence, that the great majority of the creditors of said Fitzhugh, in number and value, were, by means of said deed, unjustly and purposely hindered, delayed and defeated in their proper suits and remedies, for the recovery of their said
*571] debts, upon the absconding of said Fitzhugh, and that the *said deed was executed as aforesaid, with the purpose and design of preventing and defeating any legal recourse in behalf of such majority of creditors, against the property and effects which said Fitzhugh intended to leave behind, and did leave behind him, when he fled from justice as aforesaid; and if it be further found, that no creditor whatever of the said Fitzhugh was party or privy, or in any manner consenting, to the execution of the said deed, then the said deed is fraudulent and void in law, as against the plaintiff. Which instruction the court gave; but also instructed the jury, that the preference given by the said deed to some of the creditors of said Fitzhugh, did not of itself make the said deed fraudulent and void in law. To which also, the defendant excepted.

And the defendant further prayed the court to instruct the jury as follows: If the jury should believe, from the evidence, that Richard H. Fitzhugh, owing the debts mentioned in the deed, executed the same, under an expectation that it might have prevented him from being prosecuted for the forgeries, and that neither the said William Marbury, nor any of the holders of the said forged notes, nor persons interested in the same, held out to him any such expectations, then the said deed is valid, and the plaintiff not entitled to recover. Which opinion the court refused to give, but instructed them as follows:

If the jury should believe, from the evidence, that Richard H. Fitzhugh, owing the debts mentioned in the deed, executed the same, under an expectation that it might prevent him from being prosecuted for *the forg-
*572] eries, and that neither the said William Marbury, nor any of the holders of the said forged notes, nor persons interested in the same, held out to him any such expectation, then the said deed is valid (unless there should be some other objection to it), and the plaintiff not entitled to recover. To which refusal, the defendant by his counsel excepted: and the plaintiff also excepted to the instruction given by the court.

A verdict and judgment thereon having been rendered for the plaintiff, Brooks, in the court below, the cause was brought by writ of error to this court.

March 19th, 1822. This cause was argued by the *Attorney-General* and *Key*,(*a*) for the plaintiff in error, and by *Jones*,(*b*) for the defendant in error.

March 21st. MARSHALL, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered in a circuit court of the United

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(*a*) They cited 1 Johns. Cas. 205; 2 Johns. Ch. 297; 4 Wheat. 503; 13 Vin. Abr. 517, pl. 10; 541, pl. 3; Ambl. 596; 4 East 13; 5 T. R. 424; 8 Id. 528.

(*b*) Citing 9 Johns. 337; 5 Cranch 350; 6 Mass. 339; Cowp. 434; Roberts on Frauds 585.

States for the county of Washington. In the circuit court, the controversy turned entirely on the validity of the deed of the 31st of December 1819. The jury found against its validity, and the cause depends in this court on the correctness of the instructions under which the verdict was found.

*After the testimony was concluded, the plaintiff in the circuit court moved that court to instruct the jury, that if they find from the [*573 evidence the facts which it was offered to prove, and which are stated at large in the bill of exceptions, " that then the jury may conclude from the said facts and evidence that the said deed was devised and executed by the said Fitzhugh, and accepted by the said William Marbury, with the motive and intent of prevailing with the holders of the said forged notes to forego a prosecution for the said forgeries; and also upon the facts so given in evidence on the part of the plaintiff as aforesaid, if believed by the jury to be true as stated, that the said deed is fraudulent and void as against the plaintiff." This instruction the court gave as prayed. It consists of two parts: first, that which authorizes the jury to infer "the motive and intent " with which the deed was executed; and secondly, that which declares the deed " fraudulent and void as against the plaintiff," if the facts given in evidence by him as stated in the bill of exceptions, are believed to be true.

This last part of the instruction may possibly have been intended to depend on the first. It may have been intended to say, that if the jury should draw the conclusion which was authorized by the court, respecting the motive and intent with which the deed was executed, they should then find the deed fraudulent and void as against the plaintiff. But such is not the direction of the court, as it appears in the case before us. The second clause of the instruction *is entirely independent of the first, and the jury is directed to find the deed fraudulent and void, if the facts [*574 stated in the bill of exceptions are believed. The testimony of the plaintiff would certainly justify the conclusion, respecting the motive and intent with which the deed was executed and received, that he wished the jury to draw; and although the instructions on this point might have been expressed in terms less exposed to cavil, we will not say, that they withdraw from the jury their right for deciding for or against that conclusion. If the case rested on this branch of the opinion of the court, we feel some difficulty in saying that it was too strongly expressed.

But the second branch of this instruction cannot, we think, be sustained. Had the motive and intent with which the deed was executed and received been left to the jury; and had they been instructed, " that if they believed it to have been executed and received, with the motive and intent of prevailing with the holders of the forged notes to forego a prosecution for the said forgeries, then, the deed would be fraudulent and void against the plaintiff," the single question of law respecting the validity of such a deed would have been presented to this court. But the instuction, as given, does not depend on this conclusion. It depends on their believing that the facts stated in the bill of exceptions are proved; and they are informed, that if those facts are true, the deed is void. To sustain this instruction, the facts must be such as clearly to amount to a fraud.

The first fact is, that Marbury, the father-in-law *of Fitzhugh, [*575 and the trustee in the deed, when first informed of the forgeries which had been committed, being desirous of screening his son-in-law from

disgrace and from punishment, and being informed that the forged notes amounted to only $5000 to $6000 agreed to take up the notes, on receiving a conveyance of property for his indemnity ; but on finding that their amount was much more considerable than he had supposed, he tore up the deed, and refused to engage himself for the notes. This part of the transaction has been denominated a fraud. We cannot think it one. To advance money for a son-in-law, to repair the frauds he had committed, even with the hope of concealing the perpetration of them, is not, we think, an offence which may not be excused ; nor can a security taken for the repayment of money so advanced be deemed fraudulent. If the notes were to be taken up on condition that the holders would forbear to prosecute the criminal, or if the repayment of the money advanced were to depend upon his escape from prosecution, the validity of the contract might well be questioned. But the undertaking of Marbury was unconditional, as was the security for the repayment of the money advanced. The only feature in the transaction to which blame is attached is the attempt of a father-in-law to conceal the forgeries of a son-in-law, by paying off the notes he had forged. It may be the duty of a citizen to accuse every offender, and to proclaim every offence which comes to his knowledge; but the law which would punish him
*576] in every case, for not performing this duty, is too harsh for *man. This fact certainly indicates the interest taken by Marbury in the escape of Fitzhugh, but goes no further.

On cancelling this first deed, Marbury said to Fitzhugh, "now I advise you to make your escape as soon as you can." And immediately after it was cancelled, the deed now in contest was drawn by a person then present, which comprises all the property of Fitzhugh, of every description, and purports to secure all those creditors, who where then understood to be holders of the forged notes. It did not appear, that the creditors, for whose particular benefit the deed was made, had any notice of the transaction ; but William Marbury, the trustee, and John Marbury, who drew the deed, were severally stock-holders in two of the banks for whose debts it provided. It was also proved, that the evening before the execution of the deed, Fitzhugh called on C. Smith, the cashier of one of the banks, and a stockholder in it ; and in a conversation with him respecting the forgeries, said that Marbury would pay the notes. That Smith called on Marbury next day, while the deed was preparing, but on being told, that he would not pay the notes, departed before it was executed. Two of the forged notes fell due about the time, and were taken up by the trustees, on the day after the deed was executed. It appeared, that Fitzhugh was anxious to remain some time longer in the district, but was urged both by William Marbury and John Marbury, who was son of William, to escape immediately, as he would certainly be prosecuted by the Bank of the
*577] United States, is he remained ; and that he did abscond the *night succeeding the execution of the deed. It appeared, from the declarations of Marbury himself, that his object, throughout the whole transaction, was to save Fitzhugh from prosecution. It is sufficiently obvious, that Marbury acted as the friend and adviser of Fitzhugh, and in the hope that, if the notes should be taken up, the creditor banks would not pursue him out of the district. It is stated, that they have not instituted any prosecution against him, but it is not stated, that it has been in their power to do

so, or that they know where he is. Do these facts, of themselves, avoid the deed?

That a debtor has a right to prefer one creditor to another cannot be denied, and that his private motives for giving this preference, provided the preferred creditor has done nothing improper, cannot annul this right, is equally certain. On the other hand, it will be also admitted, that any unlawful consideration moving from the preferred creditor to induce this preference, may avoid the deed which gives it. Had Mr. Marbury acted as the agent of the banks holding the forged notes, or with their knowledge and concurrence, had they been in any manner pledged not to prosecute Fitzhugh, should the notes be taken up, either before or after the deed was executed, and while it was in the power of Marbury to withhold from them the money produced by the property conveyed, the case would be a strong one against the banks. But there is no ingredient of this sort in the case; at least, none is submitted to the jury. The fact, in its strongest aspect, is, that a deed was made, giving this preference, in the hope that it would propitiate *the preferred creditors, and prevent their being so active as they might otherwise be in proceeding against the criminal. But the [*578 facts, as they stand, show no agreement made at any time to forbear to prosecute, nor that the interest of the creditors would be in any manner affected by the institution of a prosecution, and carrying it on to the conviction of the offender.

If Fitzhugh had remained, and his crime had not been discovered, he might have sold all the property comprised in this deed, and might have applied the money to the notes he had counterfeited. His hope that this act would conceal the crime, and save him from punishment, would not have vitiated the transaction. Had he, on determining to abscond, executed to Mr. Marbury the very deed now in question, conveying all his property in trust for the creditors who are preferred in that deed, and afterwards, for other creditors, without any previous communication with any person whatever, would such conveyance have been distinguishable from an absolute sale? Would the hope in his own bosom, that such conveyance might have the effect of exempting him from a prosecution, unaccompanied by any act of the favored creditors giving countenance to such hope, avoid the deed? The consideration moving from the creditor, would be a real debt, and consequently, a valuable and fair consideration. It would not be tainted by any secret hope working in the mind of the maker *of the deed. It [*579 would not be the less fair, on account of that hope. We think that the validity of such a deed could not be drawn into question.

The only circumstance which can create any doubt in this case, is, that the father-in-law of the maker of the deed, the man who took a strong interest in his escaping prosecution, and who advised his flight, is made the trustee. How far ought this circumstance to affect the preferred creditors? There are cases in which notice to a trustee may affect the *cestui que trust*, and in which the acts of a trustee may be considered as the acts of the *cestui que trust;* but we are not prepared to say that this is one of those cases. Mr. Marbury was not a trustee selected for this purpose by the bank. They were entirely ignorant of all that was passing between him and Fitzhugh. He was not, then, agent in obtaining the deed. He was not empowered to act for them, or to make any representations in their name, or to bind them

in any manner whatever. He is the agent of Fitzhugh, to sell his property and pay his debts, in the order prescribed by himself. He had a right to prescribe this order, and the secret hopes of himself, or his agent, cannot affect those who never did any act to inspire those hopes.

This deed is absolute on its face, and there is no allegation that its effect was to depend on any subsequent agreement of the banks for the suppression of the prosecution. There is no evidence of any communication between the banks and Marbury, before the deed was recorded and irrevocable.

*580] Suppose, *Marbury had applied to the banks, the deed not being delivered as an escrow, and had told them that unless they would consent to suppress the prosecution, he would not allow them to take any benefit from the deed, would his attempt to deprive them of his benefits be supported in law? We think it would not. Suppose, Marbury had, in consequence of the actual institution of a prosecution against Fitzhugh, refused to act under the deed. Would not a court of chancery have decreed him to to execute the trust, or have appointed some other trustee to execute it? It certainly would. It is then the opinion of the court, that, even supposing the deed to have been executed in the hope and expectation that it would operate as a suppression of the prosecution, the favored creditors having done nothing to excite that hope, and being entirely ignorant of the transaction, ought not to be affected by it.

But that this was the motive to the deed, though highly probable, is not certain. Fitzhugh might have been impelled by other considerations to give these particular creditors the preference. The court was not, we think, at liberty to say, that the deed was void, in consequence of any motive which the court might impute to its maker. The motive was a fact of which the jury was to judge.

There are in the case some facts, which seem to be introduced for the purpose of raising a suspicion that the banks might have had notice of the forgeries, before the execution of the deed, and of the transactions

*581] between Fitzhugh and Marbury. But *the cause was not put on this point, nor do any of the instructions given by the court, refer to it. There is no allusion to notice to all the banks, and the deed would not be void, on account of notice to one, so far as respected others. There are several opinions given by the court, which are dependent on this single principle—that the communications between Fitzhugh and Marbury, though unknown to the banks, avoid the deed. The cause, so far as it is now before the court, essentially depends on this single principle. This court is of opinion, that in this, the circuit court erred, and that the deed is not void, unless Marbury acted with the concurrence or knowledge of the banks, or unless they assented to it under some engagement, express or implied, to suppress the prosecution.

Judgment reversed, and a *venire de novo* awarded.[1]

[1] For a further decision in this case, see 11 Wheat. 78.

Dorr *v.* Pacific Insurance Company.

Insurance.— Unseaworthiness.

Under a policy containing the following clause, "And lastly, it is agreed, that if the above vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, then the assurers shall not be bound to pay their subscription on this policy," and it was found by the jury, that the vessel was seaworthy, at the time of the commencement of the risk, and when she sailed on the voyage insured: *Held*, that proof, by a regular survey, of unsoundness, at any subsequent period of the voyage, discharged the underwriters.

*An exemplification of a condemnation of the vessel, in a foreign court of vice-admiralty, reciting the certificate of surveyors, that the vessel was unworthy of being repaired, and unsafe and unfit ever to go to sea again, and produced in evidence by the assured, to prove the loss, is "a regular survey," in the language of the above clause.[1] [*582

But the survey must correspond with the contract, and if the vessel be declared unseaworthy, for any additional cause, besides being "unsound or rotten," it is not conclusive evidence of unseaworthiness.[2]

Error to the Circuit Court for the Southern District of New York. This was an action of *assumpsit*, upon a policy of insurance, subscribed by the defendants, on the 8th September 1819, whereby they insured the ship Holofern, belonging to the plaintiff, and valued at $6125, on a voyage from Wiscasset, in Maine, to Havana, in the West Indies. The policy contained the following clause:

"And lastly, it is agreed, that if the above vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers shall not be bound to pay their subscription on this policy."

A special verdict was found by the jury, stating that the ship Holofern was the property of the plaintiff, and sailed on the voyage insured, on the 9th September 1819, and in the course of the voyage, she met with violent gales, in consequence of which, she sprung a leak, and after attempting, in vain, to pursue her voyage, was compelled to bear away for New Providence, and having arrived in the harbor, she grounded, from an insufficient depth of water, but was gotten off, *and a regular survey was had upon her, by surveyors appointed by the vice-admiralty court at Nassau, and upon such survey, the ship was condemned in the manner stated in the sentence of condemnation, of which the following is a copy: [*583

Bahama Islands, New Providence. } In the Instance Court of Vice-Admiralty.

Ship Holofern, John S. Thompson, Master.

In the name of God, Amen!

[L. S.] At a court of vice-admiralty, held the 26th day of October 1819, before me, the worshipful Theodore George Alexander, Esquire, judge and commissary of the said court, John S. Thompson, the master of the American ship Holofern, by William Kerr and Henry M. Williams, his proctor in that behalf duly appointed, came into court, and alleged, that on the 20th day of this instant month of October, he did exhibit a libel or

[1] And see Catlett *v.* Pacific Ins. Co., 1 Paine 594; Steinmetz *v.* United States Ins. Co., 2 S. & R. 293.

[2] See Armroyd *v.* Union Insurance Co., 2 Binn. 394; Hoff *v.* Marine Ins. Co., 8 Johns. 163; Innes *v.* Alliance Mutual Ins. Co., 1 Sandf. 310; Griswold *v.* National Ins. Co., 3 Cow. 96.

information against the said ship, when he gave the court to understand and be informed, that on the 8th day of October instant, the said John S. Thompson, by his proctor aforesaid, did make humble petition to the court, stating, that on the 9th day of September last past, he sailed in and with the said ship, from Wiscasset, in the state of Massachusetts, bound on a voyage to Havana, in the island of Cuba, with a cargo of lumber, spars, oars, anchors and coals, and on the 18th day of the same month, in latitude 28° 39′, by observation, he experienced a very violent gale of wind, during
*584] which the said ship sprung a leak: *that all hands were, in consequence thereof, employed at the pumps, until the 24th of the same month, when he had proceeded on his voyage as far as the Bahama bank: that at that time, the people, being nearly exhausted by incessant labor at the pumps, they insisted on bearing up for New Providence, which he thought it prudent to do, as the wind was then westerly, and a-head for the Havana: that he accordingly proceeded for New Providence with the said ship, and arrived in the harbor of Nassau, on the 26th day of the said month of September: that since the arrival of the said ship in the said port, a part of her cargo had been landed, and upon his inspecting and examining into her condition, he conceived her not only unfit to proceed to sea again, in her present state, but altogether unworthy of being repaired. And he, therefore, prayed, that a warrant might forthwith issue out of this honorable court, according to law and the usage and practice of the said court in such cases, to cause the said ship to be surveyed and examined by persons duly competent in that behalf, who might report as to the true state and condition of the said ship. And thereupon, a warrant did issue accordingly, directed to William Gibson and John Russell, of the island of New Providence, ship-wrights, and Samuel Clutsam, of the same place, late a master mariner, who did certify, on the 19th day of October instant, on oath, that on the 8th day of October instant, they repaired on board the said American ship Holofern, John S. Thompson, master, riding at anchor in the harbor of Nassau,
*585] but not finding the said ship more than half *discharged, they could not then properly proceed to examine into her state and condition. And they did further certify, that on the 16th day of October instant, the said ship being then nearly discharged, they were enabled to inspect and examine into her state and condition, and having done so, minutely and diligently, they found her to be in a very leaky state, and having, at the same time, caused a part of her inside ceiling to be stripped off, they discovered the said ship to be in a very decayed condition. And they did further certify, that they were of opinion, that the said ship was altogether unworthy of being repaired, and that she ought to be condemned as being unsafe and unfit ever to go to sea again. Wherefore, the said William Kerr and Henry M. Williams, as the lawful proctor aforesaid, prayed me, the worshipful Theodore George Alexander, Esquire, judge and commissary as aforesaid, that right and justice might be duly administered to them and their party in the premises; that the said ship Holofern might, by the decree of this honorable court, be condemned as unfit for further service, and together with boats, tackle, apparel and furniture, be ordered to be sold by the marshal of this court, and the proceeds thereof might be paid to the said John S. Thompson, or his agent, for the use of the owners and proprietors and insurers thereof, and that such other proceedings might be had and

done in the premises as should be agreeable to law, and the style and practice of the admiralty. And whereas, the usual and proper monition hath been issued and returned in this cause, and no person having appeared *to show cause why the said ship should not be condemned, agreeable to the prayer of the said master, therefore, I, the said Theodore [*586 George Alexander, Esquire, judge and commissary as aforesaid, having considered the whole proceedings had and done before me in this cause, do hereby adjudge, pronounce and declare the said ship unfit for the further service, and as such do condemn the said ship, and direct that the same, together with her boats, tackle, apparel and furniture, be forthwith sold by the marshal of the said court, and the proceeds paid to the said John S. Thompson, or his agents, for and upon account and use of the owner, proprietors and insurers thereof. In testimony whereof, I, the said Theodore George Alexander, Esquire, judge and commissary as aforesaid, have hereunto set my hand, and caused the seal of the said court to be affixed, at Nassau, the 26th day of October, in the year of our Lord 1819.

(Signed) THEO. G. ALEXANDER, J. C. V. A.

Bahama Island, New-Providence. } In the Vice-admiralty Instance Court.

In the case of the American ship Holofern, John S. Thompson, master, I certify the foregoing paper writing to be a true copy of the decree made and given in the above cause. In testimony whereof, I have hereunto set my hand, and caused the seal of the said court to be affixed, this 17th day of July, in the year of *our Lord 1820. [*587

ALEXANDER. M. EDWARDS,
Dep. Reg. C. V. A.

The special verdict also found, that the said condemnation was obtained through the agency of John and George K. Storr, a mercantile house at New Providence, to whom the Holofern was consigned by her master, and that the said John and George K. Storr (though ignorant of the insurance in this case) were the general agents of the defendants to manage their concerns at New Providence.

The special verdict further stated, that in consequence of this condemnation, the ship was sold, and the voyage lost: that the plaintiff exhibited to the defendants the requisite preliminary proofs of interest and loss, more than thirty days before bringing the action. That the said ship was seaworthy at the time of the commencement of the said risk, and when she sailed upon the voyage insured; and assessed the plaintiff's damages, in case he was entitled to recover, at $6625.20.

The record also contained a bill of exceptions, by which it appeared, that the plaintiff produced a copy of the record of the said vice-admiralty court, as preliminary proof of loss, and the judge charged the jury, that the said copy of the said sentence of condemnation having been produced in evidence by the counsel for the plaintiff, as preliminary proof of loss, *was, as [*588 against the plaintiff, sufficient evidence of a regular survey, in the absence of any proof to the contrary: to which opinion, the plaintiff's counsel excepted.

It further appeared, that the said admiralty proceedings at New Providence were conducted under the directions of Messrs. John and George K.

Storrs, a mercantile firm of that place, under whose charge the master had placed the Holofern. The Messrs. Storrs were authorized by a general power of attorney, set out in the bill of exceptions, to attend to the interests of the defendants at New Providence, but there was no evidence that they were apprised that the defendants had insured the Holofern.

The counsel for the plaintiff, for the purpose of proving that the said condemnation had been fraudulently obtained, inquired of the master of the Holofern, who was a witness in the cause, whether he ever made the statement represented by the said sentence of condemnation, to have been made in his petition to the said court, to wit, that the Holofern was not only incapable to proceed to sea in her then state, but altogether unworthy of being repaired? This question was overruled by the judge. The same witness was then asked by the plaintiff's counsel, whether the inside ceiling of the said ship was ever stripped off, as stated in the said sentence of condemnation, and whether she was not in such a situation, by reason of the position of such parts of her cargo and ballast as remained on board, and of
*589] the water in the hold, that it could not have *been stripped off as there stated? This question was in like manner overruled. The witness was then asked, whether he had not been informed by Gibson, one of the surveyors, that the Holofern was not condemned on account of her being rotten, but because she could not be hove down to be repaired, for want of conveniences for that purpose at New Providence? This question was also overruled. The same witness was then asked, whether he did not, by directions from the Messrs. Storrs, after the sale of the ship and cargo (at which sale the witness was not present), call upon the said Gibson, as having purchased part of the said cargo at auction, for the price thereof, and receive the same? The judge having ascertained, by inquiry of the plaintiff's counsel, that they had been in possession of the account sales of the said cargo, signed by the Messrs. Storrs, but that the same had been sent to Maine to recover a loss upon a policy on the corgo subscribed there, overruled the said question. The plaintiff's counsel excepted to the several decisions overruling the said questions.

March 6th. *H. D. Sedgwick*, for the plaintiff in error, argued: 1. That the sentence of condemnation of the court of vice-admiralty at New Providence, and the survey stated therein, being subsequent to the commencement of the risk, could only prove the unseaworthiness of the ship, at the
*590] time of the survey. *Marine Ins. Co.* v. *Wilson*, 3 Cranch 187. *The clause ir question has always been considered, both in arguments at the bar, and in the decisions of the courts, not as varying the reciprocal rights and duties of the parties, but simply as a stipulation in relation to evidence; nothing further is required of the assured, than to furnish a competent vessel at the inception of the voyage, and all subsequent accidents and losses are at the risk of the insurer, and of consequence, it was held in the case cited, that a report of surveyors in regard to the state of the ship on the 16th of October, was not competent, or if competent, not conclusive evidence of her condition, on the 9th September preceding. It had been suggested, that the decision in the *Marine Insurance Company* v. *Wilson* was founded on the particular state of the pleadings; but there was no intimation in that case, that the defence would have been available, in any other

form, and the case was decided for the plaintiff, on the ground that it did not appear by the record, that any evidence was offered to prove the vessel unsound on the 24th October, except the report of the surveyors, which was made on the 26th November, and that there was no parol testimony to explain the report, or apply it to the time of the commencement of the risk.

2. It is necessary for the protection of the insurers, that it should appear by the survey, that the rottenness of the ship was the exclusive cause of her condemnation. Such is the clear result of all the cases. *Garrigues* v. *Coxe*, 1 Binn. 592; *Watson* v. *Ins. Co. of North America*, 2 W. C. C. 152; *Armroyd* v. *Union Ins. Co.*, 2 Binn. 394; *Steinmetz* v. *United Ins. Co.*, 2 S. & R. 293. *Now, here, it does not appear, that the ship was irreparable from unsoundness solely. On the contrary, it appears by the special [*591 verdict, that she "met with violent gales, in consequence of which she sprang a leak." The Holofern is stated by the survey to have been in a leaky state; the cause of that leakiness is not stated, but it is to be referred to the leak sprung in consequence of the perils insured against. The rule has been laid down more strongly than we contend for. "Springing a leak is a peril insured against, and any accident which can be traced to the springing of a leak, in a calm or in a storm, and after a long or short absence from port." *Patrick* v. *Hallett*, 3 Johns. Cas. 76.

The condemnation proceeded as well on the ground of the leakiness of the vessel, as of her decayed condition; and it is sufficient for the plaintiff, if it appear, that the leakiness was not, of necessity, to be solely ascribed to the decay. In this case, the language of the record may fairly be considered as amounting to no more than this: "By the extraordinary violence of the gale, the ship was so sprung, and started in her timbers and planks, as to be in a very leaky state, and to require a thorough repair to be made tight. She was decayed, as all ships are, and not so sound a vessel as to render extensive repairs expedient."

It appears, from the whole record, that there was *no proof that a regular survey had been had on the ship. The bill of exceptions is [*592 part of the record; and if necessary, the special verdict may be amended by it. As a general rule, all errors and defects may be amended when there is anything by which the amendment can be made. The provision for amendments made by the law of the United States, is much more liberal than any of the English statutes of jeofails. Judiciary Act, 1789, c. 20, § 32. The practice of amending verdicts is familiar. It is often done from the notes of the judge, at the term subsequent to the trial, and such notes are certainly much less authentic than a bill of exceptions, settled at the time, and sealed by the judge as making part of the record. Although the fact of a survey having been had on the Holofern, is directly stated in the special verdict; we have a right, therefore, to resort to the bill of exceptions, to see upon what evidence the fact is so stated.

It is obvious, to remark a very striking difference between this case and every other to be found in the books, in which the application of this clause in a policy of insurance, was brought in question. In every other case, the survey itself, or an authenticated copy, was produced in evidence, and is set out in the case. Here, no survey was produced; no copy proved, nor even an extract given from the survey. What the survey was, or whether it ever had any existence as a written document, does not appear. All the evidence

we have of it, is an account or summary *(and probably an imperfect one), which is contained in the record of the vice-admiralty court, and it is apparent from this record, that the words of the surveyors are not given. If there ever was any paper in writing, signed by the surveyors, it has been wholly re-modelled. All the tenses of the verbs are changed. The defendants should have produced the survey itself, or, at least, have distinctly and unequivocally required the plaintiff to produce it. They did neither.

Upon what evidence, then, do the defendants rely, to substantiate the fact in question? Solely on the record of the court of vice-admiralty at New Providence. It is first to be observed, that the clause in question in the New York policies (of which this is one) differs in one respect from the correspondent clause in the policies of the cities south of New York, upon which adjudications have been had. In the southern policies, the phraseology is such as might seem to point to judicial proceedings; here the words are, "if the above vessel, upon a regular survey, should be thereby declared, &c.;" distinctly placing the bar on the survey alone. The great question between the parties is, whether the decree in the vice-admiralty court is conclusive evidence of a regular survey; for, if not conclusive, the verdict in our favor will entitle us to judgment.

It will scarcely be pretended, that independently of the stipulation in the policy, the record of the vice-admiralty court, or even the survey itself, however authenticated,* would be conclusive evidence, or any evi-
*594] dence, of the unseaworthiness of the vessel. It has been settled too often, and upon too solid grounds, that admiralty surveys, and the decrees of courts thereon, are *ex parte* proceedings, and wholly inadmissible as evidence between the insurer and assured, to make it necessary to do anything more than refer to the authorities. *Abbott* v. *Seabor*, 3 Johns. Cas. 39; *Wright* v. *Barnard*, 2 Esp. 701.; s. c. Park. on Ins. 548 (6th Lond. ed.); *Saltus* v. *Commercial Ins. Co.*, 10 Johns. 487. The precise reason for introducing the clause in question into the policy, was, because these surveys were not evidence antecedently. It is evident, therefore, that if the record in question have any validity, either as evidence of a survey, or otherwise, such validity must be acquired wholly from the stipulation in the policy, without which the survey itself, and the adjudication of the court thereon (however efficacious as a foundation of title in a *bonâ fide* purchaser) would, as between the parties to this suit, be mere nullities.

What, then, is the stipulation which is now pressed against us? If we allow it all the effect contended for on the other side, it is no more than this —a regular survey shall be taken as conclusive proof of unseaworthiness. The stipulation regards the fact, not the manner in which it is to be proved— there is no stipulation as to evidence. The just construction of the contract requires that there should be a written survey, under the hands of the sur-
*595] veyor. As has been observed, such a survey *did exist, and was proved in every case reported in the books. Now, we insist, that our stipulation, which merely makes this document evidence, does not in any degree dispense with the ordinary and regular proof of the existence and contents of the document itself. The record of the vice-admiralty court was not competent to establish this document, and, as before observed, it does not even attempt to do it.

If the record be conclusive evidence of the fact and contents of the survey, it must be for one of two reasons. 1. Because it was produced by the plaintiff—or 2. By its own efficacy.

1st. The plaintiff was bound, by a provision in the policy, to produce to the defendant preliminary proof of loss, thirty days before the commencement of the suit, and it was necessary to show on the trial that he had exhibited this evidence to the defendant. In point of fact, the decree of condemnation in the vice-admiralty court of New Providence occasioned, or rather consummated, that loss, and therefore, the plaintiff produced a copy of that decree. His having done so furnishes no reason why the recitals in that decree should be evidence against him, much less why they should be received as incontrovertible; and the hardship of such a rule is the greater, in a case like the present, where the plaintiff was required to produce the evidence. A protest of the master is usually produced among the preliminary proof, but it was never supposed, that the assured was conclusively bound by all the allegations the master might choose *to insert in it. On the contrary, it has been held to afford no legal evidence. *Senat* [*596
v. *Parker*, 7 T. R. 158. The general rule is, that a document coming from the possession of a party is evidence against him, only where he claims under it, and then it is subject to explanation. Here, we claim in opposition to it.

It may still be urged, that the plaintiff was bound to produce the survey. If it were necessary, we should wholly deny this position. The policy imposes no such obligation on the assured, but simply to produce to the underwriters "proof of interest and loss." In every other respect, the parties contest upon the usual principle, viz., that each produces the evidence in his own favor. Both parties so understood their reciprocal rights and duties. The defendants required the production, not of the survey, but of the decree of condemnation. The plaintiff furnished the document as the decree of condemnation, and nothing else. We say, then, as Lord KENYON justly observed in a similar case (*Wright* v. *Barnard*, 2 Esp. 701), the record of the court of vice-admiralty proves the fact of the condemnation, and proves nothing else. It is a rule properly and fully settled, that the underwriters can make no objection to the preliminary proofs at the trial, except such as they made at the time they were exhibited. The assured is only bound to produce what is specially required. *Vos* v. *Robinson*, 9 Johns. 192. The special verdict in this case finds that the plaintiff, on the defendants' requisition, produced the copy of the *decree of the vice-admir- [*597
alty court, "whereupon, the defendants required no further preliminary proof, but refused to pay on the ground of unseaworthiness." Agreeable to the spirit of the rule, they ought now to be held to the ground then taken.

Again, this objection, viz., that we were bound to produce the survey, assumes a very important fact, which we by no means admit, viz., that there is or ever was a written document signed by the surveyors, which could be produced. This throws us back to the great and only question in this part of the cause, viz., whether the record of the vice-admiralty court is conclusive evidence. But we contend, that independently of its production by the plaintiff, the sentence of the vice-admiralty court has not, by virtue of

the stipulation of the parties, or its own efficacy, any such conclusive effect as is contended for by the defendants.

It may be said, that the necessary effect of the clause is, to refer the parties to the municipal regulations of any port where the vessel may happen to be in distress, for there the survey must be had. We admit this in its fullest extent. The foreign court is to order the survey, appoint the surveyors, and the proceedings are all to be conducted according to the local regulations. But this is all. The parties here made no stipulation as to the rules of evidence, upon which the cause is to be tried here. It is universally true, that the evidence is to be given according to the *lex fori*. We consented that the vice-admiralty court of New Providence might order the survey; but then we were to be bound by the survey itself, produced in
*598] *court here, or a copy duly proved, according to our rules of evidence, and not by a partial garbled statement of that survey which the register or other officer of that court might choose to make.

The court below erred in overruling the several questions put to the witness Thompson. The petition was the foundation of the jurisdiction of the court. The decree of a prize court (a much stronger case) has been held void for want of a libel, as without it there could be no jurisdiction. *Sawyer* v. *Maine Fire Ins. Co.*, 12 Mass. 291. Suppose, in this case, there had been no petition, then the acts of the court would have been wholly founded on the assent of the party. The answer of the witness to the second question overruled by the judge, might have shown, not merely *crassam negligentiam* in the surveyors, but direct fraud and falsehood. The third question is precisely similar to one which was considered proper by the supreme court of the state of New York. *Haff* v. *Marine Ins. Co.*, 8 Johns. 163. The court there says, "the evidence of the declaration of Rogers (one of the surveyors) was admissible, because, though the plaintiff offered the survey as preliminary proof, yet the defendants offered it as proof in chief, and the plaintiff had a right to show the contradictory declarations of Rogers as a witness for the defendant." The object of the last question was to show
*599] that the conduct of one of the surveyors proceeded from *interested motives, and thus to render mere probable the fraudulent intent imputed to him. It was overruled, on the ground that better evidence might have been produced. But the account sales, which is a commercial document, only admissible by a relaxation of the rules of evidence in regard to foreign transactions, was not so good evidence, as the *res gestæ*, which he offered to prove. The witness, it is true, was not present at the sale, but he offered to prove the fact of his receiving payment from the surveyor, as a purchaser of part of the cargo. The rule is universal, that fraud may be proved, and when proved, will vitiate all proceedings. It must be proved directly, when the party injured by it has a direct opportunity; and therefore, in the ordinary case of misconduct of jurors or arbitrators, the party must move to set aside the verdict or award. But this rule does not hold, where the person injured was not a party to the proceedings, and, of course, had no such opportunity. Whatever objections a party to the proceedings might take, at the time, a third person may take, at any time, when the proceedings are made to bear against him. But it may be said, that the master was our agent, and the proceedings were at his instance. This begs the question; for if the loss were such as to authorize the abandonment,

then the master, by relation, was the agent of the underwriters. Besides, the Messrs. Storrs were the agents of the defendants. Their interference in the proceedings is liable to strict scrutiny, and any impropriety ought to invalidate proceedings conducted under their direction, even though it were shown (as it is not), that the master connived with them. *The case most analogous to this in common-law proceedings, is that of a jury of view. Now, suppose it was shown, that such a jury never went on the land in question, would not their verdict have been set aside? The evidence he offered was equivalent to this. It was not necessary for us to show any agency of the defendants in the alleged misconduct of the surveyors. The evidence of fraud is necessarily circumstantial. It was enough, that they sought to profit by it. [*600

Griffin, contrà, contended: 1. That by the *lex loci contractus*, it was the business of the assured to produce the survey (*Haff* v. *Marine Ins. Co.*, 4 Johns. 132); and that it was to be proved, not by examining the surveyors, but by an authenticated copy of the proceedings. This the plaintiff did produce, and read in evidence. It was a copy of all the proceedings. The sentence of condemnation, disconnected with the survey, would be unmeaning. Nor is it any objection, that the survey is set forth by way of recital. It would not have been better authenticated, had it been *in hæc verba*. A party producing in evidence a deed or other instrument, is bound by the recitals. But the objection to the competency of the evidence was too late. The bill of exceptions does not state that it was taken, until the judge charged the jury (*Russell* v. *Union Ins. Co.*, 4 Dall. 423); but it evidently implies, that the objection was *not taken sooner; and the plaintiff recognised the survey, as being in evidence, by attempting to impeach it. [*601

As to the objections to the rejected testimony, which was offered to show the survey to be incorrect: The survey was given in evidence by the assured. Expunge it, and what cause for a total loss appears? In that event, the judgment would necessarily have been for the defendants. Now, it is a rule, that a party cannot call a witness, and then impeach him. The reason assigned by Mr. Justice BULLER is, that it "would enable him to destroy the witness, if he spoke against him, and to make him a good witness, if he spoke for him, with the means in his hands of destroying the witness, if he spoke against him." Bull. N. P. 297; Phil. on Evid. 232. This rule applies with equal force to impeaching a document, introduced by the party who seeks to impeach it. In the only case where the assured was allowed to contradict the survey, it was given in evidence, not by himself, but by the underwriters. *Haff* v. *Marine Ins. Co.*, 8 Johns. 163, 167.

3. But this survey was a proceeding of a nature that the law does not allow to be impreached. It may be likened to an award of arbitrators, being a tribunal of the parties' own creation; and you cannot, under the general issue, in an action at law, impeach the award of arbitrators, even for partiality or corruption. *Wiles* v. *Maccarmick*, 2 Wils. 148; Kyd on Awards 327. The reason assigned for this doctrine is, that it would be a surprise on the opposite party. *And does not this reason emphatically apply to the case now under consideration? Neither can corruption or partiality be pleaded to an action on the arbitration bond. *Braddick* v. [*602

Thompson, 8 East 344. The only remedy is by a bill in equity, where all persons implicated may be made parties. In the present case, the assured might have applied to the court of admiralty, or filed his bill in chancery. Perhaps, however, the survey may be more properly likened to the verdict and judgment of a court. The policy contemplates, that the survey is to be a judicial act, when it requires "a regular survey." *Coit* v. *Delaware Ins. Co.*, 2 W. C. C. 375. The policy vests jurisdiction in the court of admiralty at the port of necessity: and in the present instance, the agent of the assured called that jurisdiction into activity. It is a settled maxim, that a verdict and judgment cannot be impeached. The sanctified character of a judicial proceeding attaches itself even to a foreign sentence, which is conclusive as to those facts which it possesses to decide; and that, too, even if the sentence is founded on unjust and piratical principles. *Croudson* v. *Leonard*, 4 Cranch 434. During the French revolution, the firmness of the English judges was put to a severe test in respect to the principle now in discussion, and so was that of this court in the case of a judgment founded on the Milan decree. *Williams* v. *Armroyd*, 7 Cranch 423. Had it been competent, the
*603] party aggrieved would *doubtless have been able to prove error, partiality, and even corruption in many of these foreign proceedings. But the reason why he could not be permitted to do this is stated by Mr. Justice JOHNSON, who says: "Not being at liberty, as it were, to lift the mantle of justice cast upon their decrees, it is as to other tribunals of justice immaterial what errors it covers; neither the fallibility of the judge, the perjury of witnesses, nor the oppression and injustice of nations, will sanction a deviation from this general rule." *Rose* v. *Himely*, 4 Cranch 512, App'x. The only inquiry the court feels itself authorized to make, is, had the foreign tribunal jurisdiction? And there is but a single instance where the sentence or judgment is not conclusive; and that is where the party claiming the benefit of it appears before our courts to enforce it. *Phillips* v. *Hunter*, 2 H. Bl. 410. So also, other matters beside awards, verdicts and judgments are held unimpeachable. Thus, evidence was refused, to show that the official certificate of a regularly appointed land-surveyor contained incorrect statements. *Pollard* v. *Dwight*, 4 Cranch 421.

We may, perhaps, concede another case in which judicial proceedings may be impeached, viz., where the judgment is proved to have been obtained by fraud or unfair practices, by the party attempting to avail himself of it. But the fraud here meant is not fraud in the officers of the court, but in the party. No fraud is imputed to the underwriters; and as to the agents, none can with justice be imputed to them. Besides, they were only the
*604] general agents of *the defendants, and not their agents to perpetrate frauds. As to this survey, they were the agents of the assured, and did not know that there was any insurance.

4. As to the other rejected evidence: the first item of it is the answer to the question, whether the master authorized the statement relative to the irreparable condition of the vessel. Here, the assured calls upon his master to swear that the statement contained in the petition presented by his proctors to the court was untrue. The acts of the attorney in the course of judicial proceedings bind his principal, and this, even if he have in fact no authority from the principal. The remedy must be against the attorney. *Anon.*, 1 Salk. 86; 1 Keb. 89; *Reinholdt* v. *Alberti*, 1 Binn. 461; *Denton* v.

Noyes, 6 Johns. 296. Here, the authority of the proctors is not disputed. It is only contended, that they misconceived or misrepresented the statement of their client. All the other items of rejected evidence are liable to the objection that they contradict the record. Besides, affidavits of jurymen (and surveyors stand in the like predicament) cannot be admitted to impeach their verdict. *Vaise* v. *Delaval*, 1 T. R. 11; *Jackson* v. *Williamson*, 2 Ibid. 281; *Owen* v. *Warburton*, 4 Bos. & Pul. 326; *Rogers* v. *Rogers*, 4 Johns. 485.

As to the answer to the question, whether the Messrs. Storrs did not direct the master to call on one of the surveyors, as being a purchaser at the sale of the cargo, for the price, &c. Beside the consideration *that the account of sales was better evidence; the declarations or direc- [*605 tions of an agent, except when they are part of the *res gestæ*, are not evidence against the principal. The circumstances, too, were irrelevant. No fair presumption flows from a purchase of part of the cargo.

5. As to the supposed collision between the survey and the finding of the jury, it may be observed, that there is no necessary collision. The survey finds the vessel unseaworthy on the 16th of October. The jury find that she was seaworthy when she sailed, on the 9th of September. But ships have the principle of decay inherent in their constitutions, and how can the court judicially say, that during the 37 days which elapsed between the sailing and survey, the vessel may not have passed, by the progress of decay, from a state of bare seaworthiness to unseaworthiness? And even supposing there is a collision, the finding of the jury must give way to the survey, because the finding in opposition to the survey was incorrect. Perhaps, the court ought, upon the production of the survey, to have directed the jury to find for the defendants, and to have rendered *instanter* that judgment which they rendered afterwards. But was this delay error, and such an error as the plaintiff can take advantage of?

The agreement that the survey shall be conclusive, is the voluntary agreement of the parties. Persons of full age and sound minds have a right to make what contracts they please; and to have them enforced, provided they be not unlawful. Courts *will not inquire whether the clause be reasonable or unreasonable, expedient or inexpedient. It can be no [*606 more disregarded than any other part of the policy, such as a warranty. Does the court ever inquire into the reasonableness of a warranty?

The case cited from 3 Cranch 137,(*a*) does not agitate the conclusiveness of the survey. It turned on the state of the pleadings. The plea was, that the vessel was unsound, when she sailed on the 24th of October; and the court refused to direct the jury that the survey made on the 26th of November was evidence of that fact. All the other cases admit that a condemnation for rottenness or unsoundness alone, is a conclusive bar.

The special verdict finds the survey to be a regular survey. It is not to be expected, that such surveys will adopt the very words of the clause. They are made abroad, and frequently in a foreign language; and such a coincidence would be suspicious. It is sufficient, if it appear from the whole survey, that rottenness is the sole ground of condemnation. The survey condemns, in strong and decisive terms, and no cause is intimated but decay. It is true, the surveyors find the vessel leaky. But was not rottenness a

(*a*) Marine Ins. Co. *v.* Wilson.

sufficient cause for that? They condemn her "as being unsafe and unfit ever to go to sea again." Now, there is but one disease in a vessel that is incurable, that is, rottenness: and there can be no doubt, from the face of the survey, that the vessel was condemned for unsoundness. The object of the *607] clause was to *have the state of a vessel definitely ascertained, where she is broken up, and examined. It is a wise provision, which has been sanctioned by experience, and adopted in other states, and ought not to be made a dead letter by interpretation.

H. D. Sedgwick, in reply, stated, that it had been contended, that it was the plaintiff's duty to have excepted at the trial to the proof of the survey. He did all that from the nature of the case could have been done. The proof, such as it was, of the survey, was inseparably connected with the preliminary proof of loss, which he was bound to produce. When the defendant's counsel claimed the effect now sought to be given to the supposed survey, the plaintiff resisted, and excepted to the opinion of the judge that the decree was sufficient evidence of the survey. Besides, the plaintiff's guarded and qualified admission, viz., that the copy produced was a true copy of the record of the vice-admiralty court, shows the intention of the parties. The defendants were, therefore, fully put upon their guard, and would have produced and proved the survey, if they could have done so.

An analogy is supposed to exist between the report of the surveyors, and the award of arbitrators; it is said, that an award cannot be impeached, under the general issue; and that partiality cannot be pleaded to an administration bond. But these remarks, true or false, apply only to the com- *608] mon-law rules of pleading. We are *ready to admit that the plea *nul tiel record*, which denies the fact of the award, would not lay a proper foundation for evidence to show partiality in the arbitrators. But it is enough for our argument, that an award may be impeached for the misconduct of the arbitrators; and whether for this purpose the resort be, as stated on the other side, to a court of equity, or whether the common-law tribunals are competent to the purpose, is a matter wholly depending on the municipal institutions of the country. Some remedy is confessedly provided. Now, here we had none but to impeach the survey, as we sought to do, on the trial. The opposing counsel showed how much he was pressed by this consideration, when he referred us to the vice-admiralty court at New Providence, to have the proceedings overhauled in that tribunal. Such an application would be without a precedent. A survey is never granted, but upon the application of the ship-master, founded on present necessity. The Holofern may now be at the bottom of the ocean, or if in existence, not at New Providence; and if she were there, how could a survey now ascertain what her state was on the 8th of October 1819, the time when the survey was had, and to which the question relates?

Supposing that we are wrong, in contending that the recitals of the decree are not evidence against us, inasmuch as we produced the decree, still it is competent to us to disprove them. The rule is merely that a party shall not impeach the character of his own witnesses. He may disprove any *609] facts stated by them. This is the more essential in the case of a *witness produced by necessity, *e. g.*, the subscribing witness to a deed or will. The evidence in relation to the survey was in this case produced by

us of necessity. But we are told, that if the survey be stricken out of the case, there is no ground to support the verdict for either a total or partial loss. There are these grounds :—our policy ; a vessel, seaworthy when the voyage commenced ; the springing a leak, and being forced from her course by the violence of the winds and waves ; stranded in going into a port of necessity ; there condemned for causes not legally shown, or not fully shown, or falsely stated ; the voyage lost ; ship and cargo sold ; and the damages assessed.

It is always to be remembered, that we produced the decree as that which, in point of fact, occasioned the loss, without reference to its being void or valid in point of law. Suppose, the decree had shown that the ship had been libelled and sold for wages, would this have been more than *primâ facie* evidence? The decree in question was that of an instance court. The cases cited against us of the conclusiveness of foreign sentences, are all those of prize courts, and the conclusive effect of the adjudication of these tribunals, is founded on peculiar reasons of international law. *Croudson* v. *Leonard*, 4 Cranch 434. This conclusive effect has been incautiously extended to cases between insurer and assured, where the title of the property is not drawn in question, but arises collaterally, and the ablest *judges have expressed their regret at this application of the principle,(a) and the effort is now to restrict it within as narrow limits [*610 as possible. It is enough for us, however, that this principle has never been applied to any but prize jurisdictions. It is against first principles, that a man should be bound by a decree to which he is not a party. The effect sought to be given to this decree of an instance court, is greater than could be claimed for a judgment of a court of Westminster Hall, or even for a domestic judgment, unless against the same party, and after full notice.

March 21st, 1822. JOHNSON, Justice, delivered the opinion of the court. —The material question in this cause arises on the construction of a clause in the policy, expressed in these words, "and lastly, it is agreed, that if the above vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten," then the assurers shall not be bound to pay their subscription on this policy. The special verdict negatives the proposition of the vessel's being unsound at the time of her sailing, and it is contended for the plaintiff, that this neutralizes the condemnation and survey given in evidence ; that contracts of insurance in their nature have reference to the commencement *of the risk, at least, with [*611 relation to questions of seaworthiness ; and as it is impossible for a sound vessel to become rotten in a month, it is argued, that the verdict of the jury ought to prevail against the evidence or influence of the condemnation. But we think otherwise. The words of the contract expressly look forward to a future event, "if the said vessel, upon a regular survey, should be thereby declared unseaworthy ;" obviously contemplating two objects : first, that a state of rottenness, ascertained at any period of the voyage insured, shall be conclusive evidence of original unsoundness ; secondly, that

(a) Fisher *v.* Ogle, 1 Camp. 418 ; Marshall *v.* Parker, 2 Id. 70 ; Robinson *v.* Jones, 8 Mass. 540 ; Sawyer *v.* Maine Fire Ins. Co., 12 Id. 291.

the determination of that fact by means of a regular survey should be received as conclusive evidence between the parties. It is unquestionably true, in the abstract, that a certificate of survey is not legal evidence; because the examination of the surveyors themselves would be better. But parties may by compact adopt that or any other, as the criterion for deciding on their relative rights; and in the case before us, the rights of the parties are made to depend on the fact of the survey, rather than on the truth of it. They have chosen a rule of decision for themselves, and we are not to inquire into their motives or prudence in doing so.

Whether the survey in this instance was duly substantiated, is the next question which the case presents. And here it becomes altogether unnecessary to decide, whether a condemnation, in ordinary cases, carries with it the evidence of the fact or of the fairness of the survey. For, it must be observed, that the exemplification of the proceedings in the court of vice-admiralty
*612] in New Providence *was produced in evidence by the plaintiff himself. He claimed for a total loss, and to support this claim, it became necessary to show that the vessel was condemned and sold, and the voyage broken up in New Providence. But if this exemplification should be admitted to prove those facts alone, without exposing the causes which led to them; if the eyes of the jury were to be shut against everything but the outside of the record, *non constat*, but the vessel may have been condemned for some cause for which the underwriters were not liable, and his case would not have been made out. Such subtleties cannot be countenanced; the survey was a part of the *res gestæ*, and the plaintiff could not possibly have made out the loss, without introducing the survey which led to it.

The survey was, therefore, properly in evidence, and that it was, "a regular survey," in the language of the covenant, is to be deduced from two considerations. First, if there was any irregularity in the survey, it is attributable to the plaintiff's own agents; for even the Storrs, in this case, although the general agents of the company, were voluntarily selected by the master. But, secondly, the survey bears every evidence of regularity or authenticity that can reasonably be required. On this subject, the nature of the contract of insurance casts the parties on the municipal regulations of all the world. Every commercial country has its own regulations on the subject of surveys. It is properly a subject of admiralty jurisdiction; since mariners and freighters have to claim the aid of the admiralty to release them from their contract, in cases of a defect of sea-
*613] worthiness. A *regular survey must, therefore, in every instance, be such as is known to the laws and customs of the port in which a vessel happens to be. In this instance, both from the jurisdiction assumed by the court, and the known habits of British jurisprudence, the mode of passing a survey through a court to give it authenticity, may well be adjudged a regular survey according to the laws of the port into which this vessel was forced. If this be the case, it follows, that the exemplification of the proceedings of that court is not only admissible evidence, but perhaps, the only evidence that could be received of the survey. And as to the idea of extracting the original return from the files of that court, to produce it here, it will not bear reflection. The same considerations fully justify the court below in rejecting the evidence of the master, offered

to rebut the decision of a court, and that decision, both procured by the plaintiff's own agent, and produced by himself in evidence.

But it is contended, that though the construction of the covenant be with the defendants, and the survey be held to be legally before the jury, and "a regular survey" within the meaning of the policy, still it is not conclusive against the plaintiff, inasmuch as it certifies the existence of other causes of loss, besides the decayed state of the vessel. It is unquestionably true, that the survey must respond to the covenant, and if the vessel be declared unseaworthy, for any additional cause, besides her being, in the language of the policy, "unsound or rotten," the defeasance, if it may be so called, will not avail the defendant. But what is the case here? *All the facts to be gathered from the exemplification of the condemnation, taking it from the commencement to the close, are, that the [*614 vessel encountered tempestuous weather, that she was forced to put into New Providence, in consequence of springing a leak, that the master "conceiving her not only unfit to proceed to sea again in her present state, but altogether unworthy of being repaired," libelled her in the admiralty, and prayed a warrant of survey upon her; upon issuing the warrant, the surveyors proceeded to an examination, and finding the vessel very leaky, stripped off part of her ceiling, and found her, as they report, "in a very decayed condition." They, thereupon, certified her to be "altogether unworthy of being repaired, and that she ought to be condemned as being unsafe and unfit ever to go to sea again." Here, decay is exhibited exclusively as the mortal disease, and everything else is either inducement or consequence. A bad vessel might have made a safe voyage, had she experienced no trying weather, and a good vessel would have encountered gales without injury. Springing a leak was the consequence of that state of decay which weakened the whole fabric, and her being unworthy of repair, or unfit to go to sea, was no additional cause of condemnation, but the mode in which her disease produced her destruction. Causes upon similar policies, and under similar circumstances, have in several instances passed in review before the tribunals of this country, and received decisions consonant to this. The case between the *Marine Insurance Company of Alexandria* and *Wilson*, decided in this court, did *not resemble this in any prominent feature, except [*615 that the policy contained the same clause, and the defence was attempted under the protection of it. But neither in the evidence nor in the pleadings, did the defendants bring themselves within the provisions of the clause.

This court is, therefore, of opinion, that there was no error in the decision of the court below. But an inconsiderable omission (made palpable by the briefs funished by both parties) having been committed in copying the record, and which leaves it doubtful in what form this decision is to be certified to the court below, this court will, for the present, order a *certiorari* to issue, that the correction may be duly made.

Certiorari awarded.

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