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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

JANUARY TERM 1829.

By RICHARD PETERS,

COUNSELLOR AT LAW, AND REPORTER OF THE SUPREME COURT OF THE UNITED STATES.

VOL. II.

THIRD EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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OBITUARY.

THE HONORABLE ROBERT TRIMBLE, one of the associate justices of this court, died at his residence in Paris, Kentucky, in September 1828.

Mr. Justice Trimble was born in Augusta county, Virginia, in 1777, and was the son of Mr. William Trimble, one of the earliest settlers in Kentucky —a virtuous man, whose bold, firm, and enterprising character induced him to seek an increase to his fortunes, by establishing himself on the frontiers, encountering all the dangers and hardships of a new and advanced settlement.

Mr. Justice Trimble accompanied his father, when he emigrated, and the early years of his life were passed in agricultural industry ; and frequently in the amusements and toils of the chase, upon the success of which the settlers often depended for food. He was sometimes engaged in defence against Indian invasion, to which the borderers were then constantly exposed. He was distinguished, in his youth, for his conduct, his courage and his sagacity ; and was acknowledged as a leader by his associates.

The native and powerful energies of his mind could not be restrained by the situation in which he was placed ; and he became desirous of obtaining an education which would fit him for higher duties. By teaching an English school, he procured the means of entering Bourbon Academy ; and afterwards was a student in the Kentucky Academy, in Woodford county, where he completed his classical attainments. He then studied law, and in 1800, commenced the practice of his profession at Paris, in Bourbon county, where he married. His widow and a numerous family of children survive him.

Mr. Justice Trimble always enjoyed the highest consideration and confidence of his fellow-citizens. In 1802, he was elected to the house of representatives of Kentucky ; but in the following year, he declined a re-election, determining to devote himself to his profession—a duty enjoined upon him by his narrow fortunes. In 1807, his professional reputation and character were such that he was appointed a judge of the Supreme Court of Kentucky ; which situation he held for two years with great reputation.

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He relinquished the office, to resume the practice of his profession; and in 1810, he refused the commission of chief justice of the state. In 1813, he again declined the office of chief justice; and having assiduously and successfully devoted himself to the bar, until 1817, he was, in that year, appointed district judge of the United States for the district of Kentucky. In May 1826, he received, from President Adams, the commission of associate justice of the Supreme Court of the United States.

In the performance of judicial duties in Kentucky, in the state courts, and in the district and circuit courts of the United States, Judge Trimble obtained the respect and esteem of the profession, and of his fellow-citizens. Learned in the law, just and discriminating in his judicial investigations, his decisions were characterized by great legal accuracy, research and perspicuity; and by an enlarged and liberal equity. In the Supreme Court of the United States, Mr. Justice Trimble maintained and increased the character and reputation which had placed him upon that bench. His opinions were clear and comprehensive, illustrated and enriched by all the legal learning their subjects demanded; and they gave to those who heard them the surest anticipations of increasing usefulness and talents, had it been permitted to him to remain in the performance of the high functions of his station.

In private and domestic life, Mr. Justice Trimble was universally beloved and respected. Gentle, conciliating and kind in his manners and disposition; honorable and faithful in all his transactions; every one who knew him sought his friendship, and was proud of attaining it. As a husband and a father, his mild and amiable virtues endeared him to those with whom he was connected in these relations; and his home was always the abode of cheerfulness and content. He was a patriot, and a firm republican; and he was devotedly attached to the Union; always maintaining those constitutional principles which have been declared from the tribunal of which he had been an efficient and much honored member.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

" BUSHROD WASHINGTON,
" WILLIAM JOHNSON,
" GABRIEL DUVALL,
" JOSEPH STORY,
" SMITH THOMPSON,

} Associate Justices.

WILLIAM WIRT, Esq., Attorney-General.

WILLIAM THOMAS CARROLL, Clerk.

TENCH RINGGOLD, Marshal.

The Hon. JOHN MCLEAN was appointed an associate justice of the supreme court of the United States, on the 7th day of March 1819, in the room of the Hon. ROBERT TRIMBLE, deceased. Mr. Justice MCLEAN did not take his seat during the term.

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1829.

ABRAHAM L. PENNOCK and JAMES SELLERS, Plaintiffs in error, *v.* ADAM DIALOGUE.

Error.—Patents.

The record contains, embodied in the bill of exceptions, the whole of the testimony and evidence offered at the trial of the cause, by each party, in support of the issue; it is very voluminous, and as no exception was taken to its competency or sufficiency, either generally or for any particular purpose, it is not properly before this court for consideration, and forms an expensive and unnecessary burden upon the record. This court has had occasion, in many cases, to express its regret on account of irregular proceedings of this nature; there was not the slightest necessity of putting any portion of the evidence in this case upon the record; since the opinion of the court, delivered to the jury, presented a general principle of law, and the application of the evidence to it was left to the jury.[1] p. 15.

It is no ground of reversal, that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, where it was not requested by either party, at the trial; it is sufficient for us, that the court has given no erroneous directions. p. 16.

If either party considers any point presented by the evidence, omitted in the charge of the court, it is competent for such party to require an opinion from the court upon that point; the court cannot be presumed to do more, in ordinary cases, than to express its opinions upon questions which the parties themselves have raised on the trial. p. 16.

It has not been, and indeed, it cannot be denied, that an inventor may abandon *his invention and surrender or dedicate it to the public; this inchoate right, thus gone, cannot [*2
afterwards be resumed at his pleasure, for when gifts are once made to the public in this way, they become absolute. The question which generally arises on trials, is a question of fact rather than of law, whether the acts or acquiescence of the party, furnish, in the given case, satisfactory proof of an abandonment, or dedication of the invention to the public. p. 16.

It is obvious, that many of the provisions of our patent act, are derived from the principles and practice, which have prevailed in the construction of the law of England in relation to patents. p. 18.

Where English statutes, such, for instance, as the statute of frauds, and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority.[2] This is not the case with the English statute of monopolies, which contains an exception, on which the grants of patents for inventions have

[1] Johnson *v.* Jones, 1 Black 209; Carver v. Astor, 4 Pet. 1.

[2] See Cathcart *v.* Robinson 5 Pet. 264; Taylor *v.* Thompson, Id. 358; Kendall *v.* United States, 12 Id. 527; Kirkpatrick *v.* Gibson, 2 Brock. 388.

issued in that country; the language of that clause in the statute is not identical with the patent law of the United States; but the construction of it adopted by the English courts, and the principles and practice which have long regulated the grants of their patents, as they must have been known, and are tacitly referred to in some of the provisions of our own statute, afford materials to illustrate it. p. 18.

The true meaning of the words of the patent law, "not known or used before the application," is, not known or used by the public, before the application. p. 19.

If an inventor should be permitted to hold back from the knowledge of the public, the secrets of his invention, if he should, for a long period of years, retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure, and then, and then only, when the danger of competition should force him to procure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what should be derived under it during his fourteen years; it would materially retard the progress of science and the useful arts; and give a premium to those who should be least prompt to communicate their discoveries. p. 19.

If an invention is used by the public, with the consent of the inventor, at the time of his application for a patent, how can the court say, that his case is nevertheless such as the act was intended to protect? If such a public use is not a use, within the meaning of the statute, how can the court extract the case from its operation, and support a patent, when the suggestions of the patentee were not true, and the conditions, on which alone the grant was authorized, do not exist? p. 21.

The true construction of the patent law is, that the first inventor cannot acquire a good title to a patent, if he suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application for a patent. This voluntary act, or acquiescence in the public sale or use, is an abandonment of his right, or, rather, creates a disability to comply with the terms and conditions of the law; on which alone the secretary of state is authorized to grant him a patent.[1] p. 23.

Pennock *v.* Dialogue, 4 W. C. C. 538, affirmed.

*3] *Error to the Circuit Court for the Eastern District of Pennsylvania. In that court, the plaintiffs in error had instituted their suit against the defendants, for an infringement of a patent-right, for "an improvement in the art of making tubes or hose for conveying air, water and other fluids." The invention claimed by the patentees, was in the mode of making the hose, so that the parts so joined together would be tight, and as capable of resisting the pressure as any other parts of the machine. The bill of exceptions, which came up with the record, contained the whole evidence given in the trial of the cause in the circuit court.

The invention, for which the patent-right was claimed, was completed in 1811; and the letters-patent were obtained in 1818. In this interval, upwards

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[1] Whatever may be the intention of the inventor, if he suffer his invention to go into public use, by any means whatever, without an immediate assertion of his right, he is not entitled to a patent. Shaw *v.* Cooper, 7 Pet. 292; McClurg *v.* Kingsland, 1 How. 207; Bates *v.* Coe, 98 U. S. 46. It was provided by the act of 3d March 1839, § 7, that a prior purchase, sale or use of the invention, before application for a patent, should not be held to invalidate the same, except on proof of abandonment to the public, or that such purchase, sale or prior use, had been for more than two years before the application. 5 U. S. Stat. 354. And the revised statutes provide, that in an action for an infringement of a patent, the defendant, under notice, may give evidence that the invention had been in public use, or on sale, on this country, for more than two years before the application for a patent, or had been abandoned to the public. R. S. § 4920. See Tappan *v.* National Bank-note Co. 4 Bl. C. C. 509; American Hide and Leather Splitting and Dressing Machine Co. *v.* American Tool and Machine Co., 4 Fish. 284; Sisson *v.* Gilbert, 9 Bl. C. C. 185; Clark *v.* Scott, Id. 301; Wayne *v.* Holmes, 1 Bond 27. An invention which is allowed to lie dormant for a period of five years, must be held to be abandoned. Carleton *v.* Atwood, 2 Am. L. T. Rep. 129. And see Gates *v.* Benson, 3 Id. 113; Seymour *v.* Osborne, 11 Wall. 516; Hartshorn *v.* Tripp, 7 Bl. C. C. 120.

of 13,000 feet of hose, constructed according to the invention of the patentees, had been made and sold in the city of Philadelphia. One Samuel Jenkins, by the permission of, and under an agreement between the plaintiffs as to the price, had made and sold the hose invented by the plaintiffs, and supplied several hose companies in the city of Philadelphia with the same. Jenkins, during much of the time, was in the service of the plaintiffs, and had been instructed by them in the art of making the hose. There was no positive evidence, that the agreement between Jenkins and the plaintiffs in error was known to, or concealed from, the public. The plaintiffs, on the trial, did not allege or offer evidence to prove that they had delayed making application for a patent, for the purpose of improving their invention; or that from 1811 to 1818, any important modifications or alterations had been made in their riveted hose. The plaintiffs claimed before the jury, that all the hose which had been made and sold to the public, prior to their patent, had been constructed and vended by Jenkins under their permission. Upon the whole evidence in the case, the circuit court charged the jury:

*"We are clearly of opinion, that if an inventor makes his discovery public, looks on and permits others freely to use it, without [*4 objection, or assertion of claim to the invention, of which the public might take notice; he abandons the inchoate right to the exclusive use of the invention, to which a patent would have entitled him, had it been applied for before such use. And we think it makes no difference in the principle, that the article so publicly used, and afterwards patented, was made by a particular individual, who did so by the private permission of the inventor. So long as an inventor keeps to himself the subject of his discovery, the public cannot be injured; and even if it be made public, but accompanied by an assertion of the inventor's claim to the discovery, those who should make or use the subject of the invention would, at least, be put upon their guard. But if the public, with the knowledge and the tacit consent of the inventor, be permitted to use the invention, without opposition, it is a fraud upon the public afterwards to take out a patent. It is possible, that the inventor may not have intended to give the benefit of his discovery to the public; and may have supposed, that by giving permission to a particular individual to construct for others the thing patented, he could not be presumed to have done so. But it is not a question of intention, which is involved in the principle which we have laid down; but of legal inference, resulting from the conduct of the inventor, and affecting the interests of the public. It is for the jury to say, whether the evidence brings this case within the principle which has been stated. If it does, the court is of opinion that the plaintiffs are not entitled to a verdict." To this charge, the plaintiffs excepted, and the jury gave a verdict for the defendant.

Webster, for the plaintiff in error, contended: 1. That the invention, being of such a nature, that the use of it, for the purpose of trying its utility and bringing it to perfection, must necessarily be open and public; the *implication of a waiver or abandonment of the right, furnished by such public use, is rebutted by the circumstance that the article was [*5 made and sold only by one individual; and that individual was authorized and permitted so to do by the inventors. 2. That the use of an invention, however public, if it be by the permission and under the continual exclusive

claim of the inventor, does not take away his right, except after an unreasonable lapse of time, or gross negligence in applying for a patent. 3. That the jury should have been instructed, that, if they found the riveted hose, which was in use by the hose companies, had been all made and sold by Jenkins, and by no one else, prior to the grant of the patent; and that he was permitted by the inventors, under their agreement, so to make and sell the same; that such use of the invention, not being adverse to their claim, did not take away their exclusive right, nor imply an abandonment of it to the public. 4. That, if they found the hose had not been made or sold, prior to the grant of the patent, by any person but Jenkins, then the giving of permission to him, being in itself an assertion of claim, was not a dedication to the public; and that the public, by purchasing and using the hose, thus made by the permission of the inventors, acquired no title to the invention: but on the contrary, if the price paid included a premium for the invention, the public, by so purchasing, admitted the right of the inventors. 5. That, at any rate, there being no use, by the public, of this invention, it should have been left to the jury, to say whether, under all the circumstances, considering the nature of the invention, and the time necessary to perfect it; the plaintiffs have been guilty of negligence, in not sooner applying for a patent.

Mr. *Webster* stated, that the question to be decided by the court laid within a narrow compass. The defence set up was, that the plaintiffs had *6] suffered their invention to *be used, before their application for a patent; and had thus lost all right to the exclusive use of it. The court, in this case, would be called upon to reverse the English decisions relative to abandonment; for it was admitted, that those cases had gone to the whole extent of the principles applied to this case in the circuit court. Those cases have decided, that any public use of an invention, even for experiment, renders it no longer a new machine. In the courts of the United States, a more just view had been taken of the rights of inventors. The laws of the United States were intended to protect those rights, and to confer benefits; while the provisions in the statute of England, under which patents are issued, are exceptions to the law prohibiting monopolies. Hence, the construction of the British statute had been exceedingly strait and narrow, and different from the more liberal interpretation of our laws. By the decisions of our courts, there must be voluntary abandonment, or negligence, or unreasonable delay in obtaining letters-patent, to destroy the right of the patentee. *Goodyear* v. *Mathews*, 1 Paine 300; *Morris* v. *Huntington*, Ibid. 348.

The exception to the charge of the court is, that the jury should have been instructed to decide upon the evidence, whether the plaintiff meant to abandon his invention, by the permission to Jenkins to use it. Jenkins must be considered as the private agent of the inventors; and their agreement with him, under which he made the hose, is to be considered rather as an assertion of their exclusive right to the invention, than a surrender of it. By omitting to leave to the jury this question of an intention to abandon, the case was erroneously withdrawn from them. The rights of the parties also entitled them to have the causes of their delay in patenting their invention inquired of by the jury. As the case is presented on the bill of exceptions, the court, in their charge, undertook to state the whole law of the

subject-matter to the jury; and the omission to instruct them on any one point is error. *If in this charge of the court anything is omitted [*7
which was matter of law for the jury, it is misdirection. In a case in Massachusetts, said to be reported in 4 Mason's reports,[1] it was left to the jury to decide, whether seventeen years' delay could be accounted for.

Under the provisions of the laws of the United States, the right is created by the invention, and not by the patent. The court, therefore, may have misled the jury, in stating that the plaintiffs allowed the invention to be used. The thing invented was only permitted to be used. The suggestion, that by adopting the language of the English statute, the cases decided in England upon that statute are adopted, may be answered by a reference to those cases. They have all arisen within a few years, since the enactment of our law; and except the *dictum* of Lord Coke, in 2d Institute, the authorities are all of modern date.

If this court shall be of opinion, that as no instructions were particularly asked upon the questions raised here, the court below were not bound to notice them in the charge, and that the court did not undertake to decide the whole law; the plaintiff in error can make out no case here. But if this court shall consider the questions now submitted doubtful, as the rights of the plaintiffs may not have been fully investigated; by sending the case back to the circuit court, a more full investigation of all the points involved in it may be made.

Sergeant, for the defendant, insisted: 1. That mere invention gives no right to an exclusive use, unless a patent is obtained; and that if, at a time when no right is infringed, the public fairly acquire possession of it, the inventor cannot, by subsequently obtaining a patent, take it away. 2. That the inventor, by abstaining from getting a patent, encouraged the public to use the article freely, and thus benefited his own manufactory. And he is not at liberty, when this advantage is exhausted, to turn round, and *endeavor to reach another and a different kind of advantage, by [*8
appropriating the use exclusively to himself.

In the circuit where this cause was tried, it was not the practice to ask the court for special instructions to the jury. After the evidence had been closed, and counsel heard, a charge was given to the jury, according to the nature of the case, upon the points made by counsel, or which might suggest themselves to the mind of the judge. It was competent, however, to either party, after the charge, to ask the opinion of the court upon any point supposed to have been omitted, which was material to the decision. In this case, no such request had been made; and no objection can now be made to the charge, for any imputed omission. The only question was, whether the principles laid down to the jury for their guidance were correct, and according to law, in the particular excepted to.

The charge must, of course, be considered with reference to the facts, the whole of which appear upon the record. The petition of the plaintiffs to the secretary of state stated, in the words of the patent law, that they were the inventors of a "new and useful improvement," "not known or used before their application." The "application" was made in July 1818. Their

[1] Mellus *v.* Silsbee, 4 Mason 108.

averment, therefore, upon which they obtained their patent was, that the rivet hose was a new invention, not "known or used" before the year 1818. The facts proved upon the trial were, that the invention had been completed and published in the year 1811, seven years before the application. That during all that period, it had been known and used as common public property (and not as private property), which any one might use, as publicly known. And that it was so known and used, with the knowledge of those who now claim to be the inventors; without any assertion or claim on their part of exclusive property, and without notice of intention to make such claim. There was not a single circumstance offered to explain the delay. There was an attempt to show, that the making of the article for use, was
*9] limited by the authority and permission *of the plaintiffs, and thence to infer, that they did not intend to give it to the public. A witness produced by them, and the only person who appeared to have made the article, declared in substance, "that he was taught by the plaintiffs, in 1811, to make hose; that in that year, he made a certain quantity of it for the Philadelphia Hose Company, plaintiffs being members of the committee; and that by permission of the plaintiffs, he made about 13,000 feet of hose, for different hose companies, from 1811 to the time of granting the patent." Thus, in point of fact, nearly two miles and a half in length of hose, had been made, at different times, in the course of seven years before the patent; and had been sold to different hose companies; not to experiment with, in order to bring the invention to perfection; but for public use, as a thing already completed, and adapted for the purpose of arresting the ravages of fire. It was so used; and from the year 1811 to the year 1818, it was never materially altered or improved. The thing patented in 1818 was precisely the thing invented, completed and used in 1811.

Were the plaintiffs, under these circumstances, entitled to a patent? or could a patent, thus obtained, be supported? The authorities upon the subject are decisive. He did not admit, that the weight of judicial or legal opinion in England was lessened by the supposed difference in the policy of the two countries, or that in fact any such difference existed. It was true, that the process or mode of legislation was varied according to the existing state of things. The statute of James was made to abolish monopolies; but it saved, by exception, the rights of the inventors of new and useful inventions, who had before enjoyed exclusive privileges. The constitution of the United States and the act of congress, on the contrary, having no monopolies to deal with, created exclusive privileges in favor of the same description of person. The one preserved to them a pre-existing monopoly, and the other conferred it upon them. Both were influenced by the merits of the inventors, and the public advantage of encouraging inventive genius.
*10] And they were *equally influenced by these considerations; for it required, at least, as strong a sense of their just claims to distinction, to except new and useful inventions from the statutory odium and denunciation of monopolies, as it did to confer upon them the benefits of monopoly by direct enactment. There was no reason, therefore, why the judicial construction of the statute of James (from which our act of congress was in this respect copied), which had become, as it were, incorporated with and part of the statute, should not be as much respected as in the instance of any other statute. The adoption of the language of the statute, was the

adoption also of its settled interpretation. It could not surely be insisted, that England was wanting in intelligence to discern the value of genius, or in liberality to reward it; or that there was a prevailing bias in her judiciary towards an unjust restriction of the rights of meritorious inventors. The sentiment of the nation, and the government, in all its branches, was the opposite of this.

Before referring to the cases, it might be well, however, to examine the matter a little upon principle. What is the right of an inventor? It is the right given to him by the law, to apply for and obtain a patent for his invention. The patent, when duly obtained, secures to him the exclusive enjoyment. Has he any other right, before he obtains a patent, than the one just stated? It is obvious, that he has not. This, then, is what the learned judge, in his charge, styles, with peculiar aptness, an inchoate right; that is, a right to have a title, upon complying with the terms and conditions of the law. It is like an inchoate right to land, or an inceptive right to land, well known in some of the states, and everywhere accompanied with the condition, that to be made available, it must be prosecuted with due diligence, to the consummation or completion of the title. If the condition be not complied with, the right is abandoned or lost, and the rights of others are let in. The abandonment is not a question of intention of the party, but it is the legal construction of his acts or omissions.

Had the plaintiffs ever such an inchoate right? *According to the opinion of the judge, they undoubtedly had such a right, by their [*11 invention of 1811. Then, they could have made out the case required by the first section of the act of congress; they could have stated with truth, that the thing invented "was not known or used before their application." But in the year 1818, it was no longer true. It might be stated, but it could not be truly stated. They were unable to comply with the condition of law. For, if the inventor, as was the case here, voluntarily permit his invention to be known and used, as a thing not intended to be patented, how can he make this statement? By so doing, he abandons his inchoate right; he proclaims to the world that he does not mean to secure it by patent, and every one is at liberty to consider it abandoned; because every one acquainted with the law knows that he has incurred a disability. This is the inevitable legal construction of his conduct, and is altogether independent of his intention; unless we suppose the act to be guilty of the absurdity of requiring that to be stated, which it does not require to be true.

But the terms of the act are in this respect too plain to admit of a doubt. Suppose, an applicant should state, that his invention had been known and used for seven years before his application, could he obtain a patent? Suppose, he should state, that he had always intended to reserve to himself a right to obtain a patent, would that help him? Or, if he should state, that it had been so known and used only by his permission? The language of the act is plain and imperative; there is no scope for interpretation. The prescribed condition is express. And there is no doubt, that it was the intention of congress to refer to the "application," as the period before which the thing was not known or used; for in the subsequent act of 17th April 1800, conferring the privileges of the patent law upon resident aliens, the same word is used for the same purpose. And it is declared, that the patent

shall be void, if the thing patented was known or used before the application. Act of 17th April 1800, § 1.

*12] *It is not contended, that if the invention should be pirated, the use or knowledge, obtained by the piracy, or otherwise obtained without the knowledge or consent and without the fault of the inventor, would bar him from getting a patent. Nor is it contended, that his own knowledge and use would be a bar. The latter is a necessary exception out of the generality of the terms of the law, because every inventor must know his invention, and must use it to the extent of ascertaining its usefulness, before he applies for a patent. The former is a case where there is no fault on the part of the inventor. But it is contended, that the inventor who means to rely upon a patent, must make his application within a reasonable time ; and that if he permit his invention to be publicly known and used, before he applies, he cannot obtain a patent. He abandons his right, if he sell it for public use himself, and, *à fortiori*, if he permit another so to sell it.

There is a cautious intimation in the charge, that possibly there might be some saving efficacy in accompanying the use with an assertion of claim by the inventor. And it is also put as a circumstance against the plaintiffs (which was clearly in evidence), that there was no such assertion or notice. The charge is, therefore, applicable only to a case of unqualified public use, without notice or assertion of claim. That such a notice would be available, or that there can be any other assertion of claim than the legal assertion by applying for a patent, are propositions which it is not now necessary to examine. They were not affirmatively laid down by the court, nor otherwise adverted to, than for the purpose of showing that the facts did not entitle the plaintiffs to the benefit of them. They cannot, therefore, complain. Whether such assertions or notice, contradicted by the acts of the inventor, will be available, is a question not decided below. Certain it is, that a secret permission, given to their own agent, can no more be an assertion or notice, than a resolution locked up in their own breasts.

The construction contended for is in accordance with the policy of the *13] law. Patents are intended to be granted *for a limited time, beginning with the invention. He who asks for one must describe his invention with such certainty as will insure to the public its use, when the patent expires ; and at the expiration of the time, the thing invented is public property. The inventor, to enjoy its benefits, must place his whole reliance upon it. Is it competent for him, then, to secure to himself the advantages of his own peculiar knowledge and skill, as long as these will avail him, and when they are exhausted, to apply for a patent ? There are many inventions, the secret of which is not at once discoverable, from an inspection of the thing invented. The inventor may keep that as long as he can. He may have extraordinary skill or methods of working, which will enable him to keep the market to himself. May he enjoy these exclusive privileges for seven years, and then obtain a patent for fourteen more ? He would then have the exclusive use for twenty-one years. If for seven, why not for fourteen, or twenty-one, or any other assignable time ? The moment that his invention comes into the most common or public use, is the moment when he applies for a patent. When the public have fully got possession of

it, he seeks to withdraw it from the common stock, and appropriate it to himself. This is directly contrary to the design of the law. It extends the term, and inverts the order of proceeding. The inconveniences would be very great; those who were engaged in making the article must stop; those who had arranged for making it, must abandon their arrangements; those who had employed their time in learning to make it, must lose their time and their labor. And even a *bonâ fide* inventor, who had discovered the same thing by his own study and experiments, would be deprived of the fruits of his ingenuity and exertions. And why? Simply, because the first inventor did not choose sooner to take out a patent, as he might have done. The conditions of the law being such as he can comply with, and ought to comply with, he postpones a compliance for his own profit, and leads the community into an injurious error. If it be *designed, it is a wrong; [*14
if it be without design, it is negligence. Ought he to be benefited by his own wrong or negligence? The authorities are against him. 3 Inst. 184; *Wood* v. *Zimmer*, 1 Holt 58; *Whittemore* v. *Cutter*, 1 Gallis. 482; *Evans* v. *Eaton*, Pet. C. C. 348; *Thompson* v. *Haight*, 1 U. S. Law Journ. 568.

He then examined the several points stated for the defendant, contending that some of them were unsupported by the facts, and others by the law. Under the second, he argued, that there had been an "unreasonable lapse of time," and "gross negligence." That seven years (the period here) unexplained, were beyond all reasonable bounds. He contended also, that due diligence, where there were no circumstances of explanation, was a question of law; and that it consisted in applying for a patent as soon after the invention was completed as could reasonably be done; and finally, that due diligence required that the application should be made before the thing invented was publicly known and used, with the consent of the inventor.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of Pennsylvania. The original action was brought by the plaintiffs in error for an asserted violation of a patent, granted to them on the 6th day of July 1818, for a new and useful improvement in the art of making leather tubes or hose, for conveying air, water and other fluids. The cause was tried upon the general issue, and a verdict was found for the defendant, upon which judgment passed in his favor; and the correctness of that judgment is now in controversy before this court.

At the trial, a bill of exceptions was taken to an opinion delivered by the court, in the charge to the jury, as follows, viz: "That the law arising upon the case was, that if an inventor makes his discovery public, looks on and permits others freely to use it, without objection, or assertion of claim to the invention, of which the public might take notice, he abandons *the inchoate right to the exclusive use of the invention, to which [*15
a patent would have entitled him, had it been applied for before such use. And that it makes no difference in the principle, that the article, so publicly used, and afterwards patented, was made by a particular individual who did so by the private permission of the inventor. And thereupon, the judge did charge the jury, that if the evidence brings the case within the principle which had been stated, the court were of opinion, that the plaintiffs were not entitled to a verdict.

The record contains, embodied in the bill of exceptions, the whole of the

testimony and evidence offered at the trial by each party, in support of the issue. It is very voluminous, and as no exception was taken to its competency or sufficiency, either generally or for any particular purpose, it is not properly before this court for consideration, and forms an expensive and unnecessary burden upon the record. This court has had occasion, in many cases, to express its regret, on account of irregular proceedings of this nature. There was not the slightest necessity of putting any portion of the evidence in this case upon the record, since the opinion of the court delivered to the jury presented a general principle of law, and the application of the evidence to it was left to the jury.

In the argument at the bar, much reliance has been placed upon this evidence by the counsel for both parties. It has been said, on behalf of the defendants in error, that it called for other and explanatory directions from the court, and that the omission of the court to give them in the charge, furnishes a good ground for a reversal, as it would have furnished in the court below for a new trial. But it is no ground of reversal, that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, where it was not requested by either party, at the trial. It is sufficient for us, that the court has given no erroneous directions. If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the court upon that point; if he do not, it is a waiver of it.

*16] *The court cannot be presumed to do more, in ordinary cases, than to express its opinion upon the questions which the parties themselves have raised at the trial. On the other hand, the counsel for the defendant in error has endeavored to extract from the same evidence strong confirmations of the charge of the court; but for the reason already suggested, the evidence must be laid out of the case, and all the reasoning founded on it falls.

The single question then is, whether the charge of the court was correct in point of law? It has not been, and indeed, cannot be denied, that an inventor may abandon his invention, and surrender or dedicate it to the public. This inchoate right, thus once gone, cannot afterwards be resumed at his pleasure; for, where gifts are once made to the public in this way, they become absolute. Thus, if a man dedicates a way, or other easement to the public, it is supposed to carry with it a permanent right of *user*. The question which generally arises at trials, is a question of fact, rather than of law; whether the acts or acquiescence of the party furnish, in the given case, satisfactory proof of an abandonment or dedication of the invention to the public. But when all the facts are given, there does not seem any reason why the court may not state the legal conclusion deducible from them. In this view of the matter, the only question would be, whether, upon general principles, the facts stated by the court would justify the conclusion?

In the case at bar, it is unnecessary to consider, whether the facts stated in the charge of the court would, upon general principles, warrant the conclusion drawn by the court, independently of any statutory provisions; because, we are of opinion, that the proper answer depends upon the true exposition of the act of congress, under which the present patent was obtained. The constitution of the United States has declared, that con-

gress shall have power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." It contemplates, therefore, that this exclusive right shall exist but *for a limited period, and that the period shall be subject to the discretion of congress. The [*17 patent act of the 21st of February 1793, ch. 11, prescribes the terms and conditions and manner of obtaining patents for inventions; and proof of a strict compliance with them lies at the foundation of the title acquired by the patentee. The first section provides, "that when any person or persons, being a citizen or citizens of the United States, shall allege that he or they have invented any new or useful art, machine, manufacture or composition of matter, or any new or useful improvement on any art, machine or composition of matter, not known or used before the application; and shall present a petition to the secretary of state, signifying a desire of obtaining an exclusive property in the same, and praying that a patent may be granted therefor; it shall and may be lawful for the said secretary of state to cause letters-patent to be made out in the name of the United States, bearing teste by the president of the United States, reciting the allegations and suggestions of the said petition, and giving a short description of the said invention or discovery, and thereupon granting to the said petitioner, &c., for a term not exceeding fourteen years, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention or discovery, &c." The third section provides, "that every inventor, before he can recive a patent, shall swear or affirm, that he does verily believe that he is the true inventor or discoverer of the art, machine or improvement for which he solicits a patent." The sixth section provides, that the defendant shall be permitted to give in defence, to any action brought against him for an infringement of the patent, among other things, "that the thing thus secured by 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." These are the only material clauses bearing upon the question now before the court; and upon the construction of them, there has been no inconsiderable diversity of *opinion entertained among the profession, in cases heretofore [*18 litigated.

It is obvious to the careful inquirer, that many of the provisions of our patent act are derived from the principles and practice which have prevailed in the construction of that of England. It is doubtless true, as has been suggested at the bar, that where English statutes, such, for instance, as the statute of frauds, and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority. Strictly speaking, that is not the case in respect to the English statute of monopolies, which contains an exception, on which the grants of patents for invention have issued in that country. The language of that clause of the statute is not, as we shall presently see, identical with ours. But the construction of it adopted by the English courts, and the principles and practice which have long regulated the grants of their patents, as they must have been known and are

tacitly referred to in some of the provisions of our own statute, afford materials to illustrate it.

By the very terms of the first section of our statute, the secretary of state is authorized to grant a patent to any citizen applying for the same, who shall allege that he has invented a new and useful art, machine, &c., "not known or used before the application." The authority is a limited one, and the party must bring himself within the terms, before he can derive any title to demand, or to hold, a patent. What then is the true meaning of the words "not known or used before the application?" They cannot mean, that the thing invented was not known or used before the application, by the inventor himself, for that would be to prohibit him from the only means of obtaining a patent. The use, as well as the knowledge of his invention, must be indispensable, to enable him to ascertain its competency to the end proposed, as well as to perfect its component parts. The words, then, to
*19] have any rational interpretation, must *mean, not known or used by others, before the application. But how known or used? If it were necessary, as it well might be, to employ others to assist in the original structure or use by the inventor himself, or if before his application for a patent, his invention should be pirated by another, or used without his consent, it can scarcely be supposed, that the legislature had within its contemplation such knowledge or use.

We think, then, the true meaning must be, not known or used by the public, before the application. And thus construed, there is much reason for the limitation thus imposed by the act. While one great object was, by holding out a reasonable reward to inventors, and giving them an exclusive right to their inventions for a limited period, to stimulate the efforts of genius; the main object was "to promote the progress of science and useful arts;" and this could be done best, by giving the public at large a right to make, construct, use and vend the thing invented, at as early a period as possible, having a due regard to the rights of the inventor. If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should, for a long period of years, retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure; and then, and then only, when the danger of competition should force him to secure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what should be derived under it, during his fourteen years; it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries.

A provision, therefore, that should withhold from an inventor the privilege of an exclusive right, unless he should, as early as he should allow the public use, put the public in possession of his secret, and commence the running of the period that should limit that right, would not be deemed
*20] unreasonable. It might be expected to find a place in a *wise prospective legislation on such a subject. If it was already found in the jurisprudence of the mother country, and had not been considered inconvenient there, it would not be unnatural, that it should find a place in our own.

Now, in point of fact, the statute of 21 Jac. I., c. 3, commonly called the statute of monopolies, does contain exactly such a provision. That act,

after prohibiting monopolies generally, contains, in the sixth section, an exception in favor of "letters-patent and grants of privileges for fourteen years or under, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters-patent and grants, shall not use." Lord Coke, in his commentary upon this clause or proviso (3 Inst. 184), says, that the letters-patent "must be of such manufactures, which any other, at the time of making such letters-patent, did not use; for albeit it were newly invented, yet if any other did use it, at the making of the letters-patent, or grant of the privilege, it is declared and enacted to be void by this act." The use here referred to has always been understood to be a public use, and not a private or surreptitious use, in fraud of the inventor.

In the case of *Wood* v. *Zimmer*, 1 Holt 58, this doctrine was fully recognised by Lord Chief Justice Gibbs. There, the inventor had suffered the thing invented to be sold, and go into public use, for four months before the grant of his patent; and it was held by the court, that on this account the patent was utterly void. Lord Chief Justice Gibbs said, "to entitle a man to a patent, the invention must be new to the world; the public sale of that which is afterwards made the subject of a patent, though sold by the inventor only, makes the patent void." By "invention," the learned judge undoubtedly meant, as the context abundantly shows, not the abstract discovery, but the thing invented; not the new secret principle, but the manufacture resulting from it.

The words of our statute are not identical with those of *the statute of James, but it can scarcely admit of doubt, that they must have been within the contemplation of those by whom it was framed, as well as the construction, which had been put upon them by Lord Coke. But if there were no such illustrative comment, it is difficult to conceive, how any other interpretation could fairly be put upon these words. We are not at liberty to reject words, which are sensible in the place where they occur, merely because they may be thought, in some cases, to import a hardship, or tie up beneficial rights within very close limits. If an invention is used by the public, with the consent of the inventor, at the time of his application for a patent, how can the court say, that his case is, nevertheless, such as the act was intended to protect? If such a public use is not a use within the meaning of the statute, what other use is? If it be a use within the meaning of the statute, how can the court extract the case from its operation, and support a patent, where the suggestions of the patentee are not true, and the conditions, on which alone the grant was authorised to be made, do not exist? In such a case, if the court could perceive no reason for the restrictions, the will of the legislature must still be obeyed; it cannot and ought not to be disregarded, where it plainly applies to the case. But if the restriction may be perceived to have a foundation in sound policy, and be an effectual means of accomplishing the legislative objects, by bringing inventions early into public and unrestricted use; and, above all, if such policy has been avowed and acted upon in like cases in laws having similiar objects; there is very urgent reason to suppose, that the act in those terms embodies the real legislative intent, and ought to receive that construction. It is not wholly insignificant in this point of view, that the first patent act passed by [*21

congress on this subject (act of 1790, ch. 34), which the present act repeals, uses the words "not known or used before," without adding the words "the application;" and in connection with the structure of the sentence in which they stand, might have been referred either to the time of the invention, or
*22] of the application. The addition of the *latter words in the patent act of 1793, must, therefore, have been introduced *ex industriâ*, and with the cautious intention to clear away a doubt, and fix the original and deliberate meaning of the legislature.

The act of the 17th of April 1800, ch. 25, which extends the privileges of the act of 1793 to inventors who are aliens; contains a proviso, declaring "that every patent which shall be obtained pursuant to the act, for any invention, art or discovery, which it shall afterwards appear had been known or used previous to such application for a patent, shall be void." This proviso certainly fortifies the construction of the act of 1793, already asserted; for there is not any reason to suppose, that the legislature intended to confer on aliens privileges essentially different from those belonging to citizens. On the contrary, the enacting clause of the act of 1800 purports to put both on the same footing; and the proviso seems added as a gloss or explanation of the original act.

The only real doubt which has arisen upon this exposition of the statute, has been created by the words of the sixth section already quoted. That section admits the party sued to give in his defence as a bar, that "the thing thus secured by patent was not originally discovered by the patentee, but had been in use anterior to the supposed discovery of the patentee." It has been asked, if the legislature intended to bar the party from a patent, in consequence of a mere prior use, although he was the inventor, why were not the words "anterior to the application" substituted, instead of "anterior to the supposed discovery?" If a mere use of the thing invented, before the application, were sufficient to bar the right, then, although the party may have been the first and true inventor, if another person, either innocently as a second inventor, or piratically, were to use it without the knowledge of the first inventor, his right would be gone. In respect to a use by piracy, it is not clear, that any such fraudulent use is within the intent of the statute; and upon general principles, it might well be held excluded.
*23] In respect to the case of a second invention, it is questionable, *at least, whether, if by such second invention, a public use was already acquired, it could be deemed a case within the protection of the act. If the public were already in possession and common use of an invention, fairly and without fraud, there might be sound reason for presuming, that the legislature did not intend to grant an exclusive right to any one to monopolize that which was already common. There would be no *quid pro quo*; no price for the exclusive right or monopoly conferred upon the inventor for fourteen years.

Be this as it may, it is certain, that the sixth section is not necessarily repugnant to the construction which the words of the first section require and justify. The sixth section certainly does not enumerate all the defences which a party may make, in a suit brought against him for violating a patent. One obvious omission is, where he uses it under a license or grant from the inventor. The sixth section, in the clause under consideration, may well be deemed merely affirmative of what would be the result, from

the general principles of law applicable to other parts of the statute. It gives the right to the first and true inventor, and to him only; if known or used, before his supposed discovery, he is not the first, although he may be a true inventor; and that is the case to which the clause looks. But it is not inconsistent with this doctrine, that although he is the first, as well as the true inventor, yet if he shall put it into public use, or sell it for public use, before he applies for a patent, that this should furnish another bar to his claim. In this view, an interpretation is given to every clause of the statute, without introducing any inconsistency, or interfering with the ordinary meaning of its language. No public policy is overlooked, and no injury can ordinarily occur to the first inventor, which is not in some sort the result of his own *laches* or voluntary inaction.

It is admitted, that the subject is not wholly free from difficulties; but upon most deliberate consideration, we are all of opinion, that the true construction of the act is, that the first inventor cannot acquire a good title to a patent, if he suffer the thing invented to go into public use, or to be *publicly sold for use, before he makes application for a patent. His [*24
voluntary act or acquiescence in the public sale and use, is an abandonment of his right; or rather, creates a disability to comply with the terms and conditions on which alone the secretary of state is authorized to grant him a patent. The opinion of the circuit court was, therefore, perfectly correct; and the judgment is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Pennsylvania, and was argued by counsel: On consideration whereof, it is the opinion of this court, that there is no error in the judgment of the said circuit court. Whereupon, it is considered, ordered and adjudged by this court, that the said judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Columbian Insurance Company of Alexandria, Plaintiffs in error, *v.* Joseph W. Lawrence, survivor of Lawrence & Poindexter, Defendants in error. [*25

Fire insurance.—Insurable interest.—Application.

It is undoubtedly true, that questions respecting the admissibility of evidence, are entirely distinct from those which refer to its sufficiency or effect; they arise in different stages of the trial; and cannot, with strict propriety, be propounded at the same time. p. 44.

L. & P., at the time an insurance was made for them against loss by fire, were entitled to one-third of the property by deed, and two-thirds as mortgagees; but one moiety of the whole was held under an agreement which had not been complied with, and which purported on its face to be void, if not complied with; but the other contracting party had not declared it void, nor called for a compliance with it: L. & P. had an insurable interest in the property. p. 46.

That an equitable interest may be insured, is admitted; and we can perceive no reason which excludes an interest held under an executory contract; while the contract subsists, the person claiming under it has, undoubtedly, a substantial interest in the property; if it be destroyed, the loss, in contemplation of law, is his; if the purchase-money be paid, it is in fact; if he owes the purchase-money, the property is equivalent, and is still valuable to him; the embarrassments of his affairs may be such, that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it; the destruction of the property is a real loss to the person in possession, who claims title under an executory con-

tract; and the contingency, that his title may be defeated by subsequent events, does not prevent this loss.[1] p. 46.

The material inquiry is, does the offer for insurance state truly the interest of the assured in the property to be insured? The offer described the property as belonging to Lawrence & Poindexter, and stated it, afterwards, to be their stone mill; it contained no qualifying term, which would lead the mind to suspect that their title was not complete and absolute. The title of the assured was subject to contingencies, and was held under contracts which had become void by the non-performance of the same; the court was of opinion, that a precarious title, depending for its continuance on events which might or might not happen, was not such a title as was described in this offer for insurance; construing the words of that offer as they were fairly to be understood. p. 48.

The contract for insurance against fire is one in which the underwriter generally acts on the representation of the assured; and that representation ought consequently to be fair, and to omit nothing which it is material to the underwriter to know; it may not be necessary that the person requiring insurance should state every incumbrance on his property, which it might be required of him to state, if it was offered for sale; but fair-dealing requires, that he *26] should state *everything which might influence the mind of the underwriter, in forming or declining the contract. p. 49.

Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautionary means to avoid the calamity insured against, which would be suggested by his interest; the extent of that interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium; underwriters do not rely so much on the principles, as on the interest, of the assured; it would seem, therefore, to be material, that they should always know how far this interest is engaged in guarding the property from loss.[2] p. 49.

In all treaties on insurance, and in all the cases in which the question has arisen, the principle is, that a misrepresentation which is material to the risk, avoids the policy. p. 49.

What will not constitute a waiver of the preliminary proof of loss, the assured is bound by the policy to produce.[3] p. 53.

Construction of a policy of insurance against loss by fire. p. 56.

ERROR to the Circuit Court for the District of Columbia, and county of Alexandria. The action was brought, originally, by Lawrence & Poindexter, on a policy of insurance for $7000, against fire, on a mill.

The declaration, after setting out the contract of insurance, averred, that the plaintiffs "were interested in and the equitable owners of the insured premises, at the time the insurance was made." After stating the loss by fire, on the 14th of February 1824, as within the policy, there was the following averment, "of which said loss, together with the proofs thereof, in conformity with the conditions subjoined to the said policy, the defendants, on the 20th of February 1824, at, &c., had due and regular notice."

Upon the trial of the general issue, verdict and judgment passed for the surviving plaintiff, Lawrence, for the whole amount of the insurance, under certain instructions from the court, stated in two bills of exception tendered by the defendants, now plaintiffs in error.

During the progress of the suit, Poindexter, one of the plaintiffs, died, and the suit instituted in their joint names, was carried on in the name of the survivor, for the use of his assignee.

The evidence exhibited to the jury on the part of the plaintiff, showed,

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[1] But a mortgagee cannot claim the benefit of a policy underwritten for the mortgagor. S. C. 10 Pet. 507.

[2] Nicoll *v.* American Ins. Co., 3 W. & M. 530; Biays *v.* Union Ins. Co. 1 W. C. C. 506.

[3] Beatty *v.* Lycoming Co. Mut. Ins. Co., 66 Penn. St. 9; Lycoming Ins. Co. *v.* Schreffer, 42 Id. 188; Lycoming Co. Mut. Ins. Co. *v.* Schollenberger, 44 Id. 259; Farmers' Mut. Ins. Co. *v.* Taylor, 73 Id. 342.

that Lawrence & Poindexter, by their *agents, had made application in writing to the defendants for insurance, in these words: "What premium will you ask, to insure the following property, belonging to Lawrence & Poindexter, for one year, against loss or damage by fire, on their stone mill, four stories high, covered with wood, situated on an island about one mile from Fredericksburg, in the county of Stafford? The mill called Elba; $7000 is wanted; not within thirty yards of any other building, except a corn-house, which is about twenty yards off." The premium demanded was $105. The application was made upon a printed form, of which blanks are kept at the insurance office, and filled up as required. At the foot of this document was the following: "N. B. Persons offering for insurance are requested to be particular in their descriptions, more especially of what materials the walls and roofs are constructed," &c.

The policy, an unsealed instrument, was executed in the usual form, containing the several stipulations, provisos and exceptions usual in fire policies; and among others, the following: "And it is understood and agreed, as well by this company as by the assured named in this policy, and all others who may become interested therein, that this insurance is made and accepted in reference to the conditions which accompany these presents; and in every case, the said conditions are to be used to explain the rights and obligations of the parties, except so far forth as the policy itself expressly declares those rights and obligations." Upon the back of this policy were printed the "fundamental rules of the Columbian Insurance Company," and also, the "rates of annual premiums to be paid for insurance," among which were:

"1. Persons desirous to make insurance on buildings, are to state in writing the following particulars, viz: Of what materials the wall and roof of each building are constructed, as well as the construction of the buildings contiguous thereto; whether the same are occupied as private dwellings *or how otherwise; where situated; also the name or names of the present occupiers. [*28

"Each building must be separately valued, and a specified sum insured thereon; and in like manner, a separate sum insured on the property contained therein.

"All manufactories which contain furnaces, kilns, stoves, ovens, or use fire heat, are chargeable at additional rates.

"In the assurance of goods, wares and merchandise, the building or place in which the same are deposited, is to be described, also whether such goods are of the kinds denominated hazardous, and whether any manufactory is carried on in the premises. And if any person or persons shall insure his or their buildings or goods, and shall cause the same to be described in the policy otherwise than as they really are, so as the same be charged at a lower premium than would otherwise be demanded, such insurance shall be of no force.

"2. Goods held in trust, or on commission, are to be insured as such, otherwise the policy will not extend to cover such property.

"9. All persons assured by this company, sustaining any loss or damage by fire, are forthwith to give notice to the company, and as soon as possible thereafter, deliver as particular an account of their loss or damage, signed with their own hands, as the nature of the case will admit of, and make

proof of the same, by their oath or affirmation, and by their books of accounts, or other proper vouchers, as shall be reasonably required; and shall procure a certificate, under the hand of a magistrate or a sworn notary of the town or county in which the fire happened, not concerned in such loss, directly or indirectly, importing that they are acquainted with the character and circumstances of the person or persons insured, and do know, or verily believe, that he, she or they, really, and by misfortune, without any kind of fraud or evil practice, have sustained by such fire, loss or damage to the amount therein mentioned; and, until such affidavit and certificate are produced, the loss claimed shall not be payable; also, if there
*29] appears any fraud, the claimant shall *forfeit his claim to restitution or payment, by virtue of his policy."

The property intended to be insured, was proved to be a square building, four stories high, built of stone to the square or eaves, the roof being framed, and covered entirely of wood, the two gable-ends running up perpendicularly from the stone wall to the top of the roof, they being constructed of wood.

On the 14th of February 1824, the property was destroyed by fire; and the following documents were given in evidence, to sustain the right of the plaintiffs to demand payment of the loss; the same having been exhibited as "the preliminary proof of the loss claimed under the policy."

Fredericksburg, February 16, 1824.

To the President, Directors and Company, of the Columbian Insurance Company of Alexandria.

Gentlemen:—We regret that we have now to inform you of the total destruction of our mill by fire, on the night of the 14th inst., which was insured in your office, the particulars of which we will forward you as soon as we can prepare the necessary documents, as laid down in the conditions accompanying the policy. LAWRENCE & POINDEXTER.

The affidavit of the said Lawrence & Poindexter, with the certificate of Murray Forbes, was annexed.

We hereby certify, that by the burning of our mill, situate on an island in the county of Stafford, about one mile from the town of Fredericksburg, and state of Virginia, called the Elba mill, four stories high, the walls of stone and covered with wood, on which $7000 were insured by us, in the office of the Columbian Insurance Company of Alexandria, on the 9th day of April last, per policy No. 279, and which was destroyed by fire on the night of Saturday last, the 14th inst., we lost, or were damaged at least $12,000, exclusively of the contents of said mill. We are entirely ignorant of the circumstances which occasioned the fire, and we further certify, that we have no other insurance, directly or indirectly, on the aforesaid property, except the above mentioned. JOSEPH W. LAWRENCE.
THOS. POINDEXTER, Jun.

*30] *Commonwealth of Virginia, Stafford County, to wit:
Joseph W. Lawrence and Thomas Poindexter this day personally appeared before me, a justice of the peace for the said county, and made oath, in due form, that the above certificate contains the truth, to the best of their knowledge and belief. MURRAY FORBES.

I, Murray Forbes, a magistrate duly commissioned, in and for the county of Stafford, and state of Virginia, do hereby certify, that I am acquainted with Joseph W. Lawrence and Thomas Poindexter; that the fire originated in their mill, burnt on the night of the 14th inst., by accident, or without fraud or design of their part, as far as I know or believe; and that the damage or loss they sustained by the said fire is at least $10,000. And I further certify, that the said mill was not within thirty yards of any other building, except a corn-house, which was about twenty yards off.

MURRAY FORBES.

The affidavits of Thomas Sedden and James Vasse, were annexed.

I, Thomas Sedden, of the town of Fredericksburg, in the county of Spottsylvania, and state of Virginia, do hereby certify, that I am well acquainted with the mill called and known by the name of the Elba mill, owned and occupied by Joseph W. Lawrence and Thomas Poindexter, situate on an island in the county of Stafford, about one mile from the town of Fredericksburg; that the said mill was built of stone, four stories high, and covered with wood; that between ten and eleven o'clock on Saturday night, the 14th inst., I was alarmed by the cry of fire, which I soon ascertained to be the mill aforesaid; that I have since viewed the ruins, and am of opinion, that it would require at last $10,000 to rebuild the same, and restore the proprietors in the situation they were in previous to the said fire; that I have no knowledge or idea how the fire originated.

THOMAS SEDDEN.

Commonwealth of Virginia, Stafford County, to wit:

Thomas Sedden this day personally appeared before me, one of the commonwealth's justices of the peace of the *county aforesaid, and made oath to the truth of the foregoing certificate, signed by his hand. [*31

MURRAY FORBES.

I, James Vasse, of the town of Falmouth, in the county of Stafford, and state of Virginia, do hereby certify, that I am well acquainted with the mill called and known by the name of the Elba mill, owned and occupied by Joseph W. Lawrence and Thomas Poindexter, situate on an island in the county of Stafford, and about one mile from the town of Fredericksburg; that the said mill was built of stone, four stories high, and covered with shingles; that between the hour of ten and eleven o'clock on Saturday night, the 14th current, I was alarmed by the cry of fire, which I soon ascertained to be the mill aforesaid; that I have since viewed the ruins, and I am of opinion, that it will require the sum of $10,000, or thereabout, to restore the proprietors to the situation they were in previous to the said fire; further, that I have no knowledge whatever how the fire originated.

JAMES VASSE.

Commonwealth of Virginia, Stafford County, to wit:

James Vasse this day personally appeared before me, one of the commonwealth's justices of the peace of the county aforesaid, and made oath to the truth of the foregoing certificate, signed by his hand.

MURRAY FORBES

The plaintiff also gave in evidence the following extracts from the minutes of the proceedings of the insurance company, in relation to the claim of payment for the loss.

Friday, 20th February 1824. Lawrence & Poindexter. Claim made by them this day by their attorney, Anthony Buck, with the policy and certificates of loss by fire, on policy No. 279.

On the application of Anthony Buck, leave is given to Joseph W. Lawrence and Thomas Poindexter to assign to William J. Roberts, policy No. 279, effected in this office, without prejudice to any defence which this office may have against the payment of the sum insured, or to the claim of John H. Ladd & Co., under their attachment heretofore served on the president of this company.

*32] Saturday, 13th March 1824. Ordered, that the *secretary address a letter to John Scott, to require the title of Lawrence & Poindexter to the Elba mill.

Thursday, 1st April 1824. The following papers were this day received, to wit: a letter from John Scott, Esq., Fredericksburg, covering copies of a deed from William and George Winchester to Joseph Howard and Joseph Lawrence; an agreement between Joseph Howard and Joseph Lawrence; and an agreement between Joseph Lawrence and Thomas Poindexter, jun.

Friday, 16th April 1824. In the case of Lawrence & Poindexter, ordered, that a copy of the mortgage to the banks, proof of the execution of the contract between Lawrence & Poindexter, on the day it bears date, and a copy of the notes in the bank, be required.

Thursday, 22d April 1824. Lawrence & Poindexter. The following papers were presented by R. I. Taylor, Esq., inclosed to him by Mr. John Scott, Fredericksburg: deed of trust from Joseph Howard and Mary his wife, and Joseph W. Lawrence, to William J. Roberts, for the benefit of the banks, dated 13th May 1814. An agreement between Joseph W. Lawrence and Thomas Poindexter, dated 28th November 1822. A copy of a note drawn by Howard & Lawrence, dated 10th March 1824, to the Farmers' Bank of Virginia, at Fredericksburg, for $1800. A copy of another note, dated 5th March 1824, drawn by the same, to the Bank of Virginia, at Fredericksburg, for $4187.

Saturday, 26th June 1824. Walter Jones, Esquire's, opinion having been submitted to a called board this day, on motion of Mr. Mandeville, it was resolved, that the claim of Lawrence & Poindexter be resisted, and that the secretary furnish them with a copy of this resolution.

Wednesday, 11th November 1824. Will the board now enter into a compromise with John Scott, Esq., for the claim of Lawrence & Poindexter on this office, it being perfectly understood that an agreement to enter into a compromise is not to be considered as an admission of the claim? Yes.

*33] *Thursday, 18th November 1824. The board having duly considered the case of Lawrence & Poindexter, decline making any compromise, at this time, and the secretary is directed to inform Mr. Scott of their determination.

Friday, 10th December 1824. A communication from John Scott, Esq., of Fredericksburg, was received; whereupon, it was ordered, that a board be called for to-morrow, at twelve o'clock, to receive said John Scott's proposals for an arrangement in the case of Lawrence & Poindexter.

Saturday, 11th December 1824. On application of John Scott, Esq., it is agreed to receive propositions for an arrangement between John Scott and this office, in the case of Lawrence & Poindexter, without prejudice to either of the parties concerned. John Scott, Esq., has this day proposed to settle this claim against this office by receiving from them fifty cents in the dollar in full for said claim. Will the board now agree to pay said Scott fifty cents? They will not.

The opinion of Walter Jones, Esq., counsel of the defendants, referred to in the minutes, was as follows :

"Claim of Lawrence & Poindexter, stated by the Columbian Insurance Company of Alexandria.

"An equitable title, in general, is doubtless an insurable interest against fire ; but it seems, that the interest in this case was so incumbered with liens and precedent conditions, as to make the legal estate not worth the calling for on the part of the insured ; whilst, on the other hand, their circumstances were such as, in all probability, to make any suit against them, for a specific execution of the contract, or for compensation for damages, fruitless and unproductive ; so that, to any practical effect or purpose, the insured were unable to call for the legal estate, by performing the contract of sale, and consequently, the vendor had no motive to throw the legal estate upon them, by a compulsory execution of such contract. How the insurance may be affected by such a state of facts, is a question entirely at large, and undetermined by authority; and if there were any insurable interest, it might be matter of serious doubt, under the peculiar circumstances of the property and the parties, to what *degree the general terms in [*34
which the description of the estate to be insured is given (unlimited by any specification of the quality of the estate, or of the value and quantity of the interest), involved misrepresentation or concealment.

"Whether in the description of a stone building covered with wood, the gables be necessarily understood to be a part of the masonry, is a question of art belonging to architects or house-builders, and depending upon the common use and understanding of the terms connected with that art. How, upon these principles, would a contract to build a house of brick or stone, covered with wood, be understood? would the undertakers be bound to run up the gables with brick or stone? If that question be answered in the affirmative (as I am informed, and indeed have no doubt it should be), then the omission in this case, to disclose the fact of timber gables, is a concealment of a material fact ; and the unqualified description given of a stone mill, a material misrepresentation, which avoids the policy. W. Jones."

The plaintiff also examined witnesses relative to the proceedings of the board, from which, as well as from the facts stated in the minutes, he claimed to infer, that if there was a defect in the preliminary proof, the same had been waived by the representatives of the insurance company. This evidence, so far as it was by the court considered to affect or influence the law and merits of the case, is sufficiently set out in the opinion of the court. After this and other testimony to the same effect had been given, on the part of the plaintiff, the defendants' counsel objected to the admissibility, competency and sufficiency of the same, and of all or any of the facts thereby proved (admitting the same to be true as above stated) to entitle

the plaintiffs to recover for the loss stated in the declaration and proved by the evidence; and the grounds of the said objections were specifically stated as follows: 1. That the interest claimed by the plaintiffs in the property
*35] insured, as disclosed by such evidence, was not, at *the respective times of effecting the insurance, and of the happening of the loss, an insurable interest and property. 2. That it was not such an interest as is described in the original offer of the plaintiff's agent for insurance, and in the policy, nor such as is averred in the declaration. 3. That the said documents, produced as preliminary proof of loss, do not import a fulfilment, on the part of the plaintiffs, with the terms and conditions upon which the loss is declared to be payable, by the ninth of the said printed proposals, or rules annexed to the policy. And the counsel for the defendant, thereupon, prayed the opinion and direction of the court to the jury, that the said evidence was not admissible, competent and sufficient to be left to the jury as proof of the plaintiffs' title to recover for such loss in this action.

Which instruction the court refused to give, being of opinion, 1. That the interest of the plaintiffs in the property insured, as disclosed by the said evidence, is a sufficient insurable interest to support the policy, and the averment of interest in the plaintiffs' declaration in this action; 2. That it is such an interest as is described in the original offer for insurance, and in the policy and in the declaration; and 3. That, although the said certificate of Murray Forbes is not such a certificate as is required by the said ninth rule annexed to the said policy, yet the evidence aforesaid is admissible, competent, and sufficient to be left to the jury, and from which they may infer, that the defendants waived the objection to the said certificate, and to the other preliminary proof aforesaid. The counsel for the defendants below took a bill of exceptions to the refusal and opinion of the court.

The defendants then gave evidence of the nature and particulars of the property insured, that, in a policy of insurance upon the same property, by the Mutual Insurance Society of Virginia, Lawrence & Poindexter had described the property differently, stating it to be "covered with wood; gable ends of the roof of wood;" that Lawrence & Poindexter *were
*36] insolvent; and that the property had greatly depreciated in value; that the title to the property was embarrassed, and litigated in chancery; that the property, thus incumbered, was not worth the purchase, and that the assured were unable to comply with their agreements to pay for the same, or to respond in damages for the breach thereof.

The plaintiff also produced evidence to show that it was the usual practice of the country to build the gable end of brick or stone mills of wood; and that a mill so constructed had been insured by the Mutual Insurance Society, described in the same terms used in the policy, upon which this suit was brought.

Whereupon, the defendants prayed the opinion of the court, and their instruction to the jury, that if the said contracts between Howard & Lawrence, and between Lawrence & Poindexter, have not been performed on either side; and if, from the actual state and condition of the title, and the value of the property bargained for between Howard & Lawrence, and between Lawrence & Poindexter, in the said contracts; and from the circumstances of the parties, the said contracts between the said parties could not have been specifically performed, or effectually enforced on either side,

so as to have vested the legal estate pursuant to said contracts; or to have vested in said Lawrence & Poindexter an equitable estate, with a right to call for the legal estate; and that the said contracts between the said parties were not practically available, but were, as to the practical intent and purpose which they purported an intent to effectuate, incapable of being executed; then the said Lawrence & Poindexter had not, at the time of the said insurance, and of the said loss, such an interest in the said mill as to entitle them, or either of them, to recover in this action for the loss averred in the declaration, and proved by the evidence. Which instruction the court refused; being of opinion, that it would leave a question of law to the jury, viz: Whether, under the circumstances therein stated, the said parties therein mentioned, or either of them, could be compelled *specifically to perform the agreement therein mentioned; and because the court [*37 was of opinion, that under the circumstances stated in the said evidence, the plaintiffs had, at the time of effecting the insurance, and at the time of the loss, an insurable interest in the said mill.

Whereupon, the defendants prayed the opinion of the court, and their instruction to the jury, that in order to verify the description of the property insured, as given in the policy, it is necessary, that the whole of the exterior walls of the mill-house, upon which the roof or covering rests, from the foundation to the top of the roof, should be of stone; and that, if the plan of the said house were such as that two of the exterior walls terminated in upright gable-ends, run up perpendicularly from the eaves to the top of the roof; and sloping at the same angle as the pitch of the roof, such gable-ends not properly forming, according to the ordinary rules and terms of architecture, a part of the covering or roof; it was necessary, to verify the said description, that such gable-ends should have been of stone; and if, in point of fact, such gable-ends, as well as the covering or roof, were of wood, which, under any circumstances of actual conflagration, might have increased either the risk of catching fire, or the difficulty of extinguishing or stopping the progress of fire once commenced, it amounted to a material misrepresentation, and avoids the policy; and it is not material, whether the said misrepresentation was wilful and fraudulent, or from ignorance and without design, nor whether the actual loss was produced by such misrepresentation, or by having gable-ends of wood instead of stone. Which instruction the court refused; being of opinion, that it was competent for the jury, from all the facts given in evidence, to decide whether, in order to verify the said description in the said policy, it was necessary that the whole of the exterior walls, from the foundation to the top of the roof, should be of stone. And being also of opinion, that, under the first of the rules annexed to the said policy, and referred to therein, no variation in the description of the property insured from the *true description thereof, not made [*38 fraudulently, would vitiate the policy, unless by reason of such variation, the insurance was made at a lower premium than would otherwise have been demanded.

The defendants then proved, by James Sanderson, the witness before sworn and examined on the part of the plaintiff, that, in making the insurance aforesaid, the defendants were not governed by the said printed rates of premium, and did not insure the said mill as a building, under the class No. 4, of the said printed rates, though the same premium therein indicated

was charged; but that the board, in their discretion, fixed the premium as for an extra risk, considering the frequent accidents to mills, from the circumstances of millers being in the habit of grinding all night; and if the insurers had understood the mill to have been built with wooden instead of stone gable-ends, it would have been at their discretion to have charged a higher premium, or to have declined the risk. And the plaintiff's counsel having argued to the jury, upon the presumed authority of the court's opinion upon the second of the aforesaid instructions, moved by the counsel for the defendants, and overruled as aforesaid, that the misrepresentation of the class of the building insured, if found by the jury to be such as above objected on the part of defendants, did not vitiate or avoid the policy, either as a breach of warranty or misrepresentation, unless it had been designedly and fraudulently made, or had induced the defendants to insure at a lower premium than they would otherwise have done; and that, in fact, the insurance was done at the maximum rate indicated by the said printed rates. The counsel for the defendants, thereupon, prayed the opinion of the court, and an instruction to the jury, that if the jury find from evidence, that the materials and description of the mill, for the destruction of which this loss is claimed, as it actually existed at the time of insurance, differed from the representation of the same made by the plaintiffs, or their agents, at the time of effecting the said insurance, in this; that the walls at the two ends
*39] of the building, *all the way from the eaves to the top of the roof, constituting what are commonly called the gable-ends, were constructed of wood instead of stone, and that the risk from fire was greater with such wooden gable-ends than if they had been constructed of stone; it ought to be deemed a material misrepresention, and avoids the policy, whether such misrepresentation proceeds from fraud, or casual inadvertence in the assured; and in such case, it is not necessary for the defendants to prove further, that a higher premium would have been charged, if a true and accurate representation of the building had been made; nor does it vary the effect of such misrepresentation, that the highest rate of premium stated in the said printed rates was actually charged for the said insurance. Which instruction the court refused to give, for the following reason: that, under the first of the rules annexed to the said policy, and referred to therein, no variation in the description of the property insured, from the true description thereof, not made fraudulently, would vitiate the policy, unless by reason of such variation, the insurance was made at a lower premium than would otherwise have been demanded.

Whereupon, the defendants prayed the opinion of the court, and their instruction to the jury, that the said J. W. Lawrence, as the survivor of the said Lawrence & Poindexter, if entitled, upon the principles aforesaid, to recover anything in this action, is not entitled to recover anything more than a moiety of the said loss. Which instruction the court also refused, and the defendants excepted.

Jones and *C. C. Lee*, for the plaintiff in error, made the following points: 1. In order to fulfil either the general law of insurance against fire, or the contract of insurance in this case, or the averments of the declaration; the interest of the insured in the freehold estate that constituted the particular subject of insurance, should have consisted in a substantial ownership and

proprietary right, legal or equitable; whereas, nothing appears from the paper muniments, which the plaintiff *relied on as the sole evidence of such interest, but a naked pretence, or more color of title. [*40

2. If any technical estate, equivalent to an insurable interest, appeared, yet its essential quality, quantity and condition, were either positively misrepresented by the assertion of unqualified ownership and proprietary right; or were concealed, when a particular disclosure of the nature and condition of the interest was material. Therefore, whether a total defect of interest appeared, or its essential attributes were either misrepresented or concealed, or the plaintiff failed in proving the more specific averment of interest in the declaration, the defendants were, at all events, entitled to the general instruction, against the plaintiff's right of action, asked of the court.

3. If these paper muniments did import, *primâ facie*, any insurable interest, the presumption was absolutely repelled by the facts proved on the other side; showing the supposed title in equity to have been merely nominal or colorable. Therefore, the direction to the jury, asked by the defendants of the court on this point, should have been granted, on the hypothesis of proof therein stated; not being liable to the objection stated by the court, of referring matter of law to the jury. On the contrary, the court, in their positive direction to the jury, that the assured, under the circumstances supposed, had a substantial property in the subject of insurance, trenched more upon the province of fact, than the jury, under the required direction, would have done, on that of law.

4. The preliminary tests of the claim of loss, required by the ninth fundamental rule above cited, are strictly in the nature of a condition precedent; and cannot be dispensed with, but by an express discharge; consequently, the evidence or inference of a waiver by implication was inadmissible.

5. The declaration avers an actual compliance with the rule; therefore, no evidence of any dispensation from it, express or implied, was admissible.

6. The circumstances from which such a waiver was *inferred by the court in this case, were wholly insufficient to raise any legal or reasonable presumption to that effect; whereas, from the terms of the court's direction to the jury, it must have been received by the jury as a positive presumption or inference of law from written evidence. The company were in no manner bound to communicate their reasons for resisting the claim; and their resolution to resist it, notified as it was in general terms to the assured, covered the whole ground; and was just as good notice, if any was required, of one defect as another in the claim. [*41

7. The misrepresentation of the materials and construction of the buildings insured, was palpable and material; and the direction to the jury, asked by the defendants, and refused by the court, on this point, properly referred the fact of misrepresentation, and the circumstances from which its materiality resulted, to the jury; the effect of such misrepresentation, and the result of materiality from the circumstances, to the court.

8. The first of the said rules above cited, did not reduce the materiality of misrepresentation in the policy, to the alternative tests of fraud, or of a consequent reduction in the rate of insurance, as was ruled by the court: or, if it did, then such reduction in the rate of insurance was a necessary presumption from a lower risk, and was not to be proved *aliunde*, as was also required by the court.

9. The fact, that a premium equal to the highest rate for insurance on the fourth class of hazards indicated in the said printed list of rates, had been paid, was wholly immaterial; and did not as ruled by the court, convert the risk itself to one of that class, as on a "slight or timber building;" when the specific description of it in the policy, identified it with the lower risk indicated in the second class of the printed rates; and it turned out, in fact, to be neither of the second nor of the fourth class, but identically of the third: nor did it supply any competent evidence whatever; far less conclusive evidence, as was, in effect, ruled by the court; that the premium was, in fact, accommodated to any higher risk than that specifically described in the policy.

*42] *10. The defendants in the direction asked of the court to the jury on this point, condescended to the terms of materiality of misrepresentation, and an actual increase of the risk. They, nevertheless, maintain, that the description of the risk, in the body of the policy, amounted to a warranty that it was actually of the class of hazards, to which that description specifically referred it.

For the plaintiffs in error, were cited, 2 Marsh. on Ins. 787; Ibid. 15, 118; 2 Caines 13; 2 Caines Cas. 110; 4 Dall. 421; 1 Johns. 351; 3 Dow 255; 2 Marsh. 811.

Swann and *Wirt*, for the defendant in error, maintained, that the circuit court did not err in giving or refusing the charges to the jury as set forth in several bills of exceptions. They cited *Buck & Hedrick* v. *Chesapeake Ins. Company*, 1 Peters 151; 1 Marshall on Insurance, 114, 115; 8 T. R. 13; 5 Bos. & Pul. 269; 13 Mass. 96; Ibid. 267; 3 Ibid. 133; Phil. on Ins. 85, 128, 499; 1 Johns. 220; 9 Ibid. 192; 6 Har. & Johns. 612; 6 Cranch 338, 339; 5 Ibid. 100, 109; 2 Sch. & Lef. 712; 13 Johns. 561; 3 Marsh. 221; 1 Doug. 11; 1 Chit. on Ins. 317–18; 1 T. R. 638; 2 Doug. 684, 687–8.

Marshall, Ch. J., delivered the opinion of the court.—This writ of error is brought to a judgment of the circuit court of the United States for the district of Columbia, sitting in the county of Alexandria; which was rendered in a cause in which Joseph Lawrence, survivor of Lawrence & Poindexter, was plaintiff, and the Columbian Insurance Company of Alexandria were defendants. The suit was brought on a policy insuring a mill, stated in the representation and in the policy, to belong to Lawrence & Poindexter, the assured. Pending the suit, Poindexter died; and the suit was continued and tried in the name of Lawrence, the survivor. The verdict and judg-

*43] ment were in favor of the plaintiffs below. At the trial, the court, *on the motion of the defendants' counsel, instructed the jury on several questions of law which were made in the case; to which instructions the counsel for the defendants in the circuit court excepted, and the cause is now before this court on those exceptions.

The plaintiff in the circuit court had exhibited his policy; the representation on which the contract of insurance was founded; his proofs of title and of loss; the notice which he gave of that loss, together with the documents which accompanied it, as preparatory to the assertion of his claim against the company; and the proceedings of the company in consequence of that claim, which terminated in a refusal to pay it. The counsel for the

plaintiff in the circuit court, having thus concluded his case, the counsel for the defendants made three objections to his right of action.

1. That the interest claimed by the plaintiff in the property insured, as disclosed by the evidence, was not, at the respective times of effecting the insurance, and of the happening of the loss, an insurable interest and property.

2. That it was not such an interest as is described in the original offer of the plaintiff's agent for insurance, and in the policy ; nor such as is averred in the declaration.

3. That the said documents produced as preliminary proof of loss, do not import a fulfilment, on the part of the plaintiff, of the terms and conditions upon which the loss is declared to be payable, by the ninth of the said printed rules annexed to the policy. And the counsel for the defendants thereupon prayed the opinion and direction of the court to the jury, that the said evidence was not admissible, competent and sufficient to be left to the jury as proof of the plaintiff's title to recover for such loss in this action. The court refused to give this instruction, being of opinion :

1. That the interest of the plaintiffs in the property insured, as disclosed by the said evidence, is a sufficient insurable interest to support the policy, and the averment of interest in the plaintiff's declaration in this action.

2. That it is such an interest as is described in the *original offer for insurance, and in the policy, and in the declaration. [*44

3. That although the said certificate of Murray Forbes is not such a certificate as is required by the said ninth rule annexed to the said policy ; yet the evidence aforesaid is admissible, competent and sufficient to be left to the jury, and from which they may infer, that the defendants waived the objection to the said certificate, and to the other preliminary proof aforesaid.

The counsel for the defendants in error have made some preliminary objections to the terms in which the opinions of the circuit court was asked. The counsel prayed the opinion and direction of the court to the jury, that the evidence offered by the plaintiff was not admissible, competent and sufficient to be left to the jury, as proof of the plaintiff's title to recover. This blending of an objection to the admissibility of evidence, in the same application which questions its sufficiency, is said to be not only unusual, but to confound propositions distinct in themselves, and to be calculated to embarrass the court and the questions to be decided. It is undoubtedly true, that questions respecting the admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. They arise in different stages of the trial, and cannot, with strict propriety, be propounded at the same time. If, therefore, the circuit court had proceeded no further than to refuse the instruction which was asked, this court might have considered the refusal as proper ; unless the entire prayer, as made, ought to have been granted. But the circuit court proceeded to give its opinion on the different points made by counsel, and these opinions must be examined.

1. The first is, that the interest of the assured in the property insured, is a sufficient insurable interest to support the policy, and the averment of interest in the declaration. The mill insured was built on an island in the Rappahannock, which was demised by Charles Mortimer to Stephen Winchester, for three lives, renewable for ever, at the *yearly rent of [*45

eighty pounds ($266.66), with a condition of re-entry for rent in arrear, &c. 1801, Dec. 19. Stephen Winchester conveyed one undivided third part to Richard Winchester, and another undivided third part to Joshua Howard. 1806, May 9. R. & S. Winchester conveyed to Joshua Howard, by deed of mortgage in fee, their two-thirds of the said island, with other property to a considerable amount, in order to secure the said Howard to the amount of $40,000. 1813, Jan. 27. Joshua Howard conveyed the whole island to William and George Winchester. 1813, Sept. 23. William and George Winchester conveyed the island to Joseph Howard and Joseph W. Lawrence. 1818, July 22. Joseph Howard entered into an agreement with Joseph W. Lawrence, by which the said Lawrence was to take the island, &c., at the price of $30,000, for which amount in debts, due from Howard & Lawrence, he was to procure a release; on his doing which, Howard was to execute a deed for the property; on the failure or inability of Lawrence to procure this release, the contract was to be void. 1822, Nov. 28. Joseph W. Lawrence enters into an agreement with Thomas Poindexter, jun., for the sale of one-half of the island, mills, &c., for which the said Poindexter agrees to assume and take upon himself one-half the debts due from Howard & Lawrence to the banks in Fredericksburg, which were secured by a deed of trust. Nov. 29. An agreement between Howard and Lawrence to work the mills in partnership.

By the deeds of January 27th and Sept. 23d, 1813, all the title of Joshua Howard to the island on which the mills insured were erected, passed to Joseph Howard and Joseph W. Lawrence. What was that title? He held one-third part in his own right, and the remaining two-thirds as mortgagee. The agreement of July 22d, 1818, between Howard and Lawrence, does not appear to have been performed on the part of Lawrence; nor is there any evidence of his ability *to perform it; but it does not appear, that Howard has taken any step to avoid it, or has asserted any title in himself. The agreement of Nov. 28th, 1822, between Lawrence and Poindexter, admits Poindexter to an undivided moiety of any interest Lawrence might have in the property.

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Lawrence & Poindexter, then, when the insurance was made, were entitled to one-third of the property, under the deed made by Charles Mortimer, and to the remaining two-thirds as mortgagees; but one moiety of the whole, which moiety was derived from Joseph Howard, under the agreement of July 22d, 1818, was held under an agreement which had not been complied with, and which purported on its face to be void, if not complied with; but the other contracting party had not declared it void, nor called for a compliance with it.

It cannot be doubted, we think, that the assured had an interest in the property insured. Lawrence had an unquestionable title to a moiety of one-third, subject to the rent reserved in the original lease, and to a moiety of the remaining two-thirds as mortgagee. He had such title to the other moiety, as could be acquired by an agreement for a purchase, the terms of which had not been complied with.

The title is thus stated, because those words which declare the contract to be void, if Lawrence should fail to comply with it, do not, we think, render it absolutely void, but only voidable. No time for performance is fixed; and if Howard is content with what has been done by Lawrence, and does

not choose to annul the contract, the underwriters of this policy cannot treat it as a nullity. Lawrence, having this title under an executory contract, sells to Poindexter one undivided moiety of the property. These two persons, being both in possession, partly under legal conveyances and partly under executory contracts, require an insurance on it against loss by fire. Had they an insurable interest?

That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, *the person claiming under it has, undoubtedly, a substantial interest in the property. If it be destroyed, [*47 the loss, in contemplation of law, is his. If the purchase-money be paid, it is his in fact. If he owes the purchase-money, the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such, that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events, does not prevent this loss. We perceive no reason why he should not be permitted to insure against it. The cases cited in argument, and those summed up in Phillips on Insurance 26, on insurable interest, and in 1 Marsh. 104, ch. 4, and 2 Ibid. 787, ch. 11, prove, we think, that any actual interest, legal or equitable, is insurable.

2. Having declared the interest of Lawrence & Poindexter to be insurable, the circuit court instructed the jury, that "it is such an interest as is described in the original offer for insurance, and in the policy, and in the declaration." The original offer for insurance was in these words, "What premium will you ask, to insure the following property, belonging to Lawrence & Poindexter, for one year, against loss or damage by fire? On their stone mill, four stories high, covered with wood, on an island about one mile from Fredericksburg, in the county of Stafford; the mill called Elba mill. $7000 are wanted. Not within thirty yards of any other building, except a corn-house, which is about twenty yards off." The policy states that the underwriters insure Lawrence & Poindexter against loss or damage by fire, to the amount of $7000, on their stone mill, &c. The declaration charges that the defendants insured the plaintiffs $7000, against loss or damage by fire on their stone mill, &c., and avers, that they were interested in, and the *equitable owners of the premises insured as aforesaid, at the time [*48 the insurance was made as aforesaid, &c.

The material inquiry is, does the offer of insurance state truly the interest of the assured in the property to be insured? The offer describes the property as belonging to Lawrence & Poindexter; and states it afterwards to be their stone mill. It contains no qualifying terms, which should lead the mind to suspect that their title was not complete and absolute. The plaintiffs in error contend, that the terms import an absolute legal estate in the property; and that the insurers entered into the contract, having a right to believe that the interest of the assured was of this character. Instead of such an estate in the property as the representation justified the insurers in expecting, the proof shows that the insured held only one-half of one-third, under a lease of three lives, renewable for ever, and one-half of the other two-thirds, as mortgagees; that the other moiety was held under a contract,

the terms of which had not been complied with; and which, if complied with, would give them a title to two-thirds of that moiety only as mortgagees. The defendants insist, that the representation is satisfied by an equitable title, under an executory contract, and that in truth and in fact, the mill did, at the time of its insurance and loss, belong to Lawrence & Poindexter.

It may be true, that a mill occupied by Lawrence & Poindexter, and held under a lease or an executory contract, would be generally spoken of by themselves and others, as their mill. The property alluded to would be well understood, and no inconvenience could arise from this mode of designating it. But if Lawrence & Poindexter should proceed to sell the property as theirs, should describe it in the contract as belonging to them, no court would compel the purchaser to take the title they could make. The assured then have not proved "such an interest as is described in the original offer for insurance;" and the circuit court, in this respect, misdirected the jury.

*49] It may *be proper to take some notice of the materiality of this misdirection.

The contract for insurance is one in which the underwriters generally act on the representation of the assured: and that representation ought consequently to be fair, and to omit nothing which it is material for the underwriters to know. It may not be necessary, that the person requiring insurance should state every incumbrance on his property, which it might be required of him to state, if it was offered for sale; but fair-dealing requires, that he should state everything which might influence, and probably would influence, the mind of the underwriter, in forming or declining the contract. A building held under a lease for years about to expire, might be generally spoken of as the building of the tenant; but no underwriter would be willing to insure it, as if it was his; and an offer for insurance, stating it to belong to him, would be a gross imposition.

Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles, as on the interest, of the assured; and it would seem, therefore, to be always material, that they should know how far this interest is engaged in guarding the property from loss. Marshall, in treating on insurance against fire, p. 789, b. 4, ch. 2, says; "It is not necessary, however, in order to constitute an insurable interest, that the insured shall, in every instance, have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor or agent, with the custody of goods to be sold upon commission, may insure; but with this caution, that the nature of the property be distinctly specified." In all the treatises on insurance, and in all cases in which the question has arisen, the

*50] principle is, that a *misrepresentation, which is material to the risk, avoids the policy. In this case, the circuit court has decided that there is no misrepresentation; that the interest of the assured was truly described in the offer for insurance; and, consequently, no question on the materiality of the supposed variance was submitted to the jury. As this

court is of opinion, that a precarious title, depending for its continuance on events which might or might not happen, is not such a title as is described in the offer for insurance, construing the words of that offer as they are fairly to be understood ; the circuit court has in this respect misdirected the jury.

3. The third opinion given to the jury is, that the evidence given by the plaintiff in the circuit court was admissible, competent and sufficient to be left to the jury, and from which they may infer, that the defendants waived the objection to the said certificate, and to the other preliminary proof aforesaid. The certificate to which this instruction refers is, by one of the rules which form conditions of the policy, declared to be an indispensable requisite ; without the production of which, the loss claimed "shall not be payable." A certificate intended by the assured to satisfy this condition, accompanied the proof of loss ; but it is not such a certificate as the condition requires ; and such was the opinion of the circuit court. The testimony which the court left to the jury as being sufficient to authorize them to infer a waiver on the part of the insurers of this certificate, consisted of entries on the minutes of the board, with some parol proof.

On the 20th of February 1824, the claim of Lawrence & Poindexter was submitted to the board, with the policy and certificate of loss. On the 13th of March, an order was made, requiring the title-papers of Lawrence & Poindexter to the Elba mill. On the first of April, copies of the deed from William and George Winchester to Joseph Howard and Joseph Lawrence, of the agreement between Howard and Lawrence, and of the agreement between Lawrence and Poindexter, were laid *before the board. On the 16th of April, further proof respecting the title was required, [*51 which was produced on the 22d of the same month.

The opinion of Mr. Jones was taken on the case, which was submitted to the board on the 28th of June, when it was resolved, "that the claim of Lawrence & Poindexter be resisted ; and that the secretary furnish them with a copy of this resolution." The opinion of Mr. Jones turns on the interest of the assured, and on the question whether the loss was fair or fraudulent.

On the 11th of November, inquiry was made whether the board would enter into a compromise, "it being understood that the agreement" "is not to be considered as an admission of the claim?" Answered "yes." On the 18th of November, the board passed a resolution declining a compromise, which was communicated to the agent of Lawrence & Poindexter. On the 11th of December, a further and more specific proposition for a compromise was made by the agent of the assured, which was rejected by the company.

The secretary of the company was examined, to prove the communications between him and the agent of the assured. When the documentary evidence was exhibited, he informed the agent, that he would call a board to decide on the claim. After the board had met and adjourned, he informed the agent that the claim would probably be resisted ; that the company thought the interest of the assured was not insurable ; that the representation was not faithful : and that Poindexter had set fire to the mill. No objection was made to the preliminary papers. The custom of the board was, if the claim for indemnity was thought just, to refer the preliminary

papers to their secretary, to see if they were regular. In this case, no such reference was made.

From the first presentation of the papers in February, till the passing of the final resolution in June, the claim was pending undetermined before the board, waiting for the advice of counsel. This advice being delayed by
*52] the *absence and other engagements of counsel, an agreement was entered into with the agent of the assured, that if the final resolution should be to resist the claim, the suit should be put as forward on the docket, as if brought to the intervening April term. This agreement was complied with. All the orders and resolutions of the board which have been stated were communicated by the witness to the agent of the assured; and are the only communications which he was authorized to make.

According to the invariable usage of the board, the sufficiency of the documents offered by way of preliminary proof or loss, as required by the ninth article of the rules annexed to the policy, was not to be considered by the board, till the principle of the claim should have been admitted, and then, the course was, to submit such documents to the secretary, for a special report thereon; in this case, the sufficiency of the documents was never discussed or considered by the board, nor referred to the secretary. It never was contemplated by the witness, nor, to his knowledge, by the board, to waive any compliance with this ninth article. The consideration of the documents offered under it, did not regularly come on, until the claim should be admitted in principle.

The agent of the assured was present at some of the meetings of the board, when the witness was absent. He has understood, that on these occasions, the communications between them turned entirely on questions respecting the fundamental objections to the claim. The regularity or irregularity of the preliminary proof was never mentioned. The opinion given by counsel was never communicated to the assured or their agent. To have done so, would have been contrary to the rules and to usage.

This evidence was left to the jury as testimony from which they might infer, that the preliminary proof, required by the ninth rule annexed to the policy, as indispensable to entitle the assured to demand payment for a loss, had been waived by the underwriters. It will not be pretended, that any expression is to be found, either in the resolutions of the board, or in the
*53] conversations *held by their secretary with the agent of the assured, having the slighest allusion to this preliminary proof, or to the waiver of it. If, then, the jury might infer a waiver, the inference must be founded on the opinion, that the board was bound to specify this particular objection; or that they have taken some step, or made some communication, which pre-supposes an acquiescence in the certificate which was offered. The resolution of the board to resist the claim, is expressed in general terms, and consequently, applies to every part of the testimony offered in support of it. We know of no principle nor usage which requires underwriters to specify their objections, or which justifies the inference, that any objection is waived. We know of no principle by which this preliminary proof should be separated from the other proofs which were required to sustain the claim, and its insufficiency be remarked to the assured. The general resolution of the board was notice to the assured, that if they intended to assert their

claim in a court of justice, they must come into court prepared to support it.

2. Did the examination of the title, and the proceedings of the board respecting it, pre-suppose an examination of the preliminary proof, and an acquiescence in its sufficiency? We think not. The proof of interest, and the certificate which was to precede payment, if the claim should be admitted, are distinct parts of the case, to be made out by the assured. Neither of those parts depends on the other. The one or the other may be first considered, without violating propriety or convenience. The consideration of the one, does not imply a previous consideration and approval of the other. The language of the ninth rule does not imply, that the proof it requires is first in order for consideration. After stating what shall be done by the assured, the rule requires the affidavit and certificate in question; and adds, that "until such affidavit and certificate are produced, the loss claimed shall not be payable." The affidavit and certificate must precede the payment, but need not precede the consideration of the claim. *The testimony of the secretary, if not conclusive on this point, is, we think, entitled to great weight. He states the invariable usage of [*54 the office to have been, to consider the merits of the claim, before looking into the preliminary proof, which, after deciding favorably on the claim, was always referred to him for examination and report. In this case, the decision having been unfavorable to the claimant, no reference was made to him.

We do not think the assured can be presumed ignorant of the standing usage of the office, to which he applied for insurance; or be admitted to found upon that ignorance a claim to exemption from the necessity of producing a document required by the policy, as indispensable to his demand of payment for his loss. We think the case exhibits no evidence of waiver; no evidence from which the jury could infer it; and consequently, that this instruction of the court is erroneous.[1]

It would have been subject of much regret, had the merits of the case been clearly in favor of the defendants in error, to reverse the judgment of the circuit court on account of the non-production of a document which may perhaps be so readily supplied. But the cause must go back on the opinion expressed by the circuit court to the jury, that the title proved at the trial agrees with that stated in the offer for insurance.

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[1] After this reversal, the suit was discontinued, a new certificate procured from the magistrate, correcting the defects in the first, which was furnished to the company on the 14th of February 1829, five years after the first had been delivered. A new suit was then brought, and on a second trial, the objection was taken, that the certificate had not been produced, within a reasonable time after the loss; but the court held otherwise, placing their decision upon the ground that the *laches* was not properly imputable to the assured, but to the company, on account of their neglect to give notice of the defects, when the first certificate was presented, and of the mistaken confidence which the party had placed in them. 10 Pet. 507. In Tayloe *v.* Merchants' Fire Ins. Co., 9 How. 404, the court say, "It is manifest, on an examination of the two cases, that the doctrine of the first, on this point of waiver, was virtually overruled; for, if maintained in the second, it would have upheld the ruling at the circuit in the first. The reason given in support of the corrected certificate procured and furnished some five years after the loss, are cogent and unanswerable in favor of the position, that the conduct of the company in not objecting to the defect in the first one, at the time it was furnished, operated to mislead the party, and should have been regarded as a waiver of the objection."

After the opinions which have been stated had been delivered to the jury, the defendants offered evidence to prove the insolvency of the plaintiffs, so as to disable them from obtaining a legal title; and additional embarrassments on the property; and again moved the court to instruct the jury, that the assured had not such an interest in the property as entitled them, or either of them, to recover. This instruction the court refused to give, being still of opinion, that the assured held an insurable interest in the mill. An exception was taken to this opinion. The additional incumbrances to the title, and the circumstances of Lawrence & Poindexter, might constitute additional objections to the representation contained in the offer *for insurance; but do not, we think, disprove an insurable interest, in those who were still in possession of the property, and claimed title to it under executory contracts. *55]

The defendants in the circuit court then proved, that the mill was a square building, build of stone to the eaves, that the roof was framed and covered entirely of wood, and that the two gable-ends running up perpendicularly from the stone wall to the top of the roof, were also constructed of wood. They also offered evidence to prove the general understanding, that the description of a stone house, covered with wood, was not verified or supported by a house whose gable-ends were of wood; that the gable-ends were understood to be a part of the wall, not of the roof or covering. They then moved the court to instruct the jury, that if two of the exterior walls terminated in upright gable-ends; such gable-ends not properly forming, according to ordinary rules and terms of architecture, a part of the covering or roof; it was necessary, in order to verify the said description, that such gable-ends should have been of stone; and if, in point of fact, such gable-ends, as well as the covering or roof, were of wood, which, under any circumstances of actual conflagration, might have increased either the risk of catching fire, or the difficulty of extinguishing it, it amounted to a material misrepresentation, and avoids the policy; and it is not material, whether the said misrepresentation was wilful and fraudulent, or from ignorance and without design; nor whether that actual loss was produced by such misrepresentation, or by having gable-ends of wood instead of stone.

The court refused to give this instruction, being "of opinion, that it was competent to the jury, from all the facts given in evidence, to decide whether, in order to verify the said description in the said policy, it was necessary, that the whole of the exterior walls, from the foundation to the top of the roof, should be of stone. And being also of opinion, that under the first of the rules annexed to the said policy, and referred to therein, no variation in the description of the property insured, from the true description thereof, not made fraudulently, would vitiate the policy, unless, by reason *of such variation, the insurance was made at a lower premium than would otherwise have been demanded." To this opinion also, an exception was taken. *56]

The rule referred to in the opinion requires, that "persons desirous of making insurance on buildings should state in writing the following particulars, to wit, of what materials the walls and roof of each building are constructed," &c. "And if any person shall cause the same to be described in the policy, otherwise than as they really are, so as the same be charged at a lower premium than would otherwise be demanded, such insurance shall be

of no force." If the court was correct in the construction of this rule, and of its effect upon the policy, it will become unnecessary to examine their opinion, leaving the question whether the property insured was truly described, entirely to the jury. This rule takes up the subject of describing the property, and provides for it. It requires, that the materials of which the walls and roof are constructed shall be truly stated, and prescribes the penalty for a mis-statement. The penalty is, that the insurance shall be void, if the assured shall cause the building to be described in the policy, otherwise than it really is, so as the same be charged at a lower premium than would otherwise be demanded. The rule does not place the invalidity of the policy on an untrue description of the building; but on such a description as shall reduce the premium which would otherwise have been demanded. This was a question of fact, which the jury alone could decide. The rule having provided for the case, and prescribed the precise state of things in which the penalty shall be incurred, we do not think that it could be applied in any other state of things. The jury was of opinion, that if the building was untruly described, still the misrepresentation was not such as to cause the same "to be charged at a lower premium than would otherwise have been demanded." If this verdict was against evidence, the remedy was a new trial.

This court is of opinion, that the circuit court erred, in instructing the jury that the interest of the assured in the *property insured is such as is described in the original offer for insurance and in the policy; [*57 and also in the opinion given to the jury, that the evidence was sufficient to be left to them, from which they might infer that the defendants waived the objections to the certificate and other preliminary proof required by the ninth rule annexed to the policy. The judgment is to be reversed, and the cause remanded to the circuit court, that a *venire facias de novo* may be awarded.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, and was argued by counsel: On consideration whereof, this court is of opinion, that the said circuit court erred in this: in instructing the jury that the interest of the assured in the property insured is such as is described in the original offer for insurance and in the policy. And also, that the said circuit court erred in this: in the opinion to the jury, that the evidence was sufficient to be left to them, from which they might infer, that the defendants waived the objections to the certificate and other preliminary proof required by the ninth rule annexed to the policy. Whereupon, it is considered by this court, that the said judgment of the said circuit court in this cause be and the same is hereby reversed and annulled, and that the said cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo*, and for further proceedings to be had therein according to law and justice.[1]

[1] For a further decision in this case, see 10 Pet. 507.

*William A. Gardner *v.* John C. Collins *et al.*

State decisions.—Descent.

Where the question upon the construction of the statute of a state, relative to real property, has been settled by any judicial decision in the state, where the land lies, this court, upon the uniform principles adopted by it, would recognise that decision as a part of the local law. p. 85.

The statute of descents of Rhode Island, of 1822, enacts, "that when any person, having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend, and pass in equal portions to his or her kindred in the following course;" it then provides, "if there be no father, then to the mother, brothers and sisters of such intestate, and their descendants, or such of them as there be; and then declares, in the nature of a proviso, that "when the title to any estate of inheritance, as to which the person having such title shall die intestate, came by descent, gift or devise from the parent or other kindred of the intestate, and such intestate die without children; such estate shall go to the kin next to the intestate, of the blood of the person from whom such estate came or descended, if any there be:"

An estate, situate in Rhode Island, was devised by John Collins to his daughter, Mary Collins, in fee; Mary Collins intermarried with Caleb Gardner, and upon her death, in 1806, the estate descended to her three children, John, George and Mary C. Gardner; John and George Gardner died intestate and without issue, and Mary C. Gardner, as heir to her brothers, became seised of the whole estate, and died in 1822: *Held*, that under the provisions of the law of descents of Rhode Island, two-thirds of the estate of Mary C. Gardner descended to Samuel F. Gardner, Eliza Phillips, formerly Eliza Gardner, and Mary Clarke, formerly Mary Gardner, children of Caleb Gardner by a former marriage; they being brothers and sisters of the half blood of Mary C. Gardner; it being admitted, that the remaining one-third, which Mary C. Gardner took by immediate descent from her mother, belonged to the heirs of the whole blood of John Collins. p. 86.

The phrase "of the blood," in the statute, includes the half blood;[1] this is the natural meaning of the word "blood," standing alone, and unexplained by any context; a half brother or sister is of the blood of the intestate, for each of them has some of the blood of a common parent in his or her veins; a person is, with the most strict propriety of language, affirmed to be of the blood of another, who has any, however small, a portion of the same blood, derived from a common ancestor. In the common law, the word "blood" is used in the same sense; whenever it is intended to express any qualification, the word whole or half blood is generally used to designate it, or the qualification is implied from the context, or known principles of law. p. 87.

A descent from a parent to a child cannot be construed to mean a descent through, and not from, a parent; so, a gift or devise from a parent, must be construed to mean a gift or devise by the act of that parent, and not by that of some other ancestor more remote, passing through the parent. p. 90.

It is true, that in a sense, an estate may be said to come by descent from a remote ancestor to a person upon whom it has devolved, through many intermediate descents; but this, if not loose language, is not that sense which is ordinarily annexed to the terms. When an estate is said
59] to have descended from A. to B., the natural and obvious meaning of the words is, that it is an immediate descent from A. to B. p. 91.

At the common law, a man might somtimes inherit, who was of the whole blood of the intestate, who could not have inherited from the first purchaser; as, in the case of a purchase by a son, who dies without issue, and his uncle inherits the same, and dies without issue, the father may inherit the same from the uncle, although he could not inherit from his own son. p. 93.

Certificate of Division from the Circuit Court of Rhode Island.[2] In the circuit court of the United States for the district of Rhode Island, the plaintiff, William C. Collins, instituted an action of ejectment for the recovery of two-thirds of certain real estate in the state of Rhode Island, of

[1] Saunders *v.* Gould, 4 Pet. 392.

[2] See 3 Mason 398, for a report of the case below. It does appear, upon what points the judges were divided, or how the case got into this court.

which Mary C. Gardner died seised and intestate. The facts of the case agreed upon were as follows:

"The estate in question, two-thirds of which is demanded by the plaintiff in his said writ, was the estate in fee-simple of the late John Collins, Esq., deceased, the father of the defendant, and the purchaser of said estate. That the said late John Collins died in 1817, leaving lawful issue, viz., John A. Collins, Abigail Warren and Mary Collins; and leaving a last will and testament, wherein and whereby he devised the estate in question to his daughter, the said Mary Collins, in fee-simple, who became seised and possessed thereof accordingly, and continued so seised and possessed thereof to the time of her death, viz., the 2d of October 1806, and died intestate. That the said Mary Collins intermarried with Caleb Gardner, on or about the —— day of ———, and at her death, left lawful issue, viz., John Collins Gardner, George Gardner and Mary C. Gardner. The said John Collins Gardner died the 17th of November 1806, aged about ———, of course, intestate, and without issue. The said George Gardner died the 18th of September 1811, aged about —— years, of course, intestate, and without issue. The said Mary C. Gardner died the 31st of December 1822, aged about ———, intestate, and without issue. That at the death of their mother, the said John Collins Gardner, George Gardner and Mary C. Gardner, took from their said mother the said estate, as her heirs-at-law, in equal parts, and became seised and possessed of the same accordingly, in fee-simple, and continued so seised and possessed till the death of the said John Collins Gardner, viz., *till the 17th of November 1806. That, thereupon, his part of the said estate descended to and vested in his [*60 surviving brother and sister, viz., George Gardner and Mary C. Gardner, in fee-simple, in equal moieties; and thereupon, the said George Gardner and Mary C. Gardner became seised and possessed of the estate in question, in equal and undivided moieties, in fee-simple, and so continued seised and possessed, till the death of the said George Gardner, the 18th of September 1811. That, thereupon, his part of said estate descended to and vested in his sister, the said Mary C. Gardner, in fee-simple, and she became seised and possessed of the same, accordingly, and thereby became seised and possessed of the whole estate in question, in fee-simple; and so continued seised and possessed, to the time of her death, viz., to the 31st of December 1822. That at the death of the said Mary C. Gardner, the defendants, viz., the said John A. Collins and Abigail Warren, went into possession of the estate in question, claiming to be the heirs of the said Mary C. Gardner; and the defendants have continued possessed thereof, claiming it as their inheritance, without interruption or adverse claim, till the plaintiff's suit as aforesaid. That the plaintiff, by deeds duly executed, became seised and possessed of all the right and title of the said Samuel F. Gardner, Eliza Phillips and Mary Clarke, in and to the demanded premises. The plaintiff and Samuel F. Gardner and Eliza Phillips are children of the said Caleb Gardner by a former marriage. That the said Mary Clarke is also a child of said Caleb Gardner, by a former marriage, and are brother and sister of the half blood to the said Mary C. Gardner. That the said plaintiff and Samuel F. Gardner, Eliza Phillips and Mary Clarke are not of kin to the said late John Collins, Esq., deceased, and have not any of his blood in their veins. And if, upon the foregoing facts, the court shall be of opinion,

that the plaintiff, and those under whom he claims, are heirs-at-law of the said Mary C. Gardner, and entitled to said estate, then judgment to be given for the plaintiff; but, if not, then judgment to be rendered for the said defendant."

*61] The statute of Rhode Island upon which the plaintiff in *the ejectment claimed to recover, was passed in January 1822, and is entitled—

"An act directing the descent of intestate estates, and the settlement thereof, and for other purposes therein mentioned.

"§ 1. Be it enacted by the general assembly, and by the authority thereof it is enacted, that henceforth, when any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass, in equal portions, to his or her kindred, in the following course: To his or her children, or their descendants, if any there be: If there be no children, nor their descendants, then to the father of such intestate: If there be no father, then to the mother, brothers and sisters of such intestate, and their descendants, or such of them as there be: If there be no mother, nor brother, nor sister, nor their descendants, the inheritance shall go in equal moieties to the paternal and maternal kindred, each in the following course:

"First, to the grandfather: If there be no grandfather, then to the grandmother, uncles and aunts, on the same side, and their descendants, or such of them as there be: If there be no grandmother, uncle or aunt, nor their descendants, then to the great-grandfathers, or great-grandfather, if there be but one: If there be no great-grandfather, then to the great-grandmothers, or great-grandmother, if there be but one, and the brothers and sisters of the grandfathers and grandmothers, and their descendants, or such of them as there be, and so on, in other cases, without end; passing to the nearest lineal male ancestors, and for want of them, to the lineal female ancestors, in the same degree, and the descendants of such male and female lineal ancestors, or such of them as there be.

"But no right in the inheritance shall accrue to any persons whatsoever, other than to the children of the intestate, unless such persons be in being, and capable in law to take, as heirs, at the time of the intestate's death.

*62] And when herein the inheritance is directed to go by *moieties to the paternal and maternal kindred, if there be no such kindred on the one part, the whole shall go to the other part; and if there be no kindred, either on the one part or the other, the whole shall go to the husband or wife of the intestate; and if the wife or husband be dead, it shall go to his or her kindred, in the like course as if such husband or wife had survived the intestate, and then died, entitled to the estate. The descendants of any person deceased, shall inherit the estate which such person would have inherited, had such person survived the intestate. When the title to any real estate of inheritance as to which the person having such title shall die intestate, came by descent, gift or devise from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to the intestate, of the blood of the person from whom such estate came or descended, if any there be."

For some time prior to the passage of this act, the law of descents of Rhode Island was regulated by an act of 1798, the first section of which

nearly resembled the clause in the statute of 1822. It was as follows: "When the title of any real estate of inheritance, as to which the person having such title, shall die intestate, came by descent, gift or devise from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the next of kin of the intestate of the blood of the person from whom such estate came or descended."

The judges of the circuit court of Rhode Island, having divided in opinion upon the case, the decision was certified to this court for its decision.

Whipple, for the plaintiff, made the following points. 1. That at common law, the phrase "of the blood," includes "the half blood." 2. That if this is not the case at common law, the phrase "of the blood," as it is used in the statute of Rhode Island, necessarily includes the half blood. *3. That the person whose blood is referred to in the statute, as constituting "the stock of descent," is that kindred from whom the [*63 intestate derived the estate, by immediate descent; to wit, the brothers, and not the mother of the intestate, Mary C. Gardner.

He argued, that the act of the legislature of Rhode Island gives the estate "to the next of kin of the intestate, of the blood of the person from whom such estate came or descended;" and by the act of 1822, there is added, "if any there be." The defendants contend, that "the blood," *ex vi termini*, means the whole blood; because they assert this to be the meaning at common law. For the plaintiff, it is claimed, that neither at the common law, nor by the proper construction of the statute of Rhode Island, the whole blood is intended; and that as the plaintiff claims as half blood, and as representing those who were of the half blood of Mary C. Gardner, the person last seised, the whole question in the cause, and which alone is to be decided by this court, depends upon a proper construction of the law of Rhode Island of 1822. In order to arrive at a sound conclusion upon the case, it may be proper to examine what is the meaning of the word "blood" at common law.

Under the sixth canon of descents, in reference to the intestate, the word "whole" is added, which would not have been necessary, if that was the natural import of the term. In reference to purchasers, the word "blood," simply, is used; which means, when used alone, half as well as whole blood. In a note to Chitty's Blackstone's Commentaries, vol. 2, p. 5, is the following language. "It should here be noticed, that though it is necessary that a person who would succeed must show himself to be of the blood of the first purchaser; yet, where the persons who inherit succeed or derive title to the inheritance, by virtue of remote and intermediate descents from the purchaser, it will be sufficient, if they be related by half blood only to the purchaser, or to such other remote and intermediate ancestors, who were formerly and intermediately *seised of the inheritance, in the regular [*64 course of descent from the purchaser; provided, according to the rule which follows, they are the worthiest legal relatives of the whole blood to the person last seised." Robinson on Inheritance 45, is cited; he might have cited better authority. In Co. Litt. § 8, p. 14 *b*, it is said, "But if there be two brothers by divers venters, and the eldest is seised of land in fee, and die without issue, and his uncle enter as next of kin to him, who also dies without issue; now, the younger son may have the land, as heir to

the uncle, for he is of the whole blood to him, albeit he be but of the half blood of his elder brother."

What is the meaning of the terms "of the blood," as used in the statute? The object of the provision was, to continue the estate in the blood of the person from whom it descended; to find a stock of inheritance, not to establish a new rule of descent. The provision has no application, except to a case where the purchaser or preceding holder has already transmitted it to his heirs. Under the enacting clause, the half blood take from the purchaser on the first descent. An heir of the purchaser dies; will not the same blood take from the heir, that took from the ancester? It is to go to the kin, that is, the whole or half blood of the intestate, of the whole blood of the purchaser. According to the argument for the defendant, this reverses the common law; which gives to the whole blood of the intestate, of the whole or half blood of the purchaser. After giving it to the half blood, on the first descent, you can never narrow the capacity of inheritance. You may enlarge it, as the common law does, but not give in the first descent, and take away in the second. The family, the blood of the purchaser, is his whole and half blood. The object is to continue the estate in the blood.

The second question is, who is "the person" who is to constitute the stock of descent, "the first purchaser, or the last ancestor." We agree, that the object of the statute was to preserve estates in families. We
*65] disagree as to the extent of the *object. What but the language of the act can determine that question? It is not the identity but the extent of the object, about which we differ. The former might be determined by other considerations, the latter, by nothing but the words of the act.

2. The acts of 1798 and 1822 admit of two readings. "To such of the next of kin of the intestate as are of the blood of the person from whom such right, title or interest came or descended;" or "to the nearest of such of the kin of the intestate as are of the blood," &c. The second reading will, in most cases, give it to a more remote relation of the intestate than the first; and as the next of kin is the primary object of the statute, the former reading should be preferred.

3. Suppose, we adopt the latter, however. If first purchaser had been intended, why not expressed? If the principle, why not the language of the common law? Its meaning is well settled and comprehensive. Technical words are adopted, as in other statutes. It was drawn by lawyers, who generally use technical words, not in haste. Why use eight new words, to express the meaning of three old ones? A studious rejection of the words, proves that the principle was not intended to be adopted. Other legislatures have made the same mistake. They intended the first purchaser, if we did, for their language is similar. Not a statute in the Union, except that of the state of New York, admits the first purchaser. A reference to the statutes of Connecticut, New York, New Jersey and Pennsylvania, will maintain this position.

4. Why connect "descent, gift and devise" together, if there is, in fact, no connecting medium between them? In the case of gift and devise, the last ancestor is agreed to be the stock. If he is not also, in the other case of descent, what is there in common between them? Why use them in connection, when they express two separate principles, establish two distinct

rules, and transfer the estate to two different sets of heirs? In those three cases, the same person shall be the stock of descent. This is common to them all, connects them in principle, and therefore, they are connected *in language. [*66 We never speak of a multitude, unless to say something applicable to a multitude. When something is intended, applicable to a part, and something else, applicable to another part, we separate them in our discourse. Something then was intended, equally applicable to all the three modes of transmission; and this shows that it can be nothing else but the same stock of descent. Something was to be done, equally applicable to all; for the statute directs what shall be done in those three cases. What is it? The answer is, the same stock of descent. There is a difference between the description and the disposition of the estate. The word "or," belongs to the former; it has nothing to do, either distributively or collectively, with the latter. Such estate shall go, &c. What estate? The estate which came by descent, gift or devise. There is but one estate, and one channel for it to pass.

5. To show the true meaning and necessary construction of the words that are used. The words, "parent or other kindred," embrace the brother; parent includes father and mother. All the other kindred are included under the other terms. General words, comprehending particulars, are the same as an enumeration of particulars. The order in which they stand is of no importance. "From the brother or other kindred," would be the same as those now used. If a descent from all is provided for, the same as if enumerated, an immediate descent is intended. They agree, that an immediate descent, in the case of gift and devise, is intended; and in some cases of descent, as an immediate descent from the purchaser, can both be intended? Does not an immediate, exclude an intermediate descent? Such a descent must come through those kindred who are entitled to be stocks of descent. No other qualification is required than to be of the kindred. The words are not to such of the kindred as are first purchasers.

In the preface of Judge Swift's Treatise on Descents, p. 11, it is said, in relation to our statutes, "but in the law of descents, there is an almost total change of the common *law; it is radically new, in each state, bearing no resemblance to the common law, in most of the states, and having [*67 great and essential differences in all." The laws of descent in every state in the Union, except New York and New Jersey, are altogether different from the common law.

The case of *Hall* v. *Jacobs*, 4 Har. & Johns. 249, was this: The father devises to his three children, A., B. and C., and dies; A. and B. die intestate, and their shares descend to C. The court say, that the statute provides for three cases: 1. Estates descended on the part of the father. 2. Estates descended on the part of the mother. 3. Estates by purchase. This case is neither: "but is vested in the intestate, by immediate descent from his brother and sister, a course of descent expressly directed by the act of assembly in the case of a purchaser, and is known also to the common law." In *Stewart's Lessee* v. *Evans*, 3 Har. & Johns. 287, an estate descended to John Stewart's two children, Jane and Alexander; Jane died, and her portion descended to Alexander, who also died intestate. The question was, whether this estate came to the intestate, on the part of the father, or on the part of the sister. The defendant's counsel agreed, "that it did not come from or through the

father, yet that it was on the part of the father;" and so the court decided, without giving their reasons. In the case of *Shippen* v. *Izard*, 1 Serg. & Rawle 225, TILGHMAN, Chief Justice, says, "the words, on the part of the father, and from the father, are so different, that I cannot conceive how the former can be restricted to the father alone, without violence to their plain meaning. Not only is there a difference in common phrase, but in legal acceptation; for the phrase, on the part of the father, is familiar to the common law, and must have been borrowed from that source by the persons who drew this act of assembly. That it comprehends not only the father but all the ancestors of the father, both parental and maternal, appears by the citation of the plaintiff's counsel from Co. Litt. 12 *a*." YEATES, Justice, was of the same opinion.

*68] *The act of Virginia of 1793, provides, that when an infant died seised of property, which descended "from the father," the maternal kindred should be excluded. In 3 Munf. 183, the case of *Tomlinson* v. *Dillard*, decided in 3 Call 120, was reviewed. The case of *Wyatt* v. *Muse and wife*, also came before the court. The case was a descent from the father to his children, and from a deceased child, to the intestate. The court decided, that the mother, or her issue, were not excluded, where the property was derived, not immediately, but by intervening succession, from the father. (Also, the opinion of Justice TUCKER, p. 215.) In p. 197, Mr. Justice TUCKER cites a former decision, and says: "In that case, it was determined, that Mrs. Gee, the mother of Sarah Jones, was entitled to inherit lands from the daughter, who died an infant, which she had derived from her brother, John Norfleet; to whom the same were devised by his father, who was also the father of Sarah Jones. In that case, however, John Norfleet had attained his age of twenty-one years; but I was of opinion, and understood the rest of the judges who sat in the cause to concur with me in that opinion, that the mother might have inherited these lands, although John Norfleet had not attained his age of twenty-one years; for that the descent from the father to the daughter was not immediate, but broken, and therefore, not within the exceptions contained in the fifth and sixth sections."

The words of the act under which the above decisions were made, are as follows: "That where an infant shall die without issue, having title to any real estate of inheritance, derived by gift, devise or descent from the father, and there be living, at the death of such infant, his father, or any brother and sister on the part of the father, or the paternal grandfather or grandmother of such infant, or any brother or sister of the father, or any descendant of any of them; such estate shall descend and pass to the paternal kindred, without regard to the mother or maternal kindred of such infant; in the same manner as if there had been no mother or maternal kindred."

*69] In section sixth, there is a similar provision as to estates *from the mother. These are the words of the act of 1819; but they do not, in this respect, differ from the act of 1792. Many other decisions may be found, but not exactly to the point. The remarks of Mr. Justice ROANE, in 3 Call 96, are worthy of attention. The case of *Hilliard* v. *Moore*, in 2 Carolina Law Repository 590, is exactly like the case of *Collins* v. *Gardner*, as to its facts. The decision was in favor of the maternal line, and would have been decisively against us, had the words of their act rendered such a decision unavoidable. The words of the act are, "descended on the part of the

mother." This decision supports the distinction taken by Chief Justice TILGHMAN and Mr. Justice YEATES, in 1 Serg. & Rawle, already referred to.

As to the spirit of the act, he contended: 1. The defendants take for granted, that the object was to preserve the estate in the family of Mary Collins. How do they arrive at this knowledge? The legislature have not declared their object. They have only provided certain means, and the extent of the object ought to be measured by those means. They make the means bend to the supposed object. Because the object was to preserve estates in families to a certain extent, they conclude, that an estate going out of a family, defeats the intention. Have the court a right to resort to other means than those of the statute? Do they do so, at common law, in order to prevent an estate's going out of a family?

2. A strong objection to the doctrine of a first purchaser, is the difficulty of ascertaining him, and the consequent uncertainty of the rule. The proofs of descents frequently rest in parol. The defendants take for granted, that the common-law means will prevent the evil of an estate going out of the family. So uncertain and impossible is the proof, that the common law has abandoned it, and substituted a rule of law, in the lieu of actual proof; this is the sixth canon of descents. In cases of actual descents from a real first purchaser, the difficulties are the same. *In 2 Bl. Com. it is said: [*70
"Yet when an estate has really descended in a course of inheritance to the person last seised, the strict rule of the feudal law is still observed; and none are admitted but the heirs of those through whom the inheritance has passed; as if lands come to John Stiles, by descent from his mother, Lucy Baker, no relation of his father (as such) shall ever be his heir to these lands. Here, we may observe, that so far as the feud is really *antiquum*, the law traces it back; and will not suffer any to inherit but the blood of those ancestors from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no further, as if it be not known whether his grandfather, George Stiles, inherited it from his father, Walter Stiles, or his mother, Christiana Smith; or if it appear that this grandfather was the first purchaser; in either of those cases, the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their order the heirs of John Stiles of this estate." Again, to show how uncertain a rule that of the first purchaser was: "the doctrine of the whole blood (p. 230) was calculated to supply the frequent impossibility of proving a descent from the first purchaser. And this purpose it answers for the most part effectually enough. I speak with these restrictions, because it does not, neither can any other method, answer this purpose entirely."

Suppose, three or four descents with the aid of whole blood, and sole succession. What could we do towards finding the purchaser, under half blood and partible inheritances. Let Blackstone answer (2 Bl. Com. 231): "Here, then, the supply of proof is deficient, and by no means amounts to a certainty; and the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that upon the same principles of calculation, the half blood have a much less chance of being descended from an unknown indefinite ancestor of the deceased, than the whole blood in the same degree; as, in the first degree, the whole brother of John Stiles is sure to be *descended from the unknown [*71

ancestor; his half brother has only an even chance, for half John's ancestors are not his. So, in the second degree, John's uncle of the whole blood has an even chance; but the chances are three to one against his uncle of the half blood, for three-fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against John's great-uncle of the whole blood; but they are seven to one against his uncle of the half blood. This much less probability of the half blood's descent from the first purchaser, has occasioned their general exclusion." These remarks apply to the case of a real descent. Suppose, it is not known, from whom the grandfather George Stiles inherited, his father Walter or his mother Christiana. The whole blood would give an even chance; the half blood might give only one in four. Partible inheritances increase the difficulty by the number of descents. In a country increasing in population, and freed from the influence of those principles in the law of inheritance of England, which had their origin in feudal times, rules of such difficult application are impolitic and oppressive.

Another objection to the doctrine of first purchaser is, that it is inconsistent with an allodial tenure. It acknowledges a claim in some other person than the intestate. This is an objection to going back at all. But going to the first purchaser is worse, because he has no claim, either at common law or the statute; at common law, it was in the lord. If we give it to any one, give it to him who has some share of claim. It sacrifices the main objects of regard, the kindred of the intestate, in favor of a subordinate object; the blood of the purchaser.

Among the reasons for the construction of the act of the legislature claimed by the plaintiff, Mr. *Whipple* urged, that "descent, gift and devise," are connected on account of blood. Whose blood? That of the devisor and devisee, not that of the purchaser. The consideration being
*72] their blood, the reward ought to be to their blood. *The three modes of transmission are the acts of the party. The person who bestowed the bounty is the only person having any claim; his claim extends only to the person upon whom he bestowed the bounty, his heir; he has no claim on any future descendant, because to him he has not been liberal. The claim, then, is by the devisor or ancestor, because he is the only source of the bounty. The estate descends upon his heir or devisee, and him alone; because he alone is indebted to the ancestor or devisor, to the extent of the bounty conferred, and to no greater extent.

The intestate, Mary C. Gardner, was her mother's heir for one-third; that was the extent of her bounty. To her brothers, for two-thirds. For the same reason, that Mary Collins, has a claim for one-third, the brothers have for two-thirds. She transmitted her portion of her father's estate to her children. This gives her a claim upon each. If her children transmit their portion of her estate, they have the same claim upon those to whom they transmit it.

The plaintiff's counsel denied, that the construction claimed by the counsel for the defendant was the received law of Rhode Island. No case was cited on the argument in the circuit court, to establish such a construction; and when the experience of the bar was appealed to upon the subject, it was not followed by any evidence that the principles of construction the defendants asserted, had ever gone into use in the state, with the sanction

of a judicial decision. While he admitted, that the statement of the counsel of the defendant, that the law was with him, by the common understanding of those who did not, from their education or their situation, know what the law was, he denied that this, which might be denominated "street law," could or should have any influence in this court. The construction which this court would give, would be adopted from other views, and from higher authorities—the principles of the common law, and the fair and legal import of the words of the statute.

Robbins, for the defendants.—The common law of descent of England has two leading *objects in view ; one is to preserve the inheritance [*73 in the blood of that family by whom it was originally acquired : this is the dictate of nature ; for it is an object that approves itself to reason, and recommends itself to the best affections of the human heart ; it operates as a stimulus to exertion, by furnishing the means and the hope of building up and perpetuating a family, and providing for its happiness ; it cherishes, by gratifying the love of kindred, a natural and a noble sentiment, and one in which the sentiment of patriotism itself has its root ; for the love of country is but the love of kindred expanded. The other leading purpose is, to keep the inheritance entire, by keeping it, for the time being, in a single representative of that family by whom it was acquired ; this object was the offspring of state policy ; and by it the sentiments of nature are more or less controlled.

The people of Rhode Island brought with them from their mother country, a fond attachment to both views ; and of this the proof is, that for more than one hundred years, the law of descent of England was their law. But at length, in 1770, they were weaned from one of these objects ; namely, that of keeping the inheritance entire, by keeping it in a single representative of the family ; but the other object, that of keeping the descent of the inheritance in the blood of the family by whom it had been acquired, they fondly retained, and still fondly cherish.

This case comes up upon the division of the court below, as to the interpretation of the statute of descent, passed in 1822, which is the same in substance as the statute passed in 1798. One interpretation gives the estate in question to the plaintiff, the other interpretation gives the estate to the defendants ; between the two interpretations lies the conflict of the cause.

The defendants claim the inheritance of this estate under a provision of the statute, which is in these words, viz : "When the title to any real estate of inheritance, as to which the person having such title shall die intestate, came by descent, gift or devise from the parent or other kindred of the intestate, and such intestate die without children, such *estate shall [*74 go to the kin next to the intestate, of the blood of the person from whom such estate came or descended, if any there be." The question is, as to the person referred to, whose blood is to inherit. Is it the person from whom the estate originally came or descended to the intestate ? If so, then the estate goes to the defendants ; for they are the next of kin to the intestate who are the blood of that person ; it goes to the defendants and keeps the descent of the family inheritance in the blood of the family, by whom it was acquired, and from whom it has descended : and this is one inter-

pretation. Or, is it the person from whom the estate last came or descended? If so, then the estate goes to the plaintiff; for though the defendants are of the blood of that person, and of kin to that person as well as the plaintiff, yet the plaintiff is nearer of kin to that person; it goes to the plaintiff, and the family inheritance goes out of the blood of that family by whom it was acquired, and from whom it has descended, into the blood of another and a foreign family; hereafter to descend in the blood of that foreign family: and this is the other interpretation.

Now, "blood of the person from whom such estate came or descended," may mean either the person from whom it originally came or descended, or the person from whom it last came or descended: neither the word "originally," nor the word "last" is used, but either may be understood as implied, as the case may require; and that word must be understood as implied, which is necessary to express that meaning; that meaning must be adopted which was the meaning of the legislature. But one way of settling what was the meaning of the legislature in this case is known, and that is, by determining what was the object of the legislature in making this provision. Doubtless, the legislature intended those words to be understood in that sense which is necessary to the accomplishment of their object. Say, that the object was to preserve the family inheritance in the blood of that family by whom it had been acquired, and from whom it had descended; and our construction must be adopted, in order to effectuate that object; *75] for if it is not, and the other *construction is adopted, that object must be defeated. It would be defeated, in the present instance, at once; it must be, in all cases, sooner or later.

Even if there were any verbal or literal difficulties in the way of our construction, and none are perceived, they must give way, when opposed to the intention of the legislature; for it is a settled rule of law, "that what is within the letter of a statute, is not within the statute, if it be not within the intention of the legislature." The construction claimed by the defendants appears the most natural of the two; and must so appear to every mind accustomed to that law of inheritance which our construction supposes. In expressing this idea, we would not think of using the word originally; we would understand that word as implied, and would suppose that everybody would understand it as implied. But it is enough, that these words are susceptible of either interpretation; and that the object of the legislature in making that provision, is to determine which of them is the true interpretation.

That the object of the legislature was to preserve and perpetuate the family inheritance in the blood of the family, by whom it was originally acquired, appears as evident as if they had so said in so many words. It is obvious, in the first place, from the distinction which the statute makes between estates acquired by the intestate, and estates derived to the intestate from parent or other kindred. As to all estates acquired by the intestate, or derived to him from any person, other than parent or other kindred; the statute makes the intestate the stock of inheritance, and his next of kin, his heir-at-law. But as to all estates derived to the intestate from parent or other kindred, by descent, gift or devise, the statute makes the person from whom the estate came or descended, the stock of inheritance; and it makes the next of kin to the intestate, who is of the blood of

that person, the heir-at-law. Now, it is inquired, what possible object could there have been for this distinction, but that of keeping the family inheritance in the blood of the family?

*But further, the same distinction is made between estates derived, and derived in the same manner too, to the intestate. If the estate [*76 is derived to the intestate, by descent, gift or devise; but not derived from a parent or other kindred; he is made the stock of inheritance, and his next of kin is made his heir-at-law. But if the estate is derived to him from a parent or other kindred, by descent or devise, then the person from whom it came or descended is made the stock of inheritance; and the next of kin, who is of the blood of that person, is made the heir-at-law. Providing, then, a different stock of descent, and a different rule of descent, for estates derived from a parent or other kindred, and for those estates only, must have been done to keep the descent of such estates in the blood of such parent or other kindred; and could have been done with no other view. Then, it is asked, if this, which had always been an object of their descent law, was not to remain a provision of their descent law, why was this provision introduced at all? If this object was to be abandoned, this provision was not necessary. If this was not the object, and their construction be the true one, the legislature made a general rule of descent; and then made an exception to it, by which exception no rational end whatever was to be answered.

It has been said, that it always had been the wish of the descent law of that people, to perpetuate the family inheritance in the blood of the family. A short review of the history of that law will prove this a correct statement. The common law of descent of England was the law of descent of that people to 1718, without any alteration or intermission. This law was secured by their descent law, up to that time; for it was one of its great purposes. In 1718, they made a statute of descents, which made the intestate, in all cases, the stock of inheritance, and his next of kin, his heir-at-law. But in the short period of ten years, this statute was repealed, and for the very reason, that this object was abandoned. The preamble states, "forasmuch as the aforesaid act is found by experience to be very prejudicial, by destroying inheritances," "be it therefore *enacted," &c. By destroying [*77 inheritances—that is, inheritances as they theretofore had existed, and by which family estates had been kept in the blood of the family. This repeal left the common law of descent to revive, as the law of descent of that people; by which the first law was again secured to them, and remained their law of descent to 1770. In 1770, they made another statute of descent, but in making which, they were careful to preserve the object which had been abandoned by the statute of 1718. In this statute of 1770, they made the intestate, in all cases, the stock of inheritance; but in all collateral inheritances, they made the next of kin of the full blood of the intestate, the heir-at-law. As this statute of 1770 made the intestate, in all cases, the stock of inheritance, the making the next of kin of the full blood to the intestate, in all collateral inheritances, the heir-at-law, was necessary to the plan of keeping the descent of the estate in the blood of the family. This restriction of the descent in collateral inheritances, was adopted for this purpose. This rule, like the common-law rule of descent, would be attended with some occasional cases of apparent hardship.

This statute continued unaltered, as to this provision, to 1798, when all the statutes were revised, and this among the rest. The statute of 1798 proposed to accomplish the same purpose which was accomplished by the statute of 1770, but by different means; and by a modification that would avoid those occasional cases of apparent hardship, which resulted from the application of the rules established by the statute of 1770. The statute of 1798 made the intestate the stock of inheritance, and his next of kin the heir, but not in all cases, as did the statute of 1770; it excepted cases derived to the intestate by descent, gift or devise from the parent or other kindred; and as to those excepted cases, it made the person from whom the estate came or descended, the stock of inheritance, and made the next of kin to the intestate of the blood of that person, the heir-at-law. By this modification, by making the blood, not the full blood only, of that person *the heir-at-law, it obviated the hardships occasionally incident to the rule established in the statute of 1770. This statute continued to 1822, when all the statutes were again revised, and this among the rest. The statute of 1798 is re-enacted in the statute of 1822, in substance, differing only in form. As to all the cases in which the intestate is to be the stock of inheritance, or his next of kin to be the heir, and as to all the excepted cases in which the person from whom the estate came or descended, is to be the stock of inheritance, and the blood of that person to be the heir, both statutes are the same.

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From this deduction of the history of the law of descent of Rhode Island, which cannot be impugned in any one particular, but which will be found verified and confirmed throughout, by an examination of that law, it must be admitted, that it has always been the object of that law, to keep the inheritance in the blood of that family by whom it had been acquired, and from whom it had descended. A reference to the statutes of 1718, and of 1770, will verify this exposition of those statutes.

Again, that such was the design of the legislature may be and must be inferred, from the understanding and the practice which has prevailed in the state on this point. The question is practically settled, though not judicially, and settled for such a length of time, as gives to the practical settlement all the force of a final judicial determination. For it is the result of an impression, so universal and so decided, as to have precluded all doubt and all litigation up to the origin of this action.

Nor is the statute of 1798 to be considered as a new statute of descent, introducing and prescribing a course of descent for the first time: this, however, it is not; for it is to continue only to regulate the ancient course, not to originate a new one. It is now thirty years since that statute was made; and the rule of descent thereby established is still the rule of descent in the state. Now, all the collateral descents, in all the state, during all that time, have been cast according to the defendant's construction of the statute, without a question being made as to their being rightfully *cast; and have been, and now are, enjoyed accordingly. Not an instance of a descent in that state, contrary to this statement, has been, or can be cited. How numerous those descents have been, is not known; but in that length of time, they must have been numerous. This fact is at once a proof of this practical construction by the whole state; extending back a full quarter of a century prior to the origin of this action;

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and of the mischiefs which a judicial reversal of this practical construction would now produce: for it must unsettle every one of these descents, which possession has not matured into a perfect title.

We need not go out of this case, to see, in the descents which have occurred in the case, how settled the impression has been, that the family inheritance must descend in, and be confined to the blood of the family according to our construction of the statute.

There was, in the first place, on the death of John Gardner, in 1806, the descent of his third part of the estate to his surviving brother and sister. No stress is laid upon this; for, upon both interpretations, the descent was rightly cast. But then came the death of George Gardner, in 1811, and the descent of his third part, and of his half of John's third part. On whom was the descent now cast? On Mary, the surviving sister; the descent of the whole, as well that part which George inherited from his brother John, as that part which George inherited from his mother. The plaintiff agrees to all this—agrees that she succeeded legally, rightfully and exclusively, to the part which George had inherited from John, if John, the person from whom it last descended, was the stock of inheritance as to this part, the plaintiff was entitled to succeed equally with Mary. The plaintiff himself agrees, that John was not the stock of inheritance as to this part; for he agrees, that he himself was not entitled to succeed to any share of that part. The plaintiff himself agrees, that the mother, from whom the estate had originally descended, was the stock of inheritance; for he agrees, that Mary, her child, alone had the right to succeed. Then, how can the plaintiff claim to inherit from Mary, on a principle on which he agrees he could not claim to inherit from her *brother George, as to the part which George [*80
inherited from his brother John? If the plaintiff could not make John the stock of inheritance, as to the estate which George inherited from his brother John, how can he make Mary the stock of inheritance, as to the estate which she inherited from her brother George? He has, in truth, surrendered the very principle in controversy, and left himself no ground to stand on; for he has made it a matter of record, and the court are now called upon to give to the plaintiff an estate, to which he has agreed, and agreed on the record, that he has no title.

In proof of this position, the court are referred to the statement of facts; and especially to that part distinguished by italics. It reads thus: "That thereupon (that is, upon the death of George), his part of said estate (that is, one moiety of the whole estate, including his original third part who had previously deceased), that thereupon, his (George's) part, descended to and vested in, his sister, the said Mary C. Gardner, in fee-simple; and she became seised and possessed of the same accordingly; *and thereby became seised and possessed of the whole estate in question in fee-simple.*" The legal effect of this statement, in this case, and upon this case, is a striking illustration of that familiar, that settled, that riveted notion prevalent in Rhode Island in favor of the principle of descent, which we contend for. The plaintiff's counsel, at the time, probably, were not aware of its palpable inconsistency with the new principle of descent, which they had to contend for; and unreflectingly made the statement, according to their habitual notions on the subject.

And the descent itself is another striking illustration of the same fact

It took place in 1811, eighteen years ago ; was acquiesced in then, has been acquiesced in ever since, and is ratified even now, so far as a recorded agreement can ratify it. Then came the death of Mary C. Gardner, and the descent of the whole estate ; of which she had one-third directly from her mother, and the other two-thirds from her mother, but through her two brothers. On the death of Mary, how was the descent cast or supposed to be cast? *That such has been the practical construction of the statute, must be admitted, as no instance to the contrary has been cited, or can be.

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The state of Connecticut have a parallel provision in their statute of descents. Its construction there is considered as settled, though it never has been judicially settled ; it is considered as settled, because long and uniform practice has settled it. The attention of the court is invited to the descent law of Connecticut ; as it has been said, that the provision in the Rhode Island law was framed by the provision in that ; and there is to be found in the statute of 1798, some internal evidence of the fact. It was long, in that state, a *vexata questio*, whether the words, next of kin, in their then subsisting statute of descents, did not mean, when applied to real estate in the collateral descent, "next of kin to the intestate of the full blood ;" which was much agitated, and variously decided by their courts ; but it was finally decided, that next of kin meant, next of kin, in the civil law sense of the expression ; which had no reference to distinction of blood. It was with a view to preclude this very controversy, that the Rhode Island statute of 1798, in providing for the descent of all that part of the intestate's estate which is made to descend to the next of kin to the intestate, adds, to the words next of kin, these seemingly unnecessary words, "computing according to the degrees of the civil law." The struggle in that state, about the meaning of the words next of kin, it is believed, was occasioned by the strong prevalent sentiment of that people in favor of keeping the family inheritance in the blood of the family. For they were so dissatisfied with the final judicial decision, which frustrated that object, that their legislature afterwards, in the first revision of their laws, introduced this special provision ; viz : "Provided, that all the real estate of the intestate, which came to him by descent, gift or devise, from his or her parent, ancestor or other kindred, shall belong equally to the brothers and sisters of the intestate, and those who legally represent them, of the blood of the person or ancestor from whom such estate came or descended ;" going on and *following out the same principle, if there be not any brother or sister.

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This statute was made in 1784 ; therefore, soon after the termination of this controversy. The practical construction of their statute ever since, has been precisely the practical construction given to that of Rhode Island ; and there all the estates coming within their proviso have uniformly descended to the blood of the person or ancestor from whom the estate originally came, whether by descent, gift or devise. And such is considered as the settled law of that state ; but how settled? not by any judicial adjudication, for there has been none ; but by a uniform practical execution of the statute according to that construction. Wherein such a practical construction is inferior, in point of authority, to a judicial decision, it is difficult to comprehend. The authority of this statement will be found in the case of

William Hillhouse v. *Levi Chester*, 3 Day 166 ; and also in the statute laws of Connecticut. Digest of 1821, p. 208.

In the statute regulating descents in New York, there is also a parallel provision. It is said, that there has never been any controversy as to its construction ; of course, there can be found no judicial decision settling its construction. The provision is in these words, viz : "And in such case, every brother and sister of the half blood of the person so seised, shall inherit equally with those of the full blood ; unless when such inheritance came to the person so seised, by descent, devise or gift of some one of his or her ancestors ; in which case, all those who are not of the blood of such ancestor shall be excluded from such inheritance." See the act to regulate descents of the state of New York, Laws of New York, vol. i., p. 46, § 4.

It is remarkable, how exactly alike, in all essential particulars, are all these provisions in both the laws. In one, it is the estate coming by descent, gift or devise ; in the other, it is the estate coming by descent, gift or devise ; in the Rhode Island law, it is the estate coming from parent or other kindred ; in the Connecticut provision, it is the estate coming from parent, ancestor or other kindred ; in the New York *provision, it is the estate coming from the ancestor. But what is most remarkable is, [*83 that they all agree in designating the person whose blood is to inherit, in the same general way. In all, it is the person from whom the estate came or descended ; leaving the word originally, to be understood as implied ; and as what would, of course, be understood as implied.

As to the meaning of the word "blood," as used in the proviso ; whether it mean blood or full blood, it is not deemed necessary to discuss in this case : for, whether it mean the one or the other, the plaintiff is not entitled to inherit upon our rule. Our rule is, that the blood of the person from whom the estate originally came, is to inherit ; and the plaintiff is not of that blood.

It is said, that the rule (if ours be the rule) could have been more technically expressed ; and it is inferred, that it could not be the rule, because this was not done. But does it not appear that this difficulty operates both ways? The difficulty is, that the words do not mark our rule with absolute precision ; but if they did, there could be no controversy between the parties. The argument is just as good for one as for the other ; and therefore, is good for nothing for either.

It is said, that the common law considers a gift or devise as a purchase ; and the purchaser, as the stock of inheritance ; and that we must consider descent as standing on a common foot with gift and devise. It is true, that the common law consider the donee or the devisee as the stock of inheritance. But the question is not who is made so by the common law, but whom the statute makes that stock. It is very clear, that the person whom the common law makes that stock, is not the same the statute does. The common law makes it from the donee or devisee ; that is, the intestate himself, if he be donee or devisee : but the statute certainly does not ; it goes back of the donee or devisee to some other person ; now, to say that the donor or devisor is that person, is begging the question. It may go through the donor or devisor, back to the person from whom the estate originally came ; and must, if that was the intention. The family inheritance may as

well *come down through gifts and devises, as through a course of descent; and the words, gift and devise were coupled with the word descent, purposely to cover the whole inheritance.

As to the authorities cited by the counsel for the plaintiff, Mr. *Robbins* observed, that none of them seemed to conflict with any of the grounds which had been taken for the defendant. In all the numerous references to Reeve's Law of Descent, not one militates with these grounds; nor is it supposed that the practical construction of the parallel provision of the Connecticut statute is different from ours. As to the two cases from Sergeant & Rawle's reports, and from Harris & Johnson, they are cases under the statutes of Pennsylvania and Maryland, which are different from that of Rhode Island. Theirs extend only to the estate which comes by descent; not like the one under which the defendant holds to the estate, which comes by gift or devise, as well as by descent. And one of those cases only goes to say, that the estate by devise was not embraced by the proviso in the Maryland statute, relating to estates by descent; and that the estate by devise descended upon other principles.

Story, Justice, delivered the opinion of the court.—This case comes before us from the circuit court of Rhode Island, upon a certified division of opinion of the judges of that court, upon the question whether the plaintiff was entitled to recover, upon a statement of facts incorporated into the record. The action was an ejectment for two-third parts of certain land described in the writ; and the title of the parties, being by descent, depends altogether upon the true construction of the statute of descents of Rhode Island of 1822. Accordingly as that statute shall be construed, the land now in controversy belongs to the plaintiff or the defendants.

The material facts are, that the estate (two-thirds of which are demanded in the writ) was devised by John Collins to his daughter Mary Collins in fee. Upon her death in 1806, the same descended to her three children, viz., John C. Gardner, George Gardner and Mary C. Gardner. The two
*85] *brothers died intestate and without issue; and Mary C. Gardner, as heir to her brothers, became seised of the whole estate, and died intestate and without issue, in December 1822. The defendants are the uncle and aunt of Mary C. Gardner, the intestate, of the whole blood, being children of John Collins, the devisor, and brother and sister of her mother, Mary Collins. The plaintiff is the brother of Mary C. Gardner, the intestate, of the half blood; and he holds a conveyance of their shares from her other brothers and sisters of the half blood, they being children of her father by a former marriage. The plaintiff and his brothers and sisters of the half blood claim the two-thirds of the estate now in question, as her heirs of the half blood; and the defendants claim the same as her heirs of the whole blood. It is admitted on all sides, that the one-third which Mary C. Collins took by immediate descent from her mother, belongs to the heirs of the whole blood. But the other two-thirds, being taken by immediate descent from her brothers, it is contended, that by the statute of 1822, it passes to her heirs of the half blood.

If this question had been settled by any judicial decision in the state, where the land lies, we should, upon the uniform principles adopted by this court, recognise that decision as a part of the local law. But it is admitted,

that no such decision has ever been made. If this had been an ancient statute, and a uniform course of professional opinion and practice had long prevailed in the interpretation of it, that would be respected as almost of equal authority. But no such opinion or practice has been known to prevail; and, indeed, the statute itself is but of very recent origin. Even the statute of 1798, of which, in respect to this point, that of 1822 is almost a transcript, is not of a date so remote, as to enable us to presume that many cases could have arisen in that state, on which to found a practical construction, without some unequivocal evidence. The most that has been urged is, that there has been some general understanding among the people, that such was the meaning of the statute; but even this, though very respectably attested, is encountered by equally respectable statements on the other side. We are driven, therefore, to *consider the question as entirely new and unsettled; and to be decided, not upon the mistakes of parties relative to their rights in one or two unadjudicated cases, even if they existed, but by the true construction of the statute itself. [*86

The statute of 1822 enacts, that "when any person, having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend and pass in equal portions to his or her kindred in the following course, &c." Among other clauses is the following, "if there be no father, then to the mother, brothers and sisters of such intestate, and their descendants, or such of them as there be." In the present case, there was no father or mother of Mary C. Gardner, the intestate, living at the time of her decease; and as her brothers and sisters of the half blood, are her brothers and sisters within the meaning of the statute, they would be entitled to the estate in question beyond all controversy, if there were no other disqualifying clause. But in a subsequent clause of the statute, in the nature of a proviso, it is declared, that "when the title to any estate of inheritance, as to which the person having such title shall die intestate, came by descent, gift or devise from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to the intestate of the blood of the person from whom such estate came or descended, if any there be." The most material differences between the statute of 1798 and that of 1822, so far as regards this question, is, that the words "if any there be," are omitted in the former, which also uses the words "next of kin to," instead of "kin next to." Both of these circumstances have been relied on at the bar as indicating a probable change of intention. It is said, that both acts admit of two readings, viz: "to such of the next of kin of the intestate as are of the blood, &c.," or "to the nearest of such of the kin of the intestate as are of the blood," &c. The latter reading will give the estate to a remote relation of the intestate of the blood, although he be not of the next of kin of the intestate. The former reading requires that the party should be of the next of kin (that being the primary intention), as well as of the blood; and therefore, if a person be not of the next of kin of *the intestate, although he be of the blood, he cannot take; and the words of the act of 1822, "if any there be," are relied on to fortify the construction. We think the legislative intention in both acts was the same; and that the transposition of the words "next of kin" to "kin next," was accidental, and not introductory of any new object. The true construction of the statute of [*87

1822 is, that it gives the estate to the next of kin of the intestate, who are of the blood, excluding all others, though of a nearer degree, who are not of the blood, &c.

In this view of the clause, two questions have been argued at the bar: 1. Whether the words "of the blood" include the half blood; or exclusively apply to the whole blood. 2. Whether the words "came by descent, gift or devise from the parent and other kindred of the intestate," are limited to a proximate and immediate descent, gift or devise from such parent, &c., to the intestate; or include a descent, gift or devise which can be deduced mediately from or through any ancestor, however remote, who was the first purchaser, to the intestate.

The first question has not been seriously pressed in this court by the counsel for the defendants, though it constituted in the court below a main ground of argument. We think, that the phrase "of the blood," in the statute, includes the half blood. This is the natural meaning of the word "blood," standing alone, and unexplained by any context. A half brother or sister is of the blood of the intestate, for each of them has some of the blood of a common parent in his or her veins. A person is, with the most strict propriety of language, affirmed to be of the blood of another, who has any, however small a portion, of the same blood, derived from a common ancestor. In the common law, the word "blood" is used in the same sense. Whenever it is intended to express any qualification, the word whole or half blood is generally used to designate it, or the qualification is implied from the context, on known principles of law. Thus, Littleton, in his sixth section, says, that none shall inherit "as heir to any man, unless he be his heir of the whole blood; for if a man hath issue two sons by divers *venters, and the eldest purchase lands, &c., the younger brother shall not have the lands, &c., because the younger brother is but of the half blood to the elder." The same distinction is found in section eight of the same author; and Lord Coke in his commentary on the text constantly takes it. So Robinson, in his Treatise on Inheritances 45, after laying down the rule, that the person who is to inherit must be of the whole blood to the person from whom he proximately and immediately inherits, adds, that he must also be of the blood of the first purchaser; but that it is sufficient to satisfy this, that he is of the half blood of such purchaser. The legislation of Rhode Island leads to the same result as to the meaning of the word "blood." That colony was governed by the English law of descents, from its first settlement until the year 1718, a period of more than half a century. By an act passed in 1718, the real estate of the intestate was divided among all his children, giving the eldest son a double share, &c.; and in default of issue, the same was distributable among the next kin of the intestate, within equal degree, &c. This act was repealed in 1728, and the common-law course of descents was revived and remained in force until 1770, when an act was passed, providing substantially for the same distribution as the act of 1718. It contained, however, this remarkable proviso, "that no distribution of any real estate, in consequence of this act, shall extend or be made in the collateral line, beyond the brothers and sisters of such intestate and their children, and to those only of the whole blood." In 1772, the act of 1770 was repealed in regard to the double share to the eldest son, but in other respects it remained in force, until the revision in 1798, when the proviso that none

*88]

should inherit in the collateral line, except the whole blood, was dropped; and there is not, either in the act of 1798 or of 1822, any clause referring to the blood of any person, as a stock of descent, except the very clause upon which the present questions arise. When, therefore, the distinction between the whole and half blood was well known in the colony, not only as a part of the common law, but as a part of its own legislation, and the proviso is *dropped, in which the words "whole blood" were studiously used, and the words "of the blood" only, are found in any correspondent provision, if affords a strong presumption, that the whole blood were no longer deemed to be exclusively entitled to inherit, but that the half blood should be let in. If the half blood were not permitted to inherit, in cases of this sort, this anomaly might occur; that a son might inherit from his parent, the moiety of an estate, directly, which he could not inherit from his brother of the half blood, to whom it had passed by descent from the same parent, if such brother should die without issue. We see no reason, then, to doubt, that the words "of the blood," include the half as well as the whole blood. The plaintiff, then, and those from whom he claims being the next of kin of the intestate,(*a*) and of the blood of her two brothers,(*b*) from whom she immediately derived that part of the estate which is now in controversy, is entitled to recover, unless the statute in the other part of the clause defeats the descents. [*89

This leads us to the second question. The estate originally came from John Collins, by devise to his daughter, Mary Collins, and by descent from her to her three children, and mediately, as to the two-thirds, to the intestate, through her brothers. The counsel for the plaintiffs contends, that the clause looks only to the proximate and immediate descent; the counsel for the defendants, that it looks to the origin of the title in the first purchaser, and requires that the party claiming as heir, should be of blood of the first purchaser, through whatever intermediate devolutions by descent, gift or devise, it may have passed, and however remote may be the first ancestor. If the latter be the true construction of the clause, it goes far beyond the common law, for that stopped at the last purchaser in the ancestral line (and persons taking by devise or gift are deemed purchasers), and *ascended no higher than it could trace an uninterrupted course of descents. The common law, therefore, would have considered Mary Collins as the first purchaser, for all its own purposes of descent. The words are, "when the title to any real estate, &c., as to which the person having such title shall die intestate, came by descent, gift or devise from the parent, or other kindred of the intestate," &c. Now, what reason is there to suppose, that the legislature, in this clause, meant, in favor "of the blood of the person, from whom such estate came or descended," to extend its reach beyond that of the common law? No such intention is disclosed on the face of the provision; and every progressive enactment, for the last fifty years, in Rhode Island, is a relaxation of the strict canons of descent of the common law. The words themselves certainly do not necessarily require such an interpretation. As [*90

(*a*) See Smith *v.* Tracy, 2 Mod. 204; Crook *v.* Watts, 2 Vern. 124; s. c. Show. P. C. 108.

(*b*) See Cowper *v.* Cowper, 2 P. Wms. 720, 735; Collingwood *v.* Pace, 1 Vent. 424; Watkins on Descents 227, 228 [153], note; Reeve on Descents 176.

to descents, as well as gifts and devises from a parent, it is plain, that the act looks only to the immediate descent or title. A descent from a parent to a child cannot be construed to mean a descent through, and not from, a parent. So, a gift or devise from a parent must be construed to mean a gift or devise by the act of that parent; and not by that of some other ancestor more remote, passing through the parent. It has been urged, in another quarter entitled to great respect, that the words may be construed distributively; that a distinction may be taken between a descent, gift or devise, from a parent, and a descent, &c., from other kindred; and so also, that the words descent, gift or devise, may be construed distributively; so that, in cases of descents, the party who shall inherit, is to be of the blood of the first purchaser, from whom, by intermediate descents, it was passed to the intestate; and that in cases of gifts or devises, the donor or devisor shall alone be the person whose blood is to be inquired for. It may be admitted, that the clause is susceptible of such a construction, without any great violation of its terms. But we do not think, that such is the natural construction of the terms, nor is any legislative intention disclosed, which would justify us in adopting it. There does not seem any sound reason, why the clause should
*91] be construed, in the *case of a parent, differently from what it would be, in the case of any "other kindred of the intestate." The latter words must be construed in the same manner as if each class of kindred had been enumerated in detail, such as uncles, brothers, grand-parents, cousins, &c.; and if they had been, the same rule from the specific enumeration must have been applied to them, as is now sought to be applied to the case of parents. The general expression must be deemed to include all the particulars.

Then, as to the distinction between descents, and gifts and devises, it is true, that in a sense, an estate may be said to come by descent from a remote ancestor, to a person upon whom it has devolved through many intermediate descents. But this, if not loose language, it not that sense which is ordinarily annexed to the term. When an estate is said to have descended from A. to B., the natural and obvious meaning of the words is, that it is an immediate descent from A. to B. If other words of a statute should seem to require another and more enlarged meaning, there would be no absolute impropriety in adopting it; but if the true sense is to be sought from the very terms *per se*, that which is the usual sense would seem most proper to be followed. It is not for courts of justice to indulge in any latitude of construction, where the words do not naturally justify it; and there is no express legislative intention to guide them. But we think, that the connection in which the words stand, justify us in adhering to the ordinary interpretation. If, in cases of gifts and devises, the blood of the proximate donor or devisor is alone to be regarded, there being no distinction pointed out in the words of the act, between those cases and that of descents, the very juxtaposition of the words affords a strong presumption, that the legislature intended to apply the same rule as to all. If the object was to regard the blood of the party from whom the estate was derived, what reason is there to suppose, that the legislature intended less regard to the blood of a devisor or donor, than to that of an ancestor? The mischief might be as
*92] great, in suffering the estate to pass into the hands of strangers, when there were next of kin of the blood, in the one case, as in the *other.

On the other hand, there might be solid reasons for confining the preference of blood to cases of immediate descents, which could be easily known and easily traced. One of the known inconveniences of tracing back titles and relationship, is the obscurity, which, at a small distance of time, gathers over them. It would often be difficult to ascertain, whether there were not relations of a very distant stock, of the blood of a remote ancestor, who might be entitled to the inheritance, to the exclusion of the immediate next of kin of the intestate. And even the course of descents of his own title, in a country where estates are universally partible, for two or three generations, might involve the estate of the intestate in inextricable difficulties, and disable the next of kin from ascertaining into what fragments it was to be subdivided, with any reasonable certainty. It would be no want of wisdom, therefore, in a legislature to limit its provisions in favor of the blood, to cases where the immediate title could be traced with almost absolute certainty. Certainty of title, in a country where titles so rapidly change hands, might furnish a far safer principle of legislation, than any preference for the blood of persons remotely related to the intestate, through some distant, and perhaps, unknown ancestor. We think, then, that in the case of a gift or devise, the statute stops at the immediate donor or devisor, and ascends no higher for any blood. What reason is there to suppose, that in the case of a descent, there was a different legislative intention? In the case of a parent, the parent is, by the very terms of the statute, made the sole stock of descent, whether he derived it by descent, or by gift or devise, from an ancestor or a stranger. In the case at bar, the mother of the intestate took the estate by devise from her father. She was in by purchase, and in the sense of the common law, as first purchaser, and, of course, the true stock of descent, holding the estate *ut feudum antiquum.*

It has been said, that the object was to preserve inheritances in the same family. To a limited extent, this is true; that is, as far so the legislature has provided for such cases. No general declaration is made by the legislature on the *subject; and no preamble, which discloses any leading intention, exists. What the legislative intention was, can be derived [*93 only from the words they have used; and we cannot speculate beyond the reasonable import of these words. The spirit of the act must be extracted from the words of the act, and not from conjectures *aliunde.* The common law carries back, in certain cases, the descent to the heirs of the first purchaser. But the common-law canons of descents are overturned by the statute of descents of Rhode Island. How then can we resort to the common law, to make up the supposed defects in the language of the statute? Here, there is not a *casus omissus*, but a complete scheme of descents; and the only question is, how much the proviso carves out and saves from the operation of the general rule? No such words as "the first purchaser," are to be found in the statute, though it is sufficiently technical in other respects; and what right can this court possess, to exchange the words in this statute, for the words, "first purchaser," when they are not equipollent in meaning or extent? If the legislature intended to set up anew the rule of the common law, as to descents, &c., from the first purchaser, it seems scarcely credible, that it should be omitted the very phrase, considering that, for a century at least, it was a material ingredient in the law of descents of the colony. Then, again, if the argument now urged at this bar for the defendants, be

well founded, it goes (as has been already stated) far beyond, and indeed to the overthrow of the common law on the very point of first purchasers. Indeed, at the common law, a man might sometimes inherit, who was of the whole blood of the intestate, who could not have inherited from the first purchaser. As in the case of a purchase by a son, who dies without issue, and his uncle inherits the same, and dies without issue, the father may inherit the same from the uncle, although he could not inherit from his own son.(*a*) The statute of Rhode Island imparts to parents right to inherit the real estates of their children, in cases where the latter die without issue.

*94] *The statutes of descents of the different states in the Union are so different in their provisions, that it is not easy to apply any general rule of construction to them. The cases cited at the bar do however demonstrate, that in those states where a similar language is used in their statutes of descents, the expression has been uniformly construed to mean immediate descents, gifts and devises, unless that construction has been overruled by the context. The statute of Connecticut, of 1784, which has been supposed to be the model of that of Rhode Island, as to this proviso, is understood to have received this construction.(*b*) Under words nearly similar, in the Virginia statute of 1792 (the words being, "that where an infant shall die without issue, having title to any real estate of inheritance derived by gift, devise or descent from the father, &c."), it has been held, that an immediate descent from the father, and not an intermediate descent was intended.(*c*)

Upon the whole, our opinion is, that both points are in favor of the plaintiff. We all think, that the words "of the blood," comprehend all persons of the blood, whether of the whole or half blood; and that the words, "come by descent, gift or devise, from the parent or other kindred, &c.," mean immediate descent, gift or devise and make the immediate ancestor, donor or devisor, the sole stock of descent. A certificate will accordingly be sent to the circuit court of Rhode Island, in favor of the plaintiff.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Rhode Island; and on the points on which the judges of the said circuit court were divided in opinion, and which were certified to this court for its opinion; and was argued by counsel: On consideration whereof, it is ordered and adjudged

*95] by this court, that it be certified to the said *circuit court of the United States for the district of Rhode Island, that the plaintiff and those under whom he claims the estate in controversy, are heirs-at-law of Mary C. Gardner, the intestate, and, as such heirs, are, by the statute of descents of Rhode Island of (A. D. 1822) eighteen hundred and twenty-two, entitled to the same estate, upon the facts agreed in the case, and that judgment ought to be given for the plaintiff in this cause; all which is ordered to be certified to the said circuit court.

(*a*) See Littleton § 3, and Co. Litt. 10 *b*; Litt. § 8; Co. Litt. 14 *b*.
(*b*) See Reeves on Descents 160, &c.
(*c*) 1 Munf. 183; 3 Call 120.

*Micajah T. Williams, Plaintiff in error, *v.* The Bank of the United States, Defendant in error.

Promissory notes.—Notice of non-payment.

A notary-public, after a note became due, called at the house of the indorser, who resided in the city of Cincinnati, which he found shut up, and the door locked; and on inquiry of the nearest resident, he was informed, that the indorser and family had left town on a visit; whether for a day, week or month, he did not know, nor did he inquire; he made use of no further diligence to ascertain where the indorser had gone, or whether he had left any person in town to attend to his business; he left a notice at the house of a person adjoining, with a request to hand it to the indorser, when he should return: *Held*, that this was sufficient diligence on the part of the holders of the note, to charge the indorser.[1] p. 100.

The general rule of law applicable to this subject, has long been settled—that to enable the holder of a bill of exchange or promissory note to charge the indorser, it is incumbent on him to prove that timely notice of the dishonor of the bill, or of the non-payment of the note, was given to the indorser; or if this could not be done, he must excuse the omission, by showing that due diligence had been used to give such notice. p. 101.

If the parties reside in the same city or town, the indorser must be personally notified of the dishonor of the bill or note; either verbally or in writing; or a written notice must be left at his dwelling-house or place of business; either mode is sufficient, but one or other must be observed, unless it is prevented by the act of the party entitled to the notice. p. 101.

If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with it, or, by any act of his own, prevent the performance, the opposite party is excused from proving a strict compliance with the conditions; thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it; the law will not permit him to set up the non-performance of the conditions, as a bar to the responsibility which his part of the contract had imposed upon him. p. 102.

The holder of a bill or promissory note, in order to entitle himself to call upon the drawer or indorser, must give notice of its dishonor to the party whom he means to charge; but if, when the notice should be given, the party entitled to it should be absent from the state, and has left no known agent to receive it; if he abscond, or has no place of residence which reasonable diligence used by the holder can enable him to discover; the law dispenses with the necessity of giving regular notice. p. 102.

Where the parties reside in the same city or town, the notice should be given at the dwelling-house, or place of business, and the duty of the holder does not require him to give the notice at any other place.[2] p. 102.

The court refused to hear a re-argument upon a point decided in the case of Fullerton *v.* Bank of United States, 1 Pet. 612, that the act of the legislature of Ohio, relative to proceedings against parties to promissory notes, had been well adopted as a rule of practice, in the courts of the United States for the state of Ohio. p. 106.

*This was a Writ of Error to the Circuit Court of Ohio; in which court, the Bank of the United States had instituted a joint action, [*97 under the authority of the act of assembly of the state of Ohio, passed 18th February 1820, entitled "an act to regulate judicial proceedings where banks and bankers are parties," &c.; and by the provisions of which, the plaintiff may make the drawer and indorsers of a note or bill of exchange, joint defendants in the same action. Thus the suit was against the defendant and two others; and the declaration contained a common count for money lent, against all the defendants.

The pleas were *non assumpsit;* and on the trial of the cause, two several promissory notes made by J. Embree, indorsed by D. Embree and Wil-

[1] S. P. Wiseman *v.* Chiappella, 23 How. 368.
[2] Bowling *v.* Harrison, 6 How. 248.

liams, the defendant, in blank, were offered in evidence by the bank. On the subject of notice, the bank then gave the following parol evidence, which was the only proof offered, to wit: "That the notary-public, after the protest of the note, and the expiration of the usual days of grace, called at the house of the defendant (Williams), who lived in the city of Cincinnati. He found it shut up, and the door locked; and on inquiry of the nearest resident, he was informed, that the defendant and family had left town on a visit; whether for a day, or week or month, he did not know, nor did he inquire. He made use of no further diligence to ascertain where said Williams had gone, nor whether he had left any person in town to attend to his business. The witness left a notice at the house of a person adjoining, with a request to hand it to the defendant, when he should return." The counsel for Williams submitted to the court, whether the above facts were sufficient evidence of legal notice, to charge the indorser, and to entitle the plaintiff to judgment. The court decided, that the evidence offered was conclusive against the indorser; to which decision a bill of exceptions was tendered and sealed, and judgment was then rendered for the bank, against Williams, for $12,202.88.

The cause was argued by *J. C. Wright*, for the plaintiff in error; and by *Sergeant*, for the defendants.

*98] * *Wright* maintained: 1. That this court erred in determining that the evidence of notice was sufficient to charge an indorser, and conclusive against him. 2. That the suit below was jointly against several persons, and the cause of action was for several undertakings, upon which there could not be a joint liability.

This court having decided, at the last term, in the case of *Fullerton and others* v. *Bank of United States*, 1 Peters 604, that the act of the legislature of Ohio, which authorized this proceeding, was in force in the circuit court of the United States, Mr. *Wright* declined arguing the second point, unless the court should be desirous of hearing a re-argument upon the question.

Upon the first point, he contended, that the holder of a note is bound to give personal notice of non-payment to the indorser; or to see that it reaches his dwelling, or place of business, if he has one. 10 Johns. 490; 11 Ibid. 231. The contract of an indorser is contingent; it is, that he will pay the note on the default of the maker; and the court cannot change the nature of his obligation. Notice must be given and proved, or facts must be proved which will enable a jury to presume notice. In this case, the facts do not establish anything equivalent to notice. The defendant was a resident in the city of Cincinnati, and had a right to personal notice at his dwelling-house. The notary called at the house, and not finding the defendant at home, but finding the house shut, perhaps, only for an hour, he left the notice with a person who was not called upon to deliver it, and who, it is to be presumed, never did deliver it to the plaintiff in error. The notary did not do what would have been an equivalent act, put the notice in the post-office. 2 Johns. 275. The law may require a merchant to keep his counting-house open during the hours of business; but it does not follow, that a person must keep his house open, during all the hours of daylight, and in his absence, a person to be always in the house. The testimony in this case

falls short of the requisites of the law, and authorises a presumption in favor *of the claims of the plaintiff in error. While it is fair and proper to draw such an inference, it is not so, to infer facts which should [*99 have been proved, from other facts which are in evidence. The court should have left the facts to the jury, and their inference from the proof given by the bank was error.

Sergeant, for the defendants.—There are four cases depending in this court upon the question of notice; and the decisions of the circuit court were given in them all, before the case of the *Bank of Columbia* v. *Lawrence*, 1 Peters 578. This case was decided by the circuit court without the intervention of a jury, the facts having been submitted to the court. It cannot, therefore, be objected, that the facts were withdrawn from the jury.

The evidence given by the plaintiffs below was affirmative and positive proof of due diligence; and what is due diligence is question of law, and was properly decided by the court. *Tindal* v. *Brown*, 1 T. R. 167; Chitty 290, note 1. It is not necessary, that the notice of the default of the maker, which the indorser has a right to require, shall be in writing. The obligation is to call at the dwelling-house of the indorser, or at his place of business, and if he has left no one there to attend to his affairs, it is his loss, and the holder of the bill or note has done his duty, and all that the law requires. *Goldsmith* v. *Bland*, cited in Bayley on Bills (4th Lond. ed.) 224, 225; 1 Maule & Selw. 545; Chitty on Bills (Am. ed.) 284, 285, note *a*; Ibid. 276; cases in note 1, p. 288. The difference between the requisites for legal notice at the place of business and dwelling-house is, that if notice is given at the former, it must be in the hours of business; but the dwelling-house being the place of permanent abode, the notice may be given at any hour of the day.

In this case, it is denied, that what ought to have been done was done. The rule of the commercial law is, that you shall come as near to what is required as you can; and if the party has put it out of your power to do more, you have done sufficient. Here, the indorser having left his house *shut up, and not having left an agent to attend to his business, shall [*100 not be permitted to avail himself of his own neglect, but must take the consequences of the same.

Washington, Justice, delivered the opinion of the court.—This was an action of *assumpsit*, brought in the circuit court of Ohio, by the president, directors and company of the Bank of the United States, against J. Embree, the maker, and D. Embree and M. T. Williams, the indorsers of two several promissory notes. The only count in the declaration is for money lent and advanced by the plaintiffs to the defendants. Upon the plea of the general issue, the case, at the trial, was, by consent of the parties, submitted to the court; and the above notes were given in evidence by the plaintiffs, in support of the action. The court gave judgment against the defendants, and ordered it to be certified, in pursuance of the statute of Ohio, that it appeared to the satisfaction of the court, that J. Embree had signed the notes on which the suit was brought as principal, and D. Embree and M. T. Williams, as sureties.

At the trial of the cause, thus submitted to the court, the plaintiffs having proved the demand, and the handwriting of the indorsers of the notes, offered the following evidence of the notice to the defendant Williams, viz : "that the notary-public, after the protest of the notes, and the expiration of the usual days of grace, called at the house of the defendant Williams, who resided in the city of Cincinnati, which he found shut up, and the door locked, and on inquiry of the nearest resident, he was informed, that the said Williams and family had left town on a visit ; whether for a day, week or month, he did not know, nor did he inquire. He made use of no further diligence to ascertain where Mr. Williams had gone, nor whether he had left any person in town to attend to his business. The witness left a notice at the house of a person adjoining, with a request to hand it to the defendant, when he should return." The court being of opinion, that this evidence was conclusive of legal notice to charge Williams, his counsel took
*101] a *bill of exceptions, and the cause is now for judgment before this court upon a writ of error.

The only question which this bill of exception presents is, whether due diligence was used by the defendants in error, to give notice to the indorser of the non-payment of these notes by the maker of them? The general rule of law applicable to the subject has long been settled ; that, to enable the holder of a bill of exchange or promissory note to charge the indorser, it is incumbent on him to prove that timely notice of the dishonor of the bill, or of the non-payment of the note, was given to the indorser, or if this could not be done, he must excuse the omission, by showing that due diligence had been used to give such notice. If the parties reside in the same city or town, the indorser must be personally noticed of the dishonor of the bill or note, either verbally or in writing ; or a written notice must be left at his dwelling-house or place of business. Either mode is sufficient, but one or the other must be observed, unless it is prevented by the act of the party entitled to the notice.

In the case now under consideration, the banking-house of the defendants in error, and the dwelling-house of the plaintiff were located in the same city. The notary called at the plaintiff's house, which he found shut up, and the door locked. Upon inquiry of the nearest resident, he was informed, that the defendant, with his family, had left town on a visit ; but for how long a period was unknown to this person ; no further attempt was made to ascertain where the plaintiff in error was gone, nor whether he had left any person in town to attend to his business. The question to be decided is, whether, under these circumstances, the defendants are excused for not having given the notice which the law requires?

In the case of *Goldsmith* v. *Bland*, Bayley on Bills 224 note, it was decided, that it was sufficient to send a verbal notice to the defendant's counting-house, and if no person be there, in the ordinary hours of business, to receive it, it is not necessary to leave or send a written one. The prin-
*102] ciple *of this decision is, that the counting-house of the defendant is the place in which the holder was entitled, during the regular hours of business, to look for the person for whom the notice was intended, or for some person authorized by him to receive it ; and that the omission to give it, was occasioned, not by the want of due diligence in the holder, but by the fault of the party who claimed a right to receive it.

The principle here stated is not peculiar to this class of contracts. If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by any act of his own, prevent, the performance, the opposite party is excused from proving a strict compliance with the condition. Thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it; the law will not permit him to set up the non performance of the condition, as a bar to the responsibility which his part of the contract had imposed upon him.

The application of this general principle of law to the subject before us, may be illustrated by other cases than the one immediately under consideration. The holder of a bill or promissory note, in order to entitle himself to call upon the maker or indorser, must give notice of its dishonor to the party whom he means to charge. But if, when the notice shall be given, the party entitled to it be absent from the state, and has left no known agent to receive it; if he abscond, or has no place of residence which reasonable diligence used by the holder, can enable him to discover; the law dispenses with the necessity of giving regular notice. So, where the parties, as in this case, reside in the same city or town, the notice should be given at the dwelling-house or place of business of the party entitled to claim it; and the duty of the holder does not require of him to give the notice at any other place. If the giving of the notice at either of these places be prevented by the act of the party entitled to receive it, the performance of the condition is excused. In this case, the notary called at the dwelling-house of *the indorser, at the regular time, and at a reasonable hour, for aught that appears, to serve the notice, and found the house shut up, [*103 the doors locked, and the family absent from town, upon a visit of unknown duration to the agent of the bank, or to his informer. What was he to do? He was not bound to call a second time, nor was he under any obligation to leave a written notice; even if he could have found an entrance into the house.

But it is insisted, that the defendants in error were bound, under the circumstances of this case, to give notice to the plaintiff, through the channel of the post-office; and the case of *Ogden* v. *Cowley*, 2 Johns. 274, is relied upon in support of this position. In that case, the notary called at the house of the indorser, and of his deceased partner, for the purpose of giving them notice of the non payment of the note, but found their house locked up, and on inquiring at the next door, was told that they were gone out of town. On the same day, the notary put a letter into the post-office in the city of New York, addressed to the defendant and his partner, informing them of the non-payment of the note, and that they were looked to for payment. It appeared, that at that time, the yellow fever prevailed in the city. The court decided, that all proper steps were taken to communicate the requisite notice to the indorser, and that the notice was, of course, sufficient. It may be remarked upon this case, that the absence of the indorsers from their houses was probably the consequence of a temporary removal from the city, on account of the prevailing sickness, and that the case does not inform us whether the place to which they had removed was known to the notary. We are not prepared to say, that in such a case, the parties entitled to notice

were bound to be at their dwelling-houses, or to have any person there, at the time the notary called, to receive notice, and consequently, that their absence, and the closing of their houses ought to have excused the holder from taking other steps to communicate notice to them. But laying these circumstances out of the case, the court decided no more than that the steps taken to give notice, were sufficient in point of law for that purpose; *104] *and it is not to be doubted, but that they were so. They do not decide, that, in a case freed from the circumstances before noticed, it was necessary that notice to the indorsers should have been given through the post-office.

In the case of *Crosse* v. *Smith*, 1 Maule & Selw. 545, the cashier called at the counting-house of the drawer, for the purpose of giving him notice of the dishonor of the bill. He found the outward door open, but the inner locked. The cashier knocked, and made noise enough to have been heard, if anybody had been within. After waiting a few minutes, and no person appearing, he left the house, and took no further legal step to give the notice. It was insisted, in opposition to the sufficiency of the notice, that a notice in writing, left at the counting-house, or put into the post-office, was necessary. The answer given by the court was, that the law did not require either mode to be pursued. "Putting a letter in the post," says Lord ELLENBOROUGH, "is only one mode of giving notice; but where both parties are residing in the same post-town, sending a clerk is a more regular and less exceptionable mode." The decision in this case, as to the sufficiency of the notice, was the same as that given in the case of *Goldsmith* v. *Bland*, before referred to.

The case of *Ireland* v. *Kip*, 10 Johns. 490, and 11 Ibid. 231, was much pressed upon the court, in the argument of the present cause, by the counsel for the plaintiff in error. We have examined that case with great attention and respect, but have not been able to view it in the same light as it seemed to have struck the learned counsel. The place of residence of the defendant, the indorser, was three and a half miles from the post-office, within the limits of the city of New York, but without the compact part of the city, and without the district of any letter-carrier. The case does not state that the indorser had any counting-house or place of business in the city, at which the notice could have been left. The only notice given to the defendant was a written one, put into the post-office, in the city of New York, directed to the defendant, and stating that the note had not been paid. The place of the defendant's residence was known to the clerk of the notary, who put *105] the written notice to the defendant *into the post-office. The only question decided by the court was, that under the circumstances of that case, the holder of the note was bound to give personal notice to the defendant, or to see that the notice reached his dwelling-house; and that merely putting the notice into the post-office was not sufficient. Upon a second trial of the cause, it appeared in evidence, that the defendant had given directions to the letter-carriers of the post-office, to leave all letters that came to the post-office for him, at a house in Frankfort street, in the city of New York; that the letter-carriers called at the post-office three or four times every day, and took out and delivered all letters left there; and that the defendant usually called or sent, every day, for his letters, to the house in Frankfort street. The learned judge who delivered the opinion of

the court stated, that, admitting a service of the notice at the house in Frankfort street would have been good and equivalent to a service at the defendant's dwelling or counting-house; still, the delivery of the notice at the post-office, unaccompanied with proof that it was actually delivered at the house, was not notice. He adds, that "the invariable rule with us is, that when the parties reside in the same city or place, notice of the dishonor of bills or notes must be personal, or something tantamount; such as leaving it at the dwelling-house or place of business of the party, if absent." Now, it is apparent, that the question which arises in the case under consideration, was not, and could not be, decided in the case just referred to. The objection to the notice in the latter case was, that it ought to have been given at the dwelling-house of the defendant, and could not be given through the post-office, unless it also appeared that the notice so given reached the dwelling-house, or the house in Frankfort street. No attempt was made to give the notice in the former mode, as was done in this case; and the latter mode, so far from being considered as tantamount to the former, or as being necessary, in order to excuse the want of personal notice, is declared throughout to be insufficient, without further proof.

*The opinion of this court is, that the defendants in error were, under the circumstances of this case, excused from taking any other [*106 steps than they did, to give notice to the plaintiff of the non-payment of these notes; and that the judgment of the court below ought to be affirmed with costs.

The counsel for the plaintiff in error stated another point, which he admitted had been settled by this court, in the case of *Fullerton et al.* v. *Bank of United States*, 1 Peters 612; but requested permission to re-argue the point, in case the court should decide the first point against him. I am directed by the court to say, that the case referred to was well considered by the court; that we are entirely satisfied with the decision made in it, and see no cause to call for a re-argument of the principle there decided.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Ohio, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this case be and the same is hereby affirmed, with costs.

*Abraham Venable and George McDonald, Appellants, *v.* The President, Directors and Company of the Bank of the United States, Appellees.

Fraud.—Parties.

The court set aside a conveyance which had been made to defeat the claims of creditors.
In proceedings to set aside a conveyance of real estate, made in fraud of the rights of creditors, it is not necessary to make a mortgagee of the estate a party, his rights under the mortgage not being brought into question. p. 112.

Appeal from the Circuit Court of the United States for the district of Kentucky. The appellees, at the May term 1822, of the circuit court for the district of Kentucky, obtained a decree against Venable and others, for the sum of $4700, with interest and costs ; upon which execution was issued, and levied by the marshal upon 367 acres of land, and sundry slaves and other property, named in the return, dated September 2d, 1822, shown, as the marshal says, "as the property of Abraham Venable, and not sold for the want of time."

On the 26th of November 1822, the appellees exhibited their bill, in which, after giving a history of their case, and stating the facts of the levy on the property of Venable as above, they charged, that on the 9th day of February 1822, the said Venable executed two several deeds, whereby he conveyed all the land, slaves and effects which belonged to him to George McDonald, who was made defendant ; that "the said deeds are fraudulent, intended to defraud the creditors of the said Venable, particularly the complainants, and were executed without any valuable or legal consideration passing between the parties, with that fraudulent purpose and intent," &c. The complainants prayed that the said estate and property be decreed to be sold to discharge the debt aforesaid ; for an injunction ; and for general relief.

The defendant, McDonald, by his answer, admitted, that he claimed the property as his own, by virtue of a contract, and the conveyances which are referred to ; and also in virtue of a mortgage executed long anterior to
*108] the decree against *Venable, by said Venable, to him and George Norten ; in order to indemnify them for their joint liability, as the security of Venable in two bonds, the one as the administrator of the estate of George Adams, and also as the security for said Venable as the guardian of the infant heirs of said Adams ; stated the probable extent of that liability ; and denied all fraud or intention of fraud. The evidence and proceedings, and other matters in the case, are stated more at large the opinion of the court.

The court below, by decree, declared the conveyance to McDonald fraudulent and void, and directed the sale of the estate, under the execution ; subject, however, to the mortgage executed by the defendant Venable to the defendant George McDonald and George Norten, dated the 22d May 1820, which deed of mortgage was not in any manner to be affected by said decree.

The defendants below prosecuted this appeal, and claimed to reverse the same on the ground : 1. That the court erred in the decree, in annulling the deeds of Abraham Venable to George McDonald. 2. The court ought not to have directed a sale of the real and personal estate, conveyed by

Abraham Venable to George McDonald and George Norten, and in their possession; until the mortgage was satisfied, or the condition it contained was performed. 3. Want of parties. No decree should have been pronounced by which the interest of George Norten in the mortgaged premises could be affected, as he was not before the court.

The case was argued by *Wickliffe*, for the appellants; and by *Sergeant*, for the appellees.

Wickliffe contended, that upon the evidence in the cause, it was manifest, that the liabilities of McDonald for Venable, were sufficiently great to authorize the transfer to him of the whole property conveyed by the deeds, for his protection. The extent and effect of the mortgage could not be ascertained, until the settlement of the accounts of Venable, as guardian of the children of Adams; and *therefore, the amount of McDonald's [*109
liabilities as the surety of the guardian, were undetermined, and must remain so until that event. Guardians are appointed by the county courts of Kentucky, under the authority of the first section of the act of 1797, 1 Litt. 673; and the court are required "to take good security of all guardians by them appointed." The act of 1809, 4 Litt. 125, directs these bonds to be taken in the name of the commonwealth; and he contended, that the responsibility of the surety was beyond the penalty in the bond, and to the whole extent of the estate which might come into the hands of the guardian. By an action of "covenant" on the obligation, the liability of the surety might be so extended; when, if "debt" was brought, the penalty in the bond would limit it.

2. If the decree of the court had gone no further than to vacate the deed alleged to be fraudulent, the proceeding might have been sustained. It was no matter who had the equity of redemption of the estate, but the possession of the estate was important, and this should not have been touched. A creditor may protect himself by the purchase of property, which he knows is about to be sold under an execution.

3. The decree of the court, if carried into effect, will take the possession of the estate from George Norten, who was not a party to the proceedings.

Sergeant, for the appellees, went into a full examination of the facts of the case, as admitted by the appellant Venable, and shown, by the evidence, to establish fraud. He denied, that upon the evidence, the responsibilities of McDonald exceeded the amount of the mortgage executed to him and Norten; and claimed, that by a reference to the accounts and documents exhibiting the amount of the estate which came, or could come, into the hands of Venable, as guardian of the children of Adams, it would manifestly appear, that the protection of the surety was, under that mortgage, complete. No decision had been produced, to show that the liability of the surety for a guardian goes beyond the penalty of the *bond; and it is contrary [*110
to every principle of law, that such should be the fact. A careful examination of the acts of the assembly of Kentucky, will make it evident, that such a liability does not exist.

There was no obligation on the appellees to make George Norten a party.

A mortgagor may convey the equity of redemption, without consulting the mortgagee. In this case, the decree of the court directed a sale of the property, subject to the mortgage; and the rights of Norten were not affected by this proceeding. The whole purpose of the bill of the appellees was to set aside the conveyances to McDonald, and the decree goes no further.

STORY, Justice, delivered the opinion of the court.—This is an appeal from a decree of the circuit court of the Kentucky district. The Bank of the United States, at Lexington, Kentucky, on the 3d of July 1819, discounted a note of the same date for $4700, signed by one George Norten, payable sixty days after date, to one Daniel Halstead, or order, and by him indorsed to Abraham Venable, and subsequently and severally indorsed by William Adams and Joshua Norten, and by the latter to the bank. The note was not paid at maturity, and due diligence having been used to obtain the amount from the maker, according to the local law, a suit in equity was brought in the circuit court, in November 1821, against all the indorsers (as is the course by the local law), in which a decree for principal, interest and costs was rendered, in May 1822. An execution issued upon this decree against the parties, upon which a tract of land of 200 acres, a tract of 113 acres, several negroes, and some other personal property of Venable, were levied on, but the same were not sold—the former for want of proper bidders, the latter on account of a claim set up to the same, by the defendant, George McDonald.

The present bill, after stating these facts, charges that on the 9th of February 1822, Venable made two deeds to McDonald, by which he conveyed the tracts of land and other property to McDonald, and that the same
*111] deeds were *colorable and fraudulent; and the prayer of the bill is, that the deeds may be declared fraudulent, and the property may be decreed to be sold, and an injunction granted in the mean time, and for further relief.

The answers of the defendants, McDonald and Venable, deny that the deeds of the 9th of February 1822, were colorable or fraudulent, and on the contrary, assert them to have been *bonâ fide*, and for a valuable consideration. The answer of McDonald further sets up a mortgage executed by Venable, on the 22d of May 1820, to him, McDonald, and one George Norten (who is not a party to the bill), of a tract of land of about 245 acres (part of the land in controversy), and of nine negroes (including those in controversy), to secure them against a bond executed by them as sureties, with Venable as principal, upon his appointment as guardian of the infant children of George Adams, deceased, whose mother Venable had since married, she having previously administered upon Adams's estate. The guardianship bond was in the penal sum of $4000, and upon the usual condition.

The cause being put at issue, upon the final hearing, the court decreed the deeds of the 9th of February 1822, to be colorable and fraudulent, and ordered the same to be set aside and annulled; and that the plaintiffs might pursue their judgment and execution against the real and personal estate of Venable, as if the said deeds had never been made; subject, however, to the mortgage aforesaid, which was not in any manner whatever to be affected by this decree. It is upon an appeal taken by Venable and McDonald to

this decree, that the cause is now before this court; and independently of the merits as to the asserted fraud, or good faith of the deeds of 1822, two objections have been made by the counsel for the appellants.

The first is, that the court erred in directing a sale of the estate conveyed to McDonald and Norten, until their mortgage was satisfied, or the condition thereof performed; because it had no right to change, by sale of the estate, the rights or interests of the mortgagees, under a conveyance admitted to be valid, unless by their consent. This objection is founded upon a misinterpretation of the decreee, which *does not authorize any sale to be made by virtue of it, but merely removes out of the [*112 way the deeds which obstructed a sale at law, under the judgment and levy. The decree also leaves the mortgage wholly untouched, and consequently, no sale could prejudice the rights appertaining to it.

The next objection is, that George Norten, the mortgagee, is not made a party to the bill. But this objection falls, for the same reason as the preceding. As the mortgage is not in any measure interfered with by the decree, it is wholly unnecessary to make Norten a party to the bill. He has no interests which are controverted or injured by declaring the nullity of the other deeds.

The real question then is, whether the deeds of 1822 are fraudulent or not; and to that question, the consideration of the court will now be addressed. The answers of the defendants having denied all fraud, those answers are entitled to stand, unless they are overcome by the testimony of two witneses, or of one witness and circumstances. One of the deeds purports, for the consideration of $6260, paid and secured to be paid, to convey to McDonald the two tracts of land; the other, for the consideration of $3400, to convey certain slaves, household-furniture, horses, wagons, hogs, sheep, cattle, &c., and other stock usually belonging to a farm. The bill charges that these constituted the whole estate of Venable; and this fact is not attempted to be denied in the answer. Except his liability as guardian, and indorser of the note to the bank, it does not appear, that Venable was, at this time, indebted to any persons whatever; the fact is charged in the bill, that he was not under any embarrassment, and it is supported by the proofs. Here, then, is the case of a person, upon the eve of a decree being rendered against him for a large sum of money, which it is admitted would go far to his ruin, making conveyances of his whole property, real and personal, to his brother-in-law, for an asserted consideration equal to its full value. The brother-in-law is proved to be a thrifty, industrious man, but not at the time known to possess property sufficient to pay the purchase-money; having other pursuits; and as soon as *the purchase-money is made, suffering the estate to remain in possession of the former [*113 tenant. How and in what manner is the consideration paid and received? McDonald, in his answer, states, that Venable, under the administration of his wife on Adams's estate, and his own guardianship of her infant children, was indebted for assets received, to the amount of $6286.54, and that he, McDonald, finding that Venable had used this money and was wasting the estate of his wards, and was involved in difficulties by his suretyship for others, &c., with a view to his own safety and that of George Norten (who is now insolvent), first took the mortgage, and afterwards, being fearful of the waste of the estate, was induced to purchase it, that he might have the

control of it, and accordingly, he did purchase it. The manner in which the consideration was paid and secured, he states to have been as follows: He assumed, by a written contract given to Venable, to pay the debt due by Venable to his wards, when they came of age, and in the mean time, to pay annually a sufficient sum for their maintenance and support, to be allowed in extinguishment of the interest that might become intermediately due. The contract itself is now produced, and it contains an agreement to pay to the wards, not a specific sum of money, but "as much money as they shall have a right to demand of Venable, as guardian, when they become of age." It further contains a promise to furnish Venable "as much beef, pork, hay, corn, flour, &c., to the amount of what it shall be worth, to board, school and clothe" his wards. The residue of the consideration for the purchase, viz., $2060.50, McDonald asserts to have been paid by him in money to Venable, part of which he admits that he borrowed, but he does not state how much. By the contract above stated, he was to pay the money within three months after the purchase. Such is the nature of the purchase, and the consideration, as disclosed in the answer of McDonald, and which Venable in his own answer adopts and supports.

*114] The first remark that arises on this part of the case is, that the whole consideration stated in the deeds is $9660; *and that the answers state the amount actually paid or secured as no more than $8347. This discrepancy is utterly unaccounted for. In the next place, the debt assumed to be due by Venable to his wards, is nowhere established to have been really due, by any proof in the record. Now, this was a material fact in the case, exclusively within the knowledge and power of the defendants, which they were bound to establish by competent evidence, and which, in its own nature, was susceptible of proof beyond their answers. It was vital to the good faith of the transaction. The omission to do it would, of itself, throw some doubt upon the transaction. But the proof in the record, so far as it goes, affords a strong negative upon the assumed debt. The inventory of George Adams's personal estate is only $2032.07. His widow (independently of the charges of administration) was entitled to one-third part of it; one of the children (a daughter) died early, during her minority; and without stopping to inquire whether her share in the personalty would not fall to the mother, the remaining sum, deducting only the mother's third, left the sum of $1355 only as the distributable shares of Venable's wards. There is in the record a paper, which is without any signature or proof of any sort, which puts Adams's personal estate at a much lower sum than the inventory, but which, by adding his real estate at $2200, and the rent for three years, and the hire of negroes and interest, swells the aggregate of his estate to $6286.54. This paper can be viewed in no other light than a mere speculative statement; but if it were otherwise, it is obvious, that it cannot be permitted to pass as proof of the balance then due to Adams's children.

In the first place, the real estate is not properly chargeable to the account of the administrator or guardian, merely as such. The suggestion is, that it was afterwards sold, and the proceeds received by Venable, for which he may be justly held accountable. There was no sale made, so far at least as we have any evidence, under the general act of Kentucky on this subject, passed on the third of February 1813, and therefore, that may be laid

out of the question; though it is *observable, that a guardian is not authorized under that act to sell, without an order of court, and giving a bond with sufficient sureties. The only proof of any authority to sell found in the record is the following order: "Fayette county, to wit: April court, 1818. On motion of Abraham Venable, Patterson Bain, E. Yieser and Charles Humphreys are appointed commissioners, under the act of assembly of the last session, for the sale of the estate mentioned in said law, as belonging to the heirs of George Adams, deceased, situated in Lexington." The act here referred to is not in the record, but so far as we can gather its contents, by the order itself, the commissioners, and not the guardian were authorized to make the sale. Their proceedings under the order do not appear. The only evidence is from a purchaser at the sale, who states that he bought the estate at about $2200, and, with the exception of about $300, he paid the money to Venable, by direction of the commissioners. Whether this payment was authorized by the act is left uncertain, and indeed, whether security was not directed to be taken from the commissioners, on the sale, as in ordinary cases. It is far from being certain, that the sureties on Venable's guardianship bond were liable for the sum so received. But we may assume for the present that they were.

Then, there is a charge of $900 for rent received upon the real estate for three years; and for hire of negroes for seven years $490, although the inventory mentions only "one negro girl and child," valued at $300; and to complete the amount, a charge of interest is added on the whole, of $1171.98. Now, certainly, there is no pretence for the last charge, and no justification of it by any proof. The children were maintained during this whole period by Venable and his wife; and in the most favorable view, if Adams's estate had been completely settled, the interest and income from the children's shares of his whole estate could not be presumed to amount to more than, if to so much as, the reasonable expenses for their support and maintenance. At least, if they did, that fact should have been made out by some probable evidence. Then, again, the guardianship bond is in the penalty of $4000 *only; and this circumstance discredits the supposition, that the sureties had incurred any liability beyond that [*116 amount. The usual practice is, to take the penalty in double the amount of the supposed value of the property intended to be secured by it. The original administration bond of Mrs. Venable was in the penalty of only $6000, and the inventory of personal estate of George Adams, was made by her on oath, which is not attempted to be impugned, covers but one-third of that amount. It has been said at the bar, that by the laws of Kentucky, sureties may be charged beyond the penalty of their bonds, and to the same extent of liability as their principals. If this were so, it would diminish the force of any argument grounded on the penalty; though it certainly would not establish that there was, in fact, a debt due to the children beyond that sum. But among the acts of Kentucky, we cannot find any statute that leads to such a conclusion. The act of 23d January 1810, concerning the bonds of certain officers, guardians, administrators and executors, has no provision which varies from the general law on this subject, limiting the responsibility of sureties to the penalty of the bond. It merely declares, that "an action in one case, on such bond, shall in no wise abate or bar an action thereon for another cause," which is entirely consistent

with a recognition of the general rule of law. And the act of 15th January 1811, which is supplementary to the former, and gives a remedy against sureties, beyond the penalty of the bond, is expressly limited to bonds given by public officers. No adjudged case has been cited, which goes to establish the position, that the statute of 1810 has been differently construed by the state courts. It is not, in our view of the facts, a very material consideration, because there is no evidence offered, which proves that a debt was due to Venable's wards, even to the amount of the penalty. And in a case like the present, it was indispensable for the defendants to make out so material a fact, with all due certainty. The court cannot presume it. The statement already alluded to, as a statement of the administration or guardianship account, contains no deduction whatever, either for charges, taxes,
*117] *repairs, or even for debts due from the intestate, or for expenses incurred for the children. It assumes only one side of the account, and deals not in any credits, though the presumption of their existence is almost irresistible.

In respect, then, to this part of the assumed consideration of the deeds, there is the want of certainty as to any amount of debt due to the children; and the contract given to secure it to Venable, does not ascertain any amount as due. It merely provides, in general terms, that McDonald shall pay to the children "as much money as they shall have a right to demand," &c., when they shall come of age, and in the intermediate time, they are to receive an amount sufficient for their support and maintenance. Even this contract is left wholly without any mortgage or other security for its fulfilment, either to Venable or to the children ; and Venable strips himself of his whole estate, and relies exclusively upon the good faith and solvency of McDonald, to extricate himself from all future difficulties. Such a case may exist ; but it must involve some suspicion, when the party who resorts to such measures has a demand hanging over him, which goes deeply to affect his solvency and his interests, and may furnish another and cogent motive for the transaction.

The provision in this contract for the support and maintenance of the children is somewhat extraordinary, and of a very indefinite nature and extent. McDonald agrees to deliver to Venable, "as much beef, pork, hay, corn, flour, &c., to the amount of what it shall be worth, to board, school and clothe" them. So that even the amount is not fixed, and is to depend upon the future pleasure of the parties. In case of a real purchase, such a provision could not be expected, even though it went merely to keep down the accruing interest ; and in the present case, it is not by its terms confined even within that limit. The contract itself is not avowed upon the face of the deeds, and must be deemed a mere private and secret bargain, to be kept back by the parties.

Then, again, as to the remaining cash payment of $2060.50. The bill directly charged, that it was a mere formal payment, and that the "money
*118] was by the said Venable *returned back to McDonald, or to the person of whom McDonald borrowed it." The answer of McDonald admits that a part was borrowed ; but his denial of its return is couched in terms of an ambiguous purport. He says, that the sum of $2060.50 "was paid by this defendant, in the presence of Moses S. Hall," &c. That he "borrowed a portion of the money to enable him to make the cash payment.

That it was paid by him to his co-defendant (Venable) in good faith, and that no part of it was returned to him by said Venable, nor did this defendant receive any part of said money back from said Venable, by any fraudulent contrivance, as the complainants have falsely alleged." Venable, in his answer, says, "that the said sum of money was paid to him by his co-defendant (McDonald) in good faith, and that no part of it was returned by him to his co-defendant." Now, it is remarkable, that neither of these answers, in terms, denies that the money so borrowed was returned back to the person of whom it was borrowed, which is the gist of the charge in the bill; nor does McDonald deny that he received it back; but only that it was not returned to him by Venable. Nor are these allegations thus loose, from mere accident or carelessness. On the contrary, the proof is direct, that the money borrowed was returned to McDonald, and was by him returned to the lender. Moses S. Hall, in his testimony, says, he was present when the money was paid, and it was handed to Mrs. Venable. William Achison testifies, that McDonald told him, that the next morning after the money was paid, Mrs. Venable was at his house with the money, on her way to town to deposit it in bank, and he, McDonald, borrowed it of her and returned it to Hendley (the lender) the same day. Hendley himself, in his testimony, says, "McDonald came to me, and told me that he had made a purchase; that I was a man of tolerable good sense; I could tell by a little, what a good deal meant; and observed, that he wished to borrow of me $1000, which I loaned him, and stated, he would return it in a few days. He observed, that Venable was embarrassed by a debt on account of Norten, and that he had bought him out of every species of property, and that he wanted the money to pay him. He also offered *me a mortgage on a negro man and a tract of land for the payment of the [*119
money; but I declined receiving any security, &c., because I expected to receive the money back in a few days. I took a memorandum of the amount and numbers of the different notes loaned him, thinking it was possible, I should receive the same notes back, &c. In about three or four days, I received from said McDonald, the same notes back again. McDonald stated to me, that he was security for Venable, as guardian of Mrs. Venable's children, to the amount of three or four thousand dollars, and that he made this purchase to secure himself." In point of fact, independently of the purchase, as we have already seen, he had a mortgage on the same estate, as security for that very liability. But it is impossible to wink so hard, as not to perceive, that if this statement be true, and it is nowhere contradicted or denied, the borrowing of the money was merely to exhibit before witnesses a formal payment, and that there was no real *bona fides* in this part of the transaction. It was an attempt, fruitless, as the event has shown, to throw a colorable gloss over the real transaction. How the other part of the purchase-money was obtained, is not proved by the defendant, although there is some hearsay evidence, that other money was borrowed; but the answers of the defendants furnish no statement of the amount.

There is also testimony in the case, from several witnesses, of the confessions of Venable, as to the object of the deeds, and of subsequent acts of control over the estate, to some extent, from which unfavorable inferences have been deduced at the argument against the validity of the deeds. It has been said at the bar, that these confessions and acts, being subsequent

to the execution of the deeds, ought not to be permitted to prejudice the title of McDonald, and are not evidence to bind him. It is true, that neither the acts nor confessions of a grantor, under such circumstances, are admissible to defeat the title of the grantee. But they are certainly admissible, to disprove the answer of the grantor, when he is a party to the bill. If they discredit his answer, they withdraw from the case all the influence, which
*120] his concurrence in the statement of the grantee would otherwise *have ; and to this extent, they have a bearing upon the whole merits of the case ; but not beyond it. Upon examination of these confessions, they certainly exhibit some misgivings on the part of Venable, and some proof that the sale of the estate was to defeat the debt due by him to the bank, as security of Norten. The acts of control by Venable over the estate are more equivocal ; and but for his subsequent liberal participation in all the produce of the estate, would perhaps, of themselves, not be very significant. As the case is, they cannot but have some weight.

Upon the whole, without going more at large into the case, the circumstances are such, that it appears to us these deeds were not *bonâ fide* and for a valuable consideration, and therefore, they were properly set aside by the circuit court. Looking to the nature of the transaction, the assumed considerations, the relation and circumstances of the parties, the impending decree, the sweeping extent of the deeds, the non-disclosure, on the face of them, of the real considerations, the objects of the collateral and secret contract, the very great doubt as to what was due to the children, and the ambiguous explanations of the parties ; we think, the presumptions are so strong against the validity of the deeds, that they ought not to be supported. The decree of the circuit court is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel : On consideration whereof, it is considered, ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*121] *The President, Directors and Company of the Bank of the United States, Plaintiffs in error, *v.* Thomas Corcoran, Defendant in error.

Promissory notes.—Notice of non-payment.—Presumptions of fact.

C., the indorser of a note, at the time it fell due, lived in a house in Georgetown, except the lower front room, which was occupied separately, as a store, by one of his sons ; there was a separate entrance to the dwelling part of the house, through an alley or passage, apart from the store which led to the upper rooms, and back buildings and yard of the house ; the son of C. who occupied the store, had a dwelling-house separate from the store ; C. was at that time, postmaster of Georgetown, and kept the post-office in another part of the town, where he usually transacted his private business as well as that of his office ; C. had no concern in his son's store, but he was frequently about the door ; until he took charge of the post-office, which was a year before the note fell due, written communications and notices for him were sometimes left at the store and were carried by another of his sons, unless when he forgot it, to him ; after C. took possession of the post-office, if notices had been left at the store for C., the bearer of them would have been directed to take them to the post-office, or they would have been delivered to him by his son, at the post-office, if recollected, or if they had been seen, when left at the store. The

notary stated that he believed the notice of non-payment of the note was left at the store, because he thought that he had frequently notices to give to the defendant, and was in the habit of leaving them at the store, and he never had been in the dwelling-house, or in the passage or alley: *Held*, that this notice was not sufficient of non-payment of the note, to charge C. with a liability to pay the note.

If notice of the non-payment of a note, although left at an improper place, was nevertheless, in point of fact, received in due time, by the indorser, and so proved, or could, from the evidence in the cause, be properly presumed by the jury, it is sufficient in point of law to charge the indorser. p. 132.

Presumptions from evidence of the existence of particular facts, are, in many cases, if not in all, mixed questions of law and fact; if the evidence be irrelevant to the fact insisted upon, or be such as cannot fairly warrant a jury in presuming it, the court is so far from being bound to instruct them that they are at liberty to presume it, that they would err in giving such an instruction. p. 133.

United States Bank *v.* Corcoran, 3 Cr. C. C. 46, affirmed.

ERROR to the Circuit Court of the district of Columbia, and county of Washington. In the circuit court, the plaintiffs, as indorsers of the Bank of Columbia, instituted this suit against the defendant, as indorser of a promissory note, dated "Georgetown, May 6th, 1819," for $3700, made by Daniel Reintzel, and payable, at *sixty days, to the order of the defendant. The note was protested, when at maturity, by order of the [*122 Bank of Columbia, the holders.

The plaintiffs gave in evidence the protest of the note, stating "that payment thereof had been duly demanded of the maker, on the third day of grace, and refused, and the usual notice of dishonor left, next day, at the store of James Corcoran (the son of the defendant), in Georgetown." Two written papers were also put in evidence; one, a letter from Thomas Corcoran, the defendant, dated at Georgetown, May 8th, 1822, and addressed to "O. Krutz, cashier, &c.," saying, "Mr. Rind having called on me on the subject of Mr. Reintzel's notes, I have no hesitation in saying, that I will not take any advantage of the limitation act, for my indorsement on the note of $3700, dated 6th May, 1819, and the note of $400, dated 27th May, 1819; the other note I have no knowledge of, and will call at bank to-morrow, for some explanation of it." Also a warrant of attorney in blank, dated December 14th, 1824, authorizing the docketing of suits at the ensuing term, for the use of the Bank of the United States, on these notes of Daniel Reintzel, viz., two of $400 each, and one of $3700, all due in 1819. This paper was sent to the defendant for his signature, by Mr. Richard Smith, the cashier of the bank of the United States, and the defendant addressed to him the following letter.

"Dear Sir:—If Mr. Reintzel should not be able to satisfy the bank before court, and they determine to bring suit, I will instruct and authorize Robert Dunlap, Esq., to docket the case for me.

December 16th, 1824. THOS. CORCORAN."

Benjamin F. Mackall, the notary who made the protest, was examined on the trial, and produced his notarial book, in which he recorded all his protests, and in which he had entered the protest of the note upon which this suit was brought. He stated, "that the demand and notice were made and entered in the book, and that although he had no recollection in relation to these notes, he believed the demand *and the notice thereof were [*123 made as stated in the book;" that at the time of the demand and

notice of the notes, the defendant lived in a house in Georgetown, except the lower front room thereof, which was occupied separately, as a store, by one James Corcoran, the son of the defendant. There was a separate entrance to the dwelling part of the house, occupied by the defendant, through an alley or passage apart from the store, which led to the upper rooms, apart from the house; and he believes, the notice of the note was left by him at the store, because he thinks he frequently had notices to give to the defendant, and was in the habit of leaving them at the store, and he never was in the dwelling part of the house occupied by the defendant, nor in the passage or alley.

It was also proved, that James Corcoran, the son of the defendant, who occupied the store, at the period referred to by the notary, had a family and a dwelling-house apart from the store. The defendant, at the time of the protest of the note, was postmaster of Georgetown, and kept the post-office in another part of the town; where he transacted his private business, as well as the business of his office, and had no concern in the store. The defendant was often at the door, and about the door of the store. Another son of the defendant's, a single man, was concerned in the store; he lived with the defendant, in the house, until some time in February 1819, when he left his father's family, but continued his connection with the store. It was also proved by James Corcoran, that until 1818, when the defendant took charge of the post-office, written communications and notices for the defendant were sometimes left at the store, or at the dwelling part of the house; sometimes the persons bringing such notices were directed to take them into the house, and sometimes he took them at the store, and then, unless he forgot to do so, as he sometimes did, he delivered them to the defendant. After his father took the post-office, if he had known that such communications or notices had been left at the store, he would have directed the persons who called with them to take them to the post-office; or, if going there, he would have taken them, and, unless he forgot, *would have delivered them to the defendant; but he had no recollection of such fact having occurred. When the defendant took charge of the post-office, that became the place where notices and communications were usually left; and where he transacted his business, both private and official, as postmaster and magistrate. The witness stated, that he had no recollection of a notice of the protest of the note in suit having been left at the store. The store never was, before or after the defendant took the post-office, his place of business, or the place appointed for the delivery of notices or other communications for the defendant.

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The defendant's counsel prayed the court to instruct the jury, that if they found, from the evidence, that the said notices were left at the store of the said James Corcoran, occupied by him separately from the dwelling part of the house occupied by the defendant, as stated in the evidence, the notice is not sufficient to charge the defendant in this action, and the jury, on the said evidence, ought to find for the defendant on the first issue; which instruction the court gave. And the plaintiffs, by their counsel, prayed the court to instruct the jury, that if they found from the evidence, that notwithstanding the notices were left at the room occupied as a store by James Corcoran, yet, that the said store was the place where notices for the defendant were generally left, and that the notices in the case of these notes were

duly received by the defendant; then their being so left at said store does not defeat the plaintiffs' right to recover, provided the defendant received said notices in due time. And that the said papers read in evidence by the plaintiffs, and signed and given to the plaintiffs by the defendant, as above stated, are competent evidence from which the jury may infer that the defendant did duly receive the said notices; which instructions the court refused to give. The plaintiffs, by their counsel, excepted to the instruction given by the court, upon the prayer of the defendant; and to the refusal of the court to instruct the jury as required by them; and the case was brought up upon the bill of exceptions to this court. *The counsel for the plaintiffs contended that the court erred: [*125

I. In granting the defendant's prayer. 1. Because the plaintiffs used due diligence. 2. Because, if not, it took the whole case from the jury, and directed them to find for the defendant, on the whole evidence, thus excluding any inference they might have drawn from the evidence, that the defendant duly received the notice.

II. In refusing the plaintiffs' prayer; because, 1. The papers mentioned in it were competent evidence, from which the jury might, or not, have inferred that the notice was duly received by the defendant. 2. Because, if not, it took from the jury the right of inferring from the whole evidence that the store of James Corcoran was the place where the defendant's notices were generally left; and that this notice was duly received by him.

The case was argued by *Lear* and *Sergeant*, for the plaintiffs; and by *Jones*, for the defendant.

For the *plaintiffs* in error, it was argued, that the declaration of the notary, that "he believed" he had left the notice at the store, was sufficient evidence of the fact to be left to the jury. The many notarial acts he had to perform, rendered a distinct recollection of each impossible. The suit upon this note was delayed for the benefit of the defendant; and if the recollection of the notary be indistinct, it should not avail the defendant. *Bank of North America* v. *Pettit*, 4 Dall. 127; *Miller* v. *Hackley*, 5 Johns. 375.

As to due diligence, a general rule has been established, and a non-compliance with this rule is claimed to be negligence. But the rule has exceptions in some cases, and upon the same principles which are applied in other cases. In the case of the *Bank of Columbia* v. *Lawrence*, 1 Peters 578, the court have said, that the rule must not be such as will clog commercial operations. It is no part of the contract between the indorser and the holders, that he shall give him notice of the maker's default, *but the law has made it necessary. The notice is to inform the indorser that [*126 the holder looks to him for payment; but it is not indispensable, that the notice shall reach him, if reasonable diligence has been used to accomplish the object. If notice was actually received, and so proved, the mode by which it came to the possession of the indorser is unimportant. This court have said, in the case referred to, that a person may have two places at which notices directed to him may be left; and in this case, the defendant had a dwelling, and an office of business, the post-office. The notice was left at the former, in a store where he frequently was; where notices left

for him might reach him through his son, and from which it may be inferred they did reach him. The front door of the house was the door of the store, and to that door all who did not know that the alley had been made the main entrance would go; and the notary states, he has frequently left notices there, without complaint, for the defendant, but he had never been in the alley. If the notice had been delivered to a servant, the notary going up the alley, it would have been said, that the store was the proper place, as there notices had been left. The objection is one so nice, as to take away its force or application.

It is not a rule, that it is indispensable, that the notice shall be the best the case admits of; for personal notice is always the best, but this is not always required. The reply of the defendant to the application made to him in 1819, by the cashier, is sufficient to authorize the inference that he had notice. Upon this testimony, and the parol evidence, the question of notice should have been left to the jury. 12 East 433; 2 Johns. Cas. 337. The courts of Massachusetts have decided that a waiver of notice may be inferred from many acts. 4 Mass. 245; 6 Ibid. 449; 9 Ibid. 155, 159. The plaintiffs had a right to submit the evidence to the jury, and they might have inferred notice; and when the court assumed to decide upon its sufficiency, they invaded the province of the jury and erred.

*127] *Jones*, for the defendant, stated, that the question raised *in this case goes to the whole foundation of commercial law. The liability of the indorser of a note is contingent, and it is essential, as one of the requisites to charge him, to give him notice. There are cases in which some of the pre-requisities have been dispensed with; but there are certain acts which are indispensable. The rule is universal, that the notice shall be the best the case admits of; and it is only in cases where there are difficulties in giving notice, that questions have arisen as to the mode in which it should have been given. If a party has a place of business, notice must be left there; if he has two, one or both may be adopted. In the case before the court, there was a notorious place of business, the post-office; in which the defendant was postmaster, and a dwelling. In such a case, there is no ground for equivalent notice. It is not pretended, that the notary was ignorant of the facts.

The claim to support the notice, on the ground that it was left at the store of the son of the defendant, cannot be maintained. The son was as a stranger would have been, for the law does not look at those relations. Nor was it of any consequence, that the store was under the same roof with the defendant's dwelling; to all the purposes of this case, it was the same as if it had been entirely separate. Nor does the testimony which alleges that notices were sometimes left at the store, strengthen the case, as it is not shown that the defendant ever recognised such proceedings. Where notice is not sent in the regular mode, the law presumes it would not reach the party; and here the court were called upon to tell the jury, that if they believed the notice reached the defendant, they could infer notice, and they were required to say the notice was regular. This refusal was proper. The written evidence shows nothing from which the jury could infer notice. When the defendant agreed to waive the statute of limitations, it was a declaration that he would not waive any other defence. His whole object

in this agreement was to benefit the maker, and he is not to be supposed to have intended to prejudice his own rights.

*Washington, Justice, delivered the opinion of the court.—This case comes up by writ of error by the circuit court for the district of Columbia and county of Washington. [*128

The suit was brought by the plaintiffs in error against the defendant, as the indorser of a promissory note of Daniel Reintzel, for $3700, payable sixty days after date, and dated the 6th of May 1819. The only question in the cause turns upon the sufficiency of the notice to the defendant, the circumstances attending which appear in a bill of exceptions taken by the plaintiffs to the opinion of the court. From this it appears, that the plaintiffs gave in evidence a letter from the defendant to the cashier of the Bank of Columbia, where this note was discounted, bearing date the 8th of May 1822; in which the writer, after mentioning that he had been applied to on the subject of Reintzel's notes, says, "I have no hesitation in saying, that I will not take any advantage of the limitation act for my indorsement on the note of $3700, dated 6th of May 1819, and the note of $400, dated 27th May 1819; the other note I have no knowledge of, and will call at the bank to-morrow for some explanation of it."

These notes having been transferred to the Bank of the United States, the cashier of that bank, on the 14th of December 1824, sent to the defendant a paper for the signature of himself and Reintzel, containing a general authority to some attorney to docket suits against them, at the next ensuing term of the court, in the names of the president, directors and company of the Bank of the United States, for the use of that bank, and of the United States, on three notes of Daniel Reintzel, two of $400 each, and one of $3700, all due in 1819. On the back of this note was indorsed the following address, signed by the defendant, viz: "Dear Sir,—If Mr. Reintzel should not be able to satisfy the bank before the court, and they determine to bring suit, I will instruct and authorize Robert Dunlap to docket the case for me. December 16th, 1824."

The plaintiffs proved, by the notary who made the protest of this note, who produced at the trial his notarial *book, in which he recorded all his protests, and in which he had entered the protest of the note in question, and the demand and notice; that the said demand and notice were made and entered in the said book, and that although he had no recollection in relation to these; yet he believed the demand and the notice thereof were made as stated in his said book. He further stated, that at the time of the said demand and notice, the defendant lived in a house in Georgetown, except the lower front room thereof, which was occupied separately as a store by James Corcoran, his son. That there was a separate entrance to the dwelling part of the house, occupied by the defendant, through an alley or passage apart from the store, which led to the upper rooms and back building and yard of the house; and that he believed the notice was left by him at the said store, because he thought that he had frequently notices to give to the defendant, and was in the habit of leaving them at the store; and never was in the dwelling part of the house occupied by the defendant, nor in the passage or alley leading to it. [*129

It was further proved, that James Corcoran, who occupied the store, at

the time spoken of, had a family, and a dwelling-house apart from his store; and that the defendant was then postmaster of Georgetown, and kept the post-office in another part of the town, where he commonly transacted his private business, as well as that of his office; and had no concern in his son's store, but that he was often at the door, and about the door of the store; that Thomas, another son of the defendant, was concerned with his brother in the store, and was an active partner, attending in the store to the business thereof; but that he was a single man, and lived with the defendant in the house aforesaid, until February 1819; after which, he ceased to live in his father's family, but continued his concern and attention in the store.

It was further proved, by the before-mentioned James Corcoran, that until the defendant took charge of the post-office, which was in the year 1818, written communications and notices for the defendant were sometimes left at the before-mentioned store, or at the dwelling part of the house; *130] *that the witness sometimes directed the persons bringing such notices to take them into the house, and sometimes he took them at the store, and then, unless when he forgot to do so, as he sometimes did, he delivered them to the defendant; that after his father took the post-office, the witness, if such notices or communications had been left at his store, in the presence of the witness, would have directed the bearer of them to take them to the post-office, or, if he were going there, would have taken them himself; and that if he had done so, he would, unless he forgot it, have delivered them to the defendant; but he had no recollection of any such fact having occurred. That when the defendant took charge of the post-office, that became the place where his notices, communications, &c., were usually left, and where he transacted his business, both private and official, as postmaster and magistrate. The witness had no recollection of ever having seen or known of any notices being left at his store, of the protest of the notes now in suit. That the store never was, before or after the defendant took the post-office, his place of business, or the place appointed for the delivery of notices or other communications for the defendant.

After the above evidence was given, the defendant's counsel prayed the court to instruct the jury, that if they found, from the evidence, that the said notices were left at the store of James Corcoran, occupied by him, separately from the dwelling part of the house occupied by the defendant, as stated in the evidence; the notice was not sufficient to charge the defendant in this action, and that the jury, on the said evidence, ought to find for the defendant on the first issue; which instruction the court gave.

The plaintiffs then prayed the court to instruct the jury, that if they find from the evidence, that notwithstanding the notices were left at the room occupied as a store by James Corcoran, yet that the said store was the place where notices for the defendant were generally left, and that the notices in regard to these notes were duly received by the defendant; then, their being so left at the said store does not defeat the plaintiff's right to recover, provided, the defendant received the said notices in due time; and *131] that the said *papers read in evidence by the plaintiffs, and signed and given to them by the defendant, as above stated, are competent evidence from which the jury may infer that the defendant did duly receive such notices. This instruction the court refused to give; to which refusal,

as also to the giving of the instruction prayed by the defendant's counsel, the exception was taken by the counsel for the plaintiffs.

The only question which the case presents is, whether such notice was given of the non-payment of the note on which this suit was brought, as the law requires to charge an indorser? It is not pretended, that it was given to the defendant personally, either verbally or in writing, or that a written notice was left at his dwelling-house or place of business, or that the holders of the note were prevented from giving the notice, at any time, by the absence or fault of the defendant. His place of residence, and the way by which access to it was to be gained, was known to the notary; and it is quite improbable, that he was ignorant of the place at which he transacted both his private and public business.

The inquiry is then narrowed down to the sufficiency of a notice left at the store of James Corcoran, a son of the defendant, with which the defendant had no concern, and which was not his place of business. The store of the son was as distinct and separate from the dwelling of the father, as if they had been under different roofs. The former was entered from the street, the latter from an alley or passage; and it does not appear, that there was any inside communication between the two. Overlooking, for the present, the circumstance that the notary had been in the habit of leaving notices for the defendant at the store, it must be admitted, that the service of the notice in question at the store was no more a compliance with the requisition of law, than if it had been delivered to the son, in the street or elsewhere, or left at his dwelling-honse.

Is the case then altered by the circumstance just mentioned? We think not. It seems, from the evidence, that the store never was, at any period, the place appointed for the delivery of notices or other communications to the defendant. But if it had been, the note in question came to *matur- [*132
ity, some time in the month of July 1819, and the proof was, that the defendant took charge of the post-office some time in the year 1818; after which, that became the place at which notices and other communications to him were usually left, and where he transacted both his private and public business. Were it to be admitted, that the service of a notice, at a place not appointed by the defendant as the one at which notices to him were to be delivered, would be sufficient in law to charge him, upon the ground, that other notices had been previously left at the same place; it would surely be too extravagant, to contend, that a service at the same place would be legal, after another place had been appointed for that purpose, and where they had in point of fact been usually left. It is unnecessary to pursue this inquiry further; because, although the sufficiency of the service of the notice generally was insisted upon by the counsel for the plaintiff in error, in argument, yet the instruction asked for by the plaintiff in the court below placed its validity not merely upon the circumstance that the store was the place where notices for the defendant were generally left; but upon the additional and stronger one, that the notice in this case was duly received by the defendant.

Now, it must be admitted, that if the hypothesis that the notice in this case, though left at an improper place, was nevertheless in point of fact received, in due time, by the defendant, were proved, or could from the evidence in the cause be properly presumed by the jury, it was sufficient in

point of law to charge him. In the case of *Ireland* v. *Kip*, 10 Johns. 490, 11 Ibid. 231, it was decided, that admitting a service of notice at the house in Frankfort street, where the defendant had directed his letters to be left by the letter-carriers, would have been good and equivalent to service at his dwelling or counting-house; still, the notice, though improperly put into the post-office, would be sufficient; if it were accompanied by proof that it had actually been delivered at the dwelling-house of the indorser, or at the house in Frankfort street. But in the present case, there was not a *scintilla* *133] of direct *or positive proof, that the notice in question ever reached the person, the dwelling-house, or place of business of the defendant, and the court was called upon by the plaintiffs' counsel to instruct the jury, that the papers which they had given in evidence were competent evidence from which the jury might infer that the defendant did duly receive the said notice. Was the court wrong in refusing to give this instruction?

Presumptions from evidence given in a cause, of the existence of particular facts, are, in many, if not in all cases, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or be such as cannot fairly warrant a jury in presuming it, the court is so far from being bound to instruct them that they are at liberty to presume it, that they would err in giving such instruction. For why give it, when it is manifest, that if the jury should find their verdict upon the fact so deduced, it would be the duty of the court to set it aside, and to direct a retrial of the cause?

Let us now see what were the papers which the plaintiffs had given in evidence, which the court were called upon to declare to the jury were competent evidence, from which the jury might make the inference insisted upon. The first is the letter of the defendant, dated the 8th of May 1822, and addressed to the cashier of the Bank of Columbia, in which he declares, that he will not take any advantage of the limitation act, for his indorsement on this and another note; the blank authority sent to the defendant by the cashier of the bank of the United States, on the 14th of December 1824, for the signatures of the defendant and of the maker of the notes, purporting to empower some attorney to docket suits against them on these notes; with a declaration indorsed thereon by the defendant, that if the maker of the notes should not be able to satisfy the bank, before court, and they should determine to bring suit, he would instruct a particular person to docket the case for him.

Let it be admitted, that these papers bound the defendant to abstain from making a particular defence to which the law entitled him, and to cause the action intended to be commenced against him to be docketed, so *134] as not to delay the *plaintiffs, could the jury from thence infer, with any legal propriety, either that the necessity of proving notice of the non-payment of the notes would be dispensed with, or the fact that the notice left at the store of James Corcoran was received by the defendant at any time, much less in due time? If this was a question of inference, fit to be submitted to the discretion of the jury; it seems to the court, that the rules respecting this subject, which have been laid down with so much care, would no longer be fixed and certain, but would change with the varying conclusions which a jury might draw of the fact, from evidence however slight given to prove it. What, for example, does the rule, that

notice must, in certain cases, be served personally upon the indorser, or be left at his dwelling-house or place of business, signify, if a jury may, from any evidence, however remote from the fact, presume that the notice, though left at any other place, may have found its way to the hands of the person whom it was intended to charge?

It was insisted by the counsel for the plaintiffs, that the evidence above noticed, and alone relied upon, in the instruction asked for to warrant the inference, was strengthened by the circumstance of the connection between the defendant and the owner of the store, where the notices for the former were sometimes left. But if this circumstance stood alone in the case, and a notice delivered to the son, who was not a member of the father's family, would not be a legal notice, nor competent to warrant a presumption that it had reached the father, which it unquestionably would not, the question cannot be affected by its being thrown in as a make-weight with other circumstances in themselves insufficient to justify the conclusion.

In the case of *Ireland* v. *Kip*, the circumstances to induce a presumption that the notice reached the defendant were certainly as strong as they could well be. The letter-carrier was directed to leave all letters for the defendant, at a certain house in Frankfort street. The carrier called at the post-office, three or four times every day, and took out and delivered all letters left there; and the defendant usually *sent or called every day at that house for his letters. Upon the second trial of this [*135 cause, the plaintiffs insisted, upon the above evidence, that the jury had a right to presume that the notice in qnestion had been duly received by the defendant. But the Chief Justice, who tried the cause, instead of leaving it to the jury to make this presumption, overruled the whole of the evidence offered by the plaintiffs, and directed a nonsuit. When the case came before the supreme court, it was there stated by the judge who delivered the opinion, that it would be extremely embarrassing to suffer the rule to fluctuate, by making exceptions which would lead to uncertainty, and that it was of the utmost importance in mercantile transactions, to have a certain and stable rule in relation to notices—in which sentiments, this court entirely concur. That court finally decided, that, as it did not appear that the notice was left at the defendant's place of business in Frankfort street, and it did appear that he resided in the city, the nonsuit was correct. If this case be law, as to which we are not now called upon to give an opinion, it is in point upon the very question now under consideration.

If the court below then committed no error in refusing to give the instructions asked for by the plaintiff's counsel, they were right in giving that which was prayed for by the defendant's counsel, which merely affirmed that the notice left at the store of James Corcoran, occupied by him separately from the dwelling part of the house occupied by the defendant; if the facts were so found by the jury, were not sufficient to charge the defendant, and that on the said evidence they ought to find for the defendant on the first issue.—It is the opinion of this court, that the judgment of the court below ought to be affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in

and for the county of Washington, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*136] *Daniel and Joseph Jackson, Plaintiffs in error, *v.* John Twentyman.

Jurisdiction.

The 11th section of the act of 1789, must be construed in connection with, and in conformity to, the constitution of the United States; by this latter, the judicial power does not extend to private suits in which an alien is a party, unless a citizen be the adverse party; and it is indispensable, to aver the citizenship of the defendants, to show, on the record, the jurisdiction of the court.

This cause was brought before the court by a Writ of Error to the Circuit Court of the Southern Circuit of New York.

The description of the parties on the record was "John Twentyman, a subject of the king of Great Britain *v.* Daniel and Joseph Jackson;" no citizenship of the defendants being averred.

The question was, whether the circuit court, under the 11th section of the judiciary act of 1789, ch. 20, which gives jurisdiction, among other cases, "where an alien is a party," had jurisdiction of the cause, without an averment in the record of the citizenship of the defendants.

Taylor, for the plaintiffs in error, argued, that the judgment of the circuit court should be reversed, citing *Bingham* v. *Cabot*, 3 Dall. 382; *Hodgson* v. *Bowerbank*, 5 Cranch 303; *Sullivan* v. *Fulton Steamboat Company*, 6 Wheat. 450.

The Court were of opinion, that the 11th section of the act must be construed in connection with, and in conformity to, the constitution of the United States. That, by the latter, the judicial power was not extended to private suits, in which an alien is a party, unless a citizen be the adverse party. It was indispensable, therefore, to aver the citizenship of the defendants, in order to show, on the record, the jurisdiction of the court. The omission so to do was fatal, and according to the known course of the decisions of the court, the judgment of the circuit court must be reversed, for want of jurisdiction.

Judgment reversed.

*John P. Van Ness and Marcia, his wife, Plaintiffs in error, v. Perez Pacard, Defendant in error.

Waste.—Fixtures.—Common law.—Demise.—Charge of the court.

Action on the case, against the defendant, for waste committed by him, while tenant of the plaintiff, the owner of the reversionary interest, by pulling down and removing from the demised premises, a dwelling-house erected thereon, and attached to the freehold; the question raised in the case was, what fixtures erected by the tenant, during his term, are removable by him.

The general rule of the common law undoubtedly is, that whatever is once annexed to the freehold, becomes part of it, and cannot be afterwards removed, except by him who is entitled to the inheritance. This rule, however, never was inflexible, and without exceptions; it was construed most strictly between executor and heir, in favor of the latter, and more liberally between tenant for life and in tail, and remainder-man or reversioner, in favor of the former, and with much greater latitude between landlord and tenant, in favor of the tenant. A more extensive exception to the rule has been, of fixtures erected for the purpose of trade; fixtures which were erected to carry on trade and manufactures were, from an early period of the law, allowed to be removed by the tenant, during his term, and were deemed personalty, for many other purposes.[1] p. 143.

The common law of England is not to be taken in all respects to be that of America; our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.[1] p. 144.

It might deserve consideration, whether, if the rule of the common law of England, which prohibits the removal of fixtures erected by the tenant for agricultural purposes, were not previously adopted in a state, by some authoritative practice or adjudication, it ought to be assumed by this court, as a part of the jurisprudence of such state, upon the mere footing of its existence in the common law. p. 145.

The question whether fixtures erected for the purposes of trade, are or are not removable by the tenant, does not depend upon the form or size of the building; whether it has a brick foundation or not, or is one or two stories high; or has a brick or other chimney; the sole question is, whether it is designed for the purposes of trade, or not? p. 146.

If the house were built principally for a dwelling-house for the family, independently of carrying on a trade, then it would, doubtless, be deemed a fixture, falling under the general rule, and irremovable; but if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is, within the exception. p. 147.

Every demise between landlord and tenant, in respect to matters in which the parties are silent, may fairly be open to explanation by the general usage and custom of the country, or of the district where the land lies; every person, under such circumstances, is supposed to be conusant of this custom, and to contract with a tacit reference to it. p. 148.

A court cannot be required to give an instruction to the jury as to the relation, right and credibility of the testimony adduced by the parties in a cause.[3] p. 149.

*Error to the Circuit Court of the District of Columbia and county of Washington. [*138

The plaintiffs in error instituted their action of trespass on the case, in the court below, to recover damages for the removal of certain buildings from a lot of ground, in the city of Washington, the property of the plaintiffs; which had been leased to the defendant, by the plaintiffs, for a term

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[1] S. P. Krouse *v.* Ross, 1 Cr. C. C. 368; Devin *v.* Dougherty, 27 How. Pr. 455. And see Thropp's Appeal, 70 Penn. St. 395.

[2] Wheaton *v.* Peters, 3 Pet. 591; Bogardus *v.* Trinity Church, 4 Paige 478; s. c. 15 Wend. 111; Lowber *v.* Wells, 13 How. Pr. 454.

[3] The weight of the evidence is exclusively for the jury, and not for the judge, to pass upon; the judge may express his opinion upon the subject, and in cases where the jury are likely to be influenced by their prejudices, it is well for him to do so, but it is entirely in his discretion. Insurance Co. *v.* Rodel, 95 U. S. 238, and cases there cited.

of years, reserving a rent. The jury gave a verdict in favor of the defendant.

Upon the trial of this cause, the plaintiffs gave in evidence to the jury an indenture of lease, between them and the defendant, for a lot of ground, in the city of Washington, for a term of years, reserving a certain rent, with the privilege to purchase out the fee, at a stipulated sum; and offered evidence to the jury to prove, that after the defendant had taken possession of the land described in the lease, he erected thereon a building, two stories high in front, with a cellar of stone or brick, and a shed of one story; and that the principal building, which had a brick chimney, rested upon this stone or brick foundation. That the defendant was a carpenter by trade, and resided in the house, from the commencement of his lease to about the period of its expiration, and that, before the term had expired, he took down and removed the said house from off the premises.

The defendant gave evidence, that, upon obtaining the said lease, he erected the building, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in his said business; and that the cellar, in which was a spring, was made and used exclusively for a milk cellar; that in the upper part of the house were kept, and scalded and washed, the utensils of his said business; and that that part was also occupied as a dwelling for his family; that he was also a carpenter, and had tools and two apprentices in the house, and a work-bench out of doors; and that he worked in said house, at his trade of a carpenter; that the house was in a rough, unfinished state, and made partly of old materials; and that he also erected on said lot a stable for his cows, of plank and timber, fixed upon posts fastened into the ground; and that the stable
*139] *was pulled down and removed, at the same time with the principal building. Upon this evidence, the counsel for the plaintiffs prayed the instructions of the court to the jury, that if they should believe the same to be true, the defendant was not justified in removing the house from the premises; and that he was liable in this action to the plaintiffs, for the value of the house; which instruction the court refused to give.

The defendant also offered evidence to prove, that a usage and custom existed in the city of Washington, which authorized a tenant to remove any building which he might erect upon leased premises; provided the same was removed before the expiration of the term. Upon this evidence, the counsel for the plaintiffs asked from the court instructions to the jury, that the same was not competent to establish the fact, that a general usage did exist in the city of Washington, which authorized a tenant to remove such a house as that which had been erected by the defendant; nor was it competent for the jury to infer from the evidence, that such a usage existed. These instructions were refused by the court.

The plaintiffs then gave evidence, by the examination of a number of persons, who, as owners of real property in the city of Washington, were claimed to know all that appertained to it; to show that the usage, under which the defendant asserted a right to remove the buildings erected by him, did not exist; and thereupon, moved the court to instruct the jury, that upon the evidence, it was not competent for them to find a usage or custom of the place, by which the defendant could be justified in recovering the house in question; and that there being no such usage, the plaintiffs were

entitled to a verdict for the value of the house which the defendant pulled down and destroyed. The instructions were also refused.

The plaintiffs, by their bill of exceptions, presented the whole of these matters for the consideration of this court.

Coxe, for the plaintiff, contended, that the court erred in giving and refusing the instructions. The question *in this case is one of great [*140
interest to the owners of property in the city of Washington. The evidence offered by the defendant was insufficient to establish a usage; and if, upon such testimony, a usage can be made out, there is no safety to any owner of property. To establish a usage, the evidence must be clear and certain, and uncontradicted; and the court should take care to apply this principle, whenever a usage is claimed; as, when it has been established, it becomes the law of all cases under similar circumstances. The principles of law relative to usage are settled in 1 Gallis. 444; *Collings* v. *Hope*, 3 W. C. C. 149.

It cannot be contended, that the building could be recovered by the defendant, upon the principles which courts have established in favor of trade. No case can be found, in which a building fixed to the freehold was allowed to be taken away. All the adjudged cases go to the extent of permitting instruments and machinery used for the purposes of trade, to be carried away, but nothing more. The freehold is never to be injured, and must always be left in the condition it was when the lease commenced. 3 East 35; Woodfall's Landlord and Tenant 223. This building was erected for the accommodation of the family of the defendant. It could not, therefore, be considered as required for the trade of the defendant; nor was it appropriated to a particular trade; the defendant being a carpenter, and also employing himself in vending milk.

Barrett and *Jones*, for the defendant, argued: 1. That independent of the benefit from the usage, which was set up as matter of defence, the buildings removed from the premises were erected and used by the tenant for the purposes of his trade, and he had, therefore, a right to remove them, under the general law of landlord and tenant. 2. The usage of the city of Washington, which was fully proved, recognises the right of tenants to remove buildings put up by them, on lots which, before the lease, were in an unimproved state. 3. The instructions given by the court, and their refusal *to instruct the jury as required by the counsel for the plain- [*141
tiffs, were correct.

In support of the first point, were cited 1 H. Bl. 258; 2 East 88; *Elwes* v. *Maw*, 3 Ibid. 37; 7 Johns. 227; 20 Ibid. 30. In the English cases, a distinction is taken between fixtures or buildings for agricultural purposes, and those for trade. The distinction, upon a fair view of those cases, cannot be sustained. The principles which have always been applied in those cases to trade, may be as well applied to agriculture. In the city of Washington, where there is, and for a long period will be, a large space upon which no buildings will be placed, the application of more liberal principles than those found in the English cases is proper and necessary. Woodfall's Landlord and Tenant 224; Bull. N. P. 34.

The court properly submitted the question of usage to the jury. It was regularly a question for them. Had the court prescribed a rule which would

have taken from the jury the question of usage, it would have been error; but here, whether the usage was proved, was submitted, and correctly.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, sitting for the county of Washington. The original was an action on the case, brought by the plaintiffs in error, against the defendant, for waste committed by him, while tenant of the plaintiffs, to their reversionary interest, by pulling down and removing from the demised premises, a messuage or dwelling-house erected thereon and attached to the freehold. The cause was tried upon the general issue, and a verdict found for the defendant, upon which a judgment passed in his favor; and the object of the present writ of error is to revise that judgment.

By the bill of exceptions, filed at the trial, it appeared, that the plaintiffs, in 1820, demised to the defendant, for seven years, a vacant lot, in the city of Washington, at the yearly rent of $112.50, with a clause in the lease, that the defendant should have a right to purchase the same, at any *time during the term, for $1875. After the defendant had taken pos- *142] session of the lot, he erected thereon a wooden dwelling-house, two stories high in front, with a shed of one story, a cellar of stone, or brick foundation, and a brick chimney. The defendant and his family dwelt in the house from its erection, until near the expiration of the lease, when he took the same down, and removed all the materials from the lot. The defendant was a carpenter by trade; and he gave evidence, that upon obtaining the lease, he erected the building above mentioned, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in his said business; and that the cellar, in which there was a spring, was made and exclusively used for a milk cellar, in which the utensils of his said business were kept and scalded, and washed and used; and that feed was kept in the upper part of the house, which was also occupied as a dwelling for his family. That the defendant had his tools as a carpenter, and two apprentices, in the house, and a work-bench out of doors; and carpenter's work was done in the house, which was in a rough unfinished state, and made partly of old materials. That he also erected on the lot a stable for his cows, of plank and timber, fixed upon posts fastened into the ground, and which stable he removed with the house before the expiration of his lease. Upon this evidence, the counsel for the plaintiffs prayed for an instruction, that if the jury should believe the same to be true, the defendant was not justified in removing the said house from the premises; and that he was liable to the plaintiffs in this action. This instruction the court refused to give; and the refusal constitutes his first exception.

The defendant further offered evidence to prove, that a usage and custom existed in the city of Washington, which authorized a tenant to remove any building which he might erect upon rented premises, provided he did it before the expiration of the term. The plaintiffs objected to this evidence; but the court admitted it. This constitutes the second exception. Testimony was then introduced on this point, and after *the examination of the witnesses by the defendant, the plaintiffs *143] prayed the court to instruct the jury, that the evidence was not com-

petent to establish the fact, that a general usage had existed or did exist in the city of Washington, which authorized a tenant to remove such a house as that ereected by the tenant in this case ; nor was it competent for the jury to infer from the said evidence that such a usage had existed. The court refused to give this instruction, and this constitutes the third exception.

The counsel for the plaintiffs then introduced witnesses to disprove the usage ; and after their testimony was given, he prayed the court to instruct the jury, that upon the evidence given as aforesaid in this case, it is not competent for them to find a usage or custom of the place, by which the defendant could be justified in removing the house in question ; and there being no such usage, the plaintiffs are entitled to a verdict for the value of the house which the defendant pulled down and destroyed. The court was divided and did not give the instruction so prayed ; and this constitutes the fourth exception.

The first exception raises the important question, what fixtures erected by a tenant during his term are removable by him ? The general rule of the common law certainly is, that whatever is once annexed to the freehold, becomes part of it, and cannot afterwards be removed, except by him who is entitled to the inheritance. The rule, however, never was, at least, so far back as we can trace it in the books, inflexible, and without exceptions. It was construed most strictly between executor and heir, in favor of the latter ; more liberally, between tenant for life or in tail and remainder-man or reversioner, in favor of the former; and with much greater latitude, between landlord and tenant, in favor of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant, during his *term, and were deemed personalty, for many other purposes. The principal cases are collected and reviewed by Lord [*144 Ellenborough in delivering the opinion of the court, in *Elwes* v. *Maw*, 3 East 38 ; and it seems unnecessary to do more than to refer to that case for a full summary of the general doctrine, and its admitted exceptions, in England. The court there decided, that in the case of landlord and tenant, there had been no relaxation of the general rule, in cases of erections solely for agricultural purposes, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant, they became a part of the realty, and could never afterwards be severed by the tenant. The distinction is certainly a nice one between fixtures for the purposes of trade, and fixtures for agricultural purposes ; at least, in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate. But that point is not now before us ; and it is unnecessary to consider what the true doctrine is, or ought to be, on this subject. However well settled it may now be in England, it cannot escape remark, that learned judges, at different periods, in that country, have entertained different opinions upon it, down to the very date of the decision in *Elwes* v. *Maw*, 3 East 38.

The common law of England is not to be taken, in all respects, to be that

of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted, only that portion which was applicable to their situation. There could be little or no reason for doubting, that the general doctrine as to things annexed to the freehold, so far as it respects heirs and executors, was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved, by withdrawing from the heir those things, which his ancestor had chosen to leave annexed to the inheritance. But between landlord and tenant, it is not so clear, that the rigid rule of the common law, at least, as it is expounded in 3 East 38, *was so applicable to their situation, as to give rise to *145] necessary presumption in its favor. The country was a wilderness, and the universal policy was, to procure its cultivation and improvement. The owner of the soil, as well as the public, had every motive to encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value, if he was to lose his whole interest therein, by the very act of erection? His cabin or log-hut, however necessary for any improvement of the soil, would cease to be his, the moment it was finished. It might, therefore, deserve consideration, whether, in case the doctrine were not previously adopted in a state, by some authoritative practice or adjudication, it ought to be assumed by this court as a part of the jurisprudence of such state, upon the mere footing of its existence in the common law. At present, it is unnecessary to say more, than that we give no opinion on this question. The case which has been argued at the bar may well be disposed of, without any discussion of it.

It has been already stated, that the exception of buildings and other fixtures, for the purpose of carrying on a trade or manufacture, is of very ancient date, and was recognised almost as early as the rule itself. The very point was decided in 20 Hen. VII. 13 *a*, *b*, where it was laid down, that if a lessee for years made a furnace for his advantage, or a dyer made his vats or vessels to carry on his occupation, during the term, he may afterwards remove them. That doctrine was recognised by Lord Holt, in *Poole's Case*, 1 Salk. 368, in favor of a soap-boiler, who was tenant for years: he held, that the party might well remove the vats he set up in relation to trade; and that he might do it by the common law (and not by virtue of any custom), in favor of trade, and to encourage industry. In *Lawton* v. *Lawton*, 3 Atk. 13, the same doctrine was held, in a case of a fire-engine, set up to work a colliery, by a tenant for life. Lord Hardwicke there said, that since the time of Henry VII., the general ground the courts have gone upon, of relaxing the strict construction of law is, that it is for the *benefit of the public, to encourage tenants for life to do what is *146] advantageous to the estate, during the term. He added, "one reason which weighs with me is, its being a mixed case, between enjoying the profits of the land, and carrying on a species of trade; and in considering it in this light, it comes very near the instances in brewhouses, &c., of furnaces and coppers." The case, too, of a cider-mill, between the executor and heir, &c., is extremely strong, for though cider is a part of the profits of the real estate, yet, it was held by Lord Chief Baron Comyn, a very able com-

mon lawyer, that the cider-mill was personal estate notwithstanding, and that it should go to the executor. "It does not differ it, in my opinion, whether the shed be made of brick or wood, for it is only intended to cover it from the weather and other inconveniences." In *Penton* v. *Robart*, 2 East 88, it was further decided, that a tenant might move his fixtures for trade, even after the expiration of his term, if he yet remained in possession; and Lord KENYON recognised the doctrine in its most liberal extent.

It has been suggested at the bar, that this exception in favor of trade, has never been applied to cases like that before the court, where a large house has been built, and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is, whether it is designed for purposes of trade or not? A tenant may erect a large as well as a small messuage, or a soap-boilery of one or two stories high, and on whatever foundations he may choose. In *Lawton* v. *Lawton*, 3 Atk. 13, Lord HARDWICKE said (as we have already seen), that it made no difference, whether the shed of the engine be made of brick or stone. In *Penton* v. *Robart*, 2 East 88, the building had a brick foundation, let into the ground, with a chimney belonging to it, upon which there was a superstructure of wood; yet the court thought the building removable. In *Elwes* v. *Maw*, 3 East 37, Lord ELLENBOROUGH expressly stated, that there was no difference between the building covering any fixed engine, *utensils, and the latter. The only point is, whether it is accessory to carrying on the [*147 trade or not. If *bonâ fide* intended for this purpose, it falls within the exception in favor of trade. The case of the Dutch barns, before Lord KENYON, is to the same effect.(*a*)

Then, as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling-house for the family, independently of carrying on the trade, then it would, doubtless, be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades, which cannot be carried on well, without the presence of many persons, by night as well as by day. It is so, in some valuable manufactories. It is not unusual, for persons employed in a bakery to sleep in the same building. Now, what was the evidence in the present case? It was, "that the defendant erected the building before mentioned, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business." The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operations of this trade.

Surely, it cannot be doubted, that in a business of this nature, the immediate presence of the family and servants was, or might be, of very great utility and importance. The defendant was also a carpenter, and carried on his business, as such, in the same building. It is no objection,

(*a*) Dean *v.* Allalley, 3 Esp. 11; Woodfall's Landlord and Tenant 219.

that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and unless we were prepared to say (which we are not), that the mere fact, that the house was used for a dwelling-house, as well as for a trade, superseded the exception in favor of the latter, there is no ground to declare, that the tenant was not entitled to remove it. At most, it would be deemed only a mixed *case, analogous in principle *148] to those before Lord Chief Baron COMYN and Lord HARDWICKE; and therefore, entitled to the benefit of the exception. The case of *Holmes* v. *Tremper*, 20 Johns. 29, proceeds upon principles equally liberal; and it is quite certain, that the supreme court of New York were not prepared, at that time, to adopt the doctrine of *Elwes* v. *Maw*, in respect to erections for agricultural purposes. In our opinion, the circuit court was right in refusing the first instruction.

The second exception proceeds upon the ground, that it was not competent to establish a usage and custom in the city of Washington, for tenants to make such removals of buildings, during their term. We can perceive no objection to such proof. Every demise between landlord and tenant, in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies. Every person, under such circumstances, is supposed to be conusant of the custom, and to contract with a tacit reference to it. Cases of this sort are familiar in the books; as, for instance, to prove the right of a tenant to a way-going crop.(*a*) In the very class of cases now before the court, the custom of the country has been admitted to decide the right of the tenant to remove fixtures.(*b*) The case before Lord Chief Justice TREBY turned upon that point.(*c*)

The third exception turns upon the consideration, whether the parol testimony was competent to establish such a usage and custom. Competent, it certainly was, if, by competent, is meant, that it was admissible to go to the jury. Whether it was such as ought to have satisfied their minds on the matter of fact, was solely for their consideration, open, indeed, to such commentary and observation, as the court might think proper, in its discretion, to lay before them for their aid and guidance. We cannot say, that they were not at liberty, by the principles of law, to infer from the evidence, the existence of the usage. The evidence might be somewhat *loose *and indeterminate, and so be urged with more or less effect *149] upon their judgment; but in a legal sense, it was within their own province to weigh it as proof of a usage.

The last exception professes to call upon the court to institute a comparison between the testimony introduced by the plaintiff, and that introduced by the defendant, against and for the usage. It requires from the court a decision upon its relative weight and credibility, which the court were not justified in giving to the jury in the shape of a positive instruction.

Upon the whole, in our judgment, there is no error in the judgment of the circuit court; and it is affirmed, with costs.

(*a*) 2 Starkie on Evidence, part 4, p. 453.
(*b*) Woodfall's Landlord and Tenant 218.
(*c*) Buller's Nisi Prius 34.

Boyce v. Anderson.

THIS cause came on to be heard, on a transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is the opinion of this court, that there is no error in the judgment of the said circuit court. Whereupon, it is considered, ordered and adjudged by this court, that the judgment of the circuit court in this cause be and the same is hereby affirmed, with costs.

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*ROBERT BOYCE, Plaintiff in error, *v.* PAUL ANDERSON, Defendant in error. [*150

Common carriers.

The law regulating the responsibility of common carriers, does not apply to the case of carrying intelligent beings, such as negroes; the carrier has not, and cannot have over them the same absolute control that he has over inanimate matter; in the nature of things, and in their character, they resemble passengers, and not packages of goods; it would seem reasonable, therefore, that the responsiblity of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods.[1] p. 155.

The law applicable to common carriers is one of great rigor; though to the extent to which it has been carried, and in the cases to which it has been applied, its necessity and its policy are admitted, yet it ought not to be carried further, or applied to new cases; it has not been applied to living men, and it ought not to be. p. 155.

The ancient rule of the law of carriers, that the carrier is liable only for ordinary neglect, does not apply to the conveyance of slaves. p. 166.

ERROR to the Circuit Court of Kentucky. The case was submitted to the court, on the part of the counsel for the plaintiff in error, *Rowan*, upon the following brief.

This was an action in the court below, against defendants in error, owners of the steamboat Washington, to recover from them the value of four slaves, the property of the plaintiff, who, he alleged, were delivered to the commandants of said boat, to be carried thereon, and who, he alleged, were drowned, by the carelessness, negligence, neglect or mismanagement of the captain and commandants of the said steamboat. The declaration contained two counts, which are in the ordinary form. Plea not guilty, and joinder in the usual form.

Upon the trial of the cause, the following bill of exceptions was signed by the judges, viz: "Be it remembered, that at the trial of this cause, the plaintiff gave evidence, conducing to prove that the defendants were owners of the steamboat Washington. That the said boat Washington, by them, was used and employed, on the Mississippi and Ohio rivers, as a common carrier of property and passengers, for freight and reward. That the steamboat Teche, in *descending the Mississippi, with the plaintiff's agent, and the negroes mentioned in the declaration, and others on board, was blown up, and set on fire, and the passengers escaped from the burning Teche to the shore, about six miles below Natchez. That the steamboat Washington was ascending the Mississippi, and passed the burning Teche, and when she came opposite to them, the plaintiff's agent, the negroes, and others who had escaped from the Teche, were on shore; the [*151

[1] Clark *v.* McDonald, 4 McCord 233; Williams *v.* Taylor, 4 Porter (Ala.) 238.

agent of the plaintiff, with the negroes belonging to the plaintiff, was received into the yawl belonging to the defendants, a tender to the steamboat, for the purpose of conveying the negroes from the shore on the Mississippi to the steamboat, to be put on board the steamboat, and that the yawl was upset, the negroes in the declaration mentioned, were drowned; and evidence conducing to show that the yawl was upset by ill and imprudent management, in putting the steamboat in motion as the yawl approached, and before the passengers were on board the steamboat.

The defendants on their part gave evidence conducing to show, that these negroes and other persons, to the number of sixteen, had been passengers on board the steamboat Teche, which had taken fire, and the passengers had been put on shore, about six miles below Natchez, from said Teche, in her distress. That these passengers, including the negroes, were taken into the yawl of the steamboat Washington, from their distress, so as aforesaid, from motives of humanity, and without any view to reward, at the request of Captain Camphell, commanding the Teche, or of the agent of the plaintiff. That there was no agreement for hire, reward or freight; none was charged or received. That it was the custom of steamboats in the river not to claim passage-money or reward in such cases, from persons who were in distress, and unable to pay. And to repel the evidence of plaintiff, as to negligence, it appeared, that there was no contract in this case, between the agent of the plaintiff and the owners or officers of the steamboat, about reward; but the yawl was sent to shore and the passengers taken in, without any contract, or conversation, about the carriage, or about any reward. *The steamboat Teche, when she took fire, was descending. The steamboat Washington was ascending. Upon this evidence, the plaintiff moved the court to instruct the jury:

*152]

1. That if they find, from the evidence, that the defendants were owners of the steamboat, and by themselves, their officer, or servants of the boat, did actually receive into their yawl, the negroes of the plaintiff, to be carried from shore, on board the steamboat, they are responsible for neglect and imprudent management, notwithstanding no reward, or hire, or freight, or wages, were to have been paid by Boyce to defendants.

2. That if they find, from the evidence, that the steamboat Washington was owned by defendants, and used by them, on the river, as a common carrier, for wages and freight, and that the slaves of the plaintiff were actually received by the agents and servants of the defendants, on board of the yawl, of and belonging to the defendants, as a tender of the steamboat, to be carried from the land, and put on board the steamboat, to be therein carried and transported, that the defendants were bound to the most skilful and careful management; and if the slaves were drowned in consequence of any omission of such skilful and careful management by the agents and servants in the conduct and navigation of the boat and tender, the defendants are answerable to the plaintiffs for the value of the slaves.

3. That if the jury believe the evidence in this case, the defendants would have had a legal right to demand a reasonable compensation for their undertaking to transport said slaves on board their boat; and their afterwards waiving or declining that right, from motives of humanity, or any other motive, does not change or diminish their legal responsibility as common carriers for hire and reward.

The defendants moved the court, "to instruct the jury, that if they find from the evidence, that the slaves in controversy were taken on board of the yawl, at the instance and in pursuance of the request of the master of the Teche, from motives of humanity and courtesy alone, that the defendants are not liable, unless they shall be of opinion, that the slaves were lost through the gross neglect of the master of the steamboat, or the other servants or agents of the defendants." [*153

The court gave the first instruction moved by the plaintiff, with this qualification, "that gross negligence or unskilful conduct was required, to charge the defendants." The second and third instruction moved by the plaintiff, the court refused to give, and instructed the jury, "that the doctrine of common carriers did not apply to the case of carrying intelligent beings, such as negroes; but that the defendants were chargeable for negligence or unskilful conduct." The court gave the instructions asked for by the defendants.

It is believed and alleged, that the court erred in refusing to give the instructions required by plaintiff, and in giving those required by defendants; and especially, in instructing the jury that the doctrine of common carriers did not apply to the case.

The counsel for the defendants in error, *Bates*, stated, that the question in the cause was, whether the law of carriers applies to the transportation or conveyance of slaves. He contended, that in all its principles, the law did not and could not extend. The care which might be exercised over inanimate property, which could be disposed of for its security at the will of the carrier, was not to be exercised on human beings, with the powers and rights of locomotion, and of self-preservation, by different means from those which were enjoined on the carriers of merchandise. The responsibility of the carrier of slaves must, therefore, be limited.

Under the Roman law, the condition of slaves was essentially different from that of slaves here. In Rome, the power of life and death was vested in the master. Here, slaves have rights secured to them; they are protected by law, to a certain extent, from personal violence, their lives are under the guardianship of the law; and they have even some political power, as they are enumerated in the represented population of the United States. Slaves are here in a mixed character. The general doctrine of the law of carriers will not, therefore, *apply to them; but those principles which, by that law, impose obligations on the carrier not to suffer or commit [*154 gross negligence, do apply. The facts in this case do not establish gross negligence, and as the carriers of the boat were not bound for "the most skilful care," but only for "usual care," the plaintiff in error had no case.

The proposition in the second instruction is, that the owners of the steamboat Washington might have received a compensation for carrying the slaves from the shore to the boat. It is contended, that there was no contract, and Lord MANSFIELD has said, that no compensation is due for a voluntary courtesy. Upon the Mississippi, no compensation is ever given for carriage from the shore to the boat; and in this case, the obligations of humanity alone prompted those acts, from which the plaintiffs demand of this court that the owners of the Washington shall be made liable for the slaves lost

by the performance of gratuitous kindness. Such a decision would be against policy as well as against justice.

Marshall, Ch. J., delivered the opinion of the court.—This was an action brought in the court of the United States for the seventh circuit and district of Kentucky, against the defendants, owners, &c. There being no special contract between the parties in this case, the principal question arises on the opinion expressed by the court, "that the doctrine of common carriers does not apply to the case of carrying intelligent beings, such as negroes." That doctrine is, that the carrier is responsible for every loss which is not produced by inevitable accident. It has been pressed beyond the general principles which govern the law of bailment, by considerations of policy. Can a sound distinction be taken between a human being, in whose person another has an interest, and inanimate property?

A slave has volition, and has feelings which cannot be entirely disregarded; these properties cannot be overlooked, in conveying him from place to place. He cannot be stowed away as a common package; not only does *155] *humanity forbid this proceeding, but it might endanger his life or health. Consequently, this rigorous mode of proceeding cannot safely be adopted, unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not, and cannot have, the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods.

There are no slaves in England, but there are persons in whose service another has a temporary interest. We believe, that the responsibility of a carrier, for injury which such person may sustain, has never been placed on the same principle with his responsibility for a bale of goods. He is undoubtedly answerable for any injury sustained in consequence of his negligence or want of skill; but we have never understood, that he is responsible further. The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further, or applied to new cases. We think, it has not been applied to living men, and that it ought not to be applied to them.

The directions given by the court to the jury informed them, that the defendants were responsible for negligence or unskilful conduct, but not otherwise. Sir William Jones, in his Treatise on Bailments, p. 14, says, "When a contract is reciprocally beneficial to both parties the obligation hangs in an even balance; and there can be no reason to recede from the standard: nothing more, therefore, ought in that case to be required than ordinary diligence, and the bailee should be responsible for no more than ordinary neglect." In another place (p. 144), the same author says, "A carrier for hire ought, by the rule, to be responsible only for ordinary *156] neglect; and in the time of Henry *VIII., it appears to have been generally holden, that a common carrier was chargeable in case of a loss by robbery, only when he had travelled by ways dangerous for robbing, or driven by night, or at any inconvenient hour." This rule, as relates to

the conveyance of goods, was changed, as commerce advanced, from motives of policy. But if the court is right in supposing, that the strict rule introduced for general commercial objects, does not apply to the conveyance of slaves, the ancient rule "that the carrier is liable only for ordinary neglect," still applies to them.

If the slaves were taken on board the yawl, to be conveyed in the steamboat, solely in consequence of their distress, and from motives of humanity alone, no reward, hire or freight being to be paid for their passage, as the first prayer of the plaintiff and the prayer of the defendant suppose, the carrier would certainly be responsible only in a case of gross neglect; and the qualification annexed to this construction was correct. We think, that in the case stated for the instruction of the circuit court, the defendants were responsible for the injury sustained, only in the event of its being caused by the negligence or the unskilfulness of the defendants or their agents, and there is no error in the opinion given.

This cause came on to be heard, on a transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Julia Thompson, tenant, Appellant, *v.* Alice Tolmie and others, [*157 Appellees.

Decedents' estates.—Orphans' court sales.

It was assumed on the argument, by the counsel on both sides, that the circuit court of the county of Washington, in the district of Columbia, is vested with the same power in relation to intestates' estates in that county, that is possessed by a county court in Maryland over lands lying within the county. p. 162.

When the proceedings of a court of competent jurisdiction are brought before another court collaterally, they are by no means subject to all the exceptions which might be taken to them on a direct appeal; the general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears on the face of them, that the subject-matter was within the jurisdiction of the court, they are voidable only; the errors and irregularities of any suit are to be corrected by some direct proceedings, either before the same court to set them aside, or in an appellate court.[1] If there be a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no right, and afford no jurisdiction, and may be rejected when collaterally drawn in question. p. 163.

The act of the legislature of Maryland, relative to a devise of the real estates of intestates in certain cases, in directing the commissioners when to give deeds to purchasers, has this general provision—that the commissions and proceedings thereon shall be recited in the preamble of the deed. It certainly could not have intended, that the commission and all the proceedings, should be set out *in hæc verba;* if the substance of the proceedings be recited, it is sufficient. p. 167.

The law appears to be settled in the states, that courts will go far to sustain *bonâ fide* titles acquired under sales made by statutes regulating sales made by order of orphans' courts; where there has been a fair sale, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. p. 167.

The decision of this court in Elliott *v.* Peirsol, 1 Peters 240, was not intended to decide anything at variance with the principles established in this case. p. 168.

When the jurisdiction of the court, on the subject, under whose authority lands have been sold,

[1] Hall *v.* Law, 102 U. S. 461, and cases there cited.

appears on the face of the proceedings, its errors or mistakes, if any were committed, cannot be corrected or examined, when brought up collaterally. p. 158.

Tolmie *v.* Thompson, 3 Cr. C. C. 123, reversed.

APPEAL from the Circuit Court of the District of Columbia and county of Washington; where a verdict was taken for the appellees, subject to the opinion of the court upon the following agreed case.

"The plaintiff, to prove title to the premises (lot No. 14, in square No. 290, in the city of Washington), showed a title in Robert Tolmie, regularly deduced by sundry admitted mesne conveyances from David Burnes, one of *158] the *original proprietors of city property, duly executed, and acknowledged and recorded, to the said premises, accompanied by possession thereof and payment of taxes thereon, by the several grantees, according to the titles, down to the year 1805; when the said Robert Tolmie, the last grantee in whom the said title had vested, departed this life, intestate, leaving Margaret, Alice and James Tolmie, his only three children and heirs-at-law, infants, at the time of his death, under the age of 21 years; that the said infants continued in possession of said premises, until some time in the year 1814; that Margaret was the eldest of said infants, and that in the year 1812, she intermarried with one Francis Beveridge, and has since died, leaving three children, to wit, Margaret Beveridge, Hannah Beveridge and James Beveridge, who are named among the lessors of the plaintiff; that James Tolmie aforesaid also died, after the death of said Margaret, his sister, intestate, under age and unmarried, prior to the commencement of this suit, leaving Alice aforesaid, his sister, and the said three children of Margaret, his heirs-at-law. And the plaintiff also proved, that the said Margaret Tolmie was 17 years of age, at the time of her said marriage, which was in 1812, and was an infant under the age of 21 years, at the time of the sale made by the commissioners hereinafter named; that her husband, the said Francis Beveridge, some time in the year 1814 or 1815, went away, leaving his family residents of the city of Washington; that after some time, he returned and lived with his family, and again went away, and has never since returned, and is generally believed to be dead, by his family and friends; about three or four years ago, he was heard of, and was then sick, and has never been heard of since.

"The defendant has had possession of the premises since 1814, when she became the purchaser thereof (by her then name, Julia Kean), at a public sale made by certain commissioners appointed under the act of the assembly of Maryland of 1786, c. 45, to direct descents. She entered in pursuance of that sale, claiming the lot under it, and produced in evidence the proceedings of the commissioners, which are made part of the case agreed."

*That record contained a petition in the usual form, for partition *159] of the real estate of Robert Tolmie, which purported to be the joint petition of Francis Beveridge and Margaret his wife, and of Alice Tolmie and James Tolmie, infants, by Margaret Tolmie, their guardian, mother and next friend. It stated that Robert Tolmie died seised, leaving Margaret his widow, and also the following children, his heirs-at-law, viz: "Margaret, since intermarried with Francis Beveridge, said Alice Tolmie and James Tolmie, which said Alice and James are infants under the age of 21 years." This petition was filed on the 15th of June 1814, and a commission issued on the same day. On the 17th of June 1814, the commissioners reported

that the estate consisted of a single lot, and could not be divided without loss, &c., and valued the same at $1400. Whereupon, at June term 1814, the court ordered the property to be sold at public auction, on ten days' notice, one-fourth part of the purchase-money in cash, and the residue at three, six and nine months, taking bond with good security to the heirs, according to their several interests. On the 5th of July 1814, F. Beveridge and wife, and Alice and James Tolmie, by their mother, gave notice in writing, that they did not elect to take the property at the valuation. On the 3d of July 1818, the commissioners reported, that they had sold the property, on the 30th of June 1814, to the appellant, for $1105, on a credit of three, six and nine months, one-fourth being paid in cash, and that she gave due security for the payment of the purchase-money, all which has been duly paid; they, therefore, requested that the said sale might be ratified, and that they might be directed to distribute the proceeds, and make a conveyance to the purchaser. On the same 3d of July, the court "ordered that the report of the commissioners returned and filed in this cause be and the same is hereby ratified and confirmed, so soon as proper receipts of the parties are produced before one of the judges of this court, and that then the commissioners, or a majority of them, make a sufficient deed in fee to the purchaser." On the 13th of June 1816, the majority of the commissioners made a deed to the appellant, which recited, that by a decree of the circuit *court, sitting as a court of chancery, David Appler, &c., were appointed [*160 commissioners, and they, or a majority of them, were authorized and empowered to sell said lot, the real estate of Robert Tolmie, deceased; and that in pursuance of said decree, the said Appler, &c., did, on the 30th of July 1814, sell the same to the appellant, for $1070; that the said purchase-money had been paid, and that the said Appler, &c., were authorized and empowered by said decree to execute a conveyance of the same, and accordingly the said Appler, &c., conveyed said lot to the appellant and her heirs. The statutes are the acts of assembly of Maryland of 1786, c. 45, § 8; 1797, c. 114, § 6; and 1799, c. 49, §§ 3, 4.

This ejectment was brought by Alice Tolmie, and by the three infant children of her sister, Margaret Beveridge; who, since the death of the said Margaret and of the said James Tolmie, had claimed to be entitled to the lot, as heirs of the said Robert Tolmie. The defendant entered under, and relied on the commissioners' sale above, which the lessors of the plaintiff contended was void. 1. Because none of the heirs of Robert Tolmie had arrived at age, at the time of the sale; the act of 1786 expressly prohibiting a sale until the eldest was of age. 2. Because the sale was never ratified by the court. 3. Because bonds for the purchase-money were not taken payable to each representative, according to his proportionable part of the net amount of sales. 4. Because the deed does not recite the commission and all the necessary proceedings thereon to show a good title.

Wilde and *Jones*, for the appellant, argued: 1. That the sale of the property of Robert Tolmie was a judicial proceeding; made in a court of competent jurisdiction, acting as a court of chancery, and proceeding *in rem*, in the proper exercise of its authority; and was, therefore, conclusive upon all the world. *Gelston* v. *Hoyt*, 3 Wheat. 246. But if it were otherwise, the law is, that a sale made under an erroneous judgment, is always deemed

valid; and in Maryland, it has been held, that a decree in equity, for the sale of lands, to pay debts, or for distribution, is a *proceeding *in rem*, and cannot be questioned. 6 Har. & Johns. 23. The principle of law is, that if the jurisdiction of the court attaches to the subject-matter, the proceeding cannot be examined in a collateral manner in another court. If error exist in the proceedings, by the ministerial acts of those who are the agents of the court in the same; although it is admitted those acts should not be strictly conformable to the law of the proceeding, those errors can only be examined before the tribunal from which the authority of the agents emanated. So far as the purchaser of an estate is concerned, it is entirely immaterial, whether the agents of the court did their duty; the only remedy is by application to the court. 8 Johns. 361; 1 Cow. 622; 13 Johns. 97. In those states where the sales of estates of intestates are under the authority of the courts of probate, the proceedings of such courts have been held conclusive. 4 Dall. 450; 1 Conn. 469; 4 Day 221. The purchaser is entitled to claim that all the proceedings shall be presumed to be regular; and if any were not so, proof of the irregularity should be given. When the court ratified this sale, the conclusion is, that before the same was done, all the intermediate steps had been examined, were approved, and were regular.

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Key, for the defendant, stated, that the title set up by the plaintiff, was derived from particular statutes of Maryland, and the validity of the sale depended on the conformity between the proceedings, and the requisites of the law. This had not been the course in the case before the court. He denied, that the sale was by a judicial decree of a court; but by commissioners, under the special statute. The sale having been irregular, was, therefore, invalid, on the authority of the cases in 4 Wheat. 79; 3 Cranch 321; 2 W. C. C. 382. The proceedings did not derive their authority from the general powers of the court; and the circuit court acted in this case under the special limited powers granted by the Maryland law. It was, therefore, necessary that all the facts *upon which the power was exercised should appear. Cowp. 528; 5 Har. & Johns. 42, 130; 1 Pet. 340; 6 Har. & Johns. 258. But if the commissioners had power to make the sale, the ratification of the same by the court is essential. No ratification was given, no receipts of the purchase-money produced; for the proper evidence of these, is their recital in the deed of conveyance.

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Thompson, Justice, delivered the opinion of the court.—This was an act of ejectment, brought in the circuit court of the district of Columbia, in the county of Washington, to recover possession of lot No. 14, in square No. 290, in the city of Washington. Upon the trial, the lessors of the plaintiff produced, and proved by sundry mesne conveyances, a title to the premises in question, from David Burnes, one of the original proprietors of city property, to Robert Tolmie, who, in the year 1805, died intestate. And it was also proved that the lessors of the plaintiff are the heirs-at-law of Robert Tolmie.

The defendant claimed title to the premises in question, under a purchase made at a commissioners' sale, by virtue of certain proceedings, had in the circuit court, pursuant to the provisions of the laws of Maryland relative to a division of the real estate of intestates in certain cases. Objections

were made to the validity of these proceedings, and a verdict taken for the plaintiff, subject to the opinion of the court upon a case agreed. The court below decided, that the commissioners' sale was void, and rendered judgment for the plaintiff for two-thirds of the premises in question, and the case comes now before this court upon a writ of error.

The case, in the circuit court, turned entirely upon questions arising upon the proceedings under which the sale was made. It was assumed on the argument, by the counsel on both sides, that the circuit court in which these proceedings were had, was vested with the same powers in this respect, in relation to intestates' estates in the county of Washington, that is possessed by a county court in Maryland on this subject, over lands lying within the county.

*The exceptions taken to the proceedings were, 1. Because none [*163
of the heirs of Robert Tolmie were of age at the time of the sale. 2. Because the sale was never ratified by the court. 3. Because bonds for the purchase-money were not taken, payable to each representative, according to his proportional part of the net amount of the sale. 4. Because the deed does not recite the commission and all the necessary proceedings thereon, to show a good title.

The counsel for the defendant in error have, in the argument, considered these proceedings open to the same examination and objections, as they would be in an appellate court, on a direct proceeding to bring them under review. This, however, is not the light in which we view the question now before us. These proceedings were brought before the court below, collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervising power of the court, and to receive its final ratification. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them, that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court, to set them aside, or in an appellate court. If there be a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no justification, and may be rejected, when collaterally drawn in question.

The first inquiry, therefore, is, whether it sufficiently appears, upon the face of these proceedings, that the court had jurisdiction of the subject-matter? The law of Maryland, under which they took place (act of 1786, ch. 45, § 8) declares, that in case the parties entitled to the intestate's estate cannot agree upon the division; or in case any person entitled to any part be a minor; application may be made to the court of the county where the estate lies, and *the court shall appoint and issue a commission to [*164
five discreet men, who are required to adjudge and determine whether the estate will admit of being divided, without injury and loss to all the parties entitled; and to ascertain the value of the estate. And if the estate can be divided, without loss or injury to the parties, the commissioners are required to make partition of the same. And if they shall determine that the estate cannot be divided without loss, they shall make return to the county court, of their judgment, and the reasons upon which

the same is formed; and also the real value of the estate. And if the judgment of the commissioners shall be confirmed by the county court, then the eldest son, child or persons entitled, if of age, shall have the election to take the whole of the estate, and pay to the others their just proportion of the value in money; and on the refusal of the eldest child, the same election is given in succession to the other children, or persons entitled, who are of age; and if all refuse, the estate is to be sold under the direction of the commissioners, and the purchase-money divided among the several persons entitled, according to their respective titles to the estate. But if all the parties entitled shall be minors, at the death of the intestate, the estate shall not be sold, until the eldest arrives to age, and the profits of the estate shall be equally divided in the mean time.

The principal objection raised to the title of the defendant below, and indeed, the only one that presents any difficulty is, that upon the trial of this cause, it was proved, that none of the heirs of Robert Tolmie had arrived at age, when the sale was made; and how far this will affect the sale, will depend upon the question, whether the proceedings on the partition, when brought up in this collateral way, were open to an inquiry into that fact. Did the jurisdiction of the court over the subject-matter of the proceedings depend upon that fact? or if true, was it matter of error, and to be corrected only on appeal?

It is to be borne in mind, that no such fact appears on the face of these proceedings; but on the contrary, from what is stated, it may reasonably be inferred, that it appeared *before the court, that one of the heirs *165] was of age. The petition presented to the court for the appointment of commissioners, and which was the commencement of the proceedings, in setting out the parties interested, states, that Robert Tolmie died intestate, leaving the following children and heirs-at-law, viz., Margaret, since intermarried with Francis Beveridge, and Alice Tolmie and James Tolmie, which said Alice and James are infants, under the age of twenty-one years. Why specially allege that these two were minors, if Margaret was also a minor? Every reasonable intendment is to be made in favor of the proceedings; and their allegation in the petition will fairly admit of the conclusion, that the petitioners intended to assert, that Alice and James only were under age. The age of the heirs was, at all events, a matter of fact upon which the court was to judge; and the law nowhere requires the court to enter on record the evidence upon which they decided that fact. And how can we now say, but that the court had satisfactory evidence before it, that one of the heirs was of age? If it was so stated in terms, on the face of the proceedings, and even if the jurisdiction of the court depended upon that fact; it is by no means clear, that it would be permitted to contradict it, on a direct proceeding to reverse any order or decree made by the court. But to permit that fact to be drawn in question, in this collateral way, is certainly not warranted by any principle of law.

But independent of these considerations, the jurisdiction of the court over the subject-matter of the proceedings sufficiently appears. It did not depend on the fact that one of the heirs was of age. But according to the express terms of the act, it attaches, when the ancestor dies intestate, and any of the persons entitled to his estate is a minor. The petition states that Robert Tolmie, late of the county of Washington, died intestate, seised in

fee of lot No. 14, in square No. 290, leaving Alice Tolmie and James Tolmie, two of his children, and heirs-at-law, under the age of one-and-twenty years. And whether Margaret Beveridge, his other child and heir, was of age or not, was immaterial, as it respected the jurisdiction of the court. That fact could only become *material, in case the land was not susceptible of a division, without injury or loss to the parties. If [*166 it could be divided without injury, the commissioners were required to divide it, although all the heirs were minors. The materiality of the inquiry, whether any one of the heirs was of age, was altogether contingent, and might never arise; and at all events, must depend upon the report of the commissioners, whether or not the property might be divided without injury. This must necessarily, therefore, be an inquiry arising in the course of the proceedings, and after the jurisdiction of the court attached.

With respect to the other exceptions, it would be difficult to sustain them, if the proceedings were before this court on a direct appeal. No more could be required than to set forth enough to show the jurisdiction of the court, and a substantial compliance with the requirements of the law. In June term 1814, the court confirmed the report of the commissioners, that the property would not admit of a division, and ordered a sale thereof; prescribing the terms, viz., one-fourth cash, and the other three-fourths on a credit of three, six and nine months, taking bonds, with good security, to the heirs, according to their several rights, bearing interest from the day of sale. On the 15th of June 1815, after the expiration of the time of credit, ordered by the court to be given, the commissioners report a sale of the lot to the defendant below for $1105, and that the purchase-money and interest had all been paid, and they request that the sale may be ratified, and they directed to distribute the money, and make a conveyance to the purchaser. It is objected, that it does not appear, that bonds were given to the heirs, according to the order of the court and the directions of the act of 1799. But this objection cannot certainly be considered of any importance, after the money had been paid by the purchaser, and the report ratified and confirmed by the court, and the commissioners directed to make a deed to the purchaser. But it is said, this was a conditional ratification, and not to take effect, until receipts from the parties entitled to the money were produced to one of the judges of the court. Suppose this is to be considered a conditional *ratification, and the purchaser not entitled to a deed, [*167 until the condition was performed. Where is the evidence that affords any inference that it was not performed? The receipts were to be produced to one of the judges of the court, and was not a matter which the court were afterwards to sanction or pass any order upon. It was not a judicial act, and would not, of course, be made matter of record. And the deed being afterwards given, affords a pretty fair inference that the order of the court had been complied with.

The last objection is, that the deed does not recite the commission, and all the necessary proceedings thereon, to show a good title. The act of 1799, in directing the commissioners when to give deeds to purchasers, has the general provision, that the commission and proceedings thereon shall be recited in the preamble of the deed. It certainly could not have been intended, that the commission and all the proceedings should be set out *in hæc verbâ;* and the substance of them is recited, which is all that could be

necessary. So that this exception is not well taken as to the matter of fact.

From this brief notice of the several objections which have been taken to these proceedings, it will be seen, that in the opinion of this court, the last three are unfounded, and could not be sustained, even on a direct appeal; and the first, although entitled to more consideration, cannot at all events, be raised, when the proceedings are collaterally drawn in question, as they were on the trial of this cause.

The Maryland cases cited in the argument, and reported by Harris & Johnson, Vol. 5, p. 42, 130, and Vol. 6, p. 156, 258, do not throw much light upon the particular questions drawn under examination in this case. Some of them, however, are very strong cases to show how far the courts of that state will go, to sustain *bonâ fide* titles acquired under sales made by virtues of these statutes. The rules which apply to, and govern titles acquired under sales made by order of orphans' courts and courts of probate, in the states where such regulations are adopted, are applicable to the case now before the court. The case of *McPherson* v. *Cunliff*, 11 Serg. & Rawle
*168] 429, was one of this description, and brought *under the consideration of the supreme court of Pennsylvania, the effect of a decree of the orphans' court, in matters within its jurisdiction, although founded in a mistake of facts. And in the discussion of that question, which is gone into very much at large, rules are laid down which have a strong bearing upon the present case. When there is a fair sale, say the court, and the decree executed by a conveyance from the administrator, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. After a lapse of years, presumptions must be made in favor of what does not appear. If the purchaser was responsible for the mistakes of the court, in point of fact, after they had adjudicated upon the facts, and acted upon them, these sales would be snares for honest men. The purchaser is not bound to look farther back than the order of the court. He is not to see, whether the court was mistaken in the facts of debts and children. That the decree of an orphans' court, in a case within its jurisdiction, is reversible only on appeal, and not collaterally in another suit.

In *Perkins* v. *Fairfield*, 11 Mass. 227, in the supreme judicial court of Massachusetts, it was held, that a title under a sale by administrators, by virtue of a license from the court of common pleas, was good against the heirs of the intestate, although the license was granted upon a certificate of the judge of probates, not authorized by the circumstances of the case. The court said, the license was granted by a court having jurisdiction of the subject. If that jurisdiction was improvidently exercised, or in a manner not warranted by the evidence before the probate court, yet it is not to be corrected at the expense of the purchaser; who had a right to rely upon the order of the court, as an authority emanating from a competent jurisdiction.

The case of *Elliott* v. *Peirsol*, 1 Peters 340, decided in this court, at the last term, has been referred to by the counsel for the defendant in error, as containing a doctrine that will let in every possible objection that can be
*169] made to these proceedings. The observation relied upon is, "but we cannot yield an assent *to the proposition, that the jurisdiction

of the county court could not be questioned, when its proceedings were brought collaterally before the circuit court." This remark was only in answer to the argument which had been urged at the bar, that the circuit court could not question the jurisdiction of the county court. That it was so intended is obvious, from what immediately follows. "We know nothing in the organization of the circuit courts of the Union, which can contradistinguish them from other courts in this respect." And the limitation upon the extent of the inquiry, when the proceedings are brought collaterally before the court, is explicitly laid down. "We agree, that if the county court had jurisdiction, its decisions would be conclusive. When a court has jurisdiction, it has a right to decide every question that occurs in the cause; and whether its decisions be correct or not, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought in opposition to them, even prior to a reversal."

This is clear and well-settled doctrine of the law, and applies to the case now before the court. The jurisdiction of the court (under whose order the sale was made) over the subject-matter, appears upon the face of the proceedings; and its errors or mistakes, if any were committed, cannot be corrected or examined when brought up collaterally, as they were in the circuit court.

The judgment of the court below must, accordingly, be reversed; and the record sent back, with directions to the court to enter judgment for the defendant.

Judgment reversed.

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*Thomas F. Townsley, Plaintiff in error, *v.* Joseph K. Sumrall, [*170
Defendant in error.

Bills of exchange.—Acceptance.—Protest.—Consideration.—Statute of frauds.

Bills of exchange, payable at a given time after date, need not be presented for acceptance at all; and payment may at once be demanded at their maturity. p. 178.

It is admitted, that in respect to foreign bills of exchange, the notarial certificate of protest is, of itself, sufficient proof of the dishonor of a bill, without any auxiliary evidence. p. 179.

It is not disputed, that, by the general custom of merchants of the United States, bills of exchange drawn in one state on another state, are, if dishonored, protested by a notary, and the production of such protest is the customary document of dishonor. p. 180.

If a person undertake to accept a bill, in consideration that another will purchase one already drawn, or to be thereafter drawn, and as an inducement to the purchaser to take it, and the bill is purchased upon the credit of such promise, for a sufficient consideration, such promise to accept is binding upon the party; it is an original promise to the purchaser, not merely a promise for the debt of another; and having a sufficient consideration to support it, in reason and justice, as well as in law, it ought to bind him. p. 181.

If A. says to B., pay so much money to C., and I will repay it to you, it is an original independent promise; and if the money be paid upon the faith of it, it has been always deemed an obligatory contract, even though by parol; because there is an original consideration moving between the immediate parties to the contract. p. 182.

Damages to the promisee constitutes as good a consideration as benefit to the promisor. p. 182.

In cases not absolutely closed by authority, this court has always expressed a strong inclination not to extend the operation of the statute of frauds, so as to embrace original and distinct prom-

ises, made by different persons, at the same time, upon the same general consideration.[1] p. 182.

It can make no difference in law, whether the debt for such a bill of exchange is taken, be a pre-existing debt, or money then paid for the bill; in each case, there is a substantial credit given by the party, to the drawer, upon the bill, and the party parts with his present rights, at the instance of the promisee, whose promise is substantially a new and independent one, and not a mere guarantee of the existing promise of the drawer. Under such circumstances, there is no substantial distinction, whether the bill be then in existence, or be drawn afterwards; in each case, the object of the promise is to induce the party to take the bill upon the credit of the promise. p. 182.

If the holder of a bill of exchange, at the time of taking it, knew that the drawee had not funds in his hands, belonging to the drawer, and took the bill on the promise of the drawee to accept it, expecting to receive funds from the drawer, the promise of the drawee to accept the bill, constitutes a valid contract between the parties, notwithstanding the failure of the drawer to place funds in his hands. The acceptance of the drawee of a bill, binds him, although it is known to the holder, that he has no funds in his hands; it is sufficient, that the holder trusts to such acceptance.[2] p. 183.

*171] *Error to the Circuit Court of Kentucky. This suit was originally instituted by Joseph K. Sumrall, in a state court of Kentucky, and afterwards, on the petition of Thomas F. Townsley, the defendant below, removed into the circuit court of the United States for the district of Kentucky, where the same was tried before a jury, and a verdict rendered for the plaintiff.

The action was upon an alleged verbal promise, made by the defendant, as one of the partners of Townsley & Co., that they would accept a certain draft or drafts, to be drawn on them, at New Orleans, by one Richard S. Walters, in favor of Joseph K. Sumrall; and the cause of action alleged, was a failure to comply with the promise. The bill was drawn and remitted to New Orleans, and not being paid, was returned under protest to Kentucky, and this suit was brought.

On the trial in the circuit court, various bills of exception were taken by the defendant, all of which are stated in the opinion of this court; and in which opinion is also stated the points on which the plaintiff in error sought to obtain a reversal of the judgment of the circuit court.

Coxe, for the plaintiff in error, contended: 1. That a parol promise to accept a non-existing bill does not constitute a contract, for the breach of which an action may be maintained. He admitted, that the acceptance of an existing bill might be by parol; but the allowance of such a principle of law had been regretted by judges. A written agreement to accept a bill, not yet drawn, is valid; but there has been no decision which affirmed that

[1] The acceptance of a draft is not within the statute of frauds; it need not be in writing. Dull *v.* Bricker, 76 Penn. St. 255.

[2] It is a sound principle of morality, which is sustained by well-considered decisions, that one who promises another, either in writing, or by parol, that he will accept a particular bill of exchange, and thereby induces him to advance his money upon such bill, in reliance upon his promise, shall be held to make good his promise. The party advances his money upon an original promise, upon a valuable consideration, and the promisor is, upon principle, bound to carry out his undertaking; whether it shall be held to be an acceptance, or whether he shall be subjected in damages for a breach of his promise to accept, or whether he shall be held to be estopped from impeaching his word, is matter of form merely. The result, in either event, is to compel the promisor to pay the amount of the bill, with interest. Scudder *v.* Union Bank, 91 U. S. 414, and cases there cited

a parol acceptance of such a bill is binding; and the leaning of courts has been against it. 2 Wheat. 66; 1 East 98; 4 Ibid. 57; 5 Ibid. 514; 1 Atk. 661; 3 Mass. 10. The general principle of our law is, that a verbal promise of this kind will not sustain an action. The provisions of the statute of frauds are infringed, by making it otherwise. The admission of such a parol contract will lead to difficulties and uncertainties; and the danger of such a course is shown in this case, as no one of the witnesses, of three *who were examined, represent the agreement to accept to the same extent. [*172

2. The court were requested to instruct the jury, that if they believed the bill was drawn by Waters, to pay a partnership debt, as stated by Waters, they should find for the defendant. This was accommodation paper, the benefit of which was to inure to the drawer and the payee, to enable them to pay a joint debt. No consideration, in fact, passed for it, from the plaintiff, to either the drawer or the drawee. He stands in the same situation he would have been in, if it had never been drawn. This prayer, and this view of the case, are put hypothetically to the jury. The facts upon which they are based are detailed in the testimony of Waters, and the jury was to judge of his credit. There was, therefore, enough to warrant the prayer, and it should have been allowed. So also, he contended, the next instruction should not have been refused, as it leaves to the jury the decision upon the testimony of Waters.

Upon the question, whether, if a bill be drawn in Kentucky, on a person in New Orleans, the protest is, in itself, evidence of demand and refusal: in *Nicholls* v. *Webb*, 8 Wheat. 326, is was held, that the protest of a foreign bill is sufficient; but a distinction is taken between foreign bills, and those instruments in which a protest is not necessary, and therefore, not the official act of the officers. In cases of inland bills, the protest cannot be read. *Chesmer* v. *Noyes*, 4 Camp. 122; 2 Barn. & Ald. 696. The supreme court of New York have held such bills as this to be inland bills. *Miller* v. *Hackley*, 5 Johns. 375; also, 2 Tuck. Black. 467; 5 Cow. 363. Under the English statutes, provision is made to protect inland bills; but the same statutes prescribe that the acceptance shall be in writing. At common law, no protest of an inland bill of exchange was ever made. It was introduced by statute. By the law of Louisiana, an inland bill cannot be protested for non-payment, unless it has been accepted in writing; and the *holder of an inland bill need not protest it. Livingston's Crim. Code, p. 55, art. 318; p. 73, art. 487; p. 99, art. 717. The form of protest is to be conformable to the custom of the place where it is made: p. 100, art. 727. Although the contract was made in Kentucky, yet it was to be executed in Louisiana, and the law of that place must be the law of the contract. 1 Gallis. 371–2; *Robinson* v. *Bland*, 2 Burr. 1077, 1079; 1 W. Bl. 256. Under the French law, which prevails in Louisiana, no acceptance is valid, unless it be in writing. [*173

Nicholas, for the defendant in error, stated, that the principal question is, whether an agreement to accept a bill to be drawn was binding. Originally, at common law, a verbal acceptance of a bill was as good as if it had been written; and courts have since gone further, and have made circumstances equivalent to an acceptance. In *Coolidge* v. *Payson*, 2 Wheat. 66, this court decided, that a verbal acceptance was as good as one which is written; and whatever may be the law of England, this is now settled law

in the United States. All the cases go upon the question, whether the promise to accept was the inducement to take the bill. If a verbal acceptance is as valid as one which is in writing, where is the authority to show that a parol agreement to accept a bill to be drawn is not binding? The objection to such an acceptance, on the ground of inconvenience, would prevail equally against all parol acceptances.

A verbal promise, for a good consideration, is binding, and the policy of extending the rule to bills to be drawn, to the same extent as it operates to bind the verbal acceptor of a bill drawn, is equal. In Kentucky, if A. says to B., "let C. have four thousand dollars in goods, and I will pay the amount," the promise is good. Notwithstanding the statute of frauds, this is law in that state. Before the statute of frauds, any parol promise was good, even for the conveyance of a freehold; and until it shall be shown,
*174] that in the statute of frauds, there is a provision *against the contract upon which this suit is brought, it will operate.

The *lex loci* will sustain this contract. It was made in Kentucky, and was to be performed at New Orleans; and the remedy for the breach is to be obtained by the laws of Kentucky. A demand was necessary at New Orleans; but this did not transfer the contract to that place. The law of Kentucky requires that a bill drawn on a person out of the state shall be protested. 2 Litt. Laws 103, 105. It not only authorizes a protest, but upon its being made, creates an additional liability for damages. Thus, therefore, the protest is, by a statutory provision, made necessary, and it becomes, of course, *primâ facie* evidence of demand and refusal to pay. Upon principles frequently recognised, this court have decided, that the law of Kentucky upon this matter will be respected and enforced here.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Kentucky. The original action was brought by the defendant in error, against the plaintiff in error, as one of the firm of Thomas F. Townsley & Co., to recover the amount of a bill of exchange, drawn at Maysville, in Kentucky, on the 27th of November 1827, by one Richard S. Waters, on Messrs. Townsley & Co., at New Orleans, at 120 days after date, for $2000, payable to Sumrall or order, which had been dishonored by the drawees. The declaration contained various counts; some of which alleged an actual acceptance of the bill and non-payment thereof at maturity; others, a promise by the drawees to accept and pay the bill when drawn, if the original plaintiff would purchase the same from the drawer. The cause was tried upon the general issue, and a verdict was found for the original plaintiff for $2860, upon which he obtained judgment. A bill of exceptions was taken at the trial, upon which the questions are presented which have been argued at the bar.

The bill of exceptions stated, that the plaintiff offered in evidence the
*175] bill of exchange and the protest of the notary-public *at New Orleans, to which evidence the defendant objected, but the court admitted the testimony. Evidence was then given, by the testimony of John Sumrall, the plaintiff's brother, to show, that in a conversation between the plaintiff and the defendant, relative to some shipments which Richard S. Waters proposed to make to the firm of Thomas F. Townsley & Co., and bills to be drawn against them, and the plaintiff said, he feared the bills would not

be honored and paid, Thomas F. Townsley told the plaintiff, that the firm would accept the bills of Waters, for $4000, and pay them at maturity. The plaintiff stated, he wished to pay a debt in Philadelphia, with the bills, and the produce to be shipped by Waters might not arrive in time to provide for them; to which Townsley replied, that if Waters would draw a bill or bills to the amount not exceeding $4000, such bill or bills should be accepted and paid, whether the produce arrived or not. Waters and the plaintiff had been in partnership, before the conversation, but the partnership, at the time it took place, had been dissolved. Richard S. Waters testified, that he had drawn the bill for $2000 upon which the suit was brought, and another of the same amount. That in a conversation with the plaintiff, before the bills were drawn, the plaintiff wished him to draw for $4000. He said, he was afraid to draw for $4000, and the plaintiff told him, Townsley had said, he would pay one draft for $2000, whether the produce to be shipped arrived in time or not; and he agreed to draw for $2000, and after some hesitation, he drew the other bill for $2000; both bills being drawn in favor of Sumrall. And it was perfectly understood between them, that he had no funds in the hands of the drawees, and that the bills were to be sent to Philadelphia, to discharge debts due by the plaintiff and himself as partners, to Toland & Rockhill, and to others; and the plaintiff agreed to help him to meet one of the bills, if he should be unable to pay both. He gave the plaintiff the bills, for $4000 of partnership goods taken by him at the dissolution of the partnership. That the partnership accounts were not settled; and he received no other consideration for the bills than the receipt of the *$4000 of partnership goods. He furnished Thomas F. Townsley & Co. with [*176 produce enough to pay one of the drafts, and they paid one of them. Townsley & Co. had no funds or effects in their hands belonging to him. On the dissolution of the partnership, he understood, the plaintiff was to wind up the concern and pay the debts.

The defendant then offered in evidence the record of a suit of Toland & Rockhill against Sumrall & Waters, which was objected to, and the objection sustained by the court. The deposition of Langhorne was then read stating, that in 1819, he heard Waters say, his credit was better abroad than at home, for Townsley had promised to accept for him for $4000 for Sumrall, whether his produce got down in time or not. Evidence was also given to show, that shortly after the bills of exchange were drawn, Waters became totally insolvent.

The deposition of Samuel D. Lucas was read on the part of the plaintiff. He stated, that he heard Townsley assure the plaintiff, that the drafts of Waters to the amount of $4000, which Waters proposed to let the plaintiff have, to be drawn by Waters on the house of Thomas F. Townsley & Co., of New Orleans, at 120 days after date, should be paid. The plaintiff consented to take the drafts with considerable reluctance, for fear of accident; upon which Townsley assured him, the drafts should be honored, whether the produce to be shipped by Waters arrived or not. Upon the faith of Townsley's accepting for Waters, the bills were received, and the plaintiff advanced large quantities of merchandise and other articles.

The plaintiff prayed the following instruction to the jury, which was given, and to which the defendant excepted: That if they shall believe from the evidence in this case, that the defendant Townsley promised, for himself

and company, to Sumrall, that they would honor, accept or pay bills drawn on them by Waters to the amount of $4000; and that Sumrall did immediately thereafter, or within a reasonable time, upon the credit of said promise, purchase bills drawn by Waters, accordingly, to the amount of
*177] $4000, and that the bill in the *declaration mentioned is one of the bills so purchased; then that the plaintiff, upon the evidence, is entitled to recover, whether the purchase was made before or after the drawing of said bills, or whether they were drawn for a pre-existing debt, or drawn and sold for any other good and valuable consideration.

The defendant then asked the court to instruct the jury: 1. That if they believe from the evidence, that the defendant, by parol, stated, that he would accept a bill or bills to the amount of $4000, before the bills were drawn, and before the defendant had received the amount or any part of it, under the expectation and belief that the drawer, Richard S. Waters, would put funds into his hands to take up the bills at maturity; and that the plaintiffs knew that the said Richard had no funds, but made the promise, in anticipation of such funds, and that no funds to take up the bill were placed in the hands of the defendants, or either of them, to take up the bill, nor had the drawer any funds in the hands of the drawee, to draw upon, that they should find for the defendant; provided the jury further find, that the plaintiff and R. S. Waters, the drawer, were partners in trade, and as such were indebted on their partnership account to Toland & Rockhill, and that the bill was drawn by the said Waters in favor of the plaintiff, with a view to raise funds, or to be passed in direct payment of a joint debt due as aforesaid, and that the said bill, with this object and view, and in pursuance of an agreement between drawer and plaintiff, was passed to the credit of the drawer and plaintiff to Toland & Rockhill.

2. That if they believe the said bill was drawn to pay a partnership debt as stated by R. S. Waters, they ought to find for the defendants.

3. That if they believe the bill was drawn by Waters in favor of Sumrall, to be assigned to Toland & Rockhill, in payment of a partnership debt due by Waters & Sumrall to Toland & Rockhill, and that said bill was thus assigned to Toland & Rockhill; and if they also believe, that said Waters & Sumrall have not settled their partnership; that then they should find for the defendant.

*178] 4. That if they believe from the evidence, that the drawer, *Richard S. Waters, was informed by Townsley, before he drew the bills offered in evidence, that he might draw for $4000, and that he would accept and take up $2000, whether he, the said Waters, got on in time to take it up or not; and that he would accept and take up the other bill, if funds were placed or forwarded to the house in New Orleans, to take it up with, and that when the said Richard S. Waters drew the bills, that he hesitated, for fear he could not get to New Orleans in time, with the means to take up both bills, until it was agreed between Sumrall and him, that they would risk both bills; and if Waters was not able to take up both at maturity, that as to the one Townsley would not accept, he, Sumrall, would assist the said Waters with funds to take it up with at maturity; and that Sumrall did, at the time of drawing the bills as aforesaid, state to Waters, that Townsley promised him that he would accept one of the bills unconditionally, and the other, if in funds; and that Townsley & Co. did accept and pay at maturity

one of the bills, and had not funds of Waters or of the plaintiff to pay the other at maturity; that they ought to find for the defendant.

5. That a demand of the amount of said bill, at New Orleans, was necessary to enable the plaintiff to maintain the suit; and that the protest of the notary is not evidence of such demand.

6. That a parol promise to pay a non-existing bill, since the statute of frauds, is not obligatory and binding.

To all which opinions of the court: 1. In permitting plaintiff to read said protest; 2. In refusing defendant leave to read said record; 3. In giving the instructions asked by plaintiff; 4. In refusing the instructions asked by defendant, the defendant excepted.

The first question that arises, is upon the admissibility of the protest of the notary-public at New Orleans, as proof of the dishonor of the bill. The protest is for non-payment for want of funds; and it does not appear, that there had been any prior protest for non-acceptance. Bills of exchange, payable at a given time after date, need not be presented *for acceptance at all; and payment may at once be demanded at their maturity. [*179 The objection now made does not turn upon this point, but upon the point that the present is not a foreign, but an inland bill of exchange; being drawn in Kentucky, and payable at New Orleans, in Louisiana; and that a notarial protest is not, in such cases, evidence of a demand and refusal of payment. We do not think it necessary, in this case, to decide, whether a bill drawn in one state upon persons resident in another state, within the Union, is to be deemed a foreign or an inland bill of exchange. Foreign, it certainly is not, if, by such appellation, is understood a bill drawn upon a country under a totally distinct and independent sovereignty and allegiance. Inland, it is not, if by that appellation is understood a bill drawn in one part of a territory, on another part, exclusively under the same municipal laws, and exclusively governed by the same sovereign power. It would seem to constitute an intermediate case. Different tribunals in the United States, of great respectability, have, however, differed upon the question; and it may all be left for a final decision, until it constitutes the very turning point of the judgment.(*a*)

It is admitted, that in respect to foreign bills of exchange the notarial certificate of protest is, of itself, sufficient proof of the dishonor of a bill, without any auxiliary evidence. It has been long adopted into the jurisprudence of the common law, upon the ground, that such protests are required by the custom of merchants; and being founded in public convenience, they ought, everywhere, to be allowed as evidence of the facts which they purport to state. The negotiability of such bills, and the facility as well as certainty of the proof of dishonor, would be materially affected by a different course. A foreign merchant might otherwise be compelled to rely on mere parol proof of presentment and dishonor, and be subjected to many chances of delay, and *sometimes to absolute loss, from the want of sufficient means to obtain the necessary and satisfactory proofs. The rule, [*180

(*a*) 3 Kent's Com. 63. In the case of Buckner *v.* Finlay, *post*, p. 586, this question is settled; and a bill of exchange, drawn in one state of the United States, on a person residing in another state, is held to be a foreign bill, so far as to make the protest of non-acceptance and non-payment evidence of the same.

therefore, being founded in public convenience, has been ratified by courts of law as a binding usage. But where parties reside in the same kingdom or country, there is not the same necessity for giving entire verity and credit to the notarial protest. The parties may produce the witnesses upon the stand, or compel them to give their depositions. And accordingly, even in cases of foreign bills, drawn upon and protested in another country, if the protest has been made in the country where the suit is brought, courts of justice, sitting under the common law, require that the notary himself should be produced, if within the reach of process, and his certificate is not *per se* evidence. This was so held by Lord ELLENBOROUGH, in *Chesmer* v. *Noyes*, 4 Camp. 122.

It is not disputed, that, by the general custom of merchants in the United States, bills of exchange, drawn in one state on another state, are, if dishonored, protested by a notary; and the production of such protest is the customary document of the dishonor. It is a practice founded in general convenience, and has been adopted for the same reasons which apply to foreign bills in the strictest sense. The distance between some of these states, and the difficulty of obtaining other evidence, is far greater than between England and France, or between the continental nations of Europe, where the general rule prevails. We think, upon this ground alone, the reason for admitting foreign protests would apply to cases like the present, and furnish a just analogy to govern it. There is as little doubt, that such is the custom in relation to bills drawn on New Orleans, where the jurisprudence of the civil law mainly prevails, and under which acts of this sort are generally verified by notaries. The act of Kentucky of 1798, c. 57 (2 Litt. Stat. 101), also recognises the propriety, if not the indispensable necessity of a protest, not only in the cases of foreign bills, generally, but of all bills drawn on any persons out of the state, or within any other of the United States; providing "that the same being returned back unpaid, with *a legal pro-
*181] test, the drawer and all others concerned shall pay the contents, &c., with legal interest from the time the said bill or bills were protested, the charges of protest, and ten per cent. advance for the damage, &c. The contract for the acceptance and honor of the present bill was, if made at all, made in Kentucky, and was to be governed by its laws; even supposing that the question whether it amounted to an acceptance or not, was to be governed by the law of Louisiana, where the contract was to be executed. So that, in either view of the matter, upon the general customs of merchants, on the *lex loci contractûs*, we think, the protest was rightly admitted in evidence. Whether a protest is required to fix the title of the parties, or, by the custom of merchants, is used to establish a presentment of dishonor of a bill, it is competent evidence between the parties who contract with reference to the presentment and dishonor of such bill. And there is no doubt, that it was material for this purpose, under some of the counts in the declaration.

The next objection is, to the rejection of the record of the action of *Toland & Rockhill* v. *Sumrall & Waters*. That was a suit between other parties, and falls within the general rule of *res inter alios acta;* and on that account, was, in our judgment, rightly rejected.

The remaining objections arise from the instruction given by the court to the jury, on the prayer of the plaintiff, and to the refusal of the court to

give the instruction prayed for by the defendant. The instruction given by the court, upon the plaintiff's prayer, is not understood to involve any other difficulty than that it states that the plaintiff would be entitled to recover, whether the purchase was made before or after drawing of said bills, or whether they were drawn for a pre-existing debt, or drawn and sold for any other good and valuable consideration." We cannot perceive any sound legal objection to this instruction. If a person undertake, in consideration that another will purchase a bill already drawn, or to be thereafter drawn, and as an inducement to the purchaser to accept it, and the bill is drawn and purchased upon the credit of such promise, for a sufficient consideration, *such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the [*182 debt of another; and having a sufficient consideration to support it, in reason and justice, as well as in law, it ought to bind him. It is of no consequence, that the direct consideration moves to a third person, as in this case, to the drawer of the bill; for it moves from the purchaser, and is his inducement for taking the bill. He pays his money upon the faith of it, and is entitled to claim a fulfilment of it. It is not a case falling within the objects or the mischiefs of the statute of frauds. If A. says to B., pay so much money to C., and I will pay it to you, it is an original independent promise; and if the money be paid upon the faith of it, it has been always deemed an obligatory contract, even though it be by parol; because there is an original consideration, moving between the immediate parties to the contract. Damage to the promisee, constitutes as good a consideration as benefit to the promisor. In cases not absolutely closed by authority, this court has already expressed a strong inclination not to extend the operation of the statute of frauds, so as to embrace original and distinct promises, made by different persons, at the same time, upon the same general consideration.(*a*) Then, again, as to the consideration, it can make no difference in law, whether the debt for which the bill is taken is a pre-existing debt, or money then paid for the bill. In each case, there is a substantial credit given by the party to the drawer, upon the bill, and the party parts with his present rights at the instance of the promisee; whose promise is substantially a new and independent one, and not a mere guarantee of the existing promise of the drawer. Under such circumstances, there is no substantial distinction, whether the bill be then in existence, or be drawn afterwards. In each case, the object of the promise is to induce the party to take the bill, upon the credit of the promise; and if he does so take it, it binds the promisor. The question whether a parol promise to accept a non-existing bill amounts to an acceptance of the bill, when *drawn, is quite a different question, and does not arise in this case. If the promise to accept were [*183 binding, the plaintiff would be entitled to recover, although it should not be deemed a virtual acceptance; and the point whether it was an acceptance or not, does not appear to have been made in the court below.

The instructions prayed for on behalf of the defendant and refused by the court, present several objections to the plaintiff's right of recovery. The first is, that the plaintiff is not entitled to recover, if he knew, that the defendant, at the time of taking the bill, had not funds of the drawer in his

(*a*) De Wolf *v.* Rabaud, 1 Peters 476.

hands, and if the defendant's promise was under the expectation of receiving funds, and he did not, in fact, receive them, at the maturity of the bill. We are of opinion, that this objection is unfounded in point of law. If the drawee have no funds in his hands, and the fact is known to the other party, and yet the inducement to take the bill is the promise of the drawee to accept it, it constitutes a valid contract between the parties; if there is a purchase of the bill upon the credit of such promise. The acceptance of the drawee of a bill binds him, although it is known to the holder that he has no funds in his hands. It is sufficient, that the holder trusts to such acceptance.

Another objection is, that the object of taking the bill was to pay the partnership debt of the plaintiff and the drawer (who had been partners in trade), and it was passed, in pursuance of an agreement between them, to a creditor of the firm, who subsequently returned it for the dishonor. In what respect this changes the rights of the plaintiff as to the defendant, it is somewhat difficult to perceive. There was evidence in the case, to show, that the plaintiff was, upon the dissolution, to discharge the partnership debts; and also, that upon the faith of this very promise of the defendant, he allowed partnership property to the full amount of the bill to pass into the drawer's hands, for his own exclusive use. But independently of this evidence, the bill itself was not a partnership bill, though the drawer and the plaintiff had been partners. On the contrary, it was to be drawn on the sole acccunt and credit of the drawer, and was to be *accepted *184] on that account; and if the plaintiff took the bill as the sole bill of the drawer, on the credit of the defendant's promise to accept it, for a valuable consideration, the use to which he should apply it, whether in payment of joint debts or otherwise, was nothing to the defendant. It in no respect changed the nature of his own undertaking. The receiving of such a bill, with the intent to apply the same to the payment of a partnership debt, might materially affect the plaintiff; and we see, that by the subsequent insolvency of the drawer, and his parting with the partnership effects, it did seriously affect his remedy in respect to his partner. The question is not put, whether, if no loss had been sustained in any way, the plaintiff would have been entitled to recover against the defendant. By becoming an indorser upon the bill, he incurred a responsibility to those to whom he indorsed it, very different from that which he incurred to them as creditors of the partnership. This alone was a sufficient consideration to support the promise to accept. It should be added, that the application of the bill to the payment of debts constituted no part of the ground of the promise of the defendant.

Another objection is, that the partnership accounts remain unsettled, and therefore, the plaintiff ought not to recover. Surely, this alone is not sufficient to deprive the plaintiff of his right of action. It is perfectly consistent with this state of facts, that the plaintiff should be a creditor of the firm to an extent far beyond the amount of $4000. There is evidence in the record, from which the jury might fairly presume, that such was the case. But the circumstance, that the accounts of the partnership were unsettled, is put, as, of itself, sufficient to defeat the plaintiff's recovery; which it cannot be admitted to be, if, in any possible case, consistently with

that fact, he might have sustained any loss by taking the bill upon the faith of the defendant's promise.

Another objection, arising out of the fourth instruction prayed for by the defendant, which is very complicated and embarrassing in its presentation, is, the effect of the agreement therein supposed between the plaintiff and the drawer, to accept both the bills ; and if the defendant should not *accept both, then that the plaintiff would assist the drawer with [*185 funds to take up the non-accepted bill at maturity. This agreement was not in the slightest degree prejudicial to any rights of the defendant. Its object was, to provide funds, in the event of a non-fulfilment of the promise of the defendant to accept either of the bills. It did not waive or vary the defendant's contract ; and at most, could be considered only as a collateral agreement of the parties, forming additional private inducements for the drawing of the bill.

The same instruction includes another objection, which is, that if from the evidence the jury should believe, that the plaintiff did, at the time of drawing the bills, state to the drawer, that the defendant promised him that he would accept one of the bills unconditionally, and the other, if in funds ; and that the drawee did accept and pay at maturity one of the bills, and had not funds of the drawer, or of the plaintiff, to pay the other at maturity; that they ought to find for the defendant. This part of the instruction proceeds altogether upon the ground that the mere statement of the plaintiff to the drawer, that the promise of the defendant was conditional, was a bar to the recovery. It does not affect to state, that if, in point of fact, the promise was conditional, such would and ought to be the result ; but that it was sufficient, that the plaintiff so told the defendant, whether the fact were so or not. In our judgment, the rights of the plaintiff are to be decided by the fact, whether the promise was conditional or not, and not by the mere assertion of the plaintiff. His assertion might properly be weighed by the jury, as part of the evidence, to control or explain it ; but their verdict ought to be governed by their belief of the facts, and not their belief that a particular assertion was made.

These are all the objections, which have been urged at the bar ; and we are of opinion, that the court was right in rejecting the instructions prayed for by the defendant. The judgment is, therefore, to be affirmed, with costs.

Judgment affirmed.

*Le Roy, Bayard & Co., Plaintiffs in error, *v.* George Johnson, Defendant in error.

Competency of witness.—Powers of partners to bind the firm.—Firm name.

In an action originally commenced against A. and B., as partners, upon an alleged engagement by the firm, and where A., who was not found or served with process, was offered as a witness in favor of B., having been released by B., the court said: "It is to be premised, that the only ground upon which the objection can be rested, is the supposed interest of the witness in the event of the cause; since the suit having regularly abated as to him, by the return that he was 'no inhabitant,' he was no more a party to it, than he would have been, had his name been altogether omitted in the declaration. As to the objection upon the score of interest, it is sufficient to remark, that it was manifestly hostile to the party in whose favor he testified, and who offered it in evidence; since the plaintiff's recovery against the defendant, and satisfaction from him, would be a bar to their action against the witness; and the release of A. protected him against any action which A. might bring against him for contribution or otherwise. p. 194.

It is well settled, that if a bill of exchange be drawn by one partner, in the name of the firm, or if a bill, drawn on the firm, by their usual name and style, be accepted by one of the partners, all the partnership are bound; it results necessarily from the nature of the association, and the objects for which it is constituted, that each partner should possess the power to bind the whole, when acting in the name by which the partnership is known; although the consent of the other partners to the particular contract should not be obtained, or should be withheld. p. 197.

Third persons are not bound to inquire, whether the partner with whom they are contracting is acting on the partnership account, or for his individual advantage; the interest of the partner in the joint stock of the concern, and his consequent authority to use the partnership name, raises a presumption, that the contract was made for joint account; which is sufficient to bind the firm, unless the contrary be shown; and that the person with whom the partner deals had notice, or reason to believe, that the former was acting on his separate account. p. 198.

Where, in the articles of partnership, no firm name was mentioned as agreed upon, and the concern went into operation under the articles, the books being kept, and the bills and accounts relating to their transactions being made out, at their warehouse, in the name of "Hoffman & Johnson," it cannot be questioned, but that a name, thus assumed, recognised and publicly used, became the legitimate name and style of the firm; not less so than if it had been adopted by the articles of partnership. p. 199.

Where a bill of exchange was drawn by A., after the dissolution of his partnership with B., and the proceeds of the bill went to pay, and did pay, the partnership debts of A. & B., which A., on the dissolution of the firm, had assumed to pay; the holder of the bill, after its dishonor, can have no claim on B., in consequence of the particular appropriation of the proceeds of the bill. p. 199.

*187] It is admitted, that if one of the partners contracted with a third person, in the name *of the firm, after the dissolution, but that fact not made public, or known by such third person, the law considers the contract as being made with the firm, and on their credit; but if the partner deal with another, in his individual name, and upon his sole responsibility, without even an allusion to the partnership, it was unimportant to that other, to know that the partnership was dissolved, since he was dealing, not with the firm, and upon their credit, but with the individual with whom he was acting, upon his own credit.[1] p. 200.

Error to the Circuit Court of the district of Columbia. An action of debt upon a bill of exchange for $1250*l.* sterling, was instituted by the plaintiffs in error, in the circuit court for the county of Alexandria, against Jacob Hoffman and George Johnson, alleging them to be partners in trade. By the statute of Virginia, adopted as the law of the county of Alexandria, this form of action is authorized for the recovery of the sum due upon a bill

[1] Ex parte Warren, 2 Ware 320; Smith *v.* Hoffman, 2 Cr. C. C. 51.

of exchange, and damages for non-payment. The declaration charged the bill to have been drawn by Jacob Hoffman and George Johnson, trading as copartners, in Alexandria, under the name of Jacob Hoffman, the same being for the account of the concern; and that the bill was purchased by the plaintiffs, who remitted it to London; where it was presented to the drawees and was returned protested. The process was not served on Jacob Hoffman.

Upon the trial of the cause, it was proved, that it was generally known in Alexandria, in 1823, that the defendant and Jacob Hoffman were jointly concerned in buying and selling pork; and by the articles of copartnership, signed by both partners, and entered into on the 10th of December 1823, it was agreed, *inter alia*, that the funds necessary for the purposes of the partnership were to be borrowed from the banks or otherwise, upon the notes of George Johnson, to be indorsed by Hoffman, or in such other shape, as respects the paper of the parties, as might be found suitable to the object intended. The active partner in the business was Jacob Hoffman, who, besides the business of the concern, carried on that of a sugar-refiner, a buyer, seller and salter of beef, and a tobacconist; and at the same time, the defendant George Johnson, was engaged in the transaction of business, on his own account, as a commission-merchant and grocer.

*The cashier of the bank of Alexandria proved, that an account was opened in that bank, on the 3d of December 1823, which he understood, from both parties, was to comprehend the cash deposits of the joint concern, and the proceeds of notes discounted for the purpose of raising funds for the same. For some years before, Jacob Hoffman kept an account in the bank, until the opening of the new account; upon which, the private balance due the bank was transferred to it, and no money could be drawn out of the bank upon the account, but upon the check of Hoffman drawn by him in his own name. Accounts of a similar character, in the same form, and used in the same manner and for similar purposes, were proved to have been kept, at the same period, in the Farmers' Bank, and in the Bank of Potomac. These accounts comprehended, indiscriminately, all the deposits of cash kept by Hoffman in the banks, as well as deposits and cash of the joint concern. The same witness also proved, that before a note for $6000, made by the defendant, and indorsed by John H. Ladd & Co., was discounted by the bank, he sent the bill of exchange, which was the foundation of this action to New York, at the request of Hoffman, to be there negotiated. The bill not being sold immediately in New York, Hoffman went there; and assisted by letters of recommendation from merchants of Baltimore, he negotiated the bill, and out of the proceeds of the same, the note for $6000 was paid at the bank of Alexandria. The proceeds of the discount of this note were used by the firm. The partnership of the defendant and Jacob Hoffman was advertised in the public papers of Alexandria, the advertisement being subscribed with the names of both persons; during the continuance of the concern, it was generally known in Alexandria, under the style of Hoffman & Johnson; accounts were rendered, and money was paid in that name; and the firm was dissolved on the 10th of January 1824. By the terms of the dissolution, Mr. Hoffman was bound to pay the debts of the firm, and this bill was drawn to enable him to comply with this contract. The defendant was called upon, early in June, [*188

and informed of the fate of the bills; and efforts were made, without
*189] *success, to procure payment out of property which had belonged to Hoffman & Johnson, and which was in the hands of a trustee.

The questions submitted to the jury, and upon which the court were requested to charge in favor of the plaintiffs below, who were plaintiffs in error in this court, were:

1. That upon the evidence of partnership, and that the proceeds of the bill were applied to the payment of the note which had been discounted for the firm; unless the defendant could show a notice of the dissolution of the partnership, either public or private, before the bill was sold, and that the bill was not drawn on partnership account; the plaintiffs were entitled to recover.

2. If the jury, from the evidence, should be of opinion, that the bill was drawn in reference to the business of the concern, and to meet the engagements of the same, and the proceeds of the same were so applied; then the defendant is liable to the plaintiffs, unless he proves a dissolution of the firm, and knowledge of the same by the plaintiffs, before the bill was negotiated.

3. That if the jury believed the name of Jacob Hoffman was sometimes used in relation to the business of the concern, and that the bill was drawn in the name of Jacob Hoffman, and so negotiated for the firm, to pay its notes; the plaintiff is entitled to recover, unless the defendant can prove that the bill was not drawn and negotiated on partnership account, or that the partnership was dissolved, and the plaintiff notified thereof, or the dissolution was advertised, before the bills were drawn and negotiated.

The court having refused these instructions, and a verdict and judgment having been obtained for the defendant, this writ of error was prosecuted.

The case was argued by *Swann* and *Key*, for the plaintiffs in error; and by *Jones*, for the defendant.

For the *plaintiffs*, it was contended, that the bill upon which this suit was brought was drawn by Jacob Hoffman on account of himself and the defendant, to provide for the payment of a note discounted for the concern,
*190] in the name *used by them in their arrangements of finance; and the proceeds of the sale of the bill having gone to pay the note, the defendant was liable to the plaintiffs for the amount of the bill and damages. It was, in fact, the bill of the firm. The evidence on the part of the plaintiff was sufficient to go to the jury, upon the principles claimed by the plaintiffs. The name of Jacob Hoffman was used as that of the firm, and if several persons act under one name, all are bound. Montagu on Partnership 32, note. While it is admitted, that the partnership was not bound for all the acts done in the name of Jacob Hoffman, here was a transaction in reference to its concerns, and it is, therefore, obligatory on all. Gow on Partnership 55, 70, 189. The language of the bill is in the plural, and thus it is manifest that it was not an individual transaction of Jacob Hoffman. It is thus drawn: "Ninety days after sight of our first of exchange (second, third and fourth of same tenor unpaid), pay to the order, &c." That the partnership was dissolved before the bill was drawn, is immaterial. The dissolution was secret, as it was not known to the plaintiffs; and they must

be supposed to have taken the bill upon the notoriety of the partnership. The difficulties which prevented the early sale of the bill in New York may have been removed by information obtained by the plaintiff in Alexandria, and particularly of the form in which the engagements for the money concerns of the firm were drawn.

The propositions stated by the counsel of the plaintiffs should have been submitted to the jury. The first requested the court to say whether the facts proved showed a partnership. The second, that unless notice of the dissolution was brought home to the plaintiffs, the defendants were liable. The third, that there was evidence that the parties sometimes used the name of Jacob Hoffman, and the bills were drawn to raise funds for the partnership, and therefore, the plaintiffs were entitled to charge the defendant, unless the defendant could prove they were not used for the firm. *The counsel also cited Gow on Part. 155 ; 2 Bos. & Pul. 679. [*191

Jones, for the defendant.—The evidence showed a special partnership, to buy and sell pork, and all the transactions of the firm were in the name of Jacob Hoffman and George Johnson. If the name of Jacob Hoffman was used at the banks, it was not so used as the name of the firm, but as the name of one individual of the same ; each giving his own name to raise funds for conducting the business. Nor was the bill taken as that of the firm ; the plaintiffs refused it, in the first instance, and took it afterwards, when assured of the respectability of the drawer, individually. The law is fully settled, that when it is claimed to make a person liable as a partner, in a firm carried on in the name of one person, it must be shown to be a partnership concern. The defendant is protected by this principle ; for although the proceeds of the bill were applied to pay the note discounted for the benefit of the firm, the payment of that note had been assumed by Jacob Hoffman, and he had a right to raise funds on his own responsibility to discharge it.

To bind a partnership, the name of the firm is essential. If it is not used, it must be presumed to be an individual transaction ; and if the proceeds of the same are brought into the concern, it is presumed it is done as an individual duty to the firm. The books show universally the difference between a manual act of purchasing goods, which may be done by one partner, to bind all ; and the binding of all by writing, in which all must act, or he who acts must have authority to bind all. How far the courts have gone in considering that a separate debt, which is contracted by one of a firm, is shown by the following cases. 4 T. R. 270 ; 12 East 122 ; Gow on Part. 32 ; 1 Atk. 223 ; 1 Marsh. 249.

It is incumbent on the plaintiffs, to prove they dealt with the firm, or with a view to the liability of all the parties to it. Here, George Johnson was unknown to the plaintiffs ; Jacob Hoffman alone appeared in the transaction, and he drew the bill in his own name, on his own responsibility, to *obtain the means to carry into effect the terms of the dissolution of the partnership. The court, in refusing the instructions, therefore, acted in conformity with the law, and the facts of the case. [*192

Washington, Justice, delivered the opinion of the court.—The plaintiffs instituted an action of debt, under the statute of Virginia, in the circuit

court of the district of Columbia, for the county of Alexandria, against Jacob Hoffman and the defendant, upon a bill of exchange drawn by the said Hoffmann, and dated the 3d of January 1824. The declaration charges, that the said Jacob Hoffman and George Johnson were partners in the business of buying, curing and selling pork and bacon, and carried on their said copartnership business under the name and firm of Jacob Hoffman, and that the bill of exchange on which the suit is brought, was drawn in the name of Jacob Hoffman, for and on account of the said firm, and was sold to the plaintiffs, who caused it to be presented for acceptance ; and that the same was duly protested for non-acceptance and non-payment, of which due notice was given to the defendants, the drawers. The writ being returned " no inhabitant," as to Hoffman, the suit abated against him.

From the evidence disclosed in a bill of exceptions taken by the plaintiffs to the opinion of the court, the case appears to be as follows : On the 10th of December 1823, Jacob Hoffman and the defendant entered into articles of copartnership, under their respective signatures, to commence and prosecute, on joint account, during that winter, the business of purchasing, salting up and smoking pork. The funds necessary to the accomplishment of the objects, intended to be borrowed from the banks, or otherwise, upon the paper of the said George Johnson, to be indorsed by Hoffman, or in such other shape, as respected the paper of the parties, as might be found most suitable to the object intended ; Johnson agreeing, in consideration of the extraordinary trouble and experience which Hoffmann would devote
*193] to the purchase and *putting up of the pork, to pay two-thirds of the interest arising, or growing out of the loans which should be made for the business contemplated. It was further stipulated, that the business should be carried on so far as the parties should agree, and could command the funds ; and that the profits and loss should be equally divided between them. No name or style is agreed upon, under which the business of the concern was to be transacted ; but evidence was given, that after the parties commenced their operation under these articles, the books of the concern were kept, and the bills and accounts were made out at their warehouse, where the pork was cured and kept, in the joint names of Hoffman & Johnson, and never otherwise ; and that they continued to be so kept and made out, until the pork was sold. They were generally known in Alexandria as partners in buying, curing and salting pork, under the name and style of Hoffman & Johnson, in which they acted in relation to the business of the concern, and advertised in the newspapers. It further appears, that, besides the business of this concern, and during the same period, Hoffman carried on the business of a sugar-refiner, of a buyer, salter and seller of beef, and of a tobacconist ; and the defendant, that of a grocer and commission-merchant, in the town of Alexandria.

Notwithstanding what has been stated as to the name by which this firm was known in Alexandria, and in which they did business at their warehouse, it seems, that one particular branch of business was conducted solely by and in the name of Hoffman alone. In December 1823, an account was opened in the bank of Alexandria, which, the cashier understood from both Hoffman and the defendant, was to comprehend both the cash deposits of the said concern in that bank, and the proceeds of notes therein discounted to raise money for the use of the firm. This account was opened on the third of the

month just mentioned, into which a trifling balance against Hoffman upon his private account, before kept at that bank, was transferred. This new account was so kept that no money could have been drawn out of the bank, upon that account, except upon the check *of Hoffman, in whose name [*194
alone all the checks were drawn. Hoffman had likewise long standing accounts, in his own name, in two other banks in Alexandria; which were continued in the same name, after this concern was formed; in which accounts all cash deposits in those banks respectively, and the proceeds of notes therein discounted, to raise cash for the use of the concern, were entered. These latter bank accounts comprehended, indiscriminately, all the deposits and cash kept by Hoffman in those banks, as well as the deposits and cash of the joint concern.

The partnership between these gentlemen, which commenced on the 10th of December 1823, was dissolved by mutual consent, on the 21st of the succeeding month; under an agreement, by which Hoffman contracted to pay all the debts due by the firm, the defendant binding himself to give the use of his name, either as drawer or indorser, in the renewal of all notes then existing, until the bacon should be sold. On the 30th of January 1824, the bill of exchange on which this suit is brought, was drawn by Jacob Hoffman, in his own name, and as he states in his deposition, on his individual responsibility, in order to enable him to raise the money to comply with his part of the above contract, and in particular to enable him to discharge a note for $6000, which had been made by the defendant, indorsed by John H. Ladd & Co., and Jacob Hoffman, and discounted at the bank of Alexandria. With much difficulty, and after great personal exertions by Mr. Hoffman, and with the aid of a letter from Mr. Colt, in favor of his mercantile standing, he succeeded in selling this bill to the plaintiffs, the proceeds of which he immediately applied to the discharge of the above note for $6000. In his negotiations with the plaintiffs, the name of the defendant was never mentioned.

As a part of the evidence here detailed is taken from the deposition of the before-mentioned Jacob Hoffman, which was offered by the defendant's counsel, it will be proper, in the first place, to dispose of the objection made to the competency of this evidence. The offer to read the deposition was preceded by the exhibition of a release, executed and *delivered by [*195
the defendant, to the witness, prior to his examination. It does not appear, that any objection was, or could be, made to the form of the release; and the only question is, whether, in point of law, the defendant could by any release render Hoffman a competent witness.

It is to be premised, that the only ground upon which the objection can be rested, is the supposed interest of the witness in the event of the cause, since the suit having regularly abated as against Hoffman, by the return that he was no inhabitant, he was no more a party to it than he would have been, had his name been altogether omitted in the declaration.

As to the objection upon the score of interest, it is sufficient to remark, that it was manifestly hostile to the party in whose favor he testified, and who offered it in evidence; since, if the plaintiffs recovered against Johnson, and obtained satisfaction from him, that would be a bar to their action against Hoffman, and the release of Johnson protected him against any action which Johnson might bring against him for contribution or otherwise. The general rule of law, in relation to witnesses who are interested in the

event of the cause, goes no further than to exclude them from giving evidence in favor of that party to whom their interest inclines them. If they stand, in point of interest, indifferent between the litigating parties, or if they testify against their interest, the reason of the rule which excludes their testimony no longer exists.

We come now to the instructions to the jury, asked for by the plaintiffs' counsel, and which the court refused to give. The first is, that if the jury believe, from the evidence, that the defendant and Jacob Hoffman entered into the articles of copartnership offered in evidence, and that an account was kept for the said concern, in the bank of Alexandria, in the name of Hoffman, in which the notes discounted for the use of the partnership, and deposits of money on partnership account, were entered to the credit, and checks drawn for the same, in the said Hoffman's name, and that the said Hoffman drew the bills mentioned in the declaration, and sent them to New
*196] York to be sold, for the *purpose of raising money to pay certain notes which had been discounted in the bank of Alexandria, on partnership account, some of them drawn by said Hoffman, and indorsed by the defendant or other persons, and others drawn by the defendant and indorsed by Hoffman or others, and that the same was sold to the plaintiffs, and the proceeds thereof applied by said Hoffman to the payment of the said notes; then the plaintiffs are entitled to recover, unless the defendant can show a dissolution of copartnership, and notice thereof, either public, or to the plaintiffs, before the bills were sold, or that the said bills were not drawn on partnership account, but on the individual responsibility of Hoffman. The second instruction which the court was called upon to give, is substantially the same as the first, except that it omits a circumstance much relied upon in the argument, that the bank account of the concern was kept in the name of Hoffman, upon whose checks alone the money was drawn out.

The third instruction states, that if the jury should believe from the evidence, that the defendant and Hoffman sometimes used in relation to the business of the concern, the name and style of Jacob Hoffman, as representing the firm, and that the bill in question was drawn in that name by the said Hoffman, and negotiated for the purpose of raising funds to pay notes due by the said concern; then the plaintiffs were entitled to recover, unless the defendant could prove that the said bill was not drawn and negotiated on partnership account, but on account of the said Hoffman alone, or that the partnership was dissolved, and the plaintiffs notified thereof, or the dissolution advertised, before the bills were drawn and negotiated.

In support of this action, it has been argued by the counsel for the plaintiffs, that the bill in question was drawn in the name of the firm under which the partnership concerns of Jacob Hoffman and George Johnson were transacted; that it was drawn on partnership account, and that the proceeds of the bills were, in fact, applied by Hoffman to the discharge of a debt due by the concern. These being the facts, it is insisted, that the court below ought
*197] to have complied with *the prayer of the plaintiffs' counsel, and instructed the jury, that if they were so understood by them, the plainiffs were entitled to recover. And if this statement of the facts be correct, and the instructions asked for had been so framed as to present them fairly to the jury, this court entertains no doubt but that such instructions should have been given.

It is well settled, that if a bill of exchange be drawn by one partner, in the name of the firm, or if a bill drawn on the firm by their usual name and style, be accepted by one of the partners, all the partners are bound. It results necessarily from the nature of the association, and the objects for which it is constituted, that each partner should possess the power to bind the whole, when acting in the name by which the partnership is known, although the consent of the other partners to the particular contract should not be obtained, or should even be withheld. Were it otherwise, the affairs of the concern could with difficulty be carried on; and third persons could seldom, if ever, know when they might safely deal upon credit of the firm. It follows, that such third persons are not bound to inquire, much less to assure themselves, that the partner with whom they are contracting, is acting on the partnership account, or for his own individual advantage. The interest of the partner in the joint stock of the concern, and his consequent authority to use their name, raises a presumption that the contract was made for joint account, which is sufficient to bind the firm, unless the contrary be shown, and that the person with whom the partner deals, had notice, or reason to believe, that the former was acting on his separate account.

It is now to be seen, how these principles of law apply to the case under consideration. It is quite clear, that the name of this firm is nowhere designated in the articles of copartnership which have been referred to. The mode in which a particular branch of their business was to be conducted, cannot reasonably be construed to give a name to the firm. It manifestly had no allusion to that subject. The stipulation that the funds necessary for the purposes of the concern should be raised upon the paper of Johnson, to be indorsed by Hoffman, or *in such other shape as [*198
might be found most suitable to the object of the parties, no more designated Jacob Hoffman that it did George Johnson, as the name of the copartnership. If it did, then the name would be lost or changed, as often as the parties should agree to raise funds for the concern in some other mode than the one specified. It is unnecessary to decide whether the omission to agree upon a partnership name, in the body of the instrument, was or was not supplied by the signatures of the contracting parties to it, because it was in full and uncontradicted proof, that after the concern went into operation under the articles, their books were kept, and the bills and accounts relating to their business were made out at their warehouse, in the joint names of Hoffman & Johnson, by which name the firm was generally known in Alexandria, and in which they acted in relation to the business of the concern, and advertised in the newspapers. Now, it cannot be questioned, but that a name, thus assumed, recognised and publicly used, became the legitimate name and style of the firm, not less so than if it had been adopted by the articles of copartnership.

Keeping in mind the principles of law which have been stated, and the fact, or the evidence of it, in relation to the name of this concern, it will not be difficult to decide the question, whether the instructions asked for by the plaintiffs ought or ought not to have been given. It is obvious, that the court was required by the first two of them, either to assume the fact that Jacob Hoffman and George Johnson carried on their business as partners, under the name and firm of Jacob Hoffman; or to lay it down as law to the

jury, that it is competent to one partner to bind the copartnership by a bill drawn in his individual name, even after a dissolution of the partnership, if that fact was not advertised or known to the person taking the bill; provided the object of the partner who draws and negotiates the bill be to discharge certain debts due by the concern, and the proceeds are afterwards so applied.

Now, the fact which the court was called upon to assume, was all-important to be proved, to entitle the plaintiffs to recover. It is averred in the declaration, and is, in point of *law, the foundation of the plain-
*199] tiffs' demand against the defendant Johnson. But what right had the court to assume a fact which was not warranted by any just interpretation of the articles of copartnership, or of any other written instrument which was given in evidence, but which, if it existed at all, was to be deduced from the parol evidence, of which the jury were alone competent to judge? The court was not called upon to predicate the conclusion of law, upon the fact that the defendant and Hoffman traded under the name and firm of Jacob Hoffman, if that fact should be so found by the jury—and unless it was so found, it is quite clear, that the bill in question, although drawn for the purpose before mentioned, and although the proceeds were so applied, did not bind the defendant, and consequently, the court was right in refusing to give these instructions in the form in which they were propounded—unless the fact was that which all the instructions assume, and which formed the basis of the plaintiffs' argument before the court; the plaintiffs contracted in point of law, as they manifestly did in fact, with Jacob Hoffman alone, and upon his sole responsibility, and the use which Hoffman intended to make or did make of the proceeds of the bill, was quite as unimportant to them and to their cause, as it would have been had they contracted with Hoffman & Johnson, under the name of their firm.

As to the necessity of bringing home to the knowledge of the plaintiffs, in one of the modes stated in the instructions asked for, the dissolution of the copartnership, in order to prevent their recovery against Johnson; we are all of opinion, that it did not exist, in point of law, unless, in point of fact, the bill was drawn in the name of the firm. We admit, that if one of the partners contracted in the name of his firm, with a third person, after the partnership was dissolved, but that fact not made public, or known by such third person, the law considers the contract as being made with the firm and upon their credit, and this for a reason too obvious to require explanation. But if the partner deal with another, in his individual name, and upon his sole responsibility, without even an allusion to the partnership, as the jury would *have been well warranted in concluding the facts to be in this
*209] case, it was unimportant to that other, to know that the partnership was dissolved; since he was dealing, not with the firm, and upon their credit, but with the individual with whom he was contracting, and upon his credit.

It only remains to notice the single point of difference between the last and the two preceding illustrations. These, as has before been noticed, assume the fact that the partners carried on the business of the concern under the name and style of Jacob Hoffman. That places the plaintiffs' right of recovery upon the circumstance, that the defendant and Hoffman sometimes used, in relation to the business of the concern, the name and style of Jacob Hoffman, as representing the firm, in connection with the

other facts stated in the preceding instructions. But would the court have been warranted in stating to the jury, what this instruction manifestly purports, that whatever may be the name agreed upon by the partners, and in which they generally act, in relation to the business of the concern, still, if they have sometimes used, in that relation, the name and style of one of the partners, bills drawn in that name, and negotiated for the purpose stated in the instruction, would bind the other partner? We clearly think not. The circumstance relied upon in this instruction, as to what the partners sometimes did, was, no doubt, proper to be left to the jury, as evidence conducing to maintain the averment in the declaration, that Jacob Hoffman and the defendant carried on business as partners in trade under the name of Jacob Hoffman; if the court had been called upon to leave that as a fact to the jury. But it was nothing more than evidence of that fact, upon which it would have been highly improper in the court to predicate any principle of law whatever. This point, we conceive, was fully settled in the case of *Townsley* v. *Sumrall*, decided a few days ago by this court. (*ante*, p. 170.)

We are, upon the whole, of opinion, that the court below was right in refusing to give any of the instructions prayed for; and that the judgment of that court ought to be affirmed, with costs.

Judgment affirmed.

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*David Hunt and others, Appellants, *v.* Robert Wickliffe, [*201
Appellee.

Land-law of Kentucky.—Substituted service of process.

An entry was made in the land-office of Kentucky, of 1000 acres, in the name of "John Floyd's heirs," without naming the persons who were the heirs; upon an objection to the validity of the entry, the court said, that substituting a legal description, which cannot be misunderstood, for the more definite description by the proper names of the persons who are the heirs, was not of such substantial importance as to vitiate the transaction. p. 208.

An entry was made "so as to join the settlements on the north-east and south sides thereof, so as not to run into the old military surveys, which are legal;" the old military surveys formed together a parallelogram, and adjoined the lands intended to be described by the entry; it was objected, that the limitation on the entry, "so as not to run into the old military surveys, which are legal," rendered the whole entry so uncertain as to make it void.

The rules which are settled in Kentucky would require, that this entry, had the restriction respecting the military surveys been omitted, should be surveyed equally on the north-east and south side of the settlement, the whole land to be included by rectangular lines; the old military survey must, therefore, be so contiguous to the settlement, as to stop one or two of those lines; a subsequent locator knows where to look for them, and the testimony in the cause informs us that he would encounter no difficulty in finding them: "We consider the last words 'which are legal,' merely as an affirmance that they are so, not as leaving it doubtful; and consequently, that they make no change in the entry." p. 209.

It is well settled, both in the court of Kentucky and in this court, that a possession which will bar an ejectment, is also a bar in equity. p. 212.

Each of the parties held in possession distinct parts of the land in controversy; in this state of things, it is well settled, that the party having the better right is in constructive possession of all the land, not occupied, in fact, by his adversary. p. 212.

The law of Kentucky authorizes their courts of chancery to make decrees against absent defendants, on the publication of an order for two months successively, in some paper authorized to make the publication, and on fixing it up at certain public places, prescribed by the act; this

publication is considered as a constructive service of the process; the supreme court of Kentucky has decided, that the publication must be continued for two calendar months.[1] p. 214.

As the plaintiffs in the circuit court claimed under a conveyance made in pursuance of a decree of a court of competent jurisdiction, the bill ought not to have been dismissed for want of parties; the circuit court ought to have given leave to make new parties, and on their failing to bring the proper parties before the court, the dismissal should have been without prejudice. p. 215.

APPEAL from the Circuit Court of Kentucky; in which court, the appellants had filed a bill against the appellee, claiming from him a conveyance of the legal title *to certain lands in the state of Kentucky, to which *202] the appellee had the legal title; but, by the appellants, it was alleged, that they had a prior equitable title, derived under certain entries made in the land-office of that state. The bill was dismissed by the circuit court, without costs, and from the decree of dismissal, an appeal was entered to this court.

The defendant, Robert Wickliffe, claimed the land under patents to John Craig for 2000 acres, dated 2d of December 1785, and to A. Fox and John Craig for 2000 acres, dated on the same day. He also asserted a possession, protected by the statute of limitations. The title under these patents interfered with the entries under which the appellants claimed; and the appellants in the circuit court sought to obtain a conveyance of all the interference, and also other portions of the grants to Floyd, not included within the boundaries of Craig's, and Craig and Fox's patents.

The entries under which the heirs of John Floyd and those who hold under them claim the land, were as follows:

"1779, October 29: John Floyd this day appeared and claimed a right to a settlement and pre-emption to a tract of land, lying on Four Mile creek, eight miles north-west from Boonsboro', including a plantation, claimed by the said Floyd, called Woodstock, raising corn on the premises, 1776; satisfactory proof being made to the court, that said Floyd has a right to a settlement of 400 acres, including said improvement, and a pre-emption of 1000 acres adjoining, and that a certificate issue, &c." Under this certificate for a settlement and pre-emption, the entries were made.

"November 3d, 1779: John Floyd enters 400 acres of land by virtue of a certificate, &c., on Four Mile creek, about eight miles north-west from Boonsboro', including a plantation called Woodstock.

"1780, April 28: John Floyd, assignee of James Taylor, assignee of George Muse, enters 800 acres; as assignee of Lance, 200 acres, upon military warrants, between the lines of David Robinson and John Carter, Andrew Boyd, Thomas Barns and Jonathan Martin, on Four Mile creek." This entry appeared to have been located in two surveys, *and was desig- *203] nated on the plat, 245 acres, and 240 acres. The latter interfered with the land held by the appellee.

"April 19, 1778: John Floyd, assignee, enters 1600 acres upon a military warrant, on Boon's creek, adjoining David Robinson's west line, extending along said line, and westwardly for quantity." A part of this appeared to be surveyed in a survey of 246 acres, as represented on the plat.

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[1] See Moore *v.* Houston, 3 S. & R. 169; 10 Id. 393; Gross *v.* Fowler, 21 Cal. 392; Snyder *v.* Warren, 2 Cow. 518; Parsons *v.* Mitchell *v.* Woodrow, 37 Miss. 567. Chamberlin, 4 Wend. 512; People *v.* New York,

"May 31, 1783: John Floyd's heirs enter 1000 acres on a pre-emption warrant, No. 1054, joining the settlement at Woodstock on the north-east and north sides thereof, so as not to run into the old military surveys, which are legal." These surveys all adjoined, and were patented in January 1789, to Mourning, George, John Floyd, and Jane Breckenridge, wife of Alexander Breckenridge, formerly Jane Floyd, widow of said John Floyd.

The appellants had, under a decree of the Fayette circuit court of Kentucky, obtained a conveyance from the patentee, of 694 acres, part of the land embraced in these surveys. The appellee had made no effort to establish the entries under which he claimed, relying upon his elder legal title, and an asserted possession.

Buckner, for the appellants, insisted: 1. That the entries of Floyd were valid, as supported by the testimony in the cause. 2. That by the depositions of J. W. Hunt, a witness in the cause, it was proved, that they and those from who they derive title have had the possession of the land since 1800. 3. The greater part of the survey of 200 acres of the defendant made in the name of Craig and Fox, is within the claim of the appellants. 4. The bill of the complainants ought not to have been dismissed; but if all who are interested in the claim were not before the court, leave should have been given to make new parties.

He argued, that the objects called for in the entries of Floyd, were notorious, at the time they were respectively made; and he referred to the evidence contained in the *depositions of the witnesses, to support the position. To show that the call to exclude "old military surveys [*204 which are legal," did not vitiate the entry, he cited the following cases: *Drake* v. *Ramsey & Logan*, Hardin 34, 383, 386; 2 A. K. Marsh. 395; *Jackson* v. *Johnson's Heirs*, 1 Bibb 61; *Overton & Reed* v. *Roberts*, 4 Ibid. 156.

As to the question of possession, relied upon by the appellee; it was insisted, that the deposition of Hunt, in relation to the possession of the appellants, was contradicted but by one witness, and was entitled to belief. There was no satisfactory evidence of any possession in the appellee. He also urged, that to enable a party to protect himself, under the statute of limitations, upon which the appellee relied, proof of a continued, uninterrupted possession for twenty years should be established, by clear and satisfactory testimony, and this had not been done. A right of entry is not taken away by possession, without claim of title; and therefore, if the possession of the appellee existed before the date of his patents, it will not avail. The time intended by the statute never commences, until the possession is adverse.

If, however, it were conceded, that the evidence of the witness examined on the part of the appellee, proved that he took possession of any part of the land in controversy, prior to the possession of the appellants, no benefit could result to the appellee for the same, beyond the boundary of the portion of the land which the person taking possession of the land intended to adopt. The *quo animo* in which an entry on lands is made, will determine the extent of the possession acquired by the entry. *Clark* v. *Lynn's Heirs*, 1 A. K. Marsh. 347. Admitting the proof of the appellee to be conclusive as to such portion of the land as is within the boundary intended, when the

possession was taken; there remained for the appellants a considerable part to which the statute of limitations could not apply.

While he freely conceded, that all who should have been made parties to the complainants' bill were not before the circuit court, yet, as the entries *205] under which the complainants *in the bill claimed, were valid, and their title had been sanctioned by the decree of the Fayette circuit court; and as it was manifest, that the appellants had the superior equity; he contended, that this court would reverse the decision of the court below, and remand the cause, with leave to amend the bill, and make all persons parties who were required by the rules of chancery; in order for a final decision upon the real merits of the case.

C. A. Wickliffe, for the appellee, contended: 1. That the pre-emptive entry of 1000 acres of Floyd was void, upon the principle well settled by the courts of Kentucky, that every call of an entry which might give it shape or locality, and which are, in the adjudications of those courts, denominated "locative calls," must be proved; and the objects called for should have been notorious at the date of the entry. 2. The entry is bad on its face. It is vague in the call to adjoin the settlement on the north and south sides, "so as not to run into the old military surveys which are legal." 3. The location, or pre-emptive entry, is void, upon the ground that the land-law of Virginia and Kentucky never did authorize an entry to be made in any other way than by the proper names of the person locating.

He argued, that the requisition "to adjoin the settlement on the north and south sides, so as not to run into the old military surveys," was indefinite. The land might adjoin on all sides with equal propriety. A subsequent locator would in vain look for the precise position of such lands. The injunction "so as not to run into old surveys," would give no information of any certain character. What surveys were they? How could any one know, without the particular survey had been stated, which of the old surveys were good, and which were bad? and yet this knowledge was essential. He cited in support of his arguments on these points, 1 Bibb 10; *Williams* v. *Taylor*, Ibid. 41–6; Ibid. 29, 30, 35, 127, 135, 136, 138; *Cox* v. *Smith*, Hardin 411; *Grubbs* v. *Rice*, 2 Bibb 110; *Walker* v. *Montgomery*, *206] Ibid. 259; *Kincaid* v. *Blythe*, Ibid. 476, 479; **Thomas* v. *Bowman*, Ibid. 128, 132. Also 3 Ibid. 162, 543; 4 Ibid. 132; *Howard* v. *Todd and others*, 1 A. K. Marsh. 275.

He also urged, that the entry in the name of "the heirs of John Floyd" was indefinite, and therefore void; as those terms did not designate the persons to take, the same having been made in 1783, before the law abolishing primogeniture. The land, therefore, descended to the heirs-at-law, and it is not shown, who is such heir. The complainants in the circuit court did not show any title to the land claimed by them, derived from the persons who are alleged to have been the proprietors, as heirs of John Floyd. The appellants must not only show an equitable title out of the appellees, but they must connect themselves with it. Upon the evidence on the record, there are parties who have or had an interest in the land, as heirs, or under the heirs, of John Floyd; and those persons were not before the court, or the proper course pursued to authorize a decree against them in their

absence. Breckenridge's heirs were not legally called upon, and the circuit court rightfully dismissed the bill.

It was also contended, that the appellants were not entitled to relief, upon the further grounds that the patents to Craig, and to Fox and Craig, were more than thirty years old, before the commencement of the suit. That there was proved an actual adverse possession of more than twenty years before the commencement of the suit, by the appellee, and those under whom he claimed; and that the evidence upon the record fully established these positions; and the counsel to prove the same, went fully into an examination of the depositions of the witnesses.

He also said, that the appellee had the first legal possession, within the interference. And although that possession was by a tenant and purchaser, it extended itself to the limits of the elder title of the appellee, unless it can be shown to have been restricted by limits. *Kendal et al.* v. *Slaughter*, 1 A. K. Marsh. 376. In *Miller* v. *Humphries*, 2 Ibid. 448, it was held, that if there was an entry of an elder patentee, on an *interference, before [*207
the entry of his adversary, the elder patentee is in possession to the extent of the claim, and the subsequent entry of the junior patentee is an ouster only to the extent of the claim of the junior grantee. Also, *Green* v. *Liter et al.*, 8 Cranch 229; 2 Wheat. 229.

MARSHALL, Ch. J., delivered the opinion of the court.—This is a suit in chancery, brought by the plaintiffs in the court of the United States for the seventh circuit and district of Kentucky, to obtain a conveyance of lands, to which the defendant has a legal title, but to which the plaintiffs claim the equitable title, under prior entries which they allege to be valid. At the hearing, the bill was dismissed, with costs. From this decree, the plaintiffs have appealed to this court.

The plaintiffs derive their title from John Floyd, deceased. As the patent of the defendant is anterior to that under which the plaintiffs claim, their equitable title cannot be sustained, unless it be founded on prior valid entries. These entries, therefore, must be examined. In 1779, John Floyd obtained a certificate for a settlement-right of 400 acres, and a pre-emption right to 1000 acres, to adjoin his settlement. On the 3d of November 1779, he made an entry of these 400 acres, to include a plantation called Woodstock. The validity of this entry is not controverted, nor is it otherwise important, than as it may serve to establish the entry of the pre-emption warrant, so far as that entry depends upon the settlement. On the 31st of May 1783, John Floyd's pre-emption warrant was entered in the following words: John Floyd's heirs enter 1000 acres of land on a pre-emption warrant, No. 1054, joining the settlement at Woodstock, on the north, east and south sides thereof, so as not to run into the old military surveys, which are legal.

Two objections have been made to this entry; the first is, that it is made in the name of the heirs of John Floyd, without naming them. That there is less precision and certainty in this *description than if the [*208
heirs were named, must be admitted, but the court is not prepared to say, that the entry is, on that account, a nullity. No case has been adduced, in which the courts of Kentucky have so decided; and as the description is sufficiently certain to identify the persons entitled under it, we should feel

great difficulty in declaring it to be void. In considering this question, the peculiar situation of Kentucky, at the time, cannot be overlooked; warrants had been issued for more land, perhaps, than was to be found in the country; certainly, for more than was valuable. These warrants had been most generally placed in the hands of locators, by the proprietors, who resided in the Atlantic states. The communication between the principal and agent was tedious and uncertain. The holder of the warrant might often hear of the death of its proprietor, at a critical moment; when its immediate location was very interesting to the family of the deceased; and when he was not informed of the names of the persons entitled to the warrant. To delay in making the entry, until this information could be gained, might, and probably would, be very injurious to the family of the deceased; and no injury could result to any, from making it in the name of the heirs generally. If they were not all entitled, they would all be trustees for those who were. The entry is an incipient step towards obtaining a title. Its object is, at the same time, to appropriate the land it covers, and to give notice to others that the land is appropriated. We do not think the technical objection to substituting a legal description, which cannot be misunderstood, for the more definite description by the proper names of the persons who are heirs is of such substantial importance as to vitiate the transaction. We are confirmed in this opinion, by the fact, that the survey was made in pursuance of the entry in the name of the heirs of John Floyd generally, and that the patent was issued on this survey. Several other entries and surveys were made for the heirs, without specifying their names, and patents issued on them all. The objection was certainly not deemed valid by the officer who was intrusted with the power of granting titles to lands.

*209] A second and more serious objection has been taken to *the language of the entry. It is to join the settlement on the north, east and south sides thereof, so as not to run into the old military surveys, which are legal. The old military surveys, forming together a parallelogram, adjoined Floyd's settlement on the north-west, making an acute angle with its northern line; so that the portion of his pre-emption warrant which adjoined his settlement on the north, could not be extended the whole length of the northern line, without interfering with them. It is contended, that this limitation on the entry, "so as not to run into the old military surveys, which are legal," renders the whole so uncertain as to make it void. We do not think so. The rules which are settled in Kentucky would require that this entry, had the restriction respecting the military surveys been omitted, should be surveyed equally on the north, east and south sides of the settlement; the whole land to be included by rectangular lines. The old military surveys, therefore, must be so contiguous to the settlement as to stop one or two of these lines. A subsequent locator knew where to look for them, and the testimony in the cause informs us, that he would encounter no difficulty in finding them. The evidence is, that they were well known; and that the lines were plainly marked, so as to be traced without difficulty.

We consider the last words of the entry, "which are legal," merely as an affirmance that they are so, not as leaving it doubtful; and consequently, that they make no change in the entry. Understanding them in this sense, we perceive no sufficient objection to the entry. We cannot perceive any

reason, why the lines might not be stopped by an old military survey which is well known, as well as by any other well-known object. The shape and form of the land, independent of this reference, being given by the settled rules in Kentucky, the position of the old military surveys must be such as to vary that shape. A subsequent locator could find no real difficulty in fixing the form of the entry. But if this restriction be entirely discarded, and the entry be surveyed, without regard to the old military surveys, it will make very little difference in the degree of interference between *the claims of the parties, and no difference in the decree which will be made by this court. It will, therefore, not be necessary to decide, at this time, in what manner this entry ought to be construed. [*210

The lands held by the defendant also interfere with another entry made by Floyd. On the 29th of April 1780, John Floyd entered 1600 acres upon a military warrant, on Boon's creek, adjoining David Robinson's west line, extending along said line, and westwardly for quantity. David Robinson had a survey made in 1776, on a military warrant. He afterwards entered a settlement and pre-emption warrant to adjoin this military survey; and surveyed them in September 1780. The counsel for the defendant objects to the legality of this entry, because it does not designate the tract for the west line of which it calls; and because David Robinson's survey had not sufficient notoriety to inform a subsequent locator on what part of Boon's creek he was to search for it.

The first objection is certainly not well founded. Floyd's entry was made before David Robinson's settlement and pre-emption were surveyed, possibly, before they were entered. But were it otherwise, this settlement and pre-emption form one tract with his military survey, so as to have the same west line.

There is more weight in the second objection. The testimony to establish the notoriety of Robinson's survey is far from being conclusive. John Bradford deposes, that he was conversant in the quarter in which these lands lie, in November 1779; that he had no knowledge of the military survey of David Robinson, but from the records, except from common conversation, but does not know at what time he first heard it spoken of. He knows that Robinson and Hickman have military surveys in that neighborhood, but never understood their precise situation. He believes, the McGees, at McGee's station, knew, and could show the lands of David Robinson, but of this he is not certain. Robert Boggs deposes, that he was at the making of David Robinson's military survey, and that he has been conversant *in the neighborhood, from the year 1775 to the time of giving his deposition. To the question, "from your first knowledge of those surveys (Robinson's and others), were they known and familiarly spoken of by the names of their proprietors, as aforesaid?" he answers, "he thinks they were, shortly after." He says, "he thinks the lines of Robinson's and Martin's surveys could have been found, by reasonable inquiry, at any time after they were made, for they were plainly marked." He left Kentucky, and returned in the year 1779. He left it again, in the fall of 1780, and returned in 1783. He is not certain that any person was acquainted with the lines of David Robinson's military survey, on the 29th day of April 1780, except David and William Robinson, David McGee, John Haye and Jacob Boughman. The Robinsons and Boughman lived in Virginia, McGee, at his station, about [*211

one and half or two miles from the survey. The body of the land was spoken of, and he believes, was known by many.

In estimating the weight of this testimony, it must be recollected, that the depositions were taken more than forty years after Floyd's entry was made. Few persons who were alive and in the neighborhood at the time, now survive. A fact resting mainly in memory, which might have been established with ease in 1780, would be ascertained with difficulty in 1825. Examining the testimony under this aspect of circumstances, we think, although it may not be conclusive, it is sufficient to sustain the entry. John Bradford had no personal knowledge of Robinson's survey, but intimates that he was acquainted with it from the records and from common conversation. His deposition is not explicit as to time. His deposition, however, appears rather to refer to a remote time. The people at that time were in stations, and the nearest, certainly one within two miles of the place, was McGee's. He believes, but is not certain, that the McGees knew and could have shown the land. Robert Boggs was present at the survey. It was known and spoken of as Robinson's shortly afterwards. Though he mentions only five persons who, in addition to himself, knew the lines, three of whom resided in Virginia; still, he says the body of the land was spoken of, and he believes, was known by many.

*212] *A military survey, made before the land-office was opened, must have attracted the general attention of those in the neighborhood; and after the office was opened, must have excited general inquiry. Those surveys were established by law; and it was, consequently, an object with locators to obtain exact information respecting them, in order to avoid them. Robinson's survey was spoken of at McGee's, the very place where inquiry would be made. Other witnesses, whose knowledge of that part of the country commenced five or six years afterwards, speak of Robinson's survey as having then acquired general notoriety. There is then strong reason to believe, that a subsequent locator, having Floyd's entry in his hands, could, with reasonable inquiry, have found the west line of Robinson's entry.

The defendant also relies on an adversary possession in himself and those under whom he claims, for more than twenty years. His proof of this fact is sufficient; and it is well settled, both in the courts of Kentucky and in this court, that a possession which will bar an ejectment, is also a bar in equity. But in this case, the plaintiffs also have been in possession. John W. Hunt deposes, that he took possession of the tract of land in controversy, for the plaintiffs; leased it out for a number of years, and accounted with them for the rent. He exhibited a copy of an agreement made with Isaac Johnson and Thomas Coleman, on the 12th day of August 1800, for three years; and says, that other tenants succeeded them, who continued to pay him the rent for the plaintiffs, until the year 1815. The rent he received in that year was, he believes, for the year 1814. Each of the parties then has held possession of distinct parts of the land in controversy. In this state of things, it is well settled,(*a*) that the party having the better right is in constructive possession of all the land not occupied in fact by his adversary. If then the plaintiffs in this case have the better title, that title is barred

(*a*) Green *v.* Liter, 8 Cranch 229.

by the possession of the defendant, so far as that possession was actual, but not further.

No question can arise in this case, under the act which makes *the possession of seven years a bar, because the plaintiffs were in actual [*213 possession of part of the land, until the year 1815, and this suit was instituted in April 1820. If then, the title of John Floyd is regularly vested in the plaintiffs, we perceive no sufficient obstacle to their recovering at least a part of the land in controversy.

The plaintiffs claim 694 acres of land, part of the entries which have been considered ; and charge generally in their bill, that they have regularly obtained a conveyance for the same from the heirs of the said Floyd, by metes and bounds, without specifying the persons through whom the title is derived.

The will of John Floyd, proved and admitted to record in Jefferson county, in March 1794, is among the exhibits in the cause. In that will, he devised his tract of land called Woodstock (which includes the land in controversy) to his daughter Mourning Floyd, and to his son George Floyd. Patents issued on the entries and surveys for the lands in dispute, to Mourning Floyd, John Floyd, George Floyd and Jane Floyd, widow of the said John Floyd, as tenants in common.

It appears from another exhibit in the cause, that in the year 1815, the plaintiffs, with others, filed their bill in the circuit court of Fayette county, in the state of Kentucky, sitting in chancery, against the heirs and devisees of Thomas Turpin and of John Floyd, deceased, praying for a conveyance of 699 acres of land, part of the Woodstock tract. The bill states, that in January 1798, Thomas Turpin sold to John W. Hunt and Abijah Hunt, 699 acres of land, part of John Floyd's survey, called and known by the name of Woodstock tract ; and on the same day, executed his bond to them, in the penalty of $4000, with a condition for the conveyance thereof, on or before the first day of March thereafter. The said Abijah Hunt and Thomas Turpin both departed this life, no conveyance of the land being made. Abijah Hunt, by his last will, devised his interest in the land to the plaintiffs, and the legal estate of Thomas Turpin descended to his heirs. The bill further states, that John Floyd devised his tract of *land called [*214 Woodstock, consisting of 4000 acres, of which the land sold by Thomas Turpin was part, to his daughter Mourning Floyd, since intermarried with John Stewart, and his son George Floyd, to be equally divided between them ; that the said Stewart and wife did execute a deed for the said 699 acres of land to Thomas Turpin, in his lifetime ; but they are informed, that the same was burned in the office of the county court of Fayette, when the same was destroyed by fire.

A *subpœna* issued on this bill, which was not executed on several of the defendants, among whom included John Stewart and Mourning his wife, they being no inhabitants of the country. In February 1815, the court ordered, that unless the non-resident defendants shall appear and answer, on or before the first day of the next June term, the bill should be taken for confessed against them ; and that a copy of the order be inserted in some authorized newspaper of the commonwealth, for eight weeks in succession, agreeably to law. It appearing that this order was published, and that process was served on the resident defendants, the court, in June term 1816,

decreed that the bill should be taken for confessed, and that a commissioner appointed by the court should convey the title of the defendants to the plaintiffs. The plaintiffs in this suit claim title to the lands in controversy under the conveyance executed in pursuance of this decree. The defendant insists, that no title passes by it, because Floyd's heirs were not parties to the suit.

The laws of Kentucky authorize their courts in chancery to make decrees against absent defendants, on the publication of an order, such as was made in this cause by the circuit court of Fayette county for two months successively, in some paper authorized to make the publication, and on fixing it up at certain public places prescribed by the act. This publication is considered as a constructive service of the process. The court of Fayette county obviously supposed a publication for eight weeks to be a compliance with this law; but we understand that the supreme court of the state has determined otherwise. That tribunal has decided, *that the *215] publication must be continued for two calendar months.[1] Under this construction of the act, the heirs of John Floyd were never before the court, and the decree was made against persons who were not parties to the suit; it cannot affect them.(a) The court, therefore, has no evidence that the legal or equitable right of Floyd's devisees has been acquired by the plaintiffs. They cannot be allowed to assert the equity of those devisees, against the defendant, without making them parties to the suit.

But as the plaintiffs claimed under a conveyance made in pursuance of a decree of a court of competent jurisdiction; we do not think their bill ought to have been dismissed. The circuit court ought to have given leave to make new parties; and on their failing to bring the proper parties before the court, the dismissal should be without prejudice. The decree of the circuit court is reversed, and the cause remanded; with directions that the plaintiffs have leave to amend their bill, and make new parties.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel: On consideration whereof, it is considered, ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed and annulled; and that this cause be and the same is hereby remanded to the said circuit court, with directions that the plaintiffs have leave to amend their bill and make new parties.

(a) Pract. Reg. in Ch. 125; Cas. Ch. 48; Com. Dig., tit. Chancery, Y. 8.

[1] Pyle v. Maulding, 7 J. J. Marsh. 202.

*William Patterson, Plaintiff in error, *v.* Rev. Willis Jenks *et al.*, Defendants in error

Indian lands.

Construction of the provisions of the treaties with the Indians, made by the state of Georgia, relative to boundaries; and of the acts of the legislature of that state, relative to grants of lands within its territorial limits, and which were not within the Indian boundary line, as defined by the treaties, and as recognised by those acts.

Undoubtedly, the presumption is in favor of the validity of every grant issued in the forms prescribed by law; and it is incumbent on him who controverts it, to support his objections; the whole burden of proof lies on him. But if his objections depend on facts, those facts must be submitted to a jury; if opposing testimony be produced, that testimony also must be laid before the jury; and the court may declare the law upon the fact, but cannot declare it on the testimony. p. 227.

If the state of Georgia have construed their treaty with the Cherokee Indians by any subsequent acts, manifesting an understanding of it; this court would not hesitate to adopt that construction. p. 230.

If the state of Georgia has practically settled the limits of Franklin county, such settlement ought to have been conclusive on the circuit court. p. 232.

In the nature of things, we perceive no reason why the grant of the land in controversy should not be good for land which it might lawfully pass; and void as to that part of the tract for the granting of which the office had not been open. It is every day's practice, to make grants for lands which have in part been granted to others; it has never been suggested, that the whole grant is void, because a part of the land was not grantable. p. 235.

The principle, that a patent conveying lands lying partly within and partly without the territory retained by the Indians, was void, as to so much as lay within it, and valid for the residue, was settled by this court in the case of Danforth *v.* Wear, 7 Wheat. 673; this decision was made on a patent depending on the statutes of North Carolina, which contain prohibitions at least as strong as those of Georgia.[1] p. 236.

Error to the Circuit Court of Georgia. This cause came up on a writ of error to the sixth circuit court of the United States for the district of Georgia. It was tried in Milledgeville, at May term 1827. In the course of the trial, a number of questions were raised, on some of which the judges, being divided in opinion, refused to give the jury the instruction prayed by the plaintiff; and a verdict and judgment were rendered for the defendants. The present writ of error was brought to reverse this judgment.

In the court below, the plaintiff, to sustain his case, gave in evidence a grant from the state of Georgia to Bazil Jones, *for 7160 acres of land, in Franklin county, on the waters of the south fork of the [*217 Oconee river, since called the Appalachie, bearing date the 24th day of May 1787, and deduced his title to the disputed premises regularly from the grantee.

On the part of the defendants, it was contended, that this grant was void: 1. Because the land attempted to be granted was without the temporary boundary line of the state, and within the Indian hunting-ground. 2. Because the survey wanted the line and station trees required by law; the surveyor had omitted to note on his plat the beginning corner; had laid down the water-courses inaccurately; and had been guilty, as was alleged, of various other acts of fraud, negligence, irregularity or ignorance, in making and platting the survey, prior to the emanation of the grant.

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[1] S. P. Winn *v.* Patterson, 9 Pet. 663; Mitchel *v.* United States, 15 Id. 52.

Evidence was also given on behalf of the plaintiff, to establish the lines, and to prove the possession of the defendants within them.

The first exception stated, that the plaintiff gave evidence conducing to prove that the south fork of the Oconee river, known as the Appalachie, ran through the land described by the grant and plat aforesaid, under which the plaintiff derived title; and that all the lands within the said grant which were in possession of the defendants in this action, were on the north-east side of the said south fork of the Oconee river, and within the territorial limits of the state of Georgia, as defined by Hawkins's line, which said line was run by Benjamin Hawkins, under the authority of the United States, to define the temporary boundary line between the state of Georgia and the Creek Indians: and that all the lands included within the aforesaid grant were situate on the waters of the said south fork of the Oconee river. And thereupon, the counsel for the plaintiff moved the court to instruct the jury, that the grant from the state of Georgia to Bazil Jones, under which the plaintiff derived title to 7160 acres of land, in Franklin county, in the said
*218] state, *was a legal and valid grant; which instruction the court, being divided in opinion, refused to give.

The second exception stated, that the counsel for the plaintiff also moved the court to instruct the jury, that, upon the aforesaid evidence, taking the same as true, the said tract of land, so granted to Bazil Jones, was, at the time of the survey and grant thereof, within the territorial limits of the state of Georgia, as ascertained by laws and treaties; within the limits of Franklin county, as by the law defined; and not within the Indian boundary line; which instruction the court, being divided in opinion, refused to give.

The third exception stated, that the counsel for the plaintiff also moved the court to instruct the jury, that the said grant to Bazil Jones, under which plaintiff derived title, was a legal and valid grant, for all the lands exhibited on the plat as lying north and east of the south fork of the Oconee river, now called Appalachie, including all the waters of the same; which instruction the court, being divided in opinion, refused to give.

The fourth exception stated, that the counsel for the plaintiff moved the court to instruct the jury, that the said grant to Bazil Jones, under which the plaintiff derived title, was a legal and valid grant, for all the lands exhibited on the plats as lying north and east of the south fork of the Oconee river, called Appalachie; which instruction the said court, being divided in opinion, refused to give.

The fifth exception stated, that the plaintiff moreover gave evidence conducing to identify and prove certain corner trees, station trees, and lines of the said tract of land, granted to Bazil Jones aforesaid, before described, and including all the lands on the north and east side of the south fork of the Oconee river, in the possession of the defendants. And thereupon, the counsel for the said plaintiff moved the court to instruct the jury, that neither the want of the line and station trees required by any law, nor the omission of the surveyor to note on his plat the beginning corner, nor any mistake in platting the water-courses, nor any fraud, irregularity, negligence
*219] or ignorance of the *officers of government, prior to the issuing of the grant to Bazil Jones, under which the plaintiff derives title, did, or could, legally, affect the right of the plaintiff to recover; that the existence of the grant was, in itself, a sufficient ground to infer that every pre-requisite

had been performed; and that as to all irregularities, omissions, acts of fraud, negligence or ignorance of the officers of government, prior to the emanation of the grant, the government of Georgia, and not the plaintiff claiming under her grant, must bear the consequences resulting from them; which instruction the court, being divided in opinion, refused to give.

The sixth exception stated, that the plaintiff moreover gave evidence conducive to prove, that the title of Bazil Jones, the grantee of the said land, had been regularly and legally conveyed to the lessee of the plaintiff in this action, before the commencement thereof; and that all the lands in the possession of the defendants, and of each of them, at the time of the service of the process in this action, were within the lines described by the said grant to the said Bazil Jones, and were on the north and east side of the said south fork of the Oconee river. And thereupon, the said counsel for the plaintiff moved the court to instruct the jury, that, upon the aforesaid evidence, if the jury believed the same, the plaintiff was, by law, entitled to recover the premises in dispute; which instruction the court, being divided in opinion, refused to give.

On the part of the plaintiff in error, also plaintiff in the original action, two points were made: 1. That the grant to Basil Jones was a good and valid grant, *in toto*. 2. That, if not good for the whole, it was so, at least, in part, including all the premises disputed in the present action. To maintain these propositions, it was insisted:

1. That, at the time of the emanation of the grant to Bazil Jones, under which the plaintiff derived title, the lands lying on the south fork of the Oconee river, including all the waters of the same, were within the territorial limits of *the state of Georgia; within the limits of Franklin county, as by law defined; and not within the temporary Indian [*220 boundary line; and that the said grant to Bazil Jones was, and is, a good and valid grant for the lands exhibited on the plat as lying north and east of the south fork of the Oconee river, now called Appalachie, including all the waters of the same.

2. That a large part of the land embraced in the said grant lay north and east of the south fork of the Oconee river, now called Appalachie, being the branch designated by the United States commissioner, Hawkins, as the temporary Indian boundary line; and was, consequently, at the time of the issuing of the said grant, within the acknowledged limits of the state of Georgia. As to so much of the said land, therefore, the grant was valid; and, since this comprehended all that was in possession of the defendants, at the commencement of the present action, the plaintiff was entitled to recover.

3. That neither the want of the line and station trees required by any law, nor the omission of the surveyor to note on his plat the beginning corner, nor any mistake in his platting the water-courses, nor any fraud, irregularity, negligence or ignorance of the officers of government, prior to the issuing of the grant to Bazil Jones, under which the plaintiff derives title, did, or could, legally, affect the right of the plaintiff to recover; that the existence of the grant was, in itself, a sufficient ground to infer that every pre-requisite had been performed; and that, as to all irregularities, omissions, acts of fraud, negligence or ignorance of the officers of government, prior to the emanation of the grant, the government of Georgia, and not

the plaintiff claiming under her grant, must bear the consequences resulting from them.

The case was argued by *Wilde* and *Berrien*, for the plaintiff; and by *Haynes*, for the defendant.

For the *plaintiff* in error, it was contended: That the plaintiff having made out a regular title from the grantor, and the defendant being in possession of the land *covered by the title, the only question was upon
*221] the validity of the grant; and the decision of this inquiry will depend upon which was the temporary boundary line between the state of Georgia and the Indian tribes in 1787, the grant having issued at that period.

A grant of lands, the Indian title to which has not been extinguished, is not void for that cause alone, independent of statutory regulations. 3 Johns. 365; 6 Cranch 87. This grant is not avoided by any statute of the state of Georgia, which can legally operate upon it. Statutes posterior to the emanation of this grant cannot affect it. If the grant issued legally, it created a vested right, which could not be divested. This grant is dated 24th of May 1787, and these principles dispose of all the acts of the legislature posterior to that date. The acts of 1780, Prince's Dig. 263, § 20, and 1783, Prince 268, § 5, are all retrospective in terms. Penal statutes must be construed strictly; and of this kind is the act of 1787, Prince's Dig. 278, § 2, 3; and it applies to lands granted and surveyed at the date of the law. The plaintiff's survey was before; his grant was after the date of this act.

The third article of the treaty of August 1787, between the Creeks and the state of Georgia, Marbury & Crawford's Dig. 605, provides, that a new line shall be drawn, without delay, between the present settlements in the said state, and the hunting-grounds of the said Indians, to begin on Savannah river, where the present line strikes it, thence up the said river to a place on the most northern branch of the same, commonly called Keowee, where a north-east line to be drawn from the top of the Oconee mountain shall intersect; thence along the said line, in a south-west direction, to the said mountain; thence in the same direction to Tugalo river, thence to the top of the Currohee mountain, thence to the head of the most southern branch of the Oconee river, including all the waters of the same; thence down the said river to the old line. The same boundary is recognised in the 11th article of the Gulphinton treaty. M. & C. Digest 508. The treaty
*222] of 1786, *with the Creeks, declares, that, "the present temporary lines reserved to the Indians for their hunting-grounds shall be agreeable to the treaty of Augusta and Galphinton;" and it provides, that the lines shall be marked, as soon as the Indians can attend to see it done. M. & C. Dig. 619. The land act of 1784, § 1, defines the lines of the Indian hunting-ground in the terms of the treaty, and lays off two new counties, Franklin and Washington (M. & C. Dig. 330); and the 10th section of the act of 1785 (M. & C. Dig. 336), shows the construction which the legislature put on the treaty.

The adoption of a waving boundary line, "including all the waters," is in conformity with the example and practice of the United States in her numerous Indian treaties. The counsel referred to 4th art. treaty with the Cherokees in 1785. Treaty with the same, in 1791, 1807. 1st art. in

the treaty with the Peoria tribe in 1819 ; with the Choctaws in 1805 ; with the Chickasaws in 1786, and other treaties.

All the land covered by the plaintiff's grant was, at the time of the execution of the survey, and the emanation of the grant, within the limits of the state of Georgia, and within the body of the county of Franklin ; and if the same was subsequently retroceded to the Indians, such retrocession would not divest the vested rights of the grantee. Its utmost effect would be, to subject the title in fee to the Indian title of occupancy, and the former would cease to be incumbered, whenever the latter should be removed.

If further proof were necessary to show that the lands on the waters of the south fork of the Oconee, left out by the line of 1798, were within the limits of the state of Georgia, and had been ceded by the Indians and granted by the state ; that proof is supplied by an express recognition of the fact by the joint act of Georgia and the United States. Articles of agreement or cession in 1802, 4th article, Prince's Abr. 527.

As to the proposition, that part of the land in the grant is within the Indian boundary and void, and that, consequently, the whole grant is void : the decision of this court in *Danforth* v. *Wear*, 9 Wheat. 673, establishes a *contrary doctrine, and is conclusive in favor of the plaintiff in error on this point. [*223

For the defendants in error, *Haines* maintained : 1. That the grant to Bazil Jones was void, and that no title under it could be valid ; the survey and grant lying beyond the temporary boundary line of the state of Georgia ; and that all surveys and grants located on the Indian hunting-ground, beyond the then temporary boundary line of the state, were prohibited by the statute laws of Georgia, and declared to be null and void, and inhibited from going to the jury as evidence. 2. That the warrant, survey and grant purported to be for land stated to be in the county of Franklin, and the land embraced in the survey extended across the western line of the county of Franklin ; and all surveys and grants, not lying in the same county, not laid out, are by law declared to be null and void. 3. That if the expression, "waters of the south fork of the Oconee river," contained in the plat, mean the south fork of the Oconee itself, or the Appalachie river, the grant is void on its face ; as the survey and grant are in direct violation of the statutes of the state. 4. That waters of the south fork of the Oconee river "do not mean the south fork of the Oconee itself, or Appalachie, but only tributary streams of that river ; and that the survey and grant are void, for the suppression of the fact that one of the streams marked in the plat, was the south fork of the Oconee or Appalachie, and for the suggestion of the falsehood, that the land lay within the county of Franklin, when, in truth, a great part of it lay without that county. By this suppression of truth, and suggestion of falsehood, the state was deceived ; and by the fraudulent deception practiced by the grantee, the survey and grant are void in law ; and particularly so in this case, as the grantee, Bazil Jones, was the surveyor who committed the fraud on the state, for his own benefit.

In support of the first point, the treaties with the Indians, and the construction given to them by the legislature of *Georgia, were relied upon. The treaty of Augusta in 1783, Marbury & Crawford's Digest, 604, 605, calls for "the most southern branch of the Oconee river ;" and the [*224

act of the legislature of Georgia, in defining the line of the state, adopts the same language. Prince's Dig. 270. An enlarged construction of the treaty was attempted, but this was not authorized by the legislature, when defining the boundaries of the county of Franklin; the act declaring the boundaries to be "the most southern stream of the Oconee river."

This definition of boundary is referred to in subsequent treaties, and the terms of description in those treaties are retained. M. & C. Dig. 607. Georgia has always, both in her treaties with the Indians and in her legislative enactments, respected this boundary line; as well from a sense of justice to the Indians, as from a regard for her own dignity; and she has never admitted that the temporary boundary extended west of "the south fork of the Oconee." A particular examination of the treaties with the Indians will show conclusively, that "the south fork of the Oconee," mentioned in the treaties of 1783, is Appalachie river, as known in the laws, and to the citizens of Georgia. M. & C. 619; Watkins's Dig. 364; Prince's Dig. 263, 268, 273, 278, 304; Watkins 363, 551. These treaties and statutes of the state, show beyond controversy, that the grants within the boundary of the Indian lands were void.

Upon the second point it was urged, that the act of 1784, passed soon after the treaty of 1783, made at Augusta, made the grants beyond the line of Franklin county, established by that law, absolutely void. Prince's Dig. 270. The warrant calls for land in the county of Franklin, and the survey says the land does lie there; and the grant is issued accordingly. Taking the Appalachie as the western boundary of the county, the land does not lie within the county. The surveyor who stated the fact to be otherwise, committed a deception on the state. By the laws of Georgia, a grant of land
*225] not in the *counties laid out by the state is void. Such grants are to be declared null and void. Prince 263, 271, 275, 278.

The third proposition of the defendant in error was considered as established by the treaties and statutes referred to, and in maintaining the fourth, it was urged by the counsel, that the representation of Bazil Jones, in returning the survey, was an intended deception on the state, and no title to the land could be derived through the same. 7 Bac. Abr. 64, 4; 4 Com. Dig. 307, 308; 2 Co. 33; 2 Wils. 347; 10 Johns. 23; 9 Cranch 99, 101; 10 Johns. 23; 5 Wheat. 293; 1 Ibid. 115, 155.

In answer to the claim of the plaintiff in error, that the grant was good for that part of the land which was admitted to lie within the county of Franklin, although it might be void as to the part beyond the same; the counsel for the defendants contended, that the law is fully settled, that an instrument void in part is void altogether. 1 Plowd. 54; 3 Taunt. 226; Cro. Jac. 34; 3 Co. 77; 14 Johns. 454, 458; 4 Com. Dig. 307; 1 Co. 26; 11 Ibid. 89; 9 Wheat. 673. The attempt to obtain relief from the weight of these authorities, by urging, that while acts prohibited by statute vitiate all proceedings connected with them, the same principle does not extend to an act contrary to the common law, is opposed by authorities; and if this were not so, the grant to Bazil Jones is prohibited by express statute. Act of 1778, M. & C. 401.

These acts were not *ex post facto*, upon the authority of *Calder* v. *Bull*, 3 Dall. 386. When an act is declared void, either by statute or common law, it is considered not to have had any legal existence, nor can it be set

up and made valid in the hands of any third person. 2 Bl. Com. 63; 2 Doug. 736.

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered in the court of the United States for the sixth circuit and district of Georgia, in a case in which the plaintiff in error was *plaintiff in ejectment. The plaintiff derived title from a grant dated in May 1787, which was issued by the governor of Georgia to [*226 Bazil Jones. At the trial, the counsel for the plaintiff moved the court to instruct the jury on several points, on all which the judges were divided, and therefore, the instructions were refused, to which refusal, exceptions were taken. The verdict and judgment were rendered in favor of the defendants, and the plaintiff has sued out this writ of error, by which the record is removed into this court. The opinions refused by the court, and the exceptions taken by counsel, will be severally considered.

The first is in these words. The plaintiff moreover gave evidence conducing to prove, that the south fork of the Oconee river, known as the Appalachie, runs through the land described by the grant and plat aforesaid, under which the plaintiff derives title; and that all the lands within the said grant, which are in possession of the defendants in this action, are on the north and east side of the said south fork of the Oconee river, and within the territorial limits of the state of Georgia, as defined by Hawkins's line, which said line was run by Benjamin Hawkins, under the authority of the United States, to define the temporary boundary line between the state of Georgia and the Creek Indians, and that all the lands included within the aforesaid grant are situated on the waters of the said south fork of the Oconee river. And thereupon, the counsel for the said plaintiff moved the court to instruct the jury, that the grant from the state of Georgia to Bazil Jones, under which the plaintiff derives title to 7160 acres of land, in Franklin county, in said state, was a legal and valid grant; which instruction the court, being divided in opinion, refused to give. This prayer is expressed in such terms that the court could not, with propriety, have granted it, without explanation, whatever opinion on the law of the case might have been entertained. Without stating a single fact, or placing the prayer on the belief of the jury that the evidence proved any fact, the court is asked to say positively that the grant to Bazil Jones is legal and valid. Undoubtedly, the *presumption is in favor of the validity of every [*227 grant issued in the forms prescribed by law, and it is incumbent on him who controverts it, to support his objections. The whole burden of proof lies on him; but if his objections depend on facts, those facts must be submitted to a jury. If opposing testimony be produced, that testimony also must be laid before the jury, and the court may declare the law on the fact, but cannot declare it on the testimony. In this case, the prayer states that the plaintiff offered testimony conducing to prove certain facts which were deemed essential to the validity of the grant, and asked the court to say, not that if the testimony was believed, or if those facts were proved, the grant was valid, but positively that the grant was valid. The court did not err, in refusing to give this instruction.

The second exception states, that the counsel for the plaintiff also moved the court to instruct the jury, that, upon the aforesaid evidence, taking the

same as true, the said tract of land, so granted to Bazil Jones, was, at the time of the survey and grant thereof, within the territorial limits of the state of Georgia, as ascertained by laws and treaties, within the limits of Franklin county as by law defined, and not within the Indian boundary line; which instruction the court, being divided in opinion, refused to give. This prayer is made on the admission of the testimony stated in the first, and on its sufficiency to prove that the tract of land granted to Bazil Jones was situated on the waters of the south fork of the Oconee river; and that the land in controversy lay on the north and east side of that fork, and within the territorial limits of the state of Georgia, as defined by the line run by Benjamin Hawkins, under the authority of the United States, to define the temporary boundary line between the state of Georgia and the Creek Indians. From these facts, the court is asked to draw the conclusion, that the tract of land was, at the time of the survey and grant thereof, within the territorial limits of the state of Georgia, and within the limits of Franklin county, as by law defined; and not within the Indian boundary line. This prayer requires the court to say what was the *boundary
*228] between that part of the state of Georgia, to which its jurisdiction was extended, and the Indians, and also what were the limits of Franklin county. As it requires an instruction respecting the whole tract, the court was bound to inquire whether the whole tract was within those limits. To ascertain these boundaries, the laws of Georgia, and the treaties of that state with the Creek and Cherokee Indians, must be examined.

On the 31st day of May, in the year 1783, a treaty was made at Augusta, between the state of Georgia and the Cherokee Indians, describing the line which should thereafter separate the settlements of the whites from the hunting-grounds of the Indians. The line commences on the Savannah river, and is of no importance in this case, until it reaches the top of the Currohee mountain. It is to proceed "thence to the head or source of the most southern branch of the Oconee river, including all the waters of the same, and thence down the middle of the said branch to the Creek line." On the first day of November, in the same year, the state of Georgia formed a treaty with the Creek Indians, for the purpose of drawing the line between the settlements of the whites and the hunting-grounds of the Indians. This line also commences on the Savannah river, and runs, as described in the treaty, to the top of the Currohee mountain. It proceeds "thence to the head or source of the most southern branch of the Oconee river, including all the waters of the same, thence down the said river to the old line." A subsequent treaty was held with the Creeks, on the 12th of November 1785, at Galphinton. The 4th article of this treaty declares, that "the present temporary line reserved to the Indians for their hunting-ground," shall be agreeable to the treaty held at Augusta, in the year 1783. On the 28th of November 1785, the commissioners of the United States held a treaty with the Cherokees, at Hopewell, in which it was agreed, that the boundary line should run from the top of the Currohee mountain "to the head of the south fork of Oconee river." The treaty at Shoulderbone, concluded in the year
*229] 1786, *confirmed the line as established in the treaties of Augusta and of Galphinton. All the treaties between Georgia and the Indians stipulate, that the lines shall be marked as soon as possible; but it does not appear that they were ever marked. A treaty was afterwards entered into

at New York, between the United States and Creek Indians, on the 7th day of August, in the year 1790, which fixes the boundary line from the top of the Currohee mountain, "to the head or source of the main south branch of the Oconee river, called the Appalachie, thence down the middle of the said south branch to its confluence with the Oakmulgee." In pursuance of this treaty, the line from the Currohee mountain to the head or source of the main south branch of the river Oconee, was run by Benjamin Hawkins.

Some ambiguity undoubtedly exists in the treaty made with the Creeks at Augusta, which, in a contest between Georgia and the Creeks, might claim a construction favorable to the pretension of the less powerful and less intelligent or skilful party to the compact. But in a controversy in which both parties claim title under the state of Georgia, it would seem reasonable, to give the article that construction which Georgia herself has put upon it, provided it be reconcilable to the words. The line is to run "to the source of the most southern branch of the Oconee river, including all the water of the same." The source of the most southern branch is the source of the main stream of that branch. It is a point to which the line is to be run from the top of the Currohee mountain. This line, if the treaty gave no directions respecting its course, would be a straight line. But the treaty directs it to be so run as "to include all the waters of the same;" that is, "all the waters" of the most southern branch. The line must, therefore, be drawn from the one given point to the other, in such direction as to include all the waters of the most southern branch of the Oconee. It must, therefore, instead of being straight, pass round the sources of all those streams which empty into the south fork on its northern side, and are between the points of commencement and of termination. But it is obvious, that no line from the top of the Currohee mountain to the *source of the most southern branch of the Oconee river, can include the waters which empty into it on the southern side. [*230

To obviate this difficulty, the defendants insist, that the line shall pass round the main branch of the south fork of the Oconee to the source of the lowest stream which empties into it on the south side, and proceed down that stream. This line would include all the waters of the south fork, but is attended with other difficulties of no inconsiderable magnitude. The words of the treaty seem to require, that the line should stop at the source of the main stream, not at the source of an inconsiderable rivulet. From this source, the line is to proceed down the river. It is reasonable to suppose, that it proceeds down the river, from the source of the river, not from the source of a small branch. It is to include all the waters, that is, all the tributary streams of that at whose source it stops. But this construction requires it to stop at the source of a stream, which is itself tributary to the very river which is spoken of as one of its waters. If this construction be admitted, and the source of the lowest stream on the south side be substituted for the source of the main stream, still the line must run down that lowest water-course to the south fork, and down the south fork to the old line. The case does not inform us, that even this line would include the whole tract granted to Bazil Jones. That tract is stated to lie on the waters of the south fork, but not on the Georgia side of the most extreme of those waters. So much of it as may be situated on the Indian side of that water-course, would be within the Indian hunting-grounds.

The treaty made with the Cherokees, at Augusta, on the 1st day of June 1783, is apparently intended to establish the same line which was afterwards adopted in the treaty with the Creeks. The only variance in the language is, that in the treaty with the Cherokees, the line from the source of the southern branch of the Oconee river, is to run "down the middle of the said branch;" in the treaty with the Creeks, it is to run "down the river." It is not probable, that different lines could have been intended.

If the state of Georgia has construed this treaty by any subsequent
*231] *acts manifesting her understanding of it, we should not hesitate to adopt that construction in this case. But the bill of exceptions contains no fact, showing that Georgia has adopted a construction of her treaties with the Indians, which would establish the boundary claimed by the plaintiff. On the contrary, in February 1787, an act was passed "for the appointment of commissioners to run the line designating the Indian hunting-grounds.." This act directs the commissioners to proceed, in conjunction with those to be appointed by the Creek nation, to trace and mark "the temporary boundary line, as heretofore established; that is to say, from the Currohee mountain, in the direction of the present temporary line from Zugalo river, till the same shall strike the head or source of the main direct stream of the south branch of Oconee river, called also Appalachie, by which is to be understood the main fork of Oconee river, next above Little river." This act seems to reject all claim, on the part of Georgia, to lands lying south of the main stream of the south branch of Oconee, and to adopt the construction of the treaties at Augusta, which appears to have been adopted by the commissioners of the United States, at the treaty at Hopewell, in 1785.

The prayer we are considering, also requested the court to instruct the jury that the tract of land granted to Bazil Jones was within the limits of Franklin county as by law defined. In February 1784, the legislature passed an act for laying off two more counties to the westward. One of these was the county of Franklin. The first section declares, "that the present temporary line, circumscribing the Indian hunting-ground, shall be marked by a line drawn from that part of the north branch of Savannah river, known by the name of the Owee, which shall be intersected by a line north-east from the Oconee mountains; thence in the same direction to Zugalo river; from thence, in a direct line, to the top of Currohee mountain; thence to the head or source of the most southern stream of the
*232] Oconee river, including all the waters of the *same; thence down the said river to the old line, thence along the old line." The only difference between this legislative description of the line, circumscribing the Indian hunting-ground, and that in the treaty, is in the substitution of the word "stream," for the word "branch." In the treaty, "the branch," and in the law, "the stream," appeared to be considered as "the river." The line is to run from its source "down the said river." This language would seem to indicate that a considerable, or main branch, or stream—one which had acquired the name of river—not a small rivulet, was in the mind of the legislature. The line which runs to it from the top of the Currohee mountain is subject to all the uncertainty which attends the same line, as described in the treaty of Augusta.

The second section of the act proceeds to define the exterior lines of the

county of Franklin. They run from the Savannah river to the south branch of the Oconee river; thence, up the said river, to the head or source of the most southern stream thereof; thence along the temporary line, separating the Indian hunting-ground, to the northern branch of the Savannah, &c. The southern boundary of Franklin county, from the place where the line from the Savannah strikes the most southern branch of the Oconee river, is, up that river to the head or source of the most southern stream thereof. You find the head or source of this most southern stream by proceeding up the river. It may well be doubted, whether this description will admit of leaving the river for any of its small rivulets. The words, the most southern stream of the south branch of the Oconee, whose source is to be found by proceeding up the river, may be satisfied, either by pursuing the most southern stream which has acquired the name of river, or the most southern stream which empties into the river. It can scarcely be imagined, that Georgia has not settled practically the limits of Franklin county; and any such settlement ought to have been conclusive with the circuit court. But no such settlement is stated in the record, and the court is required *to say, in what manner its boundary lines are to be drawn, in pursuance of the act of assembly by which it was constituted. The court is relieved from the difficulty by the same circumstances which made it unnecessary to determine the line which circumscribed the Indian hunting-grounds. The statement of fact on which the opinion of the court is asked, does not affirm that the land lies on the northern, or Georgia side of the most southern stream, but that it lies on the waters of the south branch of the Oconee river. For this reason, this instruction ought not to have been given as asked. [*233

The third exception states, that the said counsel for the plaintiff also moved the court to instruct the jury, that the said grant to Bazil Jones, under which plaintiff derived title, was a legal and valid grant for all the lands exhibited on the plat as lying north and east of the south fork of the Oconee river, now called Appalachie, including all the waters of the same; which instruction the court, being divided in opinion, refused to give. The court understands the words "including all the waters of the same," to mean waters north and east of the south fork of the Oconee river. This application, like the second, is supposed to be made on the assumption, that the facts stated in the first are true. If they are, then, all the land contained in the patent, lying north and east of the south branch of Oconee, is on the Georgia side of the line circumscribing the Indian hunting-ground, and within the county of Franklin, as described by law. The application supposed to be made to the court, is to instruct the jury, that the grant is good for so much land as lies within the county of Franklin, although part of the tract may be without that county and within the Indian boundary. The counsel for the defendants insist, that, under the laws of Georgia, the whole patent is void, if any part of the land it purports to grant be within the Indian boundary. The counsel for the plaintiff contended, that the laws, so far as they have declared patents to be void, are entirely retrospective; and that prospectively, they only inflict penalties on persons who shall make surveys in contravention of the statute.

*In January 1780, an act was passed "for the more speedy and effectual settling of this state." The 19th section enacts, "that no [*234

warrant, survey or plat, made or laid out in the lands yet within the lines of the Indians, shall be held valid, and the same is hereby declared null and void, to all intents and purposes whatever; nor shall any grant which may hereafter be surreptitiously obtained, be deemed legal or of any effect." We do not think the language of this section entirely retrospective. The words "made or laid out," may apply to the future as well as the past, and comprehend warrants and surveys which shall be, as well as those which have been, made or laid out in the lands yet within the lines of the Indians.

In February 1783, Georgia passed an act for opening her land-office. The 11th section of this act is retrospective so far as it annuls surveys and grants. Its prospective provisions only inflict penalties on the persons who shall make surveys or attempt to obtain a grant. But the 13th section, after describing the limits of the state, provides, "that nothing herein before contained shall extend, or be construed to extend, to authorize or empower any surveyor, or other person and persons whatsoever, to survey, run, or make lines upon the lands before described as being allowed to the Indians for hunting-ground, or any part or parcel thereof, before or until permission for that purpose shall be granted by the legislature and made known by proclamation." In consequence of this proviso, the land-office could not be considered as opened for lands within the Indian boundary. The fifth section of the act of 1785, which has been relied on, is retrospective.

The act of February 1787, for the appointment of commissioners to run the line designating the Indian hunting-ground, inflicts additional penalties on those who shall thereafter survey, or cause to be surveyed, or obtain grants for any lands beyond the temporary line designating the Indian hunting-ground. The 3d section is in these words, "whereas, notwithstanding
*235] the most positive laws to the *contrary, many persons, from design or accident, have run large quantities of land and obtained grants for the same, southward of the present temporary line between the good citizens of this state and the Indians, and expect to hold the same when a cession of said land can be obtained: be it therefore enacted, that the surveys or grants for such land be considered, and they are hereby declared to be null and void, and of no effect whatever." This enactment is undoubtedly retrospective. It manifests, however, unequivocally, the opinion of the legislature, that all the surveys and grants which are declared void, had been made and issued contrary to the most positive laws. However these laws may be construed, it is, we think, obvious, that the office was not opened for lands situated within the Indian hunting grounds, and that grants for them were not authorized.

But is the whole grant a nullity, because it contains some land not grantable? In the nature of the thing, we perceive no reason why the grant should not be good for land which it might lawfully pass, and void as to that part of the tract for the granting of which the office had not been opened. It is every day's practice, to make grants for land which have in fact been granted to others. It has never been suggested, that the whole grant is void, because a part of the land was not grantable.

The act of February 1807, after stating "that many persons had run large quantities of land, and obtained grants for the same, southward of the present temporary line between the good citizens of this state and the Indians," enacts "that the surveys or grants for such lands shall be consid-

ered nul. and void ;" and the survey in this case was made in September 1786. This enactment might, with as much propriety, be construed to apply to those surveys only which were made entirely within the Indian boundary, as to that part of a survey which lies on the Georgia side of that boundary. Neither construction would probably pursue the real intent of the legislature. Georgia was willing to grant all the lands so *far as the Indian boundary, but unwilling to pass that line. The sole [*236 object of the enactment was, to restrain her citizens from passing it, by making void all surveys and grants of lands beyond it. It is, therefore, a reasonable construction of the act, to consider it as applying to surveys and grants, so far only as they were contrary to law. There is a plain difference between a grant comprehending lands which may, with lands which may not, be granted, and one made on a fraudulent misrepresentation or illegal consideration which extends to, and vitiates, the whole instrument. Understanding this prayer as involving the validity of the grant, so far only as respects its extending in part into the Indian country, we think it ought to have been granted.

The fourth prayer, if not a repetition of the third, varies from it only by omitting the words " including all the waters of the same ;" consequently, the opinion which has been expressed on the third, is applicable to this The principle that a patent conveying lands lying partly within and partly without the territory retained by the Indians, was void as to so much as lay within it and valid for the residue, was settled by this court in the case of *Danforth* v. *Wear*, 9 Wheat. 673. That decision was made on a patent depending on the statutes of North Carolina, which contain prohibitions at least as strong as those of Georgia.

The fifth prayer states, that the plaintiff moreover gave evidence conducing to identify and prove certain corner trees, station trees, and lines of the said tract of land, granted to Bazil Jones aforesaid, before described, and including all the lands on the north and east side of the south fork of the Oconee river, in the possession of the defendants. And thereupon, the counsel for the said plaintiff moved the court to instruct the jury, that neither the want of the line and station trees required by any law, nor the omission of the surveyor to note on his plat the beginning corner, nor any mistake in platting the water-courses, nor any fraud, irregularity, negligence or ignorance of the officers of government, prior to the issuing of the grant to Bazil Jones, under which *the plaintiff derives title, did, or could, [*237 legally affect the right of the plaintiff to recover ; that the existence of the grant is, in itself, a sufficient ground to infer that every pre-requisite has been performed ; and that as to all irregularities, omissions, acts of fraud, negligence or ignorance of the officers of government, prior to the emanation of the grant, the government of Georgia, and not the plaintiff claiming under her grant, must bear the consequences resulting from them ; which instruction the court, being divided in opinion, refused to give. This prayer is, in some of its parts, unexceptional. In others, it is expressed in such vague and general terms, as to make it unsafe for any court to grant it. In the case of *Polk's Lessee* v. *Wendall*, 9 Cranch 87, 5 Wheat. 293, this court decided, that a grant raises a presumption that every pre-requisite has been performed ; consequently, that no negligence or omissions of the officers of government anterior to its emanation can affect it. The part of the

prayer which respects the defects supposed to be in the plat, speaks of the want of the line and station trees required by any law, without specifying the laws alluded to, and the omission of the surveyor to note on his plat the beginning, and of any mistake in platting the water-courses. The act for opening the land-office contains no particular rules respecting plats; and the act which requires surveyors to note the beginning corner of their surveys, passed in December 1789, long after the emanation of this patent. It would seem, that the officer by whom this patent was issued, was the proper judge of all things apparent on the face of the plat, and that the patent itself pre-supposes that the plat was sufficient in law as to those requisites of which he could judge by inspection. This part of the instruction might have been given. But it is connected with a request that the court would instruct the jury, that no fraud on the part of the officers of government could affect the plaintiff's title. It is not easy to perceive the extent of this instruction; and it could not, we think, have been safely given.

*238] *The sixth exception states, that the said plaintiff moreover gave evidence conducing to prove, that the title of Bazil Jones, the grantee of the said land, had been regularly and legally conveyed to the lessor of the plaintiff in this action, before the commencement thereof; and that all the lands in the possession of the defendants, and of each of them, at the time of the service of the process in this action, were within the lines described by the said grant to the said Bazil Jones, and were on the north and east side of the said south fork of the Oconee river. And thereupon, the said counsel for the plaintiff moved the court to instruct the jury, that, upon the aforesaid evidence, if the jury believed the same, the plaintiff was, by law, entitled to recover the premises in dispute; which instruction the court, being divided in opinion, refused to give. This prayer states more explicitly the facts contained in the third and fourth, and is understood to come completely within the opinion of the court on them.

It is the opinion of this court, that the circuit court erred, in not instructing the jury, that the grant under which the plaintiff made title was valid as to the lands in possession of the defendants; and that for refusing to give this instruction, the judgment of the said circuit court ought to be reversed, and the cause remanded, that a *venire facias de novo* may be awarded.

Judgment reversed.

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*239] J. Harper, Plaintiff in error, *v.* Anthony Butler, Defendant in error.

Suit by assignee of chose in action.

By the law of Mississippi, the assignee of a *chose in action* may institute a suit in his own name; when, therefore, an executor, having proved the will of his testator, in Kentucky, had assigned a promissory note due to the estate by a citizen of Mississippi, the suit was well brought by the assignee, without any probate of the will in that state.

Error to the District Court of the United States for the district of Mississippi. The only question submitted to the court was, whether the assignee of a *chose in action*, assigned by an executor, in the state where he had proved the will and taken out letters testamentary, where the debt was contracted, and where the testator lived and died, could maintain an action in

another state, without a new probate and new letters testamentary, taken out in the state in which the action was brought.

The question arose on the demurrer of the defendant to the plaintiff's replication, setting out the probate, letters testamentary, assignment, &c. The district court sustained the demurrer and decided against the plaintiff's right of action.

The cases of demurer shown by the defendant in error, were: 1. That the replication does not allege and set forth that the will of the testator was proved, and that letters testamentary were granted to the executor in the state of Mississippi. 2. That the replication does not show that the will of the testator was proved, and probate thereof granted to the executor, or any other person, within the jurisdiction of the court; nor that it was granted by a tribunal of competent jurisdiction.

Jones, for the plaintiff, contended, that the assignment being consummate in the jurisdiction where the executor's *authority was indisputable, operated a complete transfer of the *chose in action* there; and carried [*240 with it a right of action everywhere; to which no new probate, or letters testamentary, could have added any validity whatsoever. No counsel appeared for the defendant.

MARSHALL, Ch. J., delivered the opinion of the court.—This is an action of debt, brought by the plaintiff in error, in the court of the United States for the district of Mississippi, as the assignee of Henry Clay, executor of James Morrison, deceased. The defendant pleaded in abatement, that the will of James Morrison had not been proved or recorded in the state of Mississippi, nor had letters testamentary thereon been granted to Henry Clay, the executor. To this plea, there was a replication, which set out the probate of the will in the state of Kentucky, the letters testamentary to the executor, and the assignment, in the state of Kentucky, of the note on which the action was brought, to the plaintiff in error. To this replication, the defendant demurred. The court gave judgment for the defendant, and the plaintiff has sued out this writ of error.

The district court proceeded on the idea, that the executor could not transfer a *chose in action*, in Kentucky, because the obligor did not reside in that state. This court supposes the law to be otherwise. The assignment in Kentucky could not enable the assignee to sue in the court of Mississippi, unless the law of the court authorized the assignee to sue in his own name. But since this is permitted in the courts of Mississippi, the plea in abatement cannot be sustained. The judgment is reversed, and the cause remanded to the district court, with directions to overrule the demurrer.

Judgment reversed.

*Lessee of William A. Powell and others *v.* John Harman.

Statute of limitations.

Under the statute of limitations of Tennessee, of 1797, a possession of seven years is a protection, only when held under a grant, or under valid mesne conveyances, or a paper title, which are legally or equitably connected with a grant; a void deed is not such a conveyance as that a possession under it will be protected by the statute of limitations.[1]

This case came before the court from the Circuit Court of Western Tennessee, on a certificate of division from the judges of that court.

In the court below, the lessor of the plaintiff showed a regular title to the lands in question, under a grant from the state of North Carolina, and proved that the defendant was in possession of the land in dispute. The defendant proved, that he had been in peaceable possession of the land, for more than seven years, holding adversely to the plaintiff, under a deed from the sheriff of Montgomery county, dated the 14th of April 1808, founded upon a sale for taxes; but which sale was admitted to be void, because the requisites of the law in regard to the sale of lands for taxes had not been complied with.

Upon the trial of this cause, it occurred as a question, whether, under the statute of limitations of Tennessee, of 1797, a possession of seven years is a protection only when held under a grant, or under valid mesne conveyances, or a paper title, which are legally or equitably connected with a grant, or whether a possession under a void deed is such a conveyance as that a possession under it will be protected by the statute of limitations. The judges being opposed upon this question, it was referred to this court for their opinion.

Marshall, Ch. J., delivered the opinion of the court.—The question now referred to this court differs from that which was decided in *Patton's Lessee* *242] v. *Easton*, 1 Wheat. *476, in this, that the defendant who sets up a possession of seven years in bar of the plaintiff's title, endeavors to connect himself with a grant. The sale and conveyance, however, by which this connection is to be formed, are admitted to be void. The conveyance being made by a person having no authority to make it, is of no validity, and cannot connect the purchaser with the original grant. We are, therefore, of opinion, that the law is for the plaintiff, and that this be certified as the opinion of this court.

This cause came on to be heard, on a certificate of division of opinion of the judges of the circuit court of the United States for the district of West Tennessee, and on the questions and points on which the said judges of that court were divided in opinion, and which have been certified to this court, and was argued by counsel: On consideration whereof, this court is opinion, that under the statute of limitations of Tennesse, of 1797, a possession of seven years is a protection, only when held under a grant, or under valid mesne conveyances, or a paper title, which are legally or equitably connected with a grant; and that a void deed is not such a conveyance as that a possession under it will be protected under the statute of limitations; all which

[1] Overruled, in Green *v.* Neal, 6 Pet. 291; Gelpke *v.* Dubuque, 1 Wall. 213.

is directed and ordered to be certified to the said circuit court of the United States for the seventh circuit and district of Tennessee.

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*John T. Ritchie, Appellant, *v.* Philip Mauro and Joseph Forrest, Appellees. [*243

Appellate jurisdiction.

The value of the interest a guardian has in the minor's estate, is not the value of the estate, but that of the office of guardian; this is of no value, except so far as it affords a compensation for labors and services; and in a controversy between persons claiming adversely as guardians, having no distinct interest of their own, it cannot be considered as amounting to a sufficient sum to authorize an appeal to this court, from the circuit court of the district of Columbia.

This was an appeal from the Circuit Court of the District of Columbia, in the county of Washington; in which court, the proceedings of the orphans' court of that county, appointing a guardian to the estate of a minor, had been reversed on appeal, and the court had proceeded to pass such a decree as it adjudged the orphans' court should have passed. From this decree of the circuit court, the appellant came before this court, and he sought to sustain the decision of the orphans' court.

The apppellant, under an order of the orphans' court, had been appointed the guardian of John W. Ott, and had, in pursuance of the same order, entered into a bond as guardian of the said John W. Ott, in the penal sum of $10,000, with sureties.

The case was argued upon the whole of the matter contained in the decree, by *C. C. Lee* and *Chambers*, for the appellant; and by *Bradley*, for the appellees. As the court only decided upon one of the points in the case presented by the counsel, the arguments upon the others are omitted.

An objection was made by the counsel of the appellees, that the amount in controversy was not sufficient to authorize an appeal from the circuit court of Washington county to this court. The whole question to be decided on this appeal was, whether the appellant or the appellees were legally entitled to the guardianship of the person and estate of John W. Ott, a minor, whose estate, it was admitted, was of considerable value. It was also admitted, *that neither the appellant nor the appellees had any interest in the estate, except that which would be obtained from [*244 the compensation they might derive for their labors and responsibilities as guardians of the minor.

The counsel for the *appellant* contended, that the right of appeal was complete, as the property which would come into the hands of the guardian exceeded $2000, and the bond given by him, by order of the orphans' court, was in the sum of $10,000. The law is well settled, that a trustee may appeal, when the property under his charge is of sufficient amount, although he has no interest whatever in the trust estate. A guardian is a trustee, and should be considered in the same relations to the property of his ward

Bradley, for the appellees, submitted the question of the right of appeal to the court, presenting only the suggestion, that the pecuniary benefit of

the appellant from the estate could not, under any circumstances, amount to $1000. Whatever claims on the estate of his ward the appellant might have, for services to be rendered hereafter, in the state of things at the time of the appeal, as he had never acted as guardian, he had no pecuniary claims whatsoever.

MARSHALL, Ch. J., delivered the opinion of the court.—In the present case, a majority of the court are of opinion, that this court has no jurisdiction in the case, the value in controversy not being sufficient to entitle the party by law to claim an appeal. The value is not the value of the minor's estate, but the value of the office of guardian. The present is a controversy merely between persons claiming adversely as guardians, having no distinct interest of their own. The office of guardian is of no value, except so far as it affords a compensation for labor and services thereafter to be earned.

Appeal dismissed.

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*245] *THOMPSON WILLSON and others, Plaintiffs in error, *v.* BLACK-BIRD CREEK MARSH COMPANY, Defendants.

Error to a state court.

This court has frequently decided, that, to sustain its jurisdiction in appeals and writs of error, it is not necessary to state, in terms, upon the record, that the constitution, or a law of the United States, was drawn in question; it is sufficient to bring the case within the provision of the 25th section of the judiciary act, if the record show that the constitution, or a law of the United States, must have been misconstrued, or the decision could not have been made; or that the constitutionality of a state law was questioned, and the decision was in favor of the party claiming under such law. p. 250.

The act of the assembly of the state of Delaware, by which the construction of the dam erected by the plaintiffs was authorized, shows plainly that this is one of those many creeks passing through a deep level marsh, adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved; measures calculated to produce these objects, provided they do not come in collision with the powers of the general government, are, undoubtedly, within those which are reserved to the states. But the measure authorized by this act, stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it; this abridgment, however, unless it comes in conflict with the constitution, or a law of the United States, is an affair between the government of Delaware and the citizens, of which this court can take no cognisance. p. 251.

If congress had passed any act, in execution of the power to regulate commerce, the object of which was to control state legislation over these small navigable creeks, into which the tide ebbs and flows, and which abound throughout the lower country of the middle and southern states, we should feel not much difficulty in saying, that a state law coming in conflict with such act would be void. But congress has passed no such act; the repugnancy of the law of Delaware is placed entirely on its repugnancy to the law to regulate commerce with foreign nations, and among the several states; a power which has not been so exercised as to affect this question.[1] p. 252.

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[1] The power of congress to regulate commerce includes the regulation of intercourse and navigation, and, consequently, the power to determine what shall or shall not be deemed, in judgment of law, an obstruction of navigation. Pennsylvania *v.* Wheeling and Belmont Bridge Co., 18 How. 421; Sullivan *v.* Hudson River Bridge Co., 4 Bl. C. C. 74; s. c. 1 Black 582; 2 Wall. 403. And see Gilman *v.* Philadelphia, 3 Id. 713; The Passaic Bridges, Id. 782; United States *v.* Railroad Bridge Co., 6 McLean 517; Jolly *v.* Terre Haute Bridge Co., Id. 237; Palmer *v.* Cuyahoga Co., 3 Id. 226; Works *v.* Junction Railroad, 5 Id. 425;

Willson v. Black-bird Creek Marsh Co.

ERROR to the High Court of Errors and Appeals of the state of Delaware.

The Black-bird Creek Marsh company were incorporated by an act of the general assembly of Delaware, passed in February 1822; and the owners and possessors of the marsh, cripple[1] and low grounds in Appoquinimink hundred, in New Castle county, and state of Delaware, lying on both sides of Black-bird creek, below Mathews's landing, and extending to the river Delaware, were authorized and empowered to *make and construct a good and sufficient dam across said creek, at such place as the managers, or a majority of them, should find to be most suitable for the purpose; and also to bank the said marsh, cripple and low ground, &c. After the passing of this act, the company proceeded to erect and place in the creek a dam, by which the navigation of the creek was obstructed; also embanking the creek, and carrying into execution all the purposes of their incorporation. [*246

The defendants, being the owners, &c., of a sloop called the Sally, of $95\frac{9}{95}$ tons, regularly licensed and enrolled according to the navigation laws of the United States, broke and injured the dam so erected by the company; and thereupon, an action of trespass *vi et armis*, was instituted against them in the supreme court of the state of Delaware, in which damages were claimed amounting to $20,000. To the declaration filed in the supreme court, the defendants filed three pleas; the first only of which being noticed by the court in their decision, the second and third are omitted. This plea was in the following terms:

1. That the place where the supposed trespass is alleged to have been committed, was, and still is, part and parcel of said Black-bird creek, a public and common navigable creek, in the nature of a highway, in which the tides have always flowed and reflowed; in which there was, and of right ought to have been, a certain common and public way, in the nature of a highway, for all the citizens of the state of Delaware and of the United States, with sloops or other vessels, to navigate, sail, pass and repass, into, over, through, in and upon the same, at all times of the year, at their own free will and pleasure. Therefore, the said defendants, being citizens of the state of Delaware and of the United States, with the said sloop, sailed in and upon the said creek, in which, &c., as they lawfully might, for the cause aforesaid; and because the said gum piles, &c., bank and dam, in the said declaration mentioned, &c., had been wrongfully erected, and were there wrongfully continued standing, and being in and across said navigable creek, and obstructing the same, so that without pulling up, *cutting, breaking and destroying the said gum piles, &c., bank and dam respectively, the said defendants could not pass and repass with the said sloop, into through, over and along the said navigable creek; and that the defendants, in order to remove the said obstructions, pulled up, cut, broke, &c., as in the said declaration mentioned, doing no unnecessary damage to the said Black-bird Creek Marsh company; which is the same supposed trespass, &c. [*247

Columbus Ins. Co. *v.* Peoria Bridge Association, 6 Id. 70. Congress may legalize a bridge over a navigable river, which would otherwise be a public nuisance, by declaring that it shall be a lawful structure. Clinton Bridge, 10 Wall. 454.

[1] There is no such word in the English language. The word is Dutch, "kreupel" (German krüppel), and means "low wet land, overgrown with bushes."

The plaintiff, in the supreme court of the state, demurred generally to all the pleas; and the court sustained the demurrers, and gave judgment in their favor. This judgment was affirmed in the court of appeals, and the record remanded, for the purpose of having the damages assessed by a jury. Final judgment having been entered on the verdict of the jury, it was again carried to the court of appeals, where it was affirmed, and was now brought before this court, by the defendants in that court, for its review.

The case was argued, by *Coxe*, for the plaintiff in error; and by *Wirt*, Attorney-General, for the defendant.

Coxe insisted, that the record contained a case in which the constitutionality of a law of the state of Delaware had been brought into question; and the decision of the highest tribunal of the state had been in favor of its constitutionality. Under the provisions of the 25th section of the judiciary law, this case is, therefore, properly before this court. It may be admitted, that other questions were presented to the courts of Delaware. As the act incorporating the defendants in error was subsequently, in part, repealed, those courts had before them other questions arising under the repealing statute. But he contended, that, upon the authority of many cases decided in this court, there was sufficient apparent on the record, to show that the constitutionality of the law to which the plaintiff in error objects, must have been decided before those tribunals. It has been repeatedly held, that, to give this court jurisdiction, it is not necessary that the constitutionality of the law shall have been specially questioned before the state *court. *248] If, upon examination of the record, it shall be found, that unless the court should have held the law to be constitutional, they could not have given the judgment presented by the record, it is sufficient to maintain the jurisdiction here, under the act of congress.

Mr. Coxe contended, that the judgment of the high court of errors and appeals was erroneous, because the act of the general assembly of the state of Delaware, so far as the same authorized the company to shut up and embank across a navigable stream, below the ebb and flow of the tide, is repugnant to the constitution of the United States; and conferred no valid authority upon the company to destroy the navigation of the creek. He also considered the second act of the legislature of Delaware as a repeal of the provisions of the first law. The court not having noticed this point in their decision, the arguments of counsel upon it are omitted.

The first plea having stated the river to be navigable, it is against the principles of the common law to obstruct it. 10 Mass. 70. The rights of navigation are public rights, belonging to all the citizens of the United States. The use of them is necessary, for the purposes of commerce, to the whole people of the United States. Navigable streams are the waters of the United States. 9 Wheat. 187.

He urged, that the constitutional power of congress to regulate commerce, includes navigation; and the states are by this provision deprived of the power of closing a navigable river. In this case, the sloop was a licensed and enrolled vessel to carry on the coasting trade, and she was unlawfully and unconstitutionally impeded in the use of her license, by the dam erected by the defendants, under the unconstitutional act of the assembly of Delaware.

The statute of Delaware does not look to the preservation of the health of the citizens of the state, but to private emolument.

Upon the right of navigation being *jus publicum*, Coxe cited Coop. Justinian 68; Angel 15; Vattel 178, lib. 1, § *234, &c; 1 Halst. 72, 76; Angel 167; Hargrave's Collection, 26, 72, 87. He relied on the decision of this court in *Gibbons* v. *Ogden*, 9 Wheat. 187, as a conclusive authority for the plaintiffs in error. If Delaware has no right to restrain particular vessels from using her navigable streams, she cannot stop the navigation of those streams. [*249

Wirt, for the defendants, contended, that the record does not present a case in which this court has jurisdiction. The courts of Delaware might have decided in favor of the defendants in error, without sustaining the constitutionality of the act of incorporation; and this court will not assume that the question was decided, if, upon other grounds, the opinion of the state court could be maintained. In *Matthews* v. *Zane*, the court held, that the question of constitutionality must have arisen inevitably. Does the act authorizing the erection of this dam violate the constitution of the United States? It is admitted, that the creek was navigable; and that the stream was a public highway. But it is asked, whether the legislature of a state may not stop up a public highway within the territories of the state? Parliament, in England, exercises the power to stop up streams which are public highways. 4 Barn. & Cres. 589.

It cannot be urged, that the power to regulate commerce can interfere with the rights of the states over the property within their boundaries. While the waters of the United States belong to the whole people of the nation, this creek continued subject to the power of the state it whose territory it rises. It is one of those sluggish reptile streams, that do not run but creep, and which, wherever it passes, spreads its venom, and destroys the health of all those who inhabit its marshes; and can it be asserted, that a law authorizing the erection of a dam, and the formation of banks which will draw off the pestilence, and give to those who have before suffered from disease, health and vigor, is unconstitutional? The power given by the constitution to congress to regulate commerce, may not be exercised to prevent such *measures; and there has been no legislation by congress, under the constitution, with which the proceedings of the defendants under the law of Delaware have interfered. [*250

Marshall, Ch. J., delivered the opinion of the court.—The defendants in error deny the jurisdiction of the court, because, they say, the record does not show that the constitutionality of the act of the legislature, under which the plaintiff claimed to support his action, was drawn into question. Undoubtedly, the plea might have stated in terms, that the act, so far as it authorized a dam across the creek, was repugnant to the constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt, that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court. That question must have been discussed and decided. The plaintiffs sustain their right to build a dam across the creek, by the act of assembly. Their declaration is founded upon that act. The injury of which they complain is to a

right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly. The plea does not controvert the existence of the act, but denies its capacity to authorize the construction of a dam across a navigable stream, in which the tide ebbs and flows; and in which there was, and of right ought to have been, a certain common and public way, in the nature of a highway. This plea draws nothing into question but the validity of the act, and the judgment of the court must have been in favor of its validity. Its consistency with, or repugnancy to, the constitution of the United States, necessarily arises upon these pleadings, and must have been determined. The court has repeatedly decided in favor of its jurisdiction in such a case. *Martin* v. *Hunter's Lessee*, 1 Wheat. 355; **Miller* v. *Nicholls*, 4 Ibid. 311; and *Williams* v. *Norris*, 12 Ibid. 117, are expressly in point. They establish, so far as precedents can establish anything, that it is not necessary to state in terms on the record, that the constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the judiciary act, if the record show that the constitution, or a law or a treaty of the United States, must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favor of the party claiming under such law.

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The jurisdiction of the court being established, the more doubtful question is to be considered, whether the act incorporating the Black-bird Creek Marsh company is repugnant to the constitution, so far as it authorizes a dam across the creek. The plea states the creek to be navigable, in the nature of a highway, through which the tide ebbs and flows. The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh, adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognisance.

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The counsel for the plaintiffs in error insist, that it comes *in conflict with the power of the United States "to regulate commerce with foreign nations, and among the several states." If congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states; we should feel not much difficulty in saying, that a state law coming to conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and

among the several states; a power which has not been so exercised as to affect the question. We do not think, that the act empowering the Black-bird Creek Marsh company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject. There is no error, and the judgment is affirmed.[1]

This cause came on to be heard, on the transcript of the record from the high court of errors and appeals of the state of Delaware, and was argued by counsel: On consideration whereof, this court is of opinion, that there is no error in the judgment of the said high court of errors and appeals of the state of Delaware; whereupon, it is considered, ordered and adjudged by this court, that the judgment of the said court in this cause be and the same is hereby affirmed, with costs.

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[1] The same question was involved in the cases of Atkinson *v.* Philadelphia and Trenton Railroad Co., and Field *v.* The Same, in the circuit court for the eastern district of Pennsylvania, in June 1834, in which the following opinion was delivered by—

Baldwin, Justice.—The complainants having filed their respective bills on the equity side of this court, praying for injunctions to restrain the defendants from erecting a bridge across the Neshaminy creek, on the route of a railroad from Philadelphia to Trenton, which they are about constructing under color of an act of assembly, but, as is alleged, without any authority in law, to the great injury of the complainants; now move that one be granted till answer and the further order of the court. Due notice has been given to the defendants, who accordingly appeared by their counsel; affidavits have been taken on both sides, and the cases fully and ably argued; they are the same in their leading features, the principal difference between them being that Mr. Atkinson is under a contract for delivering lime in vessels navigating the Neshaminy, while Mr. Field is employed in transporting stone thereon, from places on said river above the site of the contemplated bridge. As they both depend on the same facts and principles of law, it is unnecessary to recite the allegations of both bills.

The bill of Mr. Atkinson states, that he is a citizen of New Jersey, employed in transporting articles by water, to and from different places, for which purpose he is the owner of five schooners; that he has, recently, in the course of such business, made a contract with Anthony Taylor, who resides on the Neshaminy river, in Bucks county, in this state, to deliver to him 1000 bushels of lime, at his wharf, about two miles from the mouth of said river, which is by law a public navigable river or highway, for the free passage of vessels up and down the same. That the defendants, under color of an act of assembly of this state, for incorporating the Philadelphia and Trenton Railroad company, passed in February 1832, are about to construct a permanent bridge over and across said stream, near its mouth, where it is navigable for sea vessels, and thence to the farm of said Taylor, which bridge is intended to be a flat structure, without an elevated arch, span, draw, or other contrivance for permitting masted vessels to pass up and down the river, freely, without interruption, hindrance, delay or unnecessary expense, as heretofore. That neither by the laws of Pennsylvania, nor the constitution of the United States, can any obstruction be placed across the said stream; that it is contrary to law, to impede or interfere with the full and free navigation thereof, for the accommodation of the inhabitants on said river, as well as all the citizens of the United States, who may have occasion to pass and repass on the same, with any masted vessels. That the act of incorporation gives no authority to erect such a bridge as is contemplated, which the defendants have begun to construct, or any bridge which shall, in any way, impede the full and free navigation of said river. The prayer of the bill is for an injunction to restrain the said president and directors, their agents, workmen, laborers, and all other persons employed about said railroad, from constructing any bridge whatever over and across said river; and for further relief.

The complainant asserts no right of property in the bank, or in the bed, of the river; his claim to the interposition of this court rests on his contract with Mr. Taylor, for the delivery of 1000 bushels of lime, at his wharf, above the site of the contemplated bridge, and on the

common right of navigation resulting from the act of assembly, declaring the Neshaminy a public navigable river. In this position, he asks us to arrest the completion of a public improvement, now in rapid progress, under an authority claimed in virtue of a law especially directed to this object; on such an application, it was our plain duty to pause and inquire whether this was a case in which an injunction should be granted, on the usual allegations of ordinary bills, and the common affidavit of the truth. That the matters involved are of deep concern to the parties and the public at large, cannot be denied, or that the consequences of our interference would be most serious; the injunction asked is not a matter of right, but rests in the discretion of the court, to be exercised according to certain well-known rules of equity from which we cannot depart. It is, perhaps, the highest, most delicate and dangerous power which can be confided to any judicial tribunal, yet it is one which is indispensable for the purposes of preventive justice; the nature of the cases which call for its exercise is such, too, as often to require a prompt and decisive action, on an *ex parte* application, without a hearing of the adverse party, and sometimes, without even notice, as that might lead to the immediate commission of an irremediable injury, in order to avoid the effect of the injunction, as, the transfer of stock, the negotiation of a bill of exchange or promissory note, the transfer a chattel of peculiar value, &c. On the other hand, as the erroneous exercise of this power may operate to the irretrievable injury of the party enjoined, and for which, as it is the act of the court, he can have no legal redress in damages, while the complainant may have his remedy at law, though the relief in equity is refused. Too much caution cannot be used by the court in satisfying themselves that the case presented for their summary action is one which admits of neither doubt nor delay.

Hence, the complainant must show in himself an apparent *primâ facie* right of property or action, to the subject-matter of the injunction, as well as an injury intended or threatened by the defendant, which, if done, cannot be compensated by damages or adequate legal remedies, and can be effectually averted only by the protecting preventive power of a court of equity. See 9 Wheat. 840–6; Bonaparte *v.* Camden & Amboy Railroad Co., Bald. 205. It is never exercised in a doubtful case, or in a new one which does not come within the established rules of equity (Dick. 600; Coop. Eq. 77; 7 Johns. Ch. 334); and if the courts of the United States can be at liberty to depart at all from the settled course of proceeding in chancery, it would seem to be their duty to proceed with more caution than its ordinary rules require. In England, it is in the discretion of the chancellor, to proceed without notice; it is directed or not, according to the nature of the case; if the effect of the injunction would be to suspend the operations of a manufactory, established and carried on at great expense, he would not proceed one step, without notice of the motion for an injunction (Eden 217); but this is merely a matter of discretion The act of congress, however, makes notice indispensable, before any proceedings had by the court: "Nor shall such writ be granted, in any case, without reasonable notice to the adverse party, or his attorney, of the time and place of moving for the same." (1 U. S. Stat. 334–5.) The spirit of this requisition is not merely to give the notice in fact; the party is entitled to all the benefits resulting from notice; to be heard by his counsel, on all matters appearing in the bill, or disclosed in the affidavits of the complainant, not as *amici curiæ*, but as representing the party in interest, who may be affected by the motion, as to whom it becomes an adversary suit, even before demurrer, plea or answer. It is difficult to draw with precision the line between the merits of the summary application, and the final hearing on the whole equity of the case, after an issue. On the motion for the injunction, the court will permit either party to inform its conscience as to the nature of the case, the consequences of granting or refusing it, without going into a full examination of the respective rights of the parties; they are bound to inquire into all circumstances bearing on the necessity of immediate action to prevent an irreparable injury to a *primâ facie* right, and in doing so, are not confined to the case made out by the complainant. Though this remedy will not be withheld, merely because the title of the complainant may admit of a doubt, or be open to litigation, there must be a clear case made out of impending danger, requiring prompt action to save an apparent right from destruction. Eden 234–7; Ibid. 309; Dick. 101; 2 Atk. 182–4. The defendant has an undoubted right to show, by affidavit, or otherwise, the authority or claim of right by which he acts, and to explain his conduct in relation to the subject-matter of complaint. The whole matter resting solely in the discretion of the court, they must be governed, in its exercise, by the particular circumstances of each case; a greater latitude will be allowed in those which affect persons engaged in large and expensive undertakings, especially, great works of public improvement, in which a great portion of the community may be interested, than in those merely affecting individuals, litigating on their

own account. The consequences of arresting the progress and completion of canals, bridges or artificial roads, are too serious, and the responsibilities of doing it are too great, to be assumed, unless in a plain case of the violation of rights which are under the peculiar protection of courts of equity. See 7 Johns. Ch. 330.

In this case, it was of special importance to be well informed as to the kind of navigation upon the Neshaminy, the kind of bridge proposed to be constructed, the extent of the inconvenience to which vessels would be subjected in consequence of its erection, on the plan contemplated by the defendants, and the nature of the injury which might be done to the complainants by its completion. To restrict the defendants to the case made out by the bill and affidavits of the complainants would mainly deprive the former of the benefits of notice of the motion, as well as confine our inquiries within limits much too narrow for a case so interesting to all concerned as this; in the development of which, we are fully satisfied, that a less expanded view of the subject as to the localities and facts would not have enabled us to come to a conclusion satisfactory to our minds, as to the justice and equity of the application.

A preliminary question of jurisdiction has been raised by the counsel of the respondents, on which we do not deem it necessary to express any opinion; without being understood as deciding it, by taking the case into our consideration, we shall assume, that there are proper parties before us, for all the purposes of the motion, and proceed to consider the grounds on which it is urged and restricted.

By an act of assembly of March 1771, the Neshaminy was declared a public highway for the purposes of navigation up and down the same, so far as Barnley's Ford, and no farther. 1 Sm. Laws 322. All citizens of this and other states had, therefore, the full and free right of passing and repassing on the said river, with all kinds of vessels or water-craft, which no individual could in any way impede or obstruct, without subjecting himself to an indictment for a nuisance, or an action for damages by the party injured. This common right is as much under the protection of the law, as a right of property in a citizen, in all matters relating to individuals, to the full extent in which the legislature have granted it; but it is a right derived from legislation, which may be abridged or modified, from time to time, as may be thought most conducive to the public welfare, by authorizing the erection of bridges or dams, which may subject the navigation to partial interruption, or wholly destroy it.

It is also as competent to the legislature to repeal a law declaring any stream a public highway for the purposes of navigation, as it is to vacate a road; the source of the power is the same, and the reason for its exercise, on land or water, are the same—public convenience, and the common advantage of the people—for the furtherance of which, the legislature may take away or modify, at their pleasure, a common right of passage, or any easement which could be enjoyed by any person who had no right of soil of property in the river or road. The only restraint which the constitution imposes on their authority is, that private property shall not be taken for public use, without just compensation, and the consent of the representatives of the people. Const. Penn. Art. 9, § 10. Laws in relation to roads, bridges, rivers and other public highways, which do not take away private rights to property, may be passed at the discretion of the legislature, however much they may effect common rights; even private rights, if they are not those of property, may be taken away, if it be deemed necessary for the promotion of public improvements, or if their destruction be the necessary consequence of their construction, without making compensation. The various laws of this state, authorizing the making of canals, either by the state or incorporated companies, have been so construed by the supreme court, as to establish the rule: "That the jury are to value the injury to property, without reference to the owner, or the actual state of his business, and in doing that, the only safe rule is, to inquire what would the property, unaffected by the obstruction, have sold for, at the time the injury was committed, and what would it have sold for, as affected by the injury. The difference is the true measure of compensation." 7 S. & R. 422–3.

The injuries to be compensated, are those which are done to property immediately, "as the swelling of water into mill-races, the inundation of land, the carrying a canal or lock through a man's land, or the taking away materials." This is the line which seems to have been marked by the legislature. Compensation shall be made for all damages from immediate injury to property, but not for any damage where there is no legal injury, which is called *damnum sine injuriâ*—as, the loss of a fishery, by the erection of a dam in the Schuylkill, whereby the passage of fish is prevented. "For not only may the owners of land contiguous to the river, complain of the obstruction, but all others near it, who have been accustomed to receive fish thence, or to fish with an angle or hoop-net. There are other kinds of injury, too, sustained particularly by the owners of land on the river, between the Fairmount dam and the

lower falls. All those persons have lost the benefit of navigation free from toll, in batteaux, flats, &c., which was very useful, as it served for carrying produce to market, and bringing up manure for their lands, yet it has not been contended, that for such injury, compensation is to be made. Suppose, the health of the country to be injured by evaporation from the dams, is compensation to be made for this, the greatest of all injuries? I presume not. No property has been taken from him, he had no property in the fish or the river, and he was bound to know the law by which the river remained public property, and of course, all emoluments were precarious." 14 S. & R. 83–4. So, of a spring of water between high and low water mark, of the use of which the owner of adjacent land has been deprived—he is entitled to no compensation, because he had no vested property in it, "and it is ridiculous (says the supreme court), to talk gravely of a great national work being obstructed, because a man will be deprived of the use of what never was his own." 1 P. & W. 467.

We must consider these adjudications of the supreme court of the state, as establishing the general principle, that the right to the use of the navigable streams which are public highways, either for fishing or navigation, is subordinate to laws which regulate its general public and internal concerns; and that no common right in the common property of rivers, is considered as private property, or the subject of individual ownership. As it rests wholly in the discretion of the legislature to provide for any other injury than what the constitution compels them to compensate, the sole remedy for any damages sustained by the interruption of any common right, is that which the law authorizing the construction of a road or canal across a navigable stream, prescribes in favor of a party who may sustain a loss; if the law is silent, the loss is deemed no legal injury, which gives a claim to redress. So far, then, as depends on the constitution and laws of Pennsylvania, and their judicial construction, there is no doubt, that the rights of navigation on the Neshaminy may be wholly or partially taken away, by the legislative power of the state, without compensation.

The only remaining objection to the validity of this law rests on its alleged repugnancy to the constitution of the United States by interfering with the power of congress "to regulate commerce among the several states," and violating that provision which declares, that "the citizens of each state shall be entitled to all privileges and immunities in the several states." The first of these objections is fully answered by the opinion of the supreme court in the case of the Black-bird Creek Marsh Co., 2 Pet. 245. The legislature of Delaware had authorized this company to erect a dam across a navigable creek; the dam formed a permanent obstruction to the navigation, so that no vessel could pass on the stream; but the court decided, that the act of assembly was neither repugnant to the constitution, nor in conflict with any act of congress on the subject of commerce or navigation; and that this abridgment of the common right of navigation was a matter between the government of the state and its citizens; of which they could take no cognisance. Id. 252. State laws on the subject of turnpike-roads, ferries and bridges, are a part of the system of internal commerce and police of the respective states, the regulation of which they have reserved to themselves, without any control by congress (9 Wheat. 208; 12 Id. 443; 9 Johns. 560, 564, 573; 4 W. C. C. 378; Bennett *v.* Boggs, Bald. 60); and no law on these subjects is prohibited by the constitution of the United States, unless it impairs the obligation of a contract. 2 Pet. 410, &c. The other objection is wholly inapplicable, as the law abridges the right of the citizens of Pennsylvania to the free navigation of the Neshaminy, to the same extent as those of New Jersey, while both are equally entitled to its benefits.

This brings us to the construction of the act. The eighth section authorizes the company to construct a railroad from Philadelphia to Trenton, which, by necessary implication, gives the power of erecting bridges over the streams between these places, without which the object of the law could not be effected. This is admitted by the counsel for the complainants, but he contends, that the proviso to the eleventh section is a positive prohibition to erect any bridge that shall not leave the navigation as full and free from all impediments as it has heretofore been, so that vessels can pass and repass with standing masts. This proviso is in these words: "That no obstruction whatever shall be placed on or across any stream now declared a public highway, so as to impede or interfere with the full and free navigation thereof, or to change the direction of any stream or water-course, not declared a public highway, so as to affect the rights and interests of the owners thereof, without the consent of the said owners, unless the right to the same be obtained by such process as is before directed in relation to other property; and that any inconvenience or expense attending the alteration of vessels now navigating said streams, to conform to the bridges erected by said company, shall be paid out of the funds of the company." The sense of the legislature, as expressed in this proviso, seems clear; the first part is a declaration that there

shall be no obstruction to the full and free navigation of the streams; the last clause is the legislative construction of the first, that an inconvenience or expense in so altering the vessels as to conform to the bridge, is not such an obstruction as is prohibited; it is, by necessary implication, a declaration, that the company are not bound to conform the bridge to the vessel, but that the vessel must be made to conform to the bridge, on the company paying the expense. We are bound to give this meaning to the law, or the last sentence becomes senseless, for it can admit of none other; taking the whole together, the sense is obviously, that if the erection of the bridge causes no other obstruction to the navigation than the inconvenience in the alteration of the vessel passing it, it is within the authority of the law. This is the more evident, from the obligation of the company to pay for the expenses being confined to vessels, "now navigating said stream;" this refers to the time of passing the act incorporating the railroad company, and would exclude the owner of any vessel which had not, in February 1832, navigated the Neshaminy, from a right to call on the company for any reimbursement of the expenses attending the alteration. The words "full and free navigation," must, therefore, be taken with the qualification attached to them by the legislature; which precludes us from considering such a bridge as they have authorized to be erected, as an obstruction in violation of the law; if the bed of the river is unobstructed, if vessels can freely pass and repass between the piers of the bridge, without injury or interruption, it seems to us, that the public common right of navigation is protected to the extent contemplated by the law. Had it been intended, that the construction of the bridge should have been such as to permit masted vessels to pass, there would have been a provision, that a draw should have been made, as is often done; this seems to have been a matter left to the discretion of the company, on condition of their making compensation to the owners of vessels then navigating the river. So far as we can judge from the bills and affidavits, the only subject of complaint seems to be, that the masts of the vessels must be struck, in order to pass the bridge, according to its present plan of construction; it is admitted, that such is the fact, and it is not denied, that vessels with struck masts can freely and safely navigate the river, without meeting with any obstruction from the bridge, except the trifling delay in striking and raising them.

Though the prayer of the bill is for an injunction to restrain the erection "of any bridge," the case has not been pressed to that extent in the argument; the great question seems to be, whether the company have a right to erect one, without a draw, which will permit those vessels which have standing masts to pass at pleasure. It appears to us, that the law imposes no such restriction, but that it contemplates the striking of the masts, as the very alteration for which provision is made. The affidavits point us to no other inconvenience or expense, to which the owners of vessels can be subjected, and unless some other is pointed out, it may be fairly inferred that none other exists; the consequence is, that the owners of vessels must submit to this restriction on their right of navigation, on the terms prescribed. The legislature had the power to authorize the erection of a dam or causeway, which would stop the navigation, if, in their opinion, it was conducive to the general welfare; whether it would be a discreet exercise of their power, is not for this court to decide, as the whole subject is clearly within their discretion, which the judicial power cannot control. 2 Pet. 412; 4 Id. 593–4; 4 Wheat. 423; 6 Pet. 729. They have thought proper to authorize this company to subject the navigation of the stream on the route of the road to some inconvenience, under the obligation of making compensation for the only injury to the common right of the citizens, which they deemed a proper subject of indemnity. In this respect, and to this extent, they put it upon the same footing as private property, but they have deemed any other inconvenience, expense, or abridgment of navigation to be matters of subordinate importance to the construction of the road; these are questions of public policy, with which we cannot interfere, without usurping legislative powers.

Though, as it would seem from the affidavits, that the contemplated bridge may render the Neshaminy unnavigable for sea vessels, yet that must have been foreseen by the legislature, to be the necessary consequence of the authority given by the eleventh section; they have made no provision for such a case; the same effect has been produced on the Schuylkill, and other navigable rivers in the state, over which permanent bridges, without draws, have been erected by corporations under the authority of laws, without a doubt of their validity or expediency. The authority given to this corporation, is agreeable to the uniform course of legislation, which allows a degree of latitude in the construction of works of public improvement, according to its nature and objects, by which more or less discretion is allowed as to the route, plan and execution, which we are not prepared to say, has been wantonly abused by the officers of the company. See 2 Dow P. C. 521; 2 Johns. 740; 7 Id. 380.

The affidavits produced on the part of the

company, especially, that of the person employed to construct the bridge, are very strong, to show, that its erection on the present plan is not only required by considerations of convenience, economy and security to the company; but that the making of a draw would be productive of very serious obstructions to the navigation, by requiring an additional pier in the bed of the stream, which would narrow the channel at low water, so that vessels could not pass. They also state, that the bridge crosses the stream at an angle with the current, whereby vessels would be incommoded and endangered in passing through a draw, and express an opinion, that the striking of the masts is a much less inconvenience than passing the draw. These statements and opinions, tend strongly to prove, that the powers of the company have not been so exercised as to evince either a want of discretion, or a design to deviate from their authority, by perverting it, so as unnecessarily to impair the rights of navigation. Whether they have abused, or misused their privileges, is an inquiry more proper for the legislature to institute, under the provisions of the 20th section of the law, than for this court to make, in an application for a summary injunction; if we could interfere at all, on such an allegation, it would only be on a clear departure from the route, or a palpable abuse of their discretion, in a manner that could admit of no colorable excuse; such a case we think has not been made out by the complainants. We cannot perceive in the law in question, any excess of legislative authority, any violation of any provision of the state or federal constitution, or in its execution by the defendants, the assumption of any power not conferred upon them, any wanton invasion of public or common rights, or any legal ground for an injunction, arresting the further progress of the work, on any principle hitherto recognised in a court of equity.

Were it even conceded, that the bridge is a common nuisance, or a purpresture, the remedy is in a court of law, at the prosecution of the state, for the public offence, where the defendants would have a right of trial by jury, before conviction. If this court enjoin them, it is, in effect an adjudication, that the offence has been committed, and the consequences become visited upon them, in anticipation of their legal guilt. Whether a court of equity would do this, in any case, before a conviction at law, is not well settled; there may be cases where, on the application of the attorney-general, such a proceeding might be sustained; it is unnecessary to give any opinion on such a case till it arises: it is clear, however, that to sustain such an application, the injury must be a public one, and can be redressed only at its suit. 18 Ves. 217, &c.; 2 Johns. Ch. 375, &c.; Harg. L. Tracts 83–7. If a public nuisance is also a specific injury to the property of an individual, he has his remedy in equity, not because the act complained of is a nuisance, but on account of the irremediable injury to his private right of property. 6 Johns. Ch. 439–40.

No case has yet occurred, in which an injunction has been granted, in favor of an individual, who claims only a common right, on a common highway, in which he can have no private property; nor can we conceive one, in which it could be justified, unless it was accompanied with an obstruction, or destruction of a private right. The injury, too, must be what is deemed in equity to be irremediable, a permanent appropriation of the property of the complainant to the use of the defendants, a destruction or total loss consequent on the act about to be done; "if the injury is susceptible of perfect pecuniary compensation, if the ordinary legal remedy in courts of law can afford adequate satisfaction, it is not, in the sense of the law, irreparable," "it must reach to the very substance and value of the estate, going to its destruction in the character in which it is enjoyed." If the act complained of is done under color of an authority conferred by law, the court will not interfere, if there is any ground of doubt, as to the authority, until the doubt has been removed, and the matter finally determined at law. 7 Johns. Ch. 332, &c., and cases cited. Also, 9 Wheat 842, &c.; 4 Johns. Ch. 22; Cowp. 77; Dick. 600; 2 Johns. Ch. 473.

The application of these familiar principles of the law of equity to the present motions, seems conclusive against them. Mr. Atkinson, as the owner of vessels employed in navigating the Delaware and its waters, can have only a common right to the navigation of the Neshaminy, the interference with which by the defendants is not the proper subject of an injunction; but if it were so, on general principles, his case would be a clear exception. He does not allege in his bill, that his vessels have standing masts, or that he would be subjected to any particular inconvenience or expense, by conforming his vessels to the bridge about to be erected, or that they had ever been employed in navigating the Neshaminy, prior to the passage of the act. On the contrary, the affidavits of the defendants are full to the fact, that his five schooners have struck masts, and go far to negative their ever having navigated this river, as early as 1832. The bill does not state the time when the contract was made for the delivery of lime, or how much of the 1000 bushels remains to be delivered; one schooner load, it seems, has been received, but we are left in the dark as to the

present state of the contract; be that as it may, there seems no impediment to its completion. If his vessels have struck masts, they can pass and repass as heretofore, or if the defendants have illegally obstructed the navigation, the injury is one which admits of adequate compensation; it is, at most, but temporary, as it must cease with the expiration of the contract.

Mr. Field's case differs from the other only in the circumstance of his being engaged in transporting stone from a quarry on the river, above the bridge; this gives him no peculiar claim to our interference, as it is only the mode in which he exercises his common right of navigation; he must stand on the same footing as the other citizens of this and other states, whose common right is protected by the law, subject to the qualifications imposed upon it by the provisions of the charter to this company. So long as they comply with its requisitions for the indemnity of the owners of vessels navigating the river, at the time of its passage, this court cannot restrain them in the completion of the bridge; should they refuse to pay for the inconvenience and expenses attendant on the necessary alteration of the vessels, that might be a case of special injury, under the provisions of the law, which would call for the interposition of the equitable powers of the court. It appears, however, that the company have made a public offer to pay for such alterations, which is all they are bound to do, before an application for indemnity, by any person who alleges himself entitled to it. See Dan. p. 6, 523; 20 Johns. 105, 740; Bonaparte *v.* Camden & Amboy Railroad Co., Bald. 205.

We can take no judicial notice of any special injury sustained by any citizen of this state, or any general inconvenience to which the people on the Neshaminy, or its vicinity, may be subjected, on account of the bridge; those are exclusively the subjects of judicial cognisance in the courts of the state, nor can we, in any way, consider the injury which any persons who are citizens of other states have sustained, who are nor parties to this suit. The remedy of injunction is individual, applicable only to special injuries in violation of private right, as to which the grievances of one man can have no bearing on those of another, nor can any alleged grievances of the public authorize any one to redress it at his own suit, either in a court of law or equity.

Considering these cases, therefore, as depending either on the validity of the act of incorporation, or its construction, we are of opinion, that the defendants have full legal authority to erect the contemplated bridge, on the plan now in progress, and that it is neither a public nuisance or purpresture; but independently of this consideration, we are also of opinion, that neither of the complainants have such a right, as under any circumstances to entitle them to an injunction, before a trial at law. There is another objection to their motion, arising from the acquiescence of the complainants, from the time, when from the plan of the bridge, it was known that it was not intended to construct it with a draw, and its erection was commenced in September or October last, till the present application was made; this objection might be a very serious one, if it was necessary to consider it, but as we have no doubt on the other points in the case, we shall give no opinion upon it. The motions for injunctions are accordingly overruled.

*James Foster and Pleasants Elam, Plaintiffs in error, *v.* David Neilson, Defendant in error.

Cession of Louisiana.—Treaty of St. Ildefonso.—Effect of treaty as a law.

By the treaty of St. Ildefonso, made on the 1st of October 1800, Spain ceded Louisiana to France; and France, by the treaty of Paris, signed the 30th of April 1803, ceded it to the United States. Under this treaty, the United States claimed the country between the Iberville and the Perdido; Spain contended, that her cession to France comprehended only that territory which, at the time of the cession, was denominated Louisiana, consisting of the island of New Orleans, and the country which had been originally ceded to her by France, west of the Mississippi.

The land claimed by the plaintiffs in error, under a grant from the crown of Spain, made after the treaty of St. Ildefonso, lay within the disputed territory; and this case presented the question, to whom did the country between the Iberville and Perdido belong, after the treaty of St. Ildefonso?

Had France and Spain agreed upon the boundaries of the retroceded territory, before Louisiana was acquired by the United States, that agreement would undoubtedly have ascertained its limits. But the declarations of France, made after parting with the province, cannot be admitted as conclusive; in questions of this character, political considerations have too much influence over the conduct of nations, to permit their declarations to decide the course of an independent government, in a matter vitally interesting to itself. p. 306.

In a controversy between two nations, concerning national boundary, it is scarcely possible, that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights; and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is, to decide upon individual rights, according to those principles which the political departments of the nation have established; if the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. p. 307.

However individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed. p. 307.

After the acts of sovereign power over the territory in dispute, which have been exercised by the legislature and government of the United States, asserting the American construction of the treaty by which the government claims it; to maintain the opposite construction in its own courts, would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted; it is not in its own courts, that this construction is to be denied.[1] p. 309.

If a Spanish grantee had obtained possession of the land in dispute, so as to be the defendant, would a court of the United States maintain his title under a *Spanish grant, made
*254] subsequent to the acquisition of Louisiana, singly on the principle, that the Spanish construction of the treaty of St. Ildefonso was right, and the American construction wrong? Such a decision would subvert those principles which govern the relations between the legislature and judicial departments, and mark the limits of each. p. 309.

The second construction of the eighth article of the treaty between the United States and Spain, of 22d February 1829, will not enable the court to apply its provisions to the case of the plaintiff. p. 314.

The article does not declare, that all the grants made by his Catholic majesty, before the 24th of January 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion; it does not say, that those grants are hereby confirmed. Had such been its

[1] S. P. Williams *v.* Suffolk Ins. Co., 13 Pet. 415; United States *v.* Reynes, 9 How. 127; Phillips *v.* Payne, 92 U. S. 130.

language, it would have acted directly on the subject, and it would have repealed those acts of congress which were repugnant to it; but its language is, that those grants shall be ratified and confirmed to the person in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised, must be the act of the legislature. Until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject.[1] p. 314.

A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially, so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument. p. 314.

In the United States, a different principle is established; our constitution declares a treaty to be the law of the land; it is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.[2] p. 314.

ERROR to the District Court of the Eastern District of Louisiana. The plaintiffs in error filed their petition in the district court, setting forth that, on the 2d of January 1804, Jayme Joydra purchased of the Spanish government, for a valuable consideration, and was put in possession of, a certain tract or parcel of land, situated in the district of Feliciana, thirty miles to the east of the Mississippi, within the province of West Florida, containing 40,000 arpens, having the marks and boundaries as laid down in the original plat of survey annexed to the deed of sale, made by Juan Ventura Morales, then intendant of the Spanish government, dated January 2d, 1804, which sale was duly confirmed by the *king of Spain, by his resolves dated May 29th, 1804, and February 20th, 1805. May 17th, 1805, [*255 Jayme Joydra sold and conveyed 6000 arpens, part of the said 40,000, to one Joseph Maria de la Barba; and upon the same day, Joseph Maria de la Barba sold and conveyed 3000 arpens, parcel of the 6000 so purchased on the same day of Jayme Joydra, to one Françoise Poinet, for the consideration of $750. These 3000 arpens are situate in the district of Feliciana, about thirty miles east of the Mississippi; bounded on the north by the line of demarcation between the United States and the Spanish territory; on the west, by lands of Manuel de Lanzos; on the east, by the lands of the said Jayme Joydra; and on the south, by the lands of the said Joseph Maria de la Barba. In June 1811, Françoise Poinet, by her attorney, Louis Leonard Poinet, sold to the petitioners the said 3000 arpens, for the sum of $3200. The petition then averred, that the 3000 arpens of land justly and legally belong to them; and that, nevertheless, David Neilson, the defendant, a resident of the parish of East Feliciana, in the state of Louisiana, had taken possession of the same, and refused to deliver the same up.

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[1] See United States *v.* Arredondo, 6 Pet. 691; United States *v.* Percheman, 7 Id. 51; Strother *v.* Lucas, 12 Id. 410; Garcia *v.* Lee, Id. 511; Keene *v.* Whitaker, 14 Id. 170; Pollard *v.* Kibbe, Id. 353; Pollard *v.* Files, 2 How. 591; Pollard *v.* Hagan, 3 Id. 212; United States *v.* Lynde, 11 Wall. 632.

[2] Fellows *v.* Blacksmith, 19 How. 366; United States *v.* Forty-three Gallons of Whiskey, 93 U. S. 188; Hauenstein *v.* Lynham, 100 Id. 483. But treaties have no higher sanctity than an act of congress; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences give rise to questions that must be met by the political department of the government; they are beyond the sphere of judicial cognisance. The Cherokee Tobacco, 11 Wall. 621.

On the 23d of March 1826, the defendant in the district court filed exceptions to the petition; and the questions before this court arose out of the third exception, which was as follows: That the petition does not show any right in the petitioners to the land demanded, which they aver lies in a district formerly called Feliciana, in the province of West Florida; and they claim under a grant made, at New Orleans, on the 2d of January 1804, and regularly confirmed by the Spanish government; whereas, as defendant pleads, all that section of territory called Feliciana was, long before the alleged date of said grant, ceded by Spain to France, and by France to the United States; and the officer making said grant had not then and there any right so to do, and the said grant is wholly null and void.

*256] The judgment of the district court was founded on this *exception; and decided, that the grant under which the plaintiffs claimed, was made by persons having no authority, at the time of the grant, to grant lands within the territory within which the lands are situated; and dismissed the petition.

On behalf of the petitioners, the plaintiffs below, it was contended: 1. That Spain possessed full right and title, at the period of the date of the grant under which they claimed, to grant the lands in question. 2. That the title of the petitioners was guarantied and confirmed by the treaty between the United States and Spain, of February 22d, 1819.

The case was argued by *Coxe* and *Webster*, for the plaintiffs in error; and by *Jones*, for the defendant.

Coxe, for plaintiffs in error.—This is a petitory action, in the nature of an ejectment, brought by the plaintiffs in error, to recover a tract of land, in the parish of East Feliciana, in the state of Louisiana. The territory within which this property lies, may be designated in general terms as included between the Mississippi and Iberville to the west, the Perdido to the east, and south of thirty-first degree of north latitude.

No objection has been interposed to the regularity, in point of form, of the original grant under which plaintiffs claimed title, or of the mesne conveyances from the original grantee to them. No title has been exhibited by the defendant; but having acquired the possession, he has rested his defence on the single ground of denying the validity of the grant, which lies at the foundation of the plaintiff's title; and this objection is confined to the single point, that the authority of the Spanish government, from which that grant emanated, had terminated, within the district of country, the boundaries of which have been indicated, anterior to the date of the grant. The grant bears date in the years 1804 and 1805, and it is contended, that, by the treaty of St. Ildefonso, between Spain and France, in the year 1800, and

*257] the treaty between *France and the United States, of April 30th, 1803, the territory in question became vested in the United States, as a component part of Louisiana. Whether such be the true interpretation and effect of these treaties, is the first question presented for consideration. It is a question which has for years been diplomatically discussed between the governments of Spain and the United States; and now comes before this court to be finally settled judicially.

Much of the history of the early settlements of the territory in question, and the grounds upon which the claims of England, France and Spain rested,

were presented and discussed in the cases of *Henderson* v. *Poindexter*, 12 Wheat. 530, and *Harcourt's Lessee* v. *Gaillard*, Ibid. 524. It may, however, be proper to remind the court that, in point of fact, it appears, that the earliest actual settlement made by the French in this district, was made under D'Iberville, at Dauphin Island, in the year 1699; and that at that period, and for some years previous, the English had formed settlements between the Mobile and the Mississippi. 4 N. Am. Rev. 76 (N. S.) Anderson's History of Commerce, vol. 3, p. 195, fixes it at 1698. On the 30th of June 1677, Charles II. made his second grant to the Earl of Clarendon and others, which included this territory: 1 Laws U. S. 465; Land Laws 81. The grant from Louis XIV. to Crouzat, bears date September 14th, 1712, thirty-five years subsequent to the English patent; and it sets forth, that the original possession was taken of the territory in 1683, which is six years subsequent to the English grant. It may be remarked, however, that the possession to which allusion is made, was nothing more than a transient and rapid passage down the Mississippi, and vague as it was, in point of fact, did not extend beyond the banks of the river. This grant to Crouzat seems to have been generally considered as comprehending this debatable ground, but, apparently, without much reason. It distinctly limits the eastern extent by the lands of the English Carolina: and not only the grant of the Carolina, but the actual settlements under it, *extended much to the westward of the line to which France subsequently claimed to extend the eastern [*258 boundary of Louisiana.

The irreconcilable claims of England and France, in reference to the extent of their American possessions, gave rise to many and bloody controversies; and particularly to the war of 1756. Numerous discussions took place between the two crowns upon this subject, which it will be unnecessary to examine, earlier than the war which terminated in their adjustment and settlement. In the negotiations which preceded the treaty of 1763, which are stated in 3 Jenkinson 1174, it seems, that France preferred her claim as far as the Perdido; and the answer of the British government to this claim will be found in its reply to the French *ultimatum*, September 1st, 1762, § 2. 3 Jenkinson 148. It was deemed utterly inadmissible, because it would comprise extensive countries, and numerous nations of Indians, who have always been reputed to be under the protection of the king.

This court, in *Johnson* v. *McIntosh*, 8 Wheat. 581, has remarked, in reference to the controversies between France and Spain in relation to this same district of country, that "the contests between the cabinets of Versailles and Madrid, respecting the territory on the northern coast of the Gulf of Mexico, were fierce and bloody, and continued, until the establishment of a Bourbon on the throne of Spain, produced such amicable dispositions in the two crowns as to suspend or terminate them." And after giving a summary of those which occurred between France and England, it is observed, that "these conflicting claims produced a long and bloody war, which terminated by the conquest of the whole country east of the Mississippi."

Pending that war, in which Spain had been induced to take part with France, the celebrated treaty was concluded between these two powers, which is entitled to notice in the present investigation. It is styled "*Pacto de Familia*," or, "*Parte de Famille*;" and is usually known in England and the United States, under the appellation of the "Family *Com- [*259

pact." It was signed August 15th, 1761 ; ratified by France, August 21st, 1761 ; and by Spain, August 25th, 1761.(*a*) The fourth article embraces the great object of the treaty, "*qui attaque une couronne, attaque l'autre ;*" and the eighteenth, carrying it out into detail, provides that, "*en conformité de ce principe et de l'engagement contracté en consequence, leur majestés tres Chretienne et Catholique, sont convenues que lorsqu'ils s'agira de terminer par la paix la guerre qu'ils auront soutenue en commun, elles compenseront les avantages que l'une des deux puissances pourroit avoir eus, avec les pertes que l'autre auroit pu faire ; de maniére que sur les conditions de la paix, ainsi que sur les operations de la guerre ; les deux monarchies de France et de l'Espagne, dans toute l'étendue de leur domination, seront regardés et agiront si elles ne formoient qu'une seule et même puissance.*" This provision is necessary, to enable us to comprehend with precision the motives which induced, and the construction which is to be given to, subsequent acts.

The preliminary articles of the treaty of peace, between Great Britian France and Spain, were signed November 3d, 1762. On the same day, another treaty was executed between France and Spain, originating in, and designed to fulfil, the stipulations of the eighteenth article of the family compact. Roch, in his *Traités de Paix*,(*b*) furnishes the following statement of it. "*La Nouvelle Orleans, avec la Louisiane, situeé à l'ouest du fleuve Mississippi, fut cedée aux Espagnols, par une convention secreté entre les deux cours de Versailles et de Madrid, signée le* 3 *de Novembre* 1762, *et qui n'a jamais eté imprimée. Cette cession avoit pour motif de dedommager l'Espagne de la Floride, qu'elle abandonnoit à l'Angleterre par la traité des preleminaries de Paris, signée le même jour. Les habitans François de la Louisane n'eurent connoissance de cette cession que le* 21 *Avril* 1764. *Ils addresserent à le sujet à la cour de France les plus vives reclamations, qui* *260] *n'empecherent pasles *Espagnols de prendre possession de cette colonie le* 18 *Aout* 1769." This cession then grew out of the provisions of the preliminary treaty of the same date, and was designed to compensate Spain for the loss of Florida. It must be construed subordinately to that general treaty, and cannot modify or control its provisions.

Keeping these considerations in view, we may proceed to examine the preliminary treaties of the same date, which were finally consummated by the definitive treaty of February 10th, 1763.(*c*) The first fourteen articles relate to France and Great Britian : the six succeeding to Great Britain, her ally, Portugal, and Spain. The sixth article establishes the boundaries between the English and French possessions, in the neighborhood of the Mississippi, and so far as is material to this case, in the following words : "The confines between the dominions of Great Britain and Spain, on the continent of North America, shall be irrevocably fixed by a line drawn along the middle of the river Mississippi, to its source, as far as the river Iberville ; and from thence, by a line drawn along the middle of this river, and of the lakes Maurepas and Pontchartrain, to the sea : and to this purpose, the most Christian king cedes in full right, and guaranties to his Britannic majesty, the river and port of Mobile, and everything which he poses-

(*a*) Colleccion de Tratados 115 ; Marten's Recueil des Traités, tom. i. p. 1 ; 3 Jenk. 70.
(*b*) Tom. 3, p. 109.
(*c*) Colleccion de Tratados 145 ; 2 Martens 17 ; 3 Jenkins. 166.

ses on the left side of the river Mississippi; except the town of New Orleans and the island on which it is situated, which shall remain to France." By the nineteenth article, "his Catholic majesty cedes and guaranties, in full right, to his Britannic majesty, all that Spain possesses on the east or the south-east of the river Mississippi."

A reasonable interpretation of these two treaties seems to conclude this question. Each party had been, nearly from the commencement of the century, claiming an almost interminable extent of territory; their claims were bringing them into constant collision with each other; these collisions had engendered the war which was to be terminated. The parties had agreed that their relative rights should be *definitively and irrevocably adjusted, and natural boundaries were agreed upon, which it was [*261 supposed, would preclude all future difficulty. England had been triumphant in the conflict; she had attained the objects for which she had commenced and had continued hostilities. During the negotiations for peace, she had avowed her determination. 3 Jenkins. 117. "The limits of Canada with regard to Louisiana and Virginia shall be clearly and firmly established, as well as those of Louisiana and Virginia; in such manner, that after the conclusion of peace there may be no more difficulties between the two nations with respect to the construction of the limits with regard to Louisiana, whether with respect to Canada or the other possessions of England." In accomplishing this design, France relinquished the pretensions upon which she had before insisted, to extend the limits of Louisiana to the eastward of the Mississippi; England yielded her empty and valueless claim, to carry the bounds of her Atlantic colonies to the Pacific; and to close all ground for future controversy, Spain ceded her possessions; and Great Britain became the unquestioned proprietor of all the territory lying to the eastward of the line designated in the sixth article. France, then, in ceding Louisiana to Spain, ceded a country which, with the exception of the island of Orleans, lay exclusively to the westward of the Mississippi; she ceded it as Louisiana, and it was accepted as such. Both of these powers were estopped by these solemn acts, from contending that Louisiana embraced the territory now the subject of consideration.

This treaty has received the consideration of this court in *Harcourt* v. *Gaillard*, 12 Wheat. 524, where it was observed, "the country of Florida, south of the twenty-ninth degree, was a conquest by Great Britain, and north of the twenty-ninth degree, and up the Mississippi, was held as a part of her own territory, concerning which her treaties with France and Spain only established a disputed boundary."

After England had thus acquired the title to Florida, and had adjusted by solemn compact the disputes as to boundary, she immediately erected these acquisitions into two governments, and designated them by the names of East *and West Florida; the boundaries of which are indicated in [*262 the proclamation of the British king, in 1763. From that period, until after the United States acquired Louisiana, this question was considered as at rest. The territory to the eastward of the Mississippi and the Iberville, the lakes Maurepas and Pontchartrain, were uniformly recognised as East and West Florida, that to the westward of the same line, as Louisiana. During the peace which preceded our revolutionary war, no question, or ground for question, existed. About the year 1781, Spain acquired by con-

quest possession of West Florida, which she retained under that name, not as part of Louisiana, which then belonged to her, but as a territory which she had acquired by conquest from England, the lawful proprietor, known only by the appellation of West Florida. This possession, thus acquired, was thus continued, *jure belli*, until the termination of the war. By the third article of the preliminary treaty of peace, it was stipulated, that his Britannic majesty should cede East Florida, and his Catholic majesty should retain West Florida. So also, by the fifth article of the definite treaty of September 3d, 1783, his Britannic majesty cedes, in absolute property, to his Catholic majesty, as well East as West Florida, guarantying them. No boundaries are mentioned. The Floridas, known as such by both parties to the compact, are ceded by words of express grant. It is not an adjustment of disputed boundaries, but a cession of an absolute and perfect right.

The treaty of 1763, then, which this court has considered as merely fixing a disputed boundary, still continued in force. The war had not affected this portion of its stipulations. "Where treaties contemplate a permanent arrangement of territorial and other national rights, it would be against every principle of just interpretation, to hold them extinguished by the event of war." *Society, &c.* v. *New Haven*, 8 Wheat. 494.

We may now briefly review some of the leading acts of all the powers concerned in the treaties of 1763 and 1783, to show that, uniformly and without exception, such has been their understanding of these compacts.

*263] *1. France considered the cession made by her to Spain as comprehending the entire province of Louisiana. The first public intimation of that cession is contained in the letter of the French king to Monsieur L'Abbadie,(*a*) dated April 21st, 1764. It commences with these words: "Monsieur L'Abbadie:—By a special act, done at Fontainebleau, November 3, 1762, of my own will and mere motion, having ceded to my very dear and best-beloved cousin, the king of Spain, and to his successors, in full property, purely and simply, and without any exceptions, the whole country known by the name of Louisiana, together with New Orleans and the island on which the said city is situated; and by another act, done at the Escurial, November 13th, in the same year, his Catholic majesty having accepted the cession of the said country of Louisiana, and the city and island of New Orleans, &c." This contemporaneous exposition of both parties to the treaty, before any other interests or rights had intervened, is entitled to grave consideration.

2. So, in regard to Spain. She had, previously, as had England, endeavored to confine French Louisiana to the western shore of the river; she had accepted a cession of that territory as comprehending "the whole of Louisiana," and from that period to the present, has always so esteemed it. After she obtained possession of her newly-acquired territory, she continued to hold it, under the same name, by the same limits. When, by the treaty of 1783, she acquired the Floridas from England, it was under a new and distinct title, wholly independent of that by which she held Louisiana. The treaty designates it as East and West Florida. In all the subsequent controversies between Spain and the United States, the same names are preserved. To many purposes, it was a distinct government from that of Louisiana,

(*a*) 1 Laws of United States, 442.

though both belonged to the same monarch ; it was sometimes a dependency upon Cuba,(*a*) and when annexed, as it appears occasionally to have been, to the government *of Louisiana, the executive magistrate was styled the governor of Louisiana and of West Florida. [*264

In the treaty of October 27th, 1795, between Spain and the United States, the same distinction is recognised and retained. The second article thus declares : " the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the river Mississippi, &c." Article 4th. " It is likewise agreed, that the western boundary of the United States, which separates them from the Spanish colony of Louisiana, is in the middle of the channel or bed of the river Mississippi, from the northern boundary of the said states to the thirty-first degree of latitude north of the equator." The fifth article is to the same purport. Subsequently to the transfer of Louisiana to the United States, Spain has uniformly asserted the same principles, and has protested, in the most decided terms, against the pretensions of the American government to extend their purchase to the Perdido. Governor Folch's letter to Governor Claiborne, dated Pensacola, May 1st, 1804, assumes the ground which has been uniformly maintained throughout the diplomatic discussions of this question.

3. It is scarcely necessary to recapitulate the various acts of Great Britain, by which she manifested and maintained her right to restrict the limits of Louisiana to the western shore of the Mississippi. Long before the treaty of 1763, this had been a fruitful source of discord between herself and France. The war of 1756 had grown out of the attempt by the latter to extend her two colonies of Canada and Louisiana.(*b*) The ground assumed by her, in her subsequent negotiations, and the manner in which she succeeded in establishing them, have been already considered.

4. In this controversy, conducted in an American tribunal, it may well be deemed important to ascertain the views which have been taken and acted upon by our own government, and the result of this inquiry will show, that the *United States have been as distinct as any nation in asserting the principles for which the plaintiffs in error contend. As early [*265 as the year 1779, the importance of this question was perceived. In the instructions then framed for Mr. Jay, to conduct the negotiations with Spain which were intrusted to his charge, there is a distinct recognition of the Floridas, and an implied one of their extending to the Mississippi.(*c*) In the following year, congress prepared a statement of the claim to the United States to the western country as far as the river Mississippi,(*d*) in which the subject is discussed, and the points now insisted upon strongly urged. The minister was instructed " to insist upon the navigation of the Mississippi for the citizens of the United States, in common with the subjects of his Catholic majesty, as also on a free port or ports below the northern limit of West Florida." Reference is made to the treaty of 1763, as having fixed the river Mississippi as the boundary between the United States and the Spanish settlements ; and it is strongly urged, that the United States are entitled to the benefit of the cession made by Spain to Great Britain. In 1791, the secretary

(*a*) Land Laws, 46.
(*b*) 1 Marsh. Wash. 372, 383.
(*c*) 2 Pick. Hist. 511.
(*d*) 2 Id. 512.

of state made a report on the subjects of controversy between the two governments, in the course of which these matters are again considered and pressed.(*a*) "Our right to navigate the Mississippi, from its source to where our southern boundary strikes it, is not questioned. It is from that point downwards only, that the exclusive navigation is claimed by Spain; that is to say, where she holds the country on both sides, to wit, Louisiana on the west, and Florida on the east." Again, "Florida was ceded by Spain (by the treaty of 1763), and its extent westwardly was fixed to the lakes Pontchartrain and Maurepas, and the river Mississippi." "We had a common right of navigation in the part of the river between Florida, the island of Orleans, and the western bank." "If we appeal to the law of nature and nations, as expressed by writers on the subject, it is agreed by them, that
*266] were the river, where it *passes between Florida and Louisiana, the exclusive right of Spain," &c. Reference has been already made to the provisions of the treaty of 1795, as conclusive upon both governments; and it may be added, that in the negotiations which preceded that treaty, as well as in the measures of both nations in carrying its stipulations into execution, by running the line agreed upon, West Florida, as belonging to Spain, is uniformly considered as extending to the Mississippi, and Louisiana as confined to the western side of the line designated in the treaty of 1763.

It thus appears, that from the earliest periods of colonial history, Great Britain and Spain had insisted, that Louisiana did not extend eastwardly beyond the Mississippi; that France finally yielded her pretensions by the treaty of 1763; and that from that period, this question had been considered as settled and at rest, not only by all the parties to that compact, but especially by the United States.

The next important document to be examined is the treaty of St. Ildefonso, of October 1st, 1800, between Spain and France. One article of this treaty alone has been communicated to the public, and that will be found recited in the treaty between France and the United States, of April 30th, 1803,(*b*) the first article of which is in these words, "whereas by the article the third of the treaty concluded at St. Ildefonso, the 9th Vendemiare, an. 9 (1st October 1800), &c., it was agreed as follows: 'his Catholic majesty promises and engages on his part to retrocede to the French republic, &c., the colony or province of Louisiana, with the same extent it now has in the hands of Spain, and that it had when France possessed it, and such as it should be (*telle qu'elle doit être*) after the treaties subsequently entered into between Spain and other states.' And whereas, in pursuance of the treaty and particularly of the third article, the French republic has an incontestable right to the domain and to the possession of the said territory; the first
*267] consul of the French republic desiring to give to the United *States a strong proof of his friendship, doth hereby cede to the said United States, in the name of the French republic, for ever and in full sovereignty, the said territory, with all its rights and and appurtenances, as fully and in the same manner as they have been acquired by the French republic, in virtue of the above-mentioned treaty concluded with his Catholic majesty."

It will not be pretended, that this language is free from ambiguity; and

(*a*) 1 Diplomacy of the United States 236.
(*b*) Land Laws 42; 1 Laws United States 134.

the probability is, from an anecdote related by one of the negotiators, Barbé Marbois, in his recent work on the subject of Louisiana, that it was not accidental. It is now contended, that this article re-opens all the questions settled by the treaty of 1763, and acquiesced in by all parties from that period. Louisiana is no longer confined within the limits there prescribed, and Florida is to be reduced down to what France and England had before insisted was properly included within that name.

It will be remarked, that France cedes to the United States what Spain had retroceded to her, upon the same conditions, and subject to the same stipulations, which were contained in the treaty of St. Ildefonso. To that treaty, reference must, therefore, be had, to ascertain the extent of this cession. The term retrocede would seem to limit it to what had been before ceded; such is the natural and most obvious signification of the term. In this sense it is used by this court in *Johnson* v. *McIntosh*, 8 Wheat. 584, where it is said, "France ceded Louisiana to Spain, and Spain has since retroceded the same country to France. At the time both of its cession and retrocession, &c."

But it was the province of Louisiana: was it ceded as France claimed it prior to 1763, with an extension of limits dictated by political ambition and future aspirations, rather than by actual occupancy; with vague and undefined boundaries, which had been contested by Spain in one quarter, and by England, throughout nearly their whole extent, or with the boundaries solemnly and deliberately settled and recognised by treaty, the concurrent act of all the parties interested? Was it Louisiana, which an ambitious monarch claimed to extend so far to the north and east as to be *intimately connected with the Canadas, and to confine the English possessions between the ocean and the Allegheny; or such as it was [*268 admitted to be, when these lofty pretensions were abandoned, and its limits clearly and for the first time defined? Had the subsequent transfer to the United States never been made, our interest and our policy would have dictated an answer to these interrogatories, which reason would have sanctioned, and which argument would have confirmed. We never, for a moment, should have yielded to a pretension which went to unsettle our western boundary and title throughout the whole extent of the Ohio and Mississippi. But the whole character of the controversy was changed, by our acquiring a new interest; and we, by virtue of the cession of Louisiana to us, claimed to the full extent of the wildest pretensions of France, when in the plenitude of her power; pretensions obsolete, unwarranted, and long since formally surrendered,

But these several forms of specification are annexed to the terms of cession, and these specifications, it is submitted, were introduced, with a view to limit and restrict, not to extend the generality of the previous language. 1. With the same extent that it now has in the hands of Spain. 2. And that it had when France possessed it. 3. And such as it ought to be, after the treaties subsequently entered into between Spain and other countries. Such is the language of the treaty of St. Ildefonso, to which the United States was no party.

1. With the same extent that it now has in the hands of Spain. We have seen, that Spain, from a very early period, resisted the extension of Louisiana to the eastward of the Mississippi; that she was a party to the treaty

of 1763, with England, then owning the Floridas, which in this country has been judicially and diplomatically considered as fixing the limits of that colony. She had acquired possession of Louisiana, in 1769—of the whole country having that appellation; but still, with the boundaries which had been settled. When she acquired the Floridas in 1783, no change of limits was introduced. In her treaty with the United States, in 1795, they are
*269] recognised by both parties as still subsisting. *When, then, did Spain possess the territory in question, under the name of Louisiana? Never. The first specification then fails our opponents; and these three clauses must be considered as cumulative and concurrent; all must be complied with.

2. That it had, when France possessed it. What period is referred to? Did it mean, at the period when the enterprising La Salle first descended the Mississippi, which the French considered the first possession; or when a few adventurers endeavored to establish a settlement at Biloxi, which was speedily abandoned; or when her restless monarch, stretching his influence from the northern lakes to the Gulf of Mexico, was laboring to effectuate his gigantic project of attaining the ascendancy over the entire continent? Or, was that period referred to, when, compelled to surrender these lofty pretensions, she compromised with her opponent, and fixed irrevocably the bounds of her American dominions? Unquestionably, the latter. Such were the limits fixed by all the parties in interest, in 1762–63. It has been objected, that France never did possess Louisiana to this limited extent; that she ceded it to Spain, on the same day on which the preliminaries were signed, and consequently, never had any title to the country, with these defined boundaries. But the cession to Spain was made by a secret treaty, which has never, to this day, been published to the world, and which was not known to be in existence, until April 1764, nor carried into execution by the transfer of possession, until August 1769. From the autumn of 1762, until August 1769, a period of near seven years, France was in possession of Louisiana, with these ascertained and settled limits; and at no other period of time, were the bounds, either of her settlements, or her claims, defined, even by herself. To this period, then, this clause of the treaty must have had reference, and this construction, and this alone, will reconcile the different clauses with each other; with what is reasonable, or what is honest.

3. Such as it ought to be, after the treaties subsequently entered into between Spain and other countries. It may well be doubted, whether the
*270] phrase has, or was intended to *have, any reference the subject of boundary. It may more reasonably be understood to look to those stipulations which Spain had made with other nations, particularly, with the United States; conceding to us the free navigation of the Mississippi, and a right of deposit at New Orleans. If, however, it be considered as referring to the subject of boundary, what construction can it receive? Subsequently to the possession of France, Spain had entered into but two treaties, which can in any manner affect the question: that of 1783, in which Great Britain ceded the Floridas to her, by virtue of which in her negotiations with the United States she claimed to carry her rights up the Mississippi, as far north as the mouth of the Yazoo; but never urged, as the proprietor of Louisiana, any rights to the eastward of the Mississippi. The treaty of 1795, already cited, was the second treaty which Spain had made, and that,

as has been shown, expressly recognises the Mississippi as the common boundary of Louisiana and West Florida.

With these three clauses of description, of limitation, not of enlargement, was this territory ceded to France, in 1800. Should doubts still exist as to its extent, it is reasonable, that we should be allowed to remove them, by reference to the contemporaneous acts of all parties. The treaty of St. Ildefonso appears to have been signed on the 1st of October 1800. The diplomatic history of our own government shows, that the negotiations with France, which terminated by our acquisition of Louisiana, commenced in January 1803, and that the result was not known in the ceded country, until a late period in that year. The royal order from the king of Spain for the delivery to France, was issued at Barcelona, October 15th, 1802. It directs the delivery to be made to General Victor, or other officer authorized by the French republic; and he is to be put in possession of "the colony of Louisiana and its dependencies, as also the city and island of New Orleans, with the same extent that it now has, that it had in the hands of France when she ceded it to my royal crown, and such as it ought to be after the treaties, &c." On the 18th of May 1803, Don Manuel de Salcedo, the governor of the provinces of Louisiana and West Florida, and the *Marquis de Casa Calvo, who were the commissioners to deliver the possession of the French authorities, issued their proclamation, announcing the fact of cession, and that the treaty was to be "executed in the same terms that France ceded it to his majesty, in virtue of which, the limits on both shores of the river St. Louis or Mississippi, shall remain as they were irrevocably fixed by the seventh article of the definitive treaty of peace, concluded at Paris on the 10th of February 1763, according to which the settlements from the river Manohac or Iberville, to the line which separates the American territory from the dominions of the king, are to remain under the power of Spain, and annexed to West Florida." [*271

The final act of delivery to the French commissioner is dated November 30th, 1803, and purports to transfer the possession "of Louisiana and its dependencies, as also of the city and island of New Orleans, to the same extent which they now possess, and which they had in the hands of France, when she ceded them to the crown of Spain." These three documents have recently been submitted to congress, in a communication from the president, and will shortly constitute a part of the history of the nation. The first two, which are very explicit, bear date when it was not supposed that this country would have an interest in the subject. They may be regarded as the contemporaneous exposition by both France and Spain of the language of the treaty of cession. No other power, deriving interests under them, or either of them, can question the construction which they have agreed to place upon their own agreement.

But the United States did accept a delivery of this same country as a full and complete execution of the treaty with France, and recognised by the public act of their commissioners, of December 20th, 1803, the full performance by Spain of the treaty of St. Ildefonso, and by France of her engagements in the treaty of the preceding April. Two separate conventions between the United States and France were executed on the same day with the treaty of cession. The first of these (1 Laws U. S. 140) stipulates for the payment of the consideration-money for the purchase of Louisiana.

The second article of this convention, and the third of the second,
*272] *make the payments to fall due after the possession of Louisiana shall be given. By making the payments, we acknowledged that France had fully complied with the engagements to put us in possession.

The general principles of law may with propriety be referred to, as furnishing the best and safest guides in the interpretation of public as well as private compacts. Both France and Spain have derived their jurisprudence from the civil code, and among all of them this general rule will be found. "The obscurities and uncertainties of obligatory clauses, are to be interpreted in favor of the party who obliges himself; and the obligation must be restricted to the sense which lessens the obligation; for he who obliges himself does it as little as he can, and if the other party is not satisfied, he is bound to require a clearer and fuller explanation of the meaning of the clause. Domat, lib. i. tit. 1, § 2, No. 15; 1 Pothier on Oblig. (Eng. ed.) 52, 7th rule. The conclusion then to which we are brought by all these different views of the subject is the same; and it is confidently submitted, that by no fair interpretation of the language of the treaty of St. Ildefonso, can it be understood to have conveyed to France any portion of what was known and occupied as West Florida; and that no portion of it was ceded to the United States, under the name of Louisiana.

Should it appear, however, that we have misapprehended the force of the arguments which have been presented, we claim the judgment of the court upon other grounds. From the year 1804, the United States claimed to give such a construction to the two treaties that have been considered, as would pass the title to the country east of the Mississippi as far as the Perdido. This claim was, however, confined to diplomatic discussion; it was not made public; no notice of it was communicated to the world, nor was it manifested by any *overt* act or proceeding. Until the year 1810, nothing was done to enforce this claim. During this interval, while Spain continued in the full and entire exercise of her sovereign authority over this territory, unquestioned, so far as the world could know, the grant in ques-
*273] tion *was concluded; the title of the plaintiffs emanated from this sovereign *de facto*. In our recent controversy with Great Britain, in relation to the north-eastern boundary, it appears to have been agreed by both parties, to be a fundamental principle of public law and of common justice, that the acts of a sovereign power over the territory which it has ceded, are lawful, until possession has been transferred.(*a*) This principle has been recognised by various acts of congress, which admit the validity of grants made by France and Spain, both in the lower and upper Louisiana, up to the day when formal possession was taken by the American authorities. Upon this principle, the validity of this title might be safely placed. It would be the height of injustice, for the government of the United States to annul all grants made by the Spanish functionaries, during the time that Spain occupied the country, virtually by our permission and under a claim of right.

In the year 1810, after Spain had become the scene of turbulence and revolution, and the reins of government over her colonies had dropped from her hands, when various movements were made in the Floridas, which threat-

(*a*) Mr. Clay to Mr. Vaughan, 17th March 1828.

ened danger and inconvenience to us; the president of the United States issued a proclamation, by virtue of which this territory was occupied by the American troops. This proclamation, dated October 27th, 1801 (5 Wait's State Papers), although it asserts the right of the United States to the territory in question, represents it as a subject of discusssion and controversy between the two governments; places the act upon the ground of an amicable proceeding, rendered necessary by the subversion of the Spanish authority; and asserts, that in the hands of the United States, it would still continue "the subject of fair and friendly negotiation and adjustment." It did continue the subject of much discussion, until all the differences between the two nations were terminated by the treaty of February 22d, 1819.(*a*) By the second article of this treaty, his Catholic majesty cedes to *the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi [*274 known by the name of East and West Florida. By the eighth article, "all the grants of lands made before the 24th January 1818, by his Catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic majesty." This is, by its terms, so far as relates to these articles, a treaty of cession. The first article so purports to be; the second purports to fix limits, but its provisions are expressly confined to the territories west of the Mississippi. The preamble sets forth, that the two parties have agreed "to settle and terminate all their differences and pretensions by a treaty." One of the most interesting of these differences respected the country lying between the Mississippi and the Perdido. Each party had pretensions to it; those pretensions had been warmly urged; numerous private rights were dependent upon the decision of them. All these matters were either settled by the treaty, or they still remain open. If settled, it is by the general terms of cession: they are sufficiently comprehensive; they embrace "all the territories which belonged to the king of Spain eastward of the Mississippi, known by the name of East and West Florida."

Had this territory continued under the power of Spain; had the United States not, in 1810, occupied it by force of arms, no room for controversy would have existed. Can that act of occupation, preceded by the proclamation of Mr. Madison, followed up by similar declarations, that it was not in any manner designed to preclude discussion, but to leave the question of title for subsequent adjustment, unaffected by this procedure, in any manner change the relative rights of the parties, or vary the construction to be given to the treaty of 1819? Nor can our own municipal proceedings be resorted to, to aid in interpreting the treaty. Spain is not to be affected by our legislative or executive acts; *and if anything of that kind is resorted [*275 to for the purpose of affecting the interests of her, or of her grantees, this government will stand condemned as guilty of a gross breach of good faith, and of positive fraud upon the other contracting party.

A reference to the correspondence between the parties to the negotiation, will show that such was not their design. On the 24th October 1818,

(*a*) Land Laws 53.

Don Onis, the Spanish minister, communicated to Mr. Adams, the American secretary of state, his project for this stipulation in the treaty, and he proposed to cede, "in full property and sovereignty, the provinces of East and West Florida, with all their towns and forts, such as they were ceded by Great Britain, in 1783, &c." The answer of Mr. Adams to this communication is not published among the documents transmitted to congress on the 7th December 1818, but was afterwards made public. It will be found to contain the following explicit language: "The uselessness of any stipulation on the subject of this first proposition is further demonstrated by the nature of the second, in which you announce your authority to cede all the property and sovereignty possessed by Spain in and over the Floridas. The effect of this measure being necessarily to remove all causes of contention between the contracting parties, with regard to the possession of those territories, and to everything incidental to them, it would be worse than superfluous to stipulate for restoring them to Spain, in the very treaty by which they are to be ceded in full sovereignty and possession to the United States." And in a subsequent part of the same communication, it is also said, in reference to the stipulations of a former treaty; "whatever relates in them to limits, or to the navigation of the Mississippi, has been extinguished by the cession of Louisiana to France, and by her to the United States, with the exception of the line between the United States and Florida, which will also be annulled by the cession of Florida, which you now propose."

The project of the treaty delivered by Don Onis, under date of the 9th February 1810, and the counter-project of Mr. Adams, on the 13th of the same month, will be found in *the papers communicated by the president to congress, on the 7th December 1819, and in p. 50, of the same documents, will be found the remarks of M. de Neuville, who was active in his efforts to bring the parties to a settlement. "It is agreed by both parties, that the article stipulating the cession of the Floridas, shall be so framed as to cover the honor of both parties, and prove that the treaty is an amicable convention, divested of all mental reservations, disguise or recrimination."

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But the language of the treaty would seem to preclude all possibility of question. The cession by the king of Spain of "all the territories which belonged to him, situated to the eastward of the Mississippi, known by the name of East and West Florida," by its terms, embraced the territory in question. That was known by both countries, and repeatedly called West Florida. In fact, the two Floridas received their names, by the same act which fixed their limits, the proclamation of 1763. In retaining those names, the same boundaries were preserved, and were never departed from. Spain is equally precluded from gainsaying the words of cession, as the United States from questioning the words of description. By adopting any limitation, the treaty would not do what it purported to do; all the differences between the two nations are not composed; all the territory known by the name of East and West Florida was not ceded; mental reservations must have been made; disguises must have been assumed; and recriminations must ensue.

If this, then, be the true exposition of the treaty, the language of the eighth article would seem conclusive upon the case. That provides, that "all the grants of land made before the 24th of January 1818, by his

Catholic majesty, or by his lawful authorities in the said territories, ceded by his majesty to the United States, shall be ratified and comfirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic majesty." No distinction is made between that part of West Florida which we occupied in 1810, and that which still continued under *the authority of Spain. All are put upon the same footing; [*277 all is ceded; and all grants throughout the whole are confirmed. In *De la Croix* v. *Chamberlain*, 12 Wheat. 599, this court remarked, "if the United States and Spain had settled this dispute by treaty, before the United States extinguished the claim of Spain to the Floridas, the boundary fixed by such treaty would have concluded all parties. But as that was not done, the United States have never, so far as we can discover, distinguished between the concessions of land made by the Spanish authorities, within the disputed territory, while Spain was in the actual possession of it, and concessions of a similar character, within the acknowledged limits."

It was strenuously insisted, in the court below, and we are apprised, that the same point will be again pressed, that the judicial tribunals of the United States are precluded from investigating this question, and giving a different construction to these treaties from that which they have received from the executive and legislative departments of the government. We apprehend, that the question before the court is one of a purely legal kind. In a recent correspondence between the Spanish minister and our own executive, upon the subject of these grants, the former was especially referred to these tribunals, as alone competent to investigate and decide upon the question of right. An American citizen has a right to demand protection from the courts of his country, against the lawless acts of the executive, and the unconstitutional proceedings of the legislature. In the decision of this question, the plaintiffs invoke the aid of treaties. They place their claim upon the language of treaties, which the constitution has made the law of the land, and which cannot be annulled by the executive, or by the legislature.

But have these departments of the government assumed ground, which will, in case of a favorable decision, involve them in controversy with the judiciary? We have endeavored, throughout the whole argument, to show that in every step we have taken, we are sustained by the executive. We submit as conclusive upon the subject, the executive *construction of [*278 the treaty of 1819, in relation to the grant made to Don Pedro de Vargas. This grant included all the land previously ungranted, to the westward of the Perdido, "comprehending all the waste lands which belong, or may belong, to Spain, and are in dispute or reclamation with the United States, according to the tenor of treaties."(*a*) This was one of the three large grants, of which our government demanded, and obtained from Spain, an express act nullifying and avoiding them, as made in fraud of the eighth article of the treaty. Upon what principle was this done, unless upon the admission that the lands were grantable by Spain, and that, if the date was anterior to the period prescribed in the treaty, the concession would be valid to pass the title.

(*a*) Land Laws 72.

In reference to the acts of congress, it may well be questioned, whether any mere municipal act of domestic legislation can be legitimately appealed to, for the purpose of aiding in the interpretation of treaties. They were unknown to Spain; she was in no manner bound by them, nor ought they to possess this effect. But it is by no means apparent, that any such language was used, or any such intention entertained, by congress. Nearly all their legislation on the subject grew out of the act of occupation in 1810, and should be construed in subordination to the language of the president's proclamation. A careful examination of these acts will show a cautious and guarded avoidance of this question. The act of March 26th, 1804, § 1 (2 U. S. Stat. 283), declares, "that all that portion of country ceded by France to the United States, under the name of Louisiana, which lies south of the Mississippi territory, and of an east and west line, to commence on the Mississippi river, at the thirty-third degree north latitude, and to extend west to the western boundary of said cession, shall constitute a territory of the United States under the name of the territory of Orleans." § 12. "The residue of the province of Louisiana shall be called the district of Louisiana."

The act of February 20th, 1811, provides, in the first section, "that the
*279] inhabitants of all that part of the country or *territory ceded under the name of Louisiana, &c., contained within the following limits;" the first lines are to the westward of the Mississippi, which river is reached at the thirty-third degree north latitude; "thence down the said river to the river Iberville, and from thence, along the middle of said river and lakes Maurepas and Pontchartrain, to the Gulf of Mexico." The act of April 8th, 1812, for the admission of the state of Louisiana into the Union, in its first section prescribes the same limits.

The act of April 14th, 1812, is the first which professes to legislate directly upon this tract of country, and in enlarging the limits of Louisiana so as to embrace a portion of it, it styles it "all that tract of country comprehended within the following bounds," no longer employing the phraseology before applied to the undisputed country; "all that part of the territory or country ceded under the name of Louisiana." The acts annexing other portions of this territory to Mississippi and to Alabama, are equally guarded in their terms; nor am I aware of any one act of congress, which, in precise and positive language, calls this country a part of that which was ceded to us under the name of Louisiana.

This great and interesting question, which has heretofore been discussed diplomatically between the representatives of the two nations whose interests were involved in it, upon grounds of policy and national interest, is now presented for decision as a merely legal question. It has ceased to be a national controversy, and has assumed a shape peculiarly fitted for this tribunal. The *ultima ratio legis* is to be the arbiter, instead of the *ultima ratio regum*. No department of the government can take exception at a decision in favor of the plaintiffs, and it is confidently hoped, that if the treaties, according to their fair construction (the supreme laws of the land), by a just interpretation, can sanction their title, it will here find its confirmation.

*280] *Jones*, for the appellees.—This case comes up for decision on the third exception, taken *by the respondent in the court below, which

was sustained in that court, and the petition of the appellant there discussed. That exception was as follows: "For that the petitioners do not set forth any right of recovery of the land demanded by them, for that they allege that the land demanded by them, lies in a district formerly called Feliciana, within the late province of West Florida, and petitioners claim under a grant, made by the Spanish governor, of land situated in said district, to the person under whom they allege that they derive title, at New Orleans, on the 2d of January 1804, and subsequently confirmed by the Spanish government; whereas, all that section of country which was formerly called Feliciana, was, long before the alleged date of said grant, ceded by the government of Spain to the government of France, and by the government of France, to the United States; and the grant aforesaid is null and void, and has no effect whatever, and the officers making the same had not then and there any right or authority so to do."

The point then for the decision of the court is, whether the plaintiffs, by their petition and the documents annexed, exhibit a *primâ facie* right and title to the lands demanded by them; or, according to the specific objection made by the defendant, had the Spanish governor of Louisiana any right, on the 2d of January 1804, at New Orleans, to make this grant to Jayme Jorda, of 40,000 arpens, or is it in any way confirmed by any laws of the United States or of the state of Louisiana? This question is to be solved by deciding what were the limits or boundaries of the territory ceded by Spain to France in 1800, and by France to the United States in 1803, under the name of Louisiana.

The district of country within which the lands claimed are situated, did not form part of the territory erected into a state, under the name of Louisiana. This act passed February 1811. In April 1812, congress passed an act enlarging the limits of the state; and the parish of Feliciana, within which these lands are, forms a part of this district. *This has more the appearance of a question of fact than of law; but the parties have [*281 treated it as of the latter character, as resting on facts of a public and notorious nature, of which courts will take notice, without proof. The divisions, districts and boundaries of a country are as much a matter of law as the existence of the government, and of the court itself. Stark. Evid. part 3, p. 410–28; part 2, p. 164. The question raised seems, moreover, to belong rather to politics than law; it rests upon the construction of a treaty; and of the construction of a treaty, as a general question, the government is the best judge; and where the government has decided upon a line of construction, there would be great embarrassment, and ought to exist very paramount reasons, even with all the power and control given to courts under our very peculiarly organized federation, to warrant their departure from the construction given by the government.

The defendant then insists, and it is the first line of defence which he raises against the attack of the plaintiffs:

1. That it has been long since settled and established by the government of the United States, that the territory in question was ceded by Spain to France in 1800, by France to the United States in 1803; and that the courts of the United States are bound by this interpretation of that treaty. The act authorizing the president of the United States to take possession, or the act erecting Louisiana into a territory, cannot, of themselves, and without

the aid of extrinsic facts, decide the matter, because they nowhere recognise any specific limits of Louisiana ; but by what authority, other than the treaty of 1803, and the construction contended for by the appellee, and adopted by the government, was Mobile taken possession of in 1804, and erected into a separate revenue district, immediately on the ratification of the treaty? (Act of Congress of 24th February 1804, § 11 ; Proclamation of the President, 27th October 1810, State Papers, vol. 5.)

Again, when in 1812, congress annexed this very territory to Louisiana, when already a state, could anything more decisively mark and ascertain the
*282] clear construction and *interpretation of congress, that this district of country was ceded by Spain to France in 1800, and by France to the United States in 1803?—can the courts of the United States, after such conclusive evidence of the acts of the government, consider the question as open, whether this territory was thus ceded or not?

From the acquisition of Louisiana in 1803, to the period of the conclusion of the treaty with Spain, by which Florida was ceded to the United States, there has been an uninterrupted series of legislative acts affecting the territory, which the appellants say remained the property of Spain until the Florida treaty. (Acts of Congress, 2d March 1805 ; 21st April 1806 ; 3d March 1807 ; 3d March 1811 ; 12th December 1811 ; 25th April 1812 ; 12th and 18th April 1814 ; 3d March 1819 ; 11th May 1820 ; 8th May 1822 ; 27th February 1814.) All these various acts of congress clearly recognise the interpretation, that the territory in question was ceded to the United States by the treaty of Paris in 1803 ; and the act of 25th April 1812 legislates on the subject of this identical territory by description, viz., territory east of the island of Orleans, and west of the Perdido ; and yet the position taken by the plaintiffs in this case calls upon this court to decide, that this territory formed no part of the United States, until it was annexed to it by the treaty of Washington, of 22d February 1819. Hundreds, if not thousands, of certificates have been issued by the land-commissioners to individuals, under the acts of 1819, 1822 and 1825, conferring titles, as against the United States, to lands lying within this territory, and covered by grants similar to the plaintiffs'. The plaintiffs demand that all this solemn legislation, and all these judicial proceedings, are to be considered as so much usurpation on the part of the government of the United States on the rights of his Catholic majesty and his subjects. It will surely require some very cogent arguments, and a very imperious necessity of duty, to induce this court to decide in contradiction to such a series of acts of the government. The states of
*283] Alabama and Mississippi were *created in 1817, and they also, according to the doctrine contended for by the plaintiffs, were made up of large portions of his Catholic majesty's dominions ; for such is the direct consequence of maintaining that the territory east of the island of Orleans and west of the Perdido, was not ceded to the United States by the treaty of 1803, but only by the treaty of 1819. It is left to the court to imagine the consequences of such a conclusion.

The question involved in this case has been raised and decided in the state courts, viz : in *Newcomb* v. *Skipwith*, 1 Martin 151. The general principle and rule of decision, that courts follow the construction put upon treaties by their governments, is laid down in the *United States* v. *Palmer*, 3 Wheat. 610 ; *The Divina Pastora*, 4 Ibid. 52 ; *Williams* v. *Armroyd*,

7 Cranch 433, 434, where this court expressly declares, that it follows the opinion of the government on a question of political law. Indeed, the principle is too obviously a necessary corollary of the connection of courts of justice with the government under which they are established, to require elaborate illustration. Under this point of view, it is conceived, that this court is concluded from entertaining any other opinion, than that which has already been expressed by the government and all its citizens, except those few whose private interest induces them to cling to an exploded fallacy.

2. It is now secondly urged, that the plaintiffs are estopped by their own petition, from alleging that the territory in question was not ceded by the treaty of 1803. In order to give jurisdiction to the court, they were obliged to allege, that the parish in which the immovable claimed by them lies, is within the state of Louisiana, which is the jurisdictional limit of the court. If within its jurisdictional limits, how and when did it become so? Feliciana was, as defendant insists, made part of Louisiana in 1812; but if not ceded till 1819, no law or act has been passed since that time, annexing it to, and constituting it part of, the state of Louisiana, and the court below had not jurisdiction over the *subject. The allegations of the plaintiff and his reasonings are thus destructive of each other. [*284

3. The defendant contends, that if the question is gone into, historical facts and the official acts of the French and Spanish governments, and a just interpretation of the treaties of 1800 and 1803, establish conclusively, that the colony or province of Louisiana was ceded to the United States, with an extent which reached, on its eastern boundary, to the river Perdido, and included the district in which the lands that plaintiffs claim is situated. The state papers containing the correspondence of our ambassadors, Mr. Pinkney and Mr. Monroe, with the Spanish ministers, embraced nearly all that can be said upon the subject. (See State Papers, vol. 12, p. 15–81, and 197–280.) To reduce the matters there stated to some order, and to add what has since transpired, is all that will be undertaken. The object of any deduction of facts on this subject, is to show, that France, at some time, possessed the territory in question, under the name of Louisiana; if this point be established, there is an end of the controversy, for Spain was bound by the treaty of St. Ildefonso, made in 1800, to restore to France whatever territory was in her possession, which France had, at any time, held, under the name of Louisiana. This is too obviously its meaning, to require to be dilated upon. The words of that treaty are: "his Catholic majesty promises and engages on his part to retrocede to the French republic, six months after the full and entire execution of the conditions and stipulations herein relative to his royal highness the Duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be, after the treaties subsequently entered into between Spain and other states." The French text is, "*Sa majesté Catholique promet et s'engage de son côté, à retrocéder à la republique Française, six mois après l'exécution pleine et entière des conditions et stipulations ci-dessus, relatives à son altesse royale le Duc de Parme, la colonie ou province de la Louisiane, avec la même étendue qu'elle a actuellement entre les mains de l'Espagne, et qu'elle avait lorsque la France la possédait *et telle qu'elle doit être, d'après les traités passés* [*285

subséquemment entre l'Espagne et d'autres etats." It was ceded by France to the United States in the same terms.

Did France, then, at any time, ever possess any territory as far or farther to the east of the island of Orleans as the present parish of Feliciana, viz., the territory between the river Mississippi and the eastern branch of Pearl river? The discovery of Louisiana by La Salle, in 1682; his unsuccessful attempt to form a settlement at Rio Colorado de Texas, in 1685; the expedition and settlement of Iberville, in 1699, at Dauphin Island and Biloxi, where he remained governor for twenty-three years, and exhibited a character for enterprise and perseverance, which has not been surpassed; are clothed with the character of historical events; and this spot, far eastward of the present state, was the first to receive the name of Louisiana. It was twenty-three years after the period of the settlement of the French at Dauphin Island and Biloxi, before the head-quarters of the province were moved to the banks of the Mississippi. At the barren and inhospitable Biloxi, Iberville, constrained by orders, maintained his government, long after his own judgment was convinced that the fertile bank of the Mississippi was destined to be the site of an immense metropolis. These events, and the general settlement of the country, are minutely detailed in a recent publication, and the authorities from which they are taken are referred to. (Martin's History of Louisiana, vol. 1, from page 122 to page 300, who cites Charlevoix, Laharpe, Vergennes, Dupratz, and the records of the country.)

That France always gave a limit to Louisiana, which embraced the territory in question, may be further seen by the grant to Crozat, made in 1712, in which Crozat is appointed solely to carry on trade, "in all the lands possessed by us, and bounded by New Mexico and the lands of the English Carolina, all the establishments, ports, havens, rivers, and principally the port and haven of the island of Dauphin, heretofore called Massucre; the river of St. Louis, heretofore called Mississippi; from the edge of the sea, as far as Illinois, *together with the river of St. Philip, heretofore called the Missourys; and of St. Jerome, heretofore called Quabache; with all the countries, territories, lakes, within land, and the rivers which fall directly and indirectly into that part of the St. Louis."

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The manner in which France dispossessed herself of Louisiana, in favor of Great Britain and Spain, by the treaty of 1763, ceding the part of Louisiana east (to the left) of the island of Orleans, to Great Britain, and the island of Orleans and the part of Louisiana west of the Mississippi, to Spain; the consolidation of the part of Louisiana thus acquired by England with other territory ceded to her by Spain in 1763, which consolidation constituted the province of West Florida; and the subsequent acquisition by Spain of West Florida, thus embracing part of Louisiana, in 1783, are so fully and explicitly detailed in the correspondence of our ministers, contained in the state papers, at the place cited, in the reasons given for the judgment of the court, and in the extract from the treatise on American diplomacy, that it would only lead to repetition, to anticipate them. For the same reason, the court is referred to these extracts, for a critical analysis of the language of the treaty, from which it will be found, that to consider the territory in question as ceded by Spain to France, and by France to the United States, is the only key to the peculiar and otherwise inexplicable phraseology of these treaties. That this peculiar phrase-

ology applied to the dimensions of the territory to be ceded, rather than to any other modifications it had undergone by treaty, is clearly deduced from the terms used. His Catholic majesty retrocedes to France, "the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be, after the treaties subsequently entered into between Spain and other states." The words, the same extent, are to be understood as applying to each member of the sentence, viz., with the same extent that it now has, in the hands of Spain, and with the same extent that it had when France possessed it, and with such extent as it has or ought to have, after the treaties *subsequently entered into between Spain and other states; this is obviously the meaning of this peculiar phraseology, [*287 and it is confirmed, by adverting to the French text, where the word *telle* is placed in the feminine to accord with *étendue*, the last preceding substantive. From these premises, there can be no doubt, that the learned judge of the court of the first instance is fully borne out and supported in the conclusion, that the country east of the island of Orleans, including Mobile, &c., to the Perdido, was, from 1682 to 1763, in possession of France, under the name of Louisiana; that it was ceded, and intended to be ceded, to her again, by Spain, in 1800, and by France to the United States, in 1803. The arguments, *pro* and *con*, on this subject are well summed up in a publication entitled, Diplomacy of the United States. From this work, it appears, that during the negotiations which ended in the peace of 1783, at an unsuspicious moment, Spain herself admitted that the country bordering on the east side of the Mississippi, previous to the war of 1756, belonged to France.

This law lays down the principle, that where there are two purchasers from the same vendor, who have both paid the price, he who gets first into possession is to be maintained in the title. To prepare for the application of this law, it is laid down, that nations are mere moral beings, and that they are to be governed in all the contracts which they enter into among them, by the same rules by which contracts of the same nature are governed, when entered into between private persons. It is further assumed, that the United States is a mere purchaser from France; and plaintiffs' grantee, in like manner, a purchaser from Spain, which was in the actual administration of the country. It is next asserted, or sought to be inferred, that plaintiff's grantee was put in actual possession of his grant, before the United States took actual possession, in December 1803, and therefore, under the afore-mentioned rule of law, has a better title than the United States, or any person deriving claim under them. The sophistry of comparing a cession by treaty, between nations, to an ordinary bargain and sale, and applying the *rules of law as to property among individuals to the transactions among nations, is almost too obvious, to require [*288 refutation.

An act erecting Louisiana into two territories, passed 26th March 1804. The 14th section of that act annuls all grants made within the ceded territory, subsequent to the treaty of St. Ildefonso, except to actual settlers, &c. No law of the United States has passed, exempting grants such as that under which plaintiffs claim, from the nullity with which they are struck by this section of that law. For, 1. This grant violates the usual powers

vested in a governor, and the laws, usages and customs of the Spanish government on this subject, in granting so large a quantity of land ; and hence, the ratification of the king was sought and obtained, but at too late a period to confer a title. 2. No actual settlement is pretended or alleged. 3. The grant exceeds a league square.

It is not a little singular, for the good faith of these large grants, that they are all located precisely between the Mississippi and the Perdido, all hurried through with the speed of lightning, compared with the usual pace of Spanish authorities, and made about the same period of time. That the payments are not in money, but in certificates of credits, issued by the minister of finance. That the grant itself expressly declares the land to be within the province of Louisiana ; for the caption is, *Louisiana, Distrito de Baton Rouge ;* that it is issued by Morales, while he yet remained at New Orleans. With these concurring facts, it is not surprising, that the government of the United States have refused to confirm eight or ten grants, which embrace 500,000 acres of land.

After the liberal course of proceeding on the part of the United States, in relation to grants, up to the very period that possession was taken by her, after the long-usurped retention of it by Spain, the court, or any one else, can feel no commiseration either for the original grantees, parties to such gross frauds, or for speculating purchasers of doubtful titles. Technicali-
*289] ties sometimes serve as handmaids to *justice ; they may also be wisely used to defeat fraud ; and the claim of the plaintiffs is of such a nature, and entitled to so little favor, that the court would decide against it, even if they were obliged to rest their decision on a rigid technicality. Even if it were neeessary to resort to *summun jus* to extinguish it, it would work nothing but *summa justitia.* But this is not necessary. The plaintiffs' title vanishes, on the application of the plainest principles of law, and the most ordinary rules of decision.

To any argument predicated on the ground, that Spain, being in actual possession, had a right to make grants, it may be answered :

1. That from the first of October 1800, the country belonged to France, who transferred it to the United States in 1803, as she received it by cession from Spain. If France permitted it to be governed by Spanish authorities, from want of ability to take possession, or motives of convenience, the Spanish authorities could not go beyond mere acts of administration, viz., such as were necessary to maintain the bond of society ; they were not at liberty to dispose of the public domain, at their own will and pleasure ; or to fill their coffers by its sale. To this extent alone, in any succeeding government held by the general principles of political law (independent of special conventions), to recognise the acts of their predecessors, who have acted the *de facto,* without being the *de jure* government. The United States succeeded to the rights of France, and France was not bound to recognise acts similar to these, done after the date of the acquisition. It is not considered, that the third article of the treaty, which secures protection and enjoyment of property, is any limitation on the first article, which transfers the province as fully, and in the same manner in which France received it from Spain. But even had it been justice and equity to recognise all ordinary acts of administration, still, every act which was in fraud of the real owner, he might disavow and refuse to ratify ; these large grants of

land, so unusual, and at variance with the ordinary Spanish regulations on this subject, carry too strongly on their front their character, to entitle them to any favor. *The government of the United States has, as we have seen, gone very far in recognising every species of title [*290 which had the presumption of fairness, that emanated from the Spanish authorities, prior to the taking possession of the country, on the 20th of December 1803, and even up to 1810 ; but they have guarded their liberality from abuse, by imposing various reasonable conditions, within which the plaintiffs' claim does not come.

The acquisition of the United States was made in April 1803, and no step was taken towards originating this title, till October 1803, long after we may fairly presume the knowledge of the transfer was made public. The United States had the right, and they have exercised it, to refuse to ratify every such grant made after their title was acquired, and *à fortiori* after it was known, and they have always refused to give any color or shadow of legal right to claims of the magnitude of that under the wings of which plaintiffs seek to cover the tract of land in dispute, conceiving them to have been issued in fraud of their rights of sovereignty. The circumstance, therefore, of the petition and order of survey being made anterior to the taking possession by the United States, but posterior to the cession, and while Spain was in actual possession, cannot confer on the plaintiffs any right, if the United States, as they have uniformly done, refuse to ratify an incomplete title, which, as sovereign, they may refuse to do.

2. As to all titles which emanate from the sovereign, and are set up against the sovereign himself, it is the government alone which can, through its tribunals, determine on such claims. The United States have instituted tribunals to decide all claims to lands, of whose want of liberality in confirming titles there has been no complaint ; except by a few individuals whose claims are judged to have originated in fraud of the rights of the United States. The claim of the plaintiff has been presented for record and confirmation ; but it has not been approved or confirmed by the commissioners, or we should have heard such approval and confirmation alleged in the petition. The United States have given away *these very lands, [*291 and by doing so, have not only manifested their liberality and wise policy, but conferred rights and created interests which, from the extent and variety of the persons interested, ought not now to be affected ; unless, indeed, the strictly impartial scale of justice preponderates against them, when, indeed, they must be extinguished, even if the sword of justice be necessary to enforce the decree. Of such a result, we have little apprehension, sustained as we are by such a mass of legislation, and the substantial rules of political law.

The question submitted in this case was glanced at in *De la Croix* v. *Chamberlain*, 12 Wheat. 599. That case was decided on the technical ground, that an imperfect title could not sustain an action of ejectment. The same objection might exist in this case, if the acts of the Spanish governor and king are considered as without authority over the territory described, after 1803. But the case is adverted to, principally with a view to an opinion advanced, as we presume, by the deciding judge ; for it is not a necessary reason for, or pivot of, the decision of the court.

The references to the acts of congress, already given, show with what

limitations the United States have confirmed titles which had their commencement after October 1800, viz., the date of the treaty of St. Ildefonso; that it is only grants limited as to quantity, viz., a league square, and which were accompanied by settlement, and considered by the commissioners to have commenced in good faith, which were thus confirmed. As to any grants which originated after October 1800, conferring titles to land to an extent exceeding a league square, the 14th section of the act of 1804 at once annuls them, and no subsequent law has withdrawn its withering effect. This and the subsequent acts clearly show, that the United States considered that the cession by Spain to France put an end to the power of Spanish officers to make grants of land; and this, doubtless, was the strict law of the case. The possession of Spain, after 1800, was not a possession as owner. Her officers could, therefore, only do administrative and conservative acts; and not acts of pure sovereignty. It is respectfully insisted, that the United
*292] *States drew a clear distinction as to dates, permitting grants, prior to 1800, to rest on their proper legality for validity; but constituting themselves into judges of all grants made subsequent to that period. They have confirmed all acts done, or grants made, after October 1800, up to 1803, where, from the minuity or contracted dimensions, they carried presumptive proof that they were made in the ordinary exercise of sovereignty, and in good faith, at least, on the part of the grantees. They have even carried this liberality in favor of such grants, made prior to 1810, when the country was actually taken possession of. Joydra's patent comes within no one of the confirming acts.

The plaintiffs must either succeed in establishing that Louisiana was bounded on the east by the Iberville and the lakes, or their grant falls to the ground. When the plaintiffs invoke the aid of the treaty of 1819, it is by assuming that the ground of dispute was not included in Louisiana, under the cession of 1803. We have, as we apprehend, clearly refuted this position. The treaty of 1819 has substance enough for its application, in the use of the terms, West Florida, in the territory actually ceded, viz., the portion of West Florida, between the Perdido and the Appalachicola, to render unnecessary the establishment of a principle which would stamp with usurpation and injustice so large a portion of federal legislation, and annihilate the original legality of the rights of thousands, in the states of Alabama, Mississippi and Louisiana.

It is not, therefore, on such a title as the one presented by plaintiffs, predicated on a petition and order of survey for 40,000 arpens of land, made after the cession, which took place in April 1803, and of which the title was not completed till January and May 1804–5, unaided by any sanction of the government of the United States, and in the very teeth of its laws; that the plaintiffs can recover. In the words of the exception, the grant or patent was made by persons who had not, at the time, any authority to grant lands within that district. The plaintiffs show no legal title to the lands claimed by them.

*293] Subsequent acts of congress have established land-offices *in the territory of Florida, westward of the Perdido, but the disputed territory remains part of the states of Mississippi, Alabama and Louisiana, under acts of congress which recognise it as ceded by the treaty of 1803. There is certainly manifested in the pretensions of the plaintiffs in setting up this

title, a gratifying instance of the latitude of legal discussion permitted under our free institutions; but there is something hopeless in the supposition that courts of justice might, by possibility, entertain an opinion different from the one so early taken and so long persevered in by the government, and by which no palpable contradiction or absurdity is maintained; the judiciary must be considered as bound to follow the twenty years' interpretation given by their government to a treaty made by them. Even under our very peculiar form of government, it would be a singular instance of *imperium in imperio*, if the judiciary and the government were found deciding such a question in different ways.

Webster, for the appellants, in reply.—The question for the decision of the court is, whether the lands, sued for by the petitioners, are a part of the province of Louisiana, as that province was ceded by France to the United States; or are a part of West Florida, as that province was ceded by Spain to the United States. If a part of Louisiana, then the lands were public domain, and now belonged to the United States, or her grantees. If a part of Florida, then the grant under which the plaintiff derives title is good, and he is entitled to recover.

Louisiana, as the United States received it from France, was bounded on the east, either by the Iberville and the lakes, or by the Perdido; no other or intermediate boundary is set up. If the United States obtained their title from France, they have both soil and jurisdiction; if under Spain, they have the jurisdiction, but not the soil. What was the extent, then, of the grant from France to the United States of April 30th, 1803? The grant was of the province of Louisiana; it stated no boundaries or limits, but it referred to the title of France, that is, to the treaty of St. Ildefonso. The words of this treaty have been frequently *repeated in the course of the argument. That treaty then is to be looked at and considered. [*294

That treaty retrocedes to the colony or province of Louisiana; 1. With the same extent which it now has in the hands of Spain. 2. That it had, when France possessed it. 3. And such as it ought to be, after the treaties subsequently entered into between Spain and other states. How, then, is this treaty to be construed?

1. In the first place, we must look at the condition and state of the country as they then were. From November 1762, a period of thirty-eight years, Spain had owned Louisiana; she had been in the actual possession of it from 1769, a period of thirty-one years. During all this time, she had possessed it, as bounded on the east side by the lakes. From 1763 to 1783, England had owned the territory on the left bank, under the appellation of Florida. For twenty years, England and Spain occupied, respectively, each its own territory, with boundaries settled by treaty and well understood. In 1783, Spain obtained the territory on the left bank, from England, but she obtained it, as Florida. As such it was ceded to her, and as such she received it. From 1783 to 1800, seventeen years, she owned both banks; but she owned one as Louisiana, and the other as Florida. This is perfectly clear, as matter of fact; and the provinces were as well known, and divided by lines as certain, as are the provinces of Spain at home. For forty years, not one foot of land, east of the Iberville, had been treated by her as part of Louisiana. Her laws, her ordinances, her colonial governments, her

archives, her administration, all recognise the distinction between Louisiana and Florida. This is the great leading consideration; it is entirely unquestionable as matter of fact, and quite important in the argument. Louisiana, then, at that time, was as clearly defined in its boundaries, at least, on the east, as Estramadura or Andalusia. All this was known to France: 1st, Because it was known to everybody; and 2d, Because these were the limits with which France herself had ceded Louisiana to Spain. *Under these circumstances, the treaty of St. Ildefonso was made. *295]

1. It cedes "the colony or province of Louisiana." This, of itself, is a sufficient description; if nothing more had been said, the colony would have passed, with its then known and established boundaries, as much so as if it had been Castille or Arragon. If it had stopped here, would there have been any doubt? Certainly, none. This is very important; because if the grant thus far is clear, then it is not to be affected by anything in itself less clear; if all that follows, taken together, be ambiguous, then it ought not to control the preceding, which is free from ambiguity. That would be worse than to illustrate the obscure, by the obscure; it would be, to obscure the clear, by the obscure. Vattel, lib. 2, c. 17, upon the interpretation of treaties, interprets the obscure, so that it agrees with what is clear and plain. Therefore, if all that follows, taken together, is doubtful, it is all to be rejected.

2. But, properly considered, what follows is not doubtful. There are two ways in which these three modes of description may be considered; and each will lead to the same result. 1. They may be viewed as explanatory of each other, or as synonymous phrases. This probably is the true mode of regarding them. 2. Or as qualifying and limiting each other.

1st. It is natural to consider them as synonymous. They are copulative; they are evidently used as synonymous. Take the first two; "Louisiana is to be ceded, as Spain now holds it, and as France held it." Does not this form of expression imply, that the extent was the same in both cases? If the extent was different, then both could not be true. Yet both are used, and the inference, therefore, is, that they were used as synonymous. If the extent had been different, then the language would have been, not as Spain now holds it, but as France held it. The fair import of the expression is, that they mean the same thing; or were intended to express the same thing. Now, if these expressions appear in any degree inconsistent with themselves, what is the rule to be applied to them? *Clearly, it is to find out, if we can, one which is clear and certain, and make the rest conform to it. This is the rule of common sense. Now, there is one of these descriptions perfectly clear, unambiguous and free from doubt; and that is entitled to control all the rest. Because it corresponds precisely with what precedes in the treaty; because it is first, and leading, in the order of arrangement; because, in itself, it is perfectly distinct and intelligible. There is no doubt how the treaty would have stood, if it had stopped there. The doctrine contended for on the other side, overrules the plain expressions of this provision. They contend, Louisiana shall not have the same extent as in the hands of Spain; they control what is clear by what is doubtful. *296]

But it is further evident, that two of these clauses completely agree, the first and the last; "such as Spain now holds it," and "such as it ought to be, after the treaties made by her;" these are precisely the same thing. Then, if these expressions were used as mutually explanatory, as different

modes of expressing the same thing; how are two of them, which are clear, and which do agree, to be explained away by the third, which is doubtful? These two are almost identical, "such as Spain now holds it," and "such as it ought to be, after the treaties made by her." Then we come to what has raised the doubt; "or as it was, when France possessed it." Now, this expression may be doubtful, or might be, if it stood alone, especially, if it be admitted, that France possessed Louisiana a long time, and that, at different periods, it had a different extent in her hands. The object is to fix the period of her possession, to which this refers.

Let it be admitted, for the present, that it had a different extent, at different periods. Was there any period when, by acknowledgment, she held it bounded east by the Mississippi? There certainly was, viz., the moment of its actual delivery to France, in 1769. For seven years, it had no other boundary but the Iberville. But it is enough to say, she so possessed it, in 1762 and 1763; *and so ceded it, when she held the whole of Louisiana. It is, then, to that moment that these words are to refer; it then [*297 went into the possession of France, to the full extent now claimed by the petitioners; because, in this way, the article is reconciled in all its parts.

But there is a stronger ground. It is quite clear, from the treaty itself, that it refers to the possession of France, at the moment after the cession. The third clause makes this manifest; "and such as it ought to be, after the treaties subsequently made by Spain," &c. Now, here are treaties spoken of as made by Spain, subsequent to the possession of France. Not treaties by France and Spain, but treaties by Spain alone. This necessarily fixes the period to be that of the cession; for, before that time, Spain could not affect Louisiana by treaties. Does the treaty mean, after the treaties entered into by Spain, subsequent to La Salle's voyage in 1682; or the primitive possession of France? It is, therefore, confidently asserted, that it is not only an admissible, but the only admissible, construction of the clause, as the time of possession by France referred to in the treaty was the moment of her cession. But there is another mode of considering these clauses; and that is, not to regard them as synonymous, but as qualifying and limiting each other; and this will lead the court to the same result.

Thus far the subject has been considered, as if there were three clauses or phrases of description. But it is suggested, that there are but two, the two first being in fact but one. The form of expression justifies this construction; "with the same extent that it now has in the hands of Spain, and that it had, when France possessed it; and such as it ought to have been, by subsequent treaties." The first sentence states the same thing, and the last qualifies it. The meaning is, take the colony as you hold it, and as I receive it from you, subject to any treaties since made by me. The punctuation shows this, as well as the phrase and manner of expression. If this construction, which appears to be the right one, *be adopted, the result will be the same; viz., that the time of possession referred to [*298 was the time of the cession to Spain.

But we may go further, and contend, that no reasonable argument can be found, for carrying back this possession to early history; in short, that France never did possess West Florida, as part of Louisiana, within the meaning of words used as these words are. She claimed it, indeed, but she never possessed it. She had a settlement here and there, with an undefined

claim. She claimed it, but no treaty acknowledged it, and it was always disputed until 1763. 12 Wheat. 522. It was certainly one object of that treaty to settle the limits of Nova Scotia; and the fair construction of the article is, that it fixes its boundaries; and that it purports to cede territory, does not alter the nature or intent of it. There were words of cession, because France had a settlement at Dauphin Island. On the 3d of November 1762, by private treaty, France ceded Louisiana to Spain—all Louisiana; and by a treaty with England, she ceded the country east of the Mississippi to England. At the time of the definitive treaty of 10th February 1763, Spain owned Louisiana, under the treaty of November preceding; and now she cedes Florida to England, and all her possessions east of the Mississippi. This was certainly a designation.

How did the parties understand the treaty of 1763? The letter to L'Abbadie (1 Laws U. S. 442), shows that it was considered, that the whole of Louisiana was the property of Spain; and then, 1763, it was admitted, that the whole of Louisiana lay west of the Mississippi; and in 1763, Spain recovering the left bank of the river from England, received it as Florida. It may be emphatically inquired, whether it is reconcilable to sound principles, to go back to the times of uncertain and contentious claims, or to the time of fixed and acknowledged rights. A contemporaneous exposition of the treaty of St. Ildefonso is obtained, from the act of the parties to that treaty. When, on the 30th November 1803, Spain delivered Louisiana to France, she delivered nothing on the eastern side of the river.

*299] *The history of the title of the United States to Louisiana will illustrate and confirm the views which have been exhibited in this investigation. In 1795, the United States made their treaty with France. Difficulties soon after arose on the subject of the navigation of the Mississippi, and the peace of the two countries was in danger from these difficulties. In 1801 or 1802, we heard of the transfer of Louisiana to France, and we were alarmed at the prospect of the armies of a powerful and successful nation landing in our neighborhood. Before it was known that France had become the owner of Louisiana, we were anxious to obtain Florida; but as soon as this became known, every effort was directed to purchase Louisiana from France, or so much of it as would secure to the flourishing and enterprising western population of our country, the free use of the magnificent river Mississippi; their right by all the laws of nature. The treaty of April 1803, gave the whole of Louisiana to the United States; that treaty reciting the treaty of San Lorenzo. How did we receive the acquired territory? Did we then suppose, we had obtained anything east of the Mississippi? When Claiborne and Wilkinson took possession, they received Louisiana extending only as asserted by the appellants; and they asked for no more.

Marshall, Ch. J., delivered the opinion of the court.—This suit was brought by the plaintiffs in error, in the court of the United States for the eastern district of Louisiana, to recover a tract of land lying in that district, about thirty miles east of the Mississippi, and in the possession of the defendant. The plaintiffs claimed under a grant for 40,000 arpens of land, made by the Spanish governor, on the 2d of January 1804, to Jayme Joydra and

ratified by the king of Spain on the 29th of May 1804. The petition and order of survey are dated in September 1803, and the return of the survey itself was made on the 27th of October in the same year. The defendant excepted to the petition of the plaintiffs, alleging that it does not show a title on which *they can recover; that the territory within which [*300 the land claimed is situated, had been ceded, before the grant, to France, and by France to the United States; and that the grant is void, being made by persons who had no authority to make it. The court sustained the exception, and dismissed the petition. The cause is brought before this court by a writ of error.

The case presents this very intricate, and, at one time, very interesting question: to whom did the country between the Iberville and the Perdido rightfully belong, when the title now asserted by the plaintiffs was acquired? This question has been repeatedly discussed, with great talent and research, by the government of the United States and that of Spain. The United States have preseveringly and earnestly insisted, that, by the treaty of St. Ildefonso, made on the first of October, in the year 1800, Spain ceded the disputed territory, as part of Louisiana, to France; and that France, by the treaty of Paris, signed on the 30th of April 1803, and ratified on the 21st of October, in the same year, ceded it to the United States. Spain has, with equal perseverance and earnestness, maintained, that her cession to France comprehended that territory only which was, at that time, denominated Louisiana, consisting of the island of New Orleans, and the country she received from France, west of the Mississippi. Without tracing the title of France to its origin, we may state with confidence, that at the commencement of the war of 1756, she was the undisputed possessor of the province of Louisiana, lying on both sides of the Mississippi, and extending eastward beyond the bay of Mobile. Spain was, at the same time, in possession of Florida; and it is understood, that the river Perdido separated the two provinces from each other.

Such was the state of possession and title, at the treaty of Paris, concluded between Great Britain, France and Spain, on the 10th day of February 1763. By that treaty, France ceded to Great Britain the river and port of Mobile, and all her possessions on the left side of the river Mississippi, except the town of New Orleans and the island on which it *is situ- [*301 ated; and by the same treaty, Spain ceded Florida to Great Britain. The residue of Louisiana was ceded by France to Spain, in a separate and secret treaty between those two powers. The king of Great Britain being thus the acknowledged sovereign of the whole country east of the Mississippi, except the island of New Orleans, divided his late acquisition in the south into two provinces, East and West Florida. The latter comprehended so much of the country ceded by France as lay south of the 31st degree of north latitude, and a part of that ceded by Spain.

By the treaty of peace between Great Britain and Spain, signed at Versailles, on the 3d of September 1783, Great Britain ceded East and West Florida to Spain; and those provinces continued to be known and governed by those names, so long as they remained in possession and under the dominion of his Catholic majesty. On the 1st of October, in the year 1800, a secret treaty was concluded between France and Spain, at St. Ildefonso, the third article of which is in these words: "His Catholic majesty prom-

ises and engages on his part to retrocede to the French republic, six months after the full and entire execution of the conditions and stipulations relative to his royal highness the duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and the other states." The treaty of the 30th of April 1803, by which the United States acquired Louisiana, after reciting this article, proceeds to state, that "the first consul of the French republic doth hereby cede to the United States, in the name of the French republic, for ever and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French republic, in virtue of the above-mentioned treaty concluded with his Catholic majesty." The fourth article stipulates that "there shall be sent by the government of France, a commisssary, to Louisiana, to the end that he do every act necessary, as well to receive
*302] from the officers of his Catholic *majesty the said country, and its dependencies, in the name of the French republic, if it has not been already done, as to transmit it, in the name of the French republic, to the commissary or agent of the United States."

On the 30th of November 1803, Peter Clement Laussatt, colonial prefect and commissioner of the French republic, authorized, by full powers, dated the 6th of June 1803, to receive the surrender of the province of Louisiana, presented those powers to Don Manuel Salcedo, governor of Louisiana and West Florida, and to the Marquis de Casa Calvo, commissioners on the part of Spain, together with full powers to them from his Catholic majesty, to make the surrender. These full powers were dated at Barcelona, the 15th of October 1802. The act of surrender declares, that in virtue of these full powers, the Spanish commissioners, Don Manuel Salcedo and the Marquis de Casa Calvo, "put, from this moment, the said French commissioner, the citizen Laussatt, in possession of the colony of Louisiana and of its dependencies, as also of the town and island of New Orleans, in the same extent which they now have, and which they had in the hands of France, when she ceded them to the royal crown of Spain, and such as they should be, after the treaties subsequently entered into between the states of his Catholic majesty and those of other powers."

The following is an extract from the order of the king of Spain, referred to by the commissioners in the act of delivery. "Don Carlos, by the grace of God, &c.:" "Deeming it convenient to retrocede to the French republic the colony and province of Louisiana, I order you, as soon as the present order shall be presented to you by General Victor, or other officer duly authorized by the French republic, to take charge of said delivery; you will put him in possession of the colony of Louisiana and its dependencies, as also of the city and island of New Orleans, with the same extent that it now has, that it had in the hands of France, when she ceded it to my royal crown, and such as it ought to be, after the treaties which have successively taken place between my states and those of other powers." Previous to the arrival
*303] of the French commissioner, the *governor of the provinces of Louisiana and West Florida, and the Marquis de Casa Calvo, had issued their proclamation, dated the 18th of May 1803; in which they say, "his majesty having before his eyes the obligations imposed by the treaties, and

desirous of avoiding any disputes that might arise, has deigned to resolve that the delivery of the colony and island of New Orleans, which is to be made to the general of division Victor, or such other officer as may be legally authorized by the government of the French republic, shall be executed on the same terms that France ceded it to his majesty; in virtue of which, the limits of both shores of the river St. Louis, or Mississippi, shall remain as they were irrevocably fixed by the seventh article of the definitive treaty of peace, concluded at Paris the 10th of February 1763, according to which the settlements from the river Manshac, or Iberville, to the line which separates the American territory from the dominions of the king, remain in possession of Spain and annexed to West Florida."

On the 21st of October 1803, congress passed an act to enable the president to take possession of the territory ceded by France to the United States; in pursuance of which, commissioners were appointed, to whom Monsieur Laussatt, the commissioner of the French republic, surrendered New Orleans and the province of Louisiana on the 20th of December 1803. The surrender was made in general terms; but no actual possession was taken of the territory lying east of New Orleans. The government of the United States, however, soon manifested the opinion, that the whole country originally held by France, and belonging to Spain, when the treaty of St. Ildefonso was concluded, was by that treaty retroceded to France.

On the 24th of February 1804, congress passed an act for laying and collecting duties within the ceded territories, which authorized the president, whenever he should deem it expedient, to erect the shores, &c., of the bay and river Mobile, and of the other rivers, creeks, &c., emptying into the gulf of Mexico, east of the said river Mobile, and west thereof to the Pascagoula, inclusive, into a separate district, and to establish a port of entry and delivery therein. The *port established in pursuance of this act was at Fort Stoddert, within the acknowledged jurisdiction of the United States; and this circumstance appears to have been offered as a sufficient answer to the subsequent remonstrances of Spain against the measure. It must be considered, not as acting on the territory, but as indicating the American exposition of the treaty, and exhibiting the claim its government intended to assert. [*304

In the same session, on the 26th of March 1804, congress passed an act erecting Louisiana into two territories. This act declares, that the country ceded by France to the United States, south of the Mississippi territory, and south of an east and west line, to commence on the Mississippi river, at the thirty-third degree of north latitude, and run west to the western boundary of the cession, shall constitute a territory, under the name of the territory of Orleans. Now, the Mississippi territory extended to the thirty-first degree of north latitude, and the country south of that territory was necessarily the country which Spain held as West Florida; but still, its constituting a part of the territory of Orleans depends on the fact that it was a part of the country ceded by France to the United States. No practical application of the laws of the United States to this part of the territory was attempted, nor could be made, while the country remained in the actual possession of a foreign power.

The 14th section enacts, "that all grants for lands within the territories ceded by the French republic to the United States, by the treaty of the 30th

of April 1803, the title whereof was, at the date of the treaty of St. Ildefonso, in the crown, government or nation of Spain, and every act and proceeding subsequent thereto, of whatsoever nature, towards the obtaining any grant, title or claim to such lands, and under whatsoever authority transacted or pretended, be and the same are hereby declared to be, and to have been from the beginning, null, void, and of no effect in law or equity." A proviso excepts the titles of actual settlers acquired before the 20th of December 1803, from the operation of this section. It was obviously intended to act on all grants made by Spain, after her retrocession of Louisiana to France, and *without deciding on the extent of that retrocession, to *305] put the titles which might be thus acquired through the whole territory, whatever might be its extent, completely under the control of the American government. The president was authorized to appoint registers or recorders of lands acquired under the Spanish and French governments, and boards of commissioners, who should receive all claims to lands, and hear and determine, in a summary way, all matters respecting such claims. These proceedings were to be reported to the secretary of the treasury, to be laid before congress for the final decision of that body.

Previous to the acquisition of Louisiana, the ministers of the United States had been instructed to endeavor to obtain the Floridas from Spain. After that acquisition, this object was still pursued, and the friendly aid of the French government towards its attainment was requested. On the suggestion of M. Talleyrand, that the time was unfavorable, the design was suspended. The government of the United States, however, soon resumed its purpose ; and the settlement of the boundaries of Louisiana was blended with the purchase of the Floridas, and the adjustment of heavy claims made by the United States for American property, condemned in the ports of Spain, during the war which was terminated by the treaty of Amiens.

On his way to Madrid, Mr. Monroe, who was empowered, in conjunction with Mr. Pinckney, the American minister at the court of his Catholic majesty, to conduct the negotiation, passed through Paris; and addressed a letter to the minister of exterior relations, in which he detailed the objects of his mission, and his views respecting the boundaries of Louisiana. In his answer to this letter, dated the 21st of December 1804, M. Talleyrand declared, in decided terms, that by the treaty of St. Ildefonso, Spain retroceded to France no part of the territory east of the Iberville which had been held and know as West Florida ; and that in all the negotiations between the two governments, Spain had constantly refused to cede any part of the Floridas, even from the Mississippi to the Mobile. He added, that he was authorized by his imperial majesty to say, that at the *beginning of the year *306] 1802, General Bournonville had been charged to open a new negotiation with Spain for the acquisition of the Floridas; but this project had not been followed by a treaty. Had France and Spain agreed upon the boundaries of the retroceded territory, before Louisiana was acquired by the United States, that agreement would undoubtedly have ascertained its limits. But the declarations of France, made after parting with the province, cannot be admitted as conclusive. In questions of this character, political considerations have too much influence over the conduct of nations, to permit their declarations to decide the course of an independent government, in a matter vitally interesting to itself.

Soon after the arrival of Mr. Monroe at his place of destination, the negotiations commenced at Aranjuez. Every word in that article of the treaty of St. Ildefonso which ceded Louisiana to France, was scanned by the ministers on both sides, with all the critical acumen which talents and zeal could bring into their service. Every argument drawn from collateral circumstances, connected with the subject, which could be supposed to elucidate it, was exhausted. No advance towards an arrangement was made, and the negotiation terminated, leaving each party firm in its original opinion and purpose. Each persevered in maintaining the construction with which he had commenced. The discussion has since been resumed between the two nations with as much ability and with as little success. The question has been again argued at this bar, with the same talent and research which it has uniformly called forth. Every topic which relates to it has been completely exhausted; and the court, by reasoning on the subject, could only repeat what is familiar to all.

We shall say only, that the language of the article may admit of either construction, and it is scarcely possible to consider the arguments on either side, without believing that they proceed from a conviction of their truth. The phrase on which the controversy mainly depends, that Spain retrocedes Louisiana, with the same extent that it had when France possessed it, might so readily have been expressed *in plain language, that it is difficult [*307
to resist the persuasion that the ambiguity was intentional. Had Louisiana been retroceded, with the same extent that it had, when France ceded it to Spain, or with the same extent that it had, before the cession of any part of it to England, no controversy respecting its limits could have arisen. Had the parties concurred in their intention, a plain mode of expressing that intention would have presented itself to them. But Spain has always manifested infinite repugnance to the surrender of territory, and was probably unwilling to give back more than she had received. The introduction of ambiguous phrases into the treaty, which power might afterwards construe according to circumstances, was a measure which the strong and the politic might not be disinclined to employ.

However this may be, it is, we think, incontestable, that the American construction of the article, if not entirely free from question, is supported by arguments of great strength, which cannot be easily confuted. In a controversy between two nations, concerning national boundary, it is scarcely possible, that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is, to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed.

The convulsed state of European Spain affected her influence over [*308
her colonies; and a degree of disorder prevailed *in the Floridas,

at which the United States could not look with indifference. In October 1810, the president issued his proclamation, directing the governor of the Orleans territory to take possession of the country as far east as the Perdido, and to hold it for the United States. This measure was avowedly intended as an assertion of the title of the United States; but as an assertion, which was rendered necessary, in order to avoid evils which might contravene the wishes of both parties, and which would still leave the territory "a subject of fair and friendly negotiation and adjustment."

In April 1812, congress passed "an act to enlarge the limits of the state of Louisiana." This act describes lines which comprehend the land in controversy, and declares, that the country included within them shall become and form a part of the state of Louisiana. In May of the same year, another act was passed, annexing the residue of the country west of the Perdido to the Mississippi territory. And in February 1813, the president was authorized "to occupy and hold all that tract of country called West Florida, which lies west of the river Perdido, not now in possession of the United States." On the third of March 1817, congress erected that part of Florida which had been annexed to the Mississippi territory, into a separate territory, called Alabama. The powers of government were extended to, and exercised in, those parts of West Florida which composed a part of Louisiana and Mississippi respectively; and a separate government was erected in Alabama. (3 U. S. Stat. 371.) In March 1819, "congress passed an act to enable the people of Alabama to form a constitution and state government." And in December 1819, she was admitted into the Union, and declared one of the United States of America. The treaty of amity, settlement and limits, between the United States and Spain, was signed at Washington, on the 22d day of February 1819, but was not ratified by Spain till the 24th day of October 1820; nor by the United States, until the 22d
*309] day of February 1821. So that Alabama was *admitted into the Union as an independent state, in virtue of the title acquired by the United States to her territory, under the treaty of April 1803.

After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty, by which the government claims it, to maintain the opposite construction in its own courts, would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature. Had this suit be instituted immediately after the passage of the act for extending the bounds of Louisiana, could the Spanish construction of the treaty of St. Ildefonso have been maintained? Could the plaintiff have insisted, that the land did not lie in Louisiana, but in West Florida; that the occupation of the country by the United States was wrongful; and that his title under a Spanish grant must prevail, because the acts of congress on the subject were founded on a misconstruction of the treaty? If it

be said, that this statement does not present the question fairly, because a plaintiff admits the authority of the court, let the parties be changed. If the Spanish grantee had obtained possession, so as to be the defendant, would a court of the United States maintain his title under a Spanish grant, made subsequent to the acquisition of Louisiana, singly on the principle, that the Spanish construction of the treaty of St. Ildefonso was right, and the American construction wrong? Such a decision would, we think, have subverted those principles which govern the relations between the legislative and judicial departments, and mark the limits of each.

*If the rights of the parties are in any degree changed, that change must be produced by the subsequent arrangement made between the two governments. A "treaty of amity, settlement and limits, between the United States of America and the king of Spain," was signed at Washington, on the 22d day of February 1819. By the second article, "his Catholic majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida." The eighth article stipulates, "that all the grants of land made before the 24th of January 1818, by his Catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic majesty." [*310

The court will not attempt to conceal the difficulty which is created by these articles. It is well known, that Spain had uniformly maintained her construction of the treaty of St. Ildefonso. His Catholic majesty had perseveringly insisted, that no part of West Florida had been ceded by that treaty, and that the whole country which had been known by that name still belonged to him. It is, then, a fair inference from the language of the treaty, that he did not mean to retrace his steps, and relinquish his pretensions; but to cede, on a sufficient consideration, all that he had claimed as his? and consequently, by the eighth article, to stipulate for the confirmation of all those grants which he had made, while the title remained in him? But the United States had uniformly denied the title set up by the crown of Spain; had insisted, that a part of West Florida had been transferred to France, by the treaty of St. Ildefonso, and ceded to the United States by the treaty of April 1803; had asserted this construction, by taking actual possession of the country; and had extended its legislation over it. The United States, therefore, cannot be understood to have admitted, that this country belonged to his Catholic *majesty, or that it passed from him to them by this article. Had his Catholic majesty ceded to the United States, "all the territories situated to the eastward of the Mississippi, known by the name of East and West Florida," omitting the words "which belong to him," the United States, in receiving this cession, might have sanctioned the right to make it, and might have been bound to consider the eighth article as co-extensive with the second. The stipulation of the eighth article might have been construed to be an admission that West Florida, to its full extent, was ceded by this treaty. But the insertion of these words materially affects the construction of the article. They cannot be rejected as surplusage. They have a plain meaning, and that meaning [*311

can be no other than to limit the extent of the cession. We cannot say, they were inserted carelessly or unadvisedly, and must understand them according to their obvious import.

It is not improbable, that terms were selected, which might not compromise the dignity of either government, and which each might understand, consistently with its former pretensions. But if a court of the United States would have been bound, under the state of things existing at the signature of the treaty, to consider the territory then composing a part of the state of Louisiana, as rightfully belonging to the United States, it would be difficult to construe this article into an admission that it belonged rightfully to his Catholic majesty. The sixth article of the treaty may be considered in connection with the second. The sixth stipulates, "that the inhabitants of the territories which his Catholic majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal constitution." This article, according to its obvious import, extends to the whole territory, which was ceded. The stipulation for the incorporation of the inhabitants of the ceded territory into the Union, is co-extensive with the cession. But the country in which the land in controversy lies, was already incorporated into the Union. It composed a part of the *state of Louisiana, which was already a member of the American confederacy. A part of West Florida lay east of the Perdido, and to that the right of his Catholic majesty was acknowledged. There was, then, an ample subject on which the words of the cession might operate, without discarding those which limit its general expressions.

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Such is the construction which the court would put on the treaties by which the United States have acquired the country east of New Orleans. But an explanation of the eighth article seems to have been given by the parties, which may vary this construction. It was discovered, that three large grants, which had been supposed, at the signature of the treaty, to have been made subsequent to the 24th of January 1818, bore a date anterior to that period. Considering these grants as fraudulent, the United States insisted on an express declaration annulling them. This demand was resisted by Spain; and the ratification of the treaty was for some time suspended. At length, his Catholic majesty yielded, and the following clause was introduced into his ratification, "Desirous at the same time of avoiding any doubt or ambiguity concerning the meaning of the eighth article of the treaty, in respect to the date which is pointed out in it, as the period for the confirmation of the grants of lands in the Floridas made by me, or by the competent authorities in my royal name, which point of date was fixed in the positive understanding of the three grants of land made in favor of the Duke of Alagon, the Count of Punon Rostro, and Don Pedro de Vargas, being annulled by its tenor; I think it proper to declare, that the said three grants have remained and do remain entirely annulled and invalid; and that neither the three individuals mentioned, nor those who may have title or interest through them, can avail themselves of the said grants, at any time or in any manner; under which explicit declaration, the said eighth article is to be understood as ratified." One of these grants, that to Vargas, lies west of the Perdido.

It has been argued, and with great force, that this explanation forms a

part of the article. It may be considered *as if introduced into it, as a proviso or exception to the stipulation, in favor of grants anterior to the 24th of January 1818. The article may be understood, as if it had been written that, "all the grants of land made before the 24th of January 1818, by his Catholic majesty or his lawful authorities in the said territories, ceded by his majesty to the United States (except those made to the Duke of Alagon, the Count of Punon Rostro, and Don Pedro de Vargas) shall be ratified and confirmed, &c." Had this been the form of the original article, it would be difficult to resist the construction, that the excepted grants were withdrawn from it by the exception, and would otherwise have been within its provisions. Consequently, that all other fair grants, within the time specified, were as obligatory on the United States, as on his Catholic majesty.

One other judge and myself are inclined to adopt this opinion. The majority of the court, however, think differently. They suppose, that these three large grants being made about the same time, under circumstances strongly indicative of unfairness, and two of them lying east of the Perdido, might be objected to, on the ground of fraud common to them all; without implying any opinion that one of them, which was for lands lying within the United States, and, most probably, in part sold by the government, could have been otherwise confirmed; the government might well insist on closing all future controversy relating to these grants, which might so materially interfere with its own rights and policy, in its future disposition of the ceded lands; and not allow them to become the subject of judicial investigation; while other grants, though deemed by it to be invalid, might be left to the ordinary course of the law. The form of the ratification ought not, in their opinion, to change the natural construction of the words of the eighth article, nor extend them to embrace grants not otherwise intended to be confirmed by it. An extreme solicitude to provide against injury or inconvenience, from the known existence of such large grants, by insisting upon a declaration of their absolute nullity, can, in their opinion, furnish no satisfactory proof that the government meant to recognise *the small grants as valid, which in every previous act and struggle, it had proclaimed to be void, as being for lands within the [*314
American territory.

Whatever difference may exist respecting the effect of the ratification, in whatever sense it may be understood, we think, the sound construction of the eighth article will not enable this court to apply its provisions to the present case. The words of the article are, that "all the grants of land, made before the 24th of January 1818, by his Catholic majesty, &c., shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if territories had remained under the dominion of his Catholic majesty." Do these words act directly on the grants, so as to give validity to those not otherwise valid? or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instru-

ment. In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.

The article under consideration does not declare that all the grants made by his Catholic majesty, before the 24th of January 1818, shall be valid, to the same extent as if the ceded territories had remained under his dominion. It does not say, that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would
*315] have repealed those acts of congress which *were repugnant to it; but its language is, that those grants shall be ratified and confirmed to the persons in possesion, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject.

Congress appears to have understood this article as it is understood by the court. Boards of commissioners have been appointed for East and West Florida, to receive claims for lands; and on their reports titles to lands not exceeding —— acres have been confirmed, and to a very large amount. On the 23d of May 1828, an act was passed, supplementary to the several acts providing for the settlement and confirmation of private land-claims in Florida; the sixth section of which enacts, that all claims to land within the territory of Florida, embraced by the treaty between Spain and the United States, on the 22d of February 1819, which shall not be decided and finally settled, under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and which have not been reported as antedated or forged, &c., shall be received and adjudicated by the judge of the superior court of the district within which the land lies, upon the petition of the claimant," &c.: Provided, that nothing in this section shall be construed to enable the judges to take cognisance of any claim annulled by the said treaty, or the decree ratifying the same by the king of Spain, nor any claim not presented to the commissioners or register and receiver. An appeal is allowed from the decision of the judge of the district to this court. No such act of confirmation has been extended to grants for lands lying west of the Perdido.

The act of 1804, erecting Louisiana into two territories, has been already mentioned. It annuls all grants for lands in the ceded territories, the title whereof was, at the date of the treaty of St. Ildefonso, in the crown of Spain. The grant in controversy is not brought within any of the exceptions from the enacting clause.

*The legislature has passed many subsequent acts, previous to the
*316] treaty of 1819, the object of which was to adjust the titles to lands in the country acquired by the treaty of 1803. They cautiously confirm to residents, all incomplete titles to lands, for which a warrant or order of survey had been obtained, previous to the 1st of October 1800. An act passed

in April 1814, confirms incomplete titles to lands in the state of Louisiana, for which a warrant or order of survey had been granted, prior to the 20th of December 1803, where the claimant, or the person under whom he claims, was a resident of the province of Louisiana, on that day, or at the date of the concession, warrant or order of survey; and where the tract does not exceed 640 acres. This act extends to those cases only which had been reported by the board of commissioners; and annexes to the confirmation several conditions, which it is unnecessary to review, because the plaintiff does not claim to come within the provisions of the act. On the 3d of March 1819, congress passed an act confirming all complete grants to land from the Spanish government, contained in the reports made by the commissioners appointed by the president, for the purpose of adjusting titles which had been deemed valid by the commissioners; and also all the claims reported as aforesaid, founded on any order of survey, *requête*, permission to settle, or any written evidence of claim derived from the Spanish authorities, which ought, in the opinion of the commissioners, to be confirmed; and which by the said reports appear to be derived from the Spanish government, before the 20th day of December 1803, and the land claimed to have been cultivated or inhabited, on or before that day. Though the order of survey in this case was granted before the 20th of December 1803, the plaintiff does not bring himself within this act. Subsequent acts have passed in 1820, 1822 and 1826, but they only confirm claims approved by the commissioners, among which the plaintiff does not allege his to have been placed.

Congress has reserved to itself the supervision of the titles [*317
*reported by its commissioners, and has confirmed those which the commissioners have approved, but has passed no law, withdrawing grants generally, for lands west of the Perdido, from the operation of the 14th section of the act of 1804, or repealing that section.

We are of opinion, then, that the court committed no error in dismissing the petition of the plaintiff, and that the judgment ought to be affirmed with costs.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On the consideration whereof, this court is of opinion, that the said district court committed no error in dismissing the petition of the plaintiffs; therefore, it is considered, ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs.

*The President and Directors of the Bank of the Commonwealth of Kentucky, Plaintiffs in error, *v.* John Wister, John M. Price and Charles Wister, Defendants.

Jurisdiction.—Banking.

In an action for money had and received, for the recovery of the amount of a deposit made in the Bank of the Commonwealth of Kentucky, acting under an act of incorporation passed by the legislature of that state, the defendant pleaded to the jurisdiction, on the ground, that the state of Kentucky alone was the proprietor of the stock of the bank, for which reason, it was insisted, that the suit was virtually against a sovereign state.

The court are of opinion, that the question is no longer open here. The case of the United States Bank *v.* Planters' Bank of Georgia, 9 Wheat. 904, was a much stronger case for the plaintiffs in error than the present; for there, the state of Georgia was not only a proprietor, but a corporator; here, the state is not a corporator, since by the terms of the act incorporating this bank, "the president and directors" alone constitute the body corporate, the metaphysical person liable to suit; hence, by the law of the state itself, it is excluded from the character of a party, in the sense of this law, when speaking of a corporation. p. 323.

It may be added to the reasons which influenced the court in their opinion, in the case of the Bank of the United States *v.* Planters' Bank of Georgia, that if a state did exercise the powers in and over a bank, or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such a bank, from a direct issue of bills of credit; which violation of the constitution, no doubt, the state here intended to avoid. p. 324.

The act of incorporating the Bank of the Commonwealth of Kentucky contains a provision, by which it is enacted, that the bank shall receive money on deposit, without being required to give an obligation, under seal, to repay it. This enactment must be construed with regard to the practice of banking, and the general understanding of mankind; and must create a liability to the depositor, by the simple act of depositing, that is, an *assumpsit* in law, implied from an act *in pais*. p. 324.

Upon the deposit being made in the Bank of the Commonwealth of Kentucky, the cashier gave, under his hand, a certificate that there had been "deposited to the credit of the plaintiffs below, $7730.81, which is subject to their order, on presentation of the certificate;" the deposit was made in the notes of the bank, and when the same were deposited, and when the demand of payment was made, the notes were passing at one-half their nominal value; when the certificate was presented to the bank, the cashier offered to pay the amount in the notes of the bank, but they refused to receive payment in anything but gold or silver. The language of the certificate is expressive of a general, not a specific deposit, and the act of incorporation is express, that the bank shall pay and redeem its bills in gold or silver; the transaction, then, was equivalent to receiving and depositing the gold or silver; if the bank did not so understand it, it might have refused to receive it; and the plaintiffs would certainly have recovered the gold and silver, to the amount upon the face of the bills. p. 325.

*319] *The bank having offered to pay the amount of the certificate in its bills, put its own construction on the same, and cannot afterwards say, that the plaintiffs below should have accompanied the certificate with a check. p. 326.

The bills of the bank were payable to an individual or bearer, and in the action upon the bills, there was no averment of the citizenship of the person to whom the bills are payable, and they might, therefore, have been payable, in the first instance, to a party not competent to sue in the courts of the United States. This court has uniformly held, that a note payable to bearer, is payable to anybody, and is not affected by the disabilities of the nominal payee.[1] p. 326.

Error to the Circuit Court of the district of Kentucky. On the 31st October 1824, the agent of the defendants in error, John T. Drake, deposited in the Bank of the Commonwealth of Kentucky, in the notes of that bank,

[1] The holder of a note payable to bearer may sue in a circuit court, if otherwise capable. Bonafee *v.* Williams, 3 How. 574. So may the holder of a railroad bond, payable in blank. White *v.* Vermont and Massachusetts Railroad Co., 21 Id. 575. Or the holder of a coupon bond, payable to bearer. Thomson *v.* Lee County, 3 Wall. 327.

the sum of $7730.81, and received from the cashier the following memorandum in writing, usually denominated a certificate of deposit.

"Frankfort, 31st October 1824.

John T. Drake this day deposited to the credit of John Wister, John M. Price and Charles J. Wister, seven thousand seven hundred and thirty dollars and eighty-one cents, which is subject to their order, upon presentation of this certificate.

$7730.81. (Signed) C. G. Waggoner, cashier."

On the 6th of November 1824, Mr. Drake presented the certificate to the bank, and demanded payment of the sum mentioned in it, in gold or silver, which was refused by the cashier, who, at the same time, offered the amount in notes on the bank, which were rejected by Mr. Drake. At the time the deposit was made, the notes of the bank were of the value of, and current in the country at, half their nominal amount. The payment of the amount of the deposit in gold or silver having been thus refused, Wister, Price and Wister brought their action in the circuit court of the United States for the district of Kentucky. The declaration contained two counts, the first for money had and received, the second, a special count upon the certificate of deposit.

At November term 1826, the defendants appeared by attorney, and afterwards filed a plea to the jurisdiction of the court, under the corporate seal of the bank. The plea stated, "that the court ought not to have or take cognisance of this *action, because the defendant is a body corporate and politic, created and established by an act of assembly of the commonwealth of Kentucky, and constituted by the name and style of 'The President and Directors of the Bank of the Commonwealth of Kentucky,' and that the whole capital stock of the said corporation is exclusively and solely the property of the Commonwealth of Kentucky, and that the state of Kentucky, in her political sovereign capacity as a state, is the sole, exclusive and only member of the said corporation." To this plea, the plaintiffs below demurred, and the circuit court having sustained the same, the defendants were ordered to answer over. [*320

Upon the trial of the cause, the plaintiffs proved the facts as stated; and the defendants moved the court to instruct the jury, that the plaintiffs had not made out a good cause of action, and that the plaintiffs were not entitled to the nominal amount of the deposit; but to the value of the notes at the time of the demand. The court overruled these motions, and instructed the jury, that the plaintiffs were entitled to the full sum, as expressed in the certificate, with interest thereon, from the date of the demand, in lawful money of the United States. The defendants excepted to the opinion of the court, upon all matters submitted to them, and the case came before this court upon the bill of exceptions. The facts of the case were not controverted.

For the plaintiffs in error, *Nicholas* maintained: 1. That the circuit court had no jurisdiction over the cause. 2. The declaration was insufficient. 3. The court erred in the instructions given to the jury.

1. He argued, that upon the decisions of this court, the jurisdiction could not exist in the case. The courts of the United States take jurisdiction; 1st, According to the subject-matter; 2d, The character of the parties; 3d, In

cases arising under treaties, &c. In this case, the jurisdiction cannot be assumed, as those principles upon which the courts of the United States
*321] *would have jurisdiction from the characters of the parties, forbid the same. This court will look behind the act of incorporation to ascertain who are the corporators; and if they find they are not such parties as can sue or be sued in the circuit court, they will refuse to acknowledge that the court could exercise jurisdiction. *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904. In this case, the state of Kentucky is the only stockholder of the bank; and this appearing, the state is the party, and cannot be sued. It is a sole corporation, using the money of the state, and by its obligations binding the state. The interests of the state are alone involved in the suit, and the judgment of the court will operate upon the state directly.

2. The declaration is insufficient, because, as the real party defendant is the state of Kentucky, this action should have been so brought, and can only be so sustained. This court has decided, that a corporation can bind itself by promise, without seal. In other states of the Union, the same principle has been acknowledged; but it is otherwise in Kentucky. In the supreme court of that state, it has been adjudged, that unless this obligation or promise of a corporation be under seal, it is not binding. 3 A. K. Marsh. 1. This has now become a part of the municipal law of the state: and it will be regarded in this court, in cases where the decision applies. The certificate of deposit given by the bank was not, therefore, legal evidence of the promise.

3. In this court, it has been held, that bank-notes are not money; and this action, which is for money had and received, cannot be sustained, as the notes of the bank only were received.

It may also be urged, that as the notes are payable to J. T. Pendleton, or bearer, there should have been an averment that he was a citizen of Kentucky. The action cannot be supported, unless the citizenship was stated; this court not having jurisdiction, unless J. T. Pendleton was a citizen of Kentucky, and averred so to be in the pleadings.

*322] **Caswell*, for the defendants in error.—The plea of the president, directors and company of the Bank of the Commonwealth of Kentucky expressly avers an act of incorporation, constituting them a corporation by that name. That there are no stockholders but the state, the stock belonging to the state of Kentucky only. Thus it appears, that the real corporators are the president and directors, citizens of Kentucky; and this court has decided, that it has jurisdiction in such a case.

That the stock of the bank belongs to the state of Kentucky, will not prevent this court from sustaining the suit. The plaintiffs in error are a corporation, with all the ordinary powers and incidents of such a body. Among others, to lend money to the commonwealth of Kentucky. Can it be said, that such a body is not suable, and that it is not the corporation, but the state of Kentucky who is the plaintiff in error; and that her rights as a sovereign state were violated by the suit in the circuit court? The plaintiffs in error have a legal entity, independent of the state. They exist under the law, and they pay and receive money, and by themselves make contracts which they must perform. Unless subject to suits upon such con-

tracts, there is no remedy for those who have claims, as no suit can be brought against the state.

The amount of the plaintiffs' claim must be that mentioned in the certificate. Had it been the intention of the parties to limit the same to what was the current value of the notes when this deposit was made, this should have been declared. This court can know no other amount but that mentioned in the certificate, or any other money than the lawful money of the United States.

In reference to the claim of the counsel of the plaintiffs in error, to apply the decision of the court of Kentucky to the contract of the bank, in opposition to the law of this court, holding corporations liable under obligations not under seal; it was argued, that this court will not permit the decisions of a state court to contravene the general law, whatever respect it may be disposed to pay to the decisions of such courts upon the statutes or local laws of the place.

*Johnson, Justice, delivered the opinion of the court.—The defendants here were plaintiffs in the court below, in an action for [*323 money had and received, instituted to recover the amount of a deposit made in the Bank of the Commonwealth of Kentucky. The defendants pleaded to the jurisdiction, on the ground, that the state of Kentucky was sole proprietor of the stock of the bank, for which reason, it was insisted, that the suit was virtually against a sovereign state. To this plea, the plaintiffs demurred, and the circuit court of Kentucky having decided in favor of its jurisdiction, that decision is made the first ground of error in the present suit.

But this court is of opinion, that the question is no longer open here. The case of the *United States Bank* v. *Planters' Bank of Georgia*, 9 Wheat. 904, was a much stronger case for the defendants than the present; for there, the state of Georgia was not only a proprietor but a corporator. Here, the state is not a corporator, since by the terms of the act incorporating this bank (Kentucky acts of 1820, page 55, § 2), "the president and directors" alone constitute the body corporate, the metaphysical person liable to suit. Hence, by the laws of the state itself, it is excluded from the character of a party, in the sense of the law, when speaking of a body corporate. On the subject of an interest in the stock of a bank, the language of this court, in the case cited, is this: "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of the Union which have an interest in banks, are not suable even in their own courts, yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so *far as respects the transactions of the bank, and waives all privileges [*324 of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises

no other power in the management of the affairs of the corporation than are expressly given by the incorporating act." To which it may be added, that if a state did exercise any other power in or over a bank, or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such banks, from a direct issue of bills of credit; which violation of the constitution, no doubt, the state here intended to avoid.

The next question in the cause is, on the sufficiency of the declaration; and on this point, it is insisted, that in Kentucky a corporation can only assume under seal, whereas, the *assumpsit* here laid is general, and without seal. On this subject, the counsel admitted, that every other court in the United States had decided otherwise, but that it had been so ruled in the courts of Kentucky, and was there held as an established law. It cannot be denied, that the case of the *Frankfort Bank* v. *Anderson*, 3 A. K. Marsh. 1, fully sustains him in his position; but this court declares it unnecessary, at this time, to enter into the inquiry, how far its decisions and those of other states upon a question of a general, not a local, case or character, are to be controlled by those of any particular state, since they are of opinion, that the act by which the Bank of the Commonwealth of Kentucky is incorporated, contains a provision which is conclusive upon this question. We mean the eighth section, by which it is enacted, that the bank shall receive money on deposit, without requiring them to give an obligation, under seal, to repay it. This enactment must be construed with regard to the practice of banking, and the general understanding of mankind; and must create a liability to the depositor by the simple act of depositing; that is, an *assumpsit* in law, implied from an act *in pais*.

The two remaining questions arose upon a bill of exceptions, the material
*325] facts on which were these: *The deposit was proved by an instrument of writing, in these words:

"J. T. Drake this day deposited to the credit of J. Wister, J. M. Price and C. J. Wister, the plaintiffs, seven thousand seven hundred and thirty dollars and eighty-one cents, which is subject to their order on presentation of the certificate. (Signed) O. G. Waggoner, cashier."

It was admitted, that the deposit was made in bills of the Commonwealth Bank; that bills of that bank were then, and at the time of demand, passing current at half their nominal value; and that, on presentation of the certificate, the cashier offered bills of the bank to that amount, but the agent of the defendants refused to receive payment in anything but gold or silver.

In behalf of the bank, it was moved, that the court instruct the jury, that the plaintiffs below had not made out a good cause of action, and were not entitled to the nominal amount deposited, but only to the value of the notes. The court overruled the motion, and instructed the jury, that the plaintiffs below were entitled to receive the full sum, as expressed in the certificate, with interest from the date of the demand, in lawful money of the United States. In this instruction, it is now insisted, that the court below erred: 1. Because nothing but a receipt of money can prove the basis of a recovery for money had and received. 2. Because, if entitled to recover at all, the plaintiffs below could recover no more than the value of the thing deposited. On both of these points, we are of opinion, that the form of the certificate, and the act of incorporation furnish a conclusive answer.

The language of the certificate is expressive of a general, not a special

deposit; and the act of incorporation, § 17, is express, that the bills of the bank "shall be payable and redeemable in gold or silver." The transaction then was equivalent to receiving and depositing the gold or silver; if the bank did not so understand it, nothing would have been easier than to refuse to take the money as a formal deposit; and the holder of their bills would then have been put to his action upon the bills *themselves, in which case, he would certainly have recovered the gold or silver, to the amount upon the face of the bills. [*326

There are two other points which the cause has been supposed to present, and which the court notices, to avoid the imputation of letting them escape their attention. The first is, that the refusal of the bank to pay, on the presentation of the cashier's certificate, may be imputed to the failure to accompany it with a check from the principals. But on this subject, the majority of the court are of opinion, that the bank put its own construction on the sufficiency of the demand and the meaning of their cashier's certificate, when they tendered, upon its presentation, all that they admitted to be due upon it. The other point has relation to the form of the bills, which are made payable to individuals or bearer, concerning which individuals there is no averment of citizenship, and which, therefore, may have been payable, in the first instance, to parties not competent to sue in the courts of the United States. But this also is a question which has been considered and disposed of in our previous decisions. This court has uniformly held, that a note payable to bearer, is payable to anybody, and not affected by the disabilities of the nominal payee. The judgment is affirmed, with costs.

This cause came on to be heard, on a transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and is hereby affirmed, with costs.

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*The President, Directors and Company of the Bank of the Commonwealth of Kentucky, Plaintiffs in error, *v.* John Ashley and John Ella, Defendants. [*327

Remitter in appellate court.

The declaration purported to count upon sixty-eight bills of the Bank of the Commonwealth of Kentucky, and it appeared, that one of the bills had been omitted to be described, so that the declaration made out a less sum than the writ claimed or the judgment gave; the defendants in error, plaintiffs below, moved for leave to cure the defect, by entering a *remitter* of the amount of the bill so omitted, and damages *pro tanto*.

This court thinks itself authorized to make a precedent in furtherance of justice, whereby a more convenient practice may be introduced, and to allow the party to enter his *remitter;* but on payment of the costs of the writ, if error is prosecuted no further, after such amendment made. p. 329.

Error to the Circuit Court of Kentucky. This action was in all respects similar to that of the president, directors and company of the Bank of Commonwealth of Kentucky *v.* Wister, Price and Wister (*ante*, page 318), with the exception only, that it was founded on the notes of the bank, payable to

bearer, and usually denominated bank-notes. The declaration contained counts in debt on simple contract, averring that the plaintiffs in the case were the holders of the notes, and that they became their property by delivery, and that payment had been demanded and had been refused. The defendants entered the same plea as in the case referred to, which was adjudged against them, and a trial was had and a verdict of judgment rendered for the plaintiffs below, for the whole debt, with damages for the detention from the commencement of the suit. The bill of exceptions presented the same points to the court as in the former case, and the only question which was argued before this court was upon the effect of an omission to describe one of the sixty-eight bank-notes in the declaration—the verdict and judgment having been given for a sum including the note, as if the same had been so described.

The counsel for the defendants in error, *Caswell*, stated, that a *remitter* would be entered for the amount of *the note which had not *328] been set out in the declaration, if this court permit the same. The *debet* and *detinet* in the declaration, stated correctly the amount of the plaintiffs' claim, and the verdict and judgment were in conformity therewith.

Nicholas, for the plaintiffs in error, replied, that this court cannot amend the declaration, and that the plaintiffs here have a right to avail themselves of the error. Amendments may be made in the courts from which the case is brought, while the record is in the possession of those courts; but this writ of error has brought up the whole record, and the power to amend in the circuit court no longer exists.

Johnson, Justice, delivered the opinion of the court.—This was an action of debt instituted upon the bank-notes of the Commonwealth Bank, in which the defendants have recovered judgment for $6350, with interest. The bank filed the same plea to the jurisdiction of the court below, as was filed in the case of Wister, Price and Wister. The decision, therefore, delivered in that case, renders it unnecessary to remark upon this part of the present cause. No other plea having been filed, judgment went by default, for the sum claimed by the writ. But upon examining the declaration, which purports to count severally upon sixty-eight bills, it appears, that one of the sixty-eight has been omitted. Of consequence, the declaration makes out a less sum, and one debt less in number than the writ claims or the judgment gives. This is error: but the plaintiffs now move for leave to cure it, by entering a *remitter* of the debt so omitted, and damages *pro tanto*. And this court has taken time to consider the motion.

That the party would have had a right to remit in the court below, cannot be questioned; it is every day's practice, sustained by the gravest precedents. And the right extends, not only to the amount of damages, but to several causes of action, distinct debts, distinct acres of land, and distinct pleas. Cro. Jac. 146; Hob. 178; Ld. Raym. 395; 3 T. R. 659. And the *329] right is recognised as existing, after error *brought, and while the cause is depending in the court above, and the court of error will suspend its judgment, to give time for the defendant in error to amend in the court below. 3 T. R. 349, 659, 749, &c.

But the difficulty consists in this, that the writ of error here does not bring up the original record, but only a transcript, as in the case of error to the house of lords. In error to the king's bench, that court will permit a *remitter*, because it gets possession of the record (3 T. R. 349); but in error to the house of lords, it is otherwise, and the entry must be made below for the reason assigned. Ibid. 659.[1]

After such amendment made in our circuit courts, the party would have to avail himself of it by suggesting diminution, and bringing up the amended record by *certiorari*. This court, therefore, thinks itself authorized to make a precedent, in furtherance of justice, whereby a more convenient practice shall be introduced; and to allow the party to enter his *remitter* here; but on payment of the costs, if the writ of error be prosecuted no further, after such amendment made. Such seems to be the rule in the British courts (Barnes 17), and we think it reasonable. The defendants here will be permitted to enter the *remitter*, and upon such entry, the judgment will be affirmed, without costs in error.

THIS cause came on to be heard, on a transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel: On consideration whereof, it appearing to this court, that the judgment of the said circuit court is for a larger sum than that claimed and counted upon in the declaration in said cause in said court, the said defendants in error filed here in open court a *remitter* in the following words, to wit:

"Supreme Court of the United States, of January term, in the year of our Lord, eighteen hundred and twenty-nine: Be it remembered, that on the trial of this cause before the *supreme court of the United States on a writ of error to the circuit court of the United States for the district of Kentucky, on the fourteenth day of February, in the year aforesaid, it appeared that one of the sixty-eight bills upon which the declaration purported to count severally, to wit, a bill for the amount of fifty dollars, had been omitted in said declaration; the declaration making out a less sum, and one debt less in number, than the writ claimed or the judgment gave; and hereupon, the said John Ashley and John Ella, junior, defendants in error, by Daniel J. Caswell, their attorney and counsel in this court, freely here in court remit to the said president and directors of the Bank of the Commonwealth of Kentucky, plaintiffs in error as aforesaid in this cause, as well the said debt of fifty dollars so omitted as aforesaid, the residue of the debt aforesaid, together with interest on the said fifty dollars at the rate of six per centum per annum, from the twenty-second day of September, in the year of our Lord, eighteen hundred and twenty-five, as also damages *pro tanto*. As witness our hands this fourteenth day of February, in the year of our Lord eighteen hundred and twenty-nine. John Ashley and John Ella, junior, by Daniel J. Caswell, their attorney and counsel in this court." [*330

Whereupon, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs, deducting from the said judgment of the said circuit court, the amount so deducted as aforesaid.

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[1] See Spackman v. Byers, 6 S. & R. 385.

*The President, Directors and Company of the Bank of the United States, Appellants, *v.* Daniel Weisiger, Appellee.

Promissory notes.—Equitable action against remote indorser.—Diligence.—Insolvency.

This court has decided, that a suit could be maintained in equity, by the holder of an indorsed note, against a remote indorser; and upon grounds perfectly familiar to courts exercising equity jurisdiction.

It has been decided in Kentucky, that a suit at law could not be maintained in that state by the indorsee, against a remote indorser; the conclusion then results from our own decisions, that he must be let into equity; for an indorsement is certainly no release to the previous indorsers; and the ultimate assignee alone is entitled to the benefit of their liability; and this we understand to be consistent with the received opinions and practice in Kentucky. p. 348.

The law in Kentucky is settled, as it is in Virginia and in this court, that upon Virginia contracts, by indorsement of promissory notes, every reasonable effort must be made to recover of the maker, by suit, before the assignee can have recourse against the assignor or indorser.

It is upon the question, what constitutes such diligence, that all the difficulties arise in suits upon these contracts; and certainly, this court cannot be called upon to carry the obligations imposed upon assignees on this point, further than the state courts have already extended them. p. 348.

What will be considered a sufficient compliance with the requisitions of the laws of Kentucky, imposing diligence in the prosecution of a suit against the maker of a note, by the indorsee, in order to charge a prior indorser.

The discharge of an insolvent, under the statutes, is the most satisfactory evidence of insolvency; after such discharge, it is not required, that process of execution shall be issued against the party, in order to conform to the injunction of diligence. p. 349.

The second, third and fourth sections of the act of January 6th, 1800, entitled "an act for the relief of persons imprisoned for debts," make provision for the discharge of persons confined under execution; and the fifth section extends "the privileges and relief" of that act, to persons in confinement, against whom judgment is obtained, but no execution issued; under the provisions in favor of persons charged in execution, on the day of arrest, a notice may be served upon the person at whose suit they are confined, and at the end of thirty days, they may be discharged. By the fifth section, it is enacted, "that any person imprisoned upon process issuing from any court of the United States, except at the suit of the United States, in any civil action, against whom judgment has been or shall be recovered, shall be entitled to the privileges and relief provided by this act, after the expiration of thirty days from the time such judgment has been or shall be recovered, though the creditor should not, within that time, sue out his execution, and charge the debtor therewith."

It has been argued, that under this section, the defendant must remain in prison thirty days after judgment, before he can sue out his notice to the plaintiff; thus requiring him to remain sixty days in confinement, in the cases which come under this section, whereas, he remains but thirty days, when confined under execution.

*322] There can be no reason for this distinction; and in favor of liberty, and with a *view to consistency, the construction should be otherwise; if such were the true construction, the relief would not be the same as is extended to debtors of the other class. The day of entering judgment, under the fifth section, is the day that corresponds to the day of arrest, under the previous provisions of the law, and therefore, in thirty days after the judgment, the defendant may be discharged—complying with the other requisitions of the law. p. 350.

Where the agent of the plaintiff agreed in writing to dispense with the imprisonment required by law, to entitle the defendant to be discharged under the insolvent law of the United States, and the defendant, who was in confinement, was discharged, without having been imprisoned thirty days, this was not such a proceeding as would bar the assignee of the note to recover against a subsequent assignor; the object of the imprisonment is, to give the plaintiff an opportunity to ascertain the situation of the defendant, and if he do not require this, it may be waived, without prejudice to his claims on others. p. 351.

A discharge under the insolvent laws of the United States, is confined in its effects altogether

to the particular cause; and even as to that, does not exempt the debtor's present effects, or future acquisitions, from the process of the law; nor is his person exempt from confinement for the same debt, should he be detected in a fraud upon the creditor. p. 353.

APPEAL from the Circuit Court of Kentucky. The complainant's bill, filed in the circuit court of Kentucky, on the 22d of November 1822, stated, that on the 25th of July 1821, Peter G. Voorhees made his promissory note for $2560, payable sixty days after date, to Daniel Weisiger; that Weisiger assigned to John H. Hanna, and Hanna to the complainants, who discounted the note. That they duly instituted a suit against Voorhees, on the common-law side of the court, recovered judgment, and prosecuted him to insolvency. It prayed, that the defendant might be decreed to pay the amount, with interest and costs. Annexed to the bill, was a copy of the record of the proceedings against Voorhees, from which it appeared, that the declaration was filed on the 2d of October 1821, and on the same day, a writ of *capias ad respondendum* was issued, with this memorandum: "This is an action of debt; bail required." The marshal made return to the writ, as follows: "Executed, 6th of October 1821, and committed defendant to jail of Franklin county: receipt thereon." The jailer's receipt bore date 5th of November 1821. At November term 1821, judgment was entered for the plaintiffs, by default, for $2560, with interest from the 26th of February (September) 1821, and costs. Afterwards, on the *14th of December 1821, the jailer of Franklin county surrendered the body of Voorhees into court. [*333 On the 29th of December 1821, a *fieri facias* issued, which was placed in the hands of the marshal, on the 19th of January; and the marshal returned, "no estate found." On the 11th of April 1822, a writ of *capias ad satisfaciendum* issued, to which the marshal returned, "not found."

To this bill, the defendant Weisiger moved the court for leave to file a demurrer, alleging for cause, that the bill did not aver the prosecution of any suit against Hanna, the immediate assignee of the complainant, and that Hanna was not made a party defendant; that the bill contained no case of equitable jurisdiction, nor for a decree against Weisiger; and was altogether void of equity. Afterwards, in the same term, the defendant Hanna appeared, and waived all objections to a decree, on account of the want of service of process upon him, and Weisiger waived the demurrer, so far as respected the want of proper parties. And at the following term, the court overruled the demurrer.

At May term 1826, the defendants failing to answer according to rule, the bill was taken for confessed, and the cause came on for hearing on the bill and exhibits; whereupon, the court decreed, that the complainants should recover from the defendant Weisiger, the sum of $3208.17, and costs, unless, &c.; which decree was afterwards set aside, on Weisiger's motion, and leave given him to file an answer.

The answer of Weisiger, protesting against the jurisdiction of the court, relied and insisted, by way of plea in bar to the relief claimed, that the matters contained in the bill, if true, did not constitute a case for the interposition of a court of equity, but were cognisable at law, and relied upon the 16th section of the judiciary act of 1789. It admitted, that he might have put his name on the note, but denied, that he ever received any consideration for the same, or that it was ever passed or negotiated by him, or for his use

or benefit. He answered further, that he did not, of his own knowledge, know *of the discount of the note, although he was informed, that *334] such discount had been made, and for a long time believed, that it had been fully satisfied by Voorhees; that he was advised, that the proper measures were not adopted, in due season, to enforce the payment; and that the proceedings had, were not such as to authorize a recovery against him, inasmuch as the return of the marshal showed, that Voorhees was committed to jail, and it did not appear, that he had ever been discharged, or escaped, and there did not appear to have been any order to charge him in execution; nor was there any return, that he had no property or estate on which the *fieri facias* might have been levied. He did not admit, that Voorhees was insolvent, at the time the judgment was obtained against him, but believed, he then had estate within the district, sufficient to satisfy the same, in whole or in part.

The complainants' amended bill stated, that before the rendition of the judgment against Voorhees, he was brought before the district judge, took the oath required by the act of congress, and was discharged as an insolvent from the custody of the jailer. Shortly after, and before the return of the *fieri facias*, he left the state, and had ever since remained out of it, leaving no estate upon which the amount could be levied, or any part of it; all of which was averred to be personally known to Weisiger, as was also the fact, that he indorsed the note for the accommodation of Voorhees, and to give him credit, and with the view and expectation that it would be discounted by the bank.

The exhibit referred to in the amended bill, stated the proceedings to discharge Voorhees from imprisonment, in three suits of the Bank of the United States, entitled as follows: The president, directors and company of the Bank of the United States, plaintiffs, *v.* Peter G. Voorhees, defendant; The same *v.* The same; The same *v.* George M. Bibb, Charles S. Todd and Peter G. Voorhees.

The judge's order to discharge, dated 14th December 1821, stated, that Voorhees was imprisoned in the jail of Franklin county by process in these *335] suits; that judgment *had been rendered in the suits, and he had petitioned to have the oath administered to him; that a citation had been served upon Henry Clay, Esq., agent, &c.; that they appeared, and no good cause being shown, the oath was administered, and he was discharged. The citation bore date the 14th of December 1821, and required appearance on the 7th of January following. And then there was a paper of which the following is a copy:

"I agree, on behalf of the Bank of the United States, to waive the previous imprisonment by law, to entitle the defendant to take oath of an insolvent debtor, and that the said oath may be now administered, with the same effect as if that imprisonment had taken place.

14 December 1821. (Signed) H. Clay,
Counsel of the B. U. S."

Upon the bills, answer and exhibits above set forth, the court, at May term 1827, decreed the complainants' bill to be dismissed, with costs.

Sergeant, for the appellants, complainants below, made the following points: 1. The defendant not being the immediate indorser to the complain-

ant, but a remote indorser, the case was cognisable and the complainant relievable only in equity. 2. That, having proceeded at law, with due diligence, against the maker, and the maker being insolvent, the complainant was entitled to relief against the indorser. 3. That the discharge by the district judge, or the consent of the counsel of the plaintiff to waive the thirty days' notice, or the thirty days' imprisonment, or any part thereof, did not impair or affect the right to recover against the indorser. 4. The fact of Voorhees's insolvency is established by the oath taken by him before the district judge, which is, at least, *primâ facie* evidence, and sufficient, until the contrary appear, as well as by the return to the *fieri facias;* and that fact being established, is sufficient to entitle the complainant to recover: For, 5. The discharge could not prejudice the indorser; his cause *of action against the maker will accrue by the payment of the money, and be unaffected by the discharge. 6. That the decree below ought to be reversed, and a decree rendered for the appellant. [*336

1. As to the objection that the bill contained no case for equitable jurisdiction, and was altogether without equity; he said, the whole of the questions in the cause, the present included, depended upon a law peculiar (so far as he knew) to Virginia and Kentucky, and derived by the latter from the former. It was not created by statute, but was the common law of the state, in the case of indorsers or assignors, as expounded by judicial decisions.

The first case in the books was *Mackie's Executors* v. *Davis and Young*, in Virginia, 1796, 2 Wash. 219. It makes no distinction between bonds and notes, sealed and unsealed instruments. It established, in general, "that the assignor is liable to the assignee, provided due diligence be used by him against the obligor or drawer, and the latter prove insolvent." Tuck. Bl. 442, in note. In *Lee* v. *Love*, 1 Call 497 (1799), it was decided, that the assignee of a note must sue the maker, before he can resort to the assignor. The liability of the indorser, therefore, is dependent upon a condition which elsewhere does not belong to it, of due diligence being first used against the maker, and failing from his established want of ability to pay.

Against the immediate indorser, the remedy is at law; against a remote indorser, in equity. *Mandeville* v. *Riddle*, 1 Cranch 293; *Riddle* v. *Mandeville*, 5 Ibid. 322; *Drake* v. *Johnson*, Hardin 218; s. p. 3 A. K. Marsh. 163. This being decided by the supreme court of the United States, as well as by the tribunals of Kentucky, there can be no doubt, that the present is a case for equitable jurisdiction; being the case of a remote, and not of an immediate, indorser, there is no jurisdiction at law.

That the bill was without equity, is supposed to be made out, because Hanna, a subsequent indorser to Weisiger, was not first prosecuted to insolvency, and because (as alleged) there was no consideration from the bank to Weisiger. *To the first of these suggestions, after stating that Hanna was a party defendant, he replied, that it was no part of the condition of the holder's resort against one indorser, that he should first proceed against another. Their common liability was dependent upon one and the same condition, that is, failure by due diligence to obtain the money from the maker; upon which condition, they all became liable, and the holder might proceed against either. Such was the law, as decided. Independently of this, it must be obvious, that no reason can be assigned, for requiring the [*337

holder first to proceed against a subsequent indorser, inasmuch as a recovery from him would give him an immediate action against the prior indorser. This is contrary to the principle of *Riddle* v. *Mandeville*. There is no ground, however, for the suggestion.

To the other, he replied, that if it appeared (which he did not admit), that there was no beneficial consideration from the bank to Weisiger, still there was a consideration sufficient at law and in equity to support the contract; the consideration of injury to the bank. The money was loaned (whoever may have received it) upon the credit of the indorser. His contract was the inducement to lend, without which the loan would not have been made.

2. The complainants, he said, had fully performed the condition to entitle them to recover from the indorser. They had proceeded at law, with due diligence, against the maker, until he became insolvent, and further pursuit became hopeless. To proceed further could not be required, and would be liable to censure, if attempted at the expense of the indorser. He is answerable for costs reasonably incurred, but not for expenses entirely thrown away. The note fell due the 26th of September 1821; suit was brought against the maker the 2d of October 1821, to the next term; at the next term, judgment was obtained; a *fi. fa.* issued December 29th, 1821, and a *ca. sa.*, the 11th of April 1822. In the mean time, to wit, December 14th, 1821, Voorhees was discharged under the insolvent law of the United States. So that here there were due diligence, and established legal insolvency.

*338] There was even more than *due diligence; for after the insolvency, the process of execution was unnecessary, and could only have been taken out from abundant caution.

He then examined all the decided cases in Kentucky so far as they were

*339] accessible,(*a*) and proceeded to state, that *he perceived in them nothing which appeared to him to interfere with the complainants' right to recover.

(*a*) The following abstract of the cases which have been decided in the courts of Kentucky, for which the reporter is indebted to the counsel of the appellant, will be found highly useful and interesting to the profession.

McKinney *v.* McConnell, 1 Bibb 239; 1808.—Assignor holding up obligation for fourteen months, without suit, was guilty of gross negligence. Not accounting for this delay, he was not entitled to recourse against assignor. If the debtor was in doubtful circumstances, the necessity for due diligence was therefore the greater.

Smallwood *v.* Woods, 1 Bibb 542; 1809.—Assignee to use every compulsory process of the law against the debtor; and all the incidental remedies to compel payment; except where obligor is out of the commonwealth, and such absence was not contemplated by assignor and assignee. To omit to demand bail, where bail was of right demandable, in case the *ca. sa.* should be returned *non est inventus*, would be negligence. Where bail given, the assignee must proceed against bail, upon *n. e. i.* returned against principal. Referring to Mackie *v.* Davis, 2 Wash. 219; Boals *v.* McConnell, Sneed 152.

Spratt *v.* McKinney, 1 Bibb 595; 1809.—*Assumpsit* on assignment of a covenant. Absence of debtor from the circuit is not sufficient to entitle the assignee to recourse against the assignor. Diligence by suit cannot be dispensed with, by averring that debtor was insolvent.

Drake *v.* Johnson, Hardin 218; 1808.—The assignee of a bond or note cannot sue a remote indorser, for there is no privity between them. Referring to Mandeville *v.*

*The point to be established by a reasonably diligent pursuit, is the insolvency of the maker, or the impossibility of getting the money from him. Upon that being established, the right arises against the indorser. It may be established in various ways.

Riddle, 1 Cranch 209: s. p. 3 A. K. Marsh. 163; 2 Tuck. Bl. 442, a case in district court, Virginia; and a case in Maryland, see p. 222.

Hogan *v.* Vance, 2 Bibb 34; 1810.—The sheriff's return of no property to a *fi. fa.* directed to the county where debtor resides, is conclusive evidence that he had no property in the county; and, *primâ facie*, that he hath none elsewhere. But such return on an execution, directed to a county where he does not reside, is no evidence of insolvency. The assignee must use due diligence to recover the money from the obligor; if he do not, and debtor becomes insolvent, he makes the debt his own.

Thompson *v.* Caldwell, 2 Bibb 290; 1811.—Suit against two obligors (first one, and then the other added), *fi. fa.* against one, and afterwards *ca. sa.* against both. Sheriff returned, that he had taken defendant, and released by county court. Held, not sufficient against assignor. Ought to have been a *fi. fa.* Doubt, to which defendant the return applied. Doubt as to power of court.

McGinnis *v.* Burton, 3 Bibb 6; 1813.—Assignee of note (bond) holding up for ten months, without bringing suit, and not accounting for delay, guilty of negligence. Staying execution by plaintiff, after property seized by sheriff, discharges assignor. Replevying debt is conclusive evidence of solvency at the time, and if bond afterwards quashed for irregularity, remedy is against officer, and not assignor. (Seems otherwise. 2 Litt. 132, *post*, in this note.)

Young *v.* Cosby, 3 Bibb 227; 1813.—If the assignee prosecute diligently so far as a prudent man would do, in a case where he was solely interested, that is all that is required, to give him recourse upon the assignor. If he sue a *fi. fa.*, which is returned *nulla bona*, and then a *ca. sa.*, upon which the debtor is arrested, and discharged for want of security for prison fees, that is not *laches*, unless the debtor had property not within the reach of a *fi. fa.*, which the assignor must prove.

Campbell *v.* Hopson, 1 A. K. Marsh. 228; 1818.—On a transfer of a bond, a covenant to be liable, if obligor not solvent, does not vary legal liability of assignor. Must be diligence. "Failing to commence his action for four months, inexcusable delay. Fatal negligence, not so to prosecute it, as to ascertain insolvency or fix the bail."

Stapp *v.* Anderson, 1 A. K. Marsh. 535; 1819.—The insolvency and removal from the state of the maker, *per se*, subjects the assignor, without suit against the maker. "The law does not require any one to do a vain or idle act." A note negotiated in bank is a mercantile paper, &c. See s. p. Dodge *v.* Bank, 2 A. K. Marsh. 610.

Collyer *v.* Whitaker, 2 A. K. Marsh. 197; 1820.—Assignee preferring a petition and summons, and thereby waiving his right to bail, must show payee's insolvency by *ca. sa.*, not *aliunde*. Note, in this case, no neglect imputed for not requiring bail, which is contrary to 1 Bibb 542. (Perhaps, they may be reconciled; the one speaking of a return of *non est*, and the other supposing an arrest.) As to time of bringing suit, the case says, "shortly and within a reasonable time after note became due;" not immediately. As to *fi. fa.*, "which issued in reasonable time;" not immediately. Supposes, that in general, "insolvency only legitimately proved by suit," &c. "The prosecution of suit, however, is essential barely as the means of ascertaining," &c.

Clair *v.* Barr, 2 A. K. Marsh. 255; 1820.—If maker dead at time note falls due, without heirs or letters testamentary, parol evidence may be received of insolvency. But if he be alive when note falls due, insolvency does not absolve holder from necessity of suing; he may have had credit, though without property. Note 1. In this case, the maker died on the third day of the first term after the note fell due, being about two months. The court say, that a suit was essential, that proof of insolvency could make no difference, and yet reverse the judgment below, because parol proof of insolv-

1. By showing that he was out of the state and not within the reach of process, and without property in the state. This he inferred from *Spratt* v. *McKinney*, 1 Bibb 595 ; *Stapp* v. *Anderson*, 1 A. K. Marsh. 535.

2. By the use of due diligence, and inability to recover, or prosecution to insolvency. He must sue in a reasonable *time ; *McKinney* v. *McConnell*, 1 Bibb 239 ; *McGinnis* v. *Burton*, 3 Ibid. 6. But there is no fixed time ; *Collyer* v. *Whitaker*, 2 A. K. Marsh. 197. Perhaps, it must generally be the next term ; *Clair* v. *Barr*, 2 A. K. Marsh. 255. He must use the ordinary remedies ; *Smallwood* v. *Wood*, 1 Bibb 542. But he is not bound to use extraordinary ones ; *Oldham* v. *Bengan*, 2 Litt. 132. He must, in general, issue *fi. fa.* and *ca. sa.* and issue them in succession ; he cannot issue them together ; no decided case gives any countenance to the suggestion that he can do so ; the records in this court show that he cannot. The return to the *fi. fa.* directed to the county where party resides, is conclusive to show that there is no property in the county, and, *primâ facie*, that there is none in the state. The result is to be insolvency, evidenced by legal pursuit ; the end and object is to make this appear.

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3. But there is another case : Insolvency, legally ascertained by other means. When this occurred after the note fell due, he contended, that it

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ency was not received. Note 2. "He might not have been without credit," &c., *i. e.*, there was no open, public or legal insolvency ; therefore, he might possibly have paid, &c. In this sense (which is the obvious one) it is correct. It cannot be proved, that he would not have paid, as he was going on. Many men are insolvent. This reconciles it.

Smith *v.* Blunt, 2 A. K. Marsh. 522 ; 1820.—Omitting to issue a *ca. sa.* for five months after the return of the *fi. fa.*, is an unreasonable delay, and discharges assignor. Note. There appears to have been some interval between judgment and *fi. fa.* Certificate of discharge as an insolvent debtor in another suit, is not evidence, as he is liable to be imprisoned in other suits.

Parker *v.* Owings, 3 A. K. Marsh. 59 ; 1820.—Assignor not liable, though maker has taken the oath and surrendered a schedule ; unless schedule produced and amount of property ascertained, the assignee is bound to pursue the property.

Oldham *v.* Bengan, 2 Litt. 132 ; 1822.—1. Not obliged to sue at first term, if he cannot, by so doing, get judgment. 2. Not obliged to apply the extraordinary process of the law. 3. Whether, in any case, *laches* of sheriff will relieve assignor ? If in any case, it can only be, where of such a nature as to subject him to the whole debt. 4. Not obliged to take out execution on affidavit, during sitting of court, nor can the assignor avoid responsibility, by showing that other plaintiffs did so and got their money.

Trimble *v.* Webb, 1 T. B. Monr. 100 ; 1824.—Judgment obtained 4th of April 1820 ; court adjourned the 14th ; execution issued 26th of July. Court below deemed it sufficient diligence. Court of appeals : "The only chasm in the diligence exercised by the appellees in prosecuting their suit against the original debtor, appears between the judgment and execution. For this delay, no apology was offered, nor excuse proved. This court has never held assignees to more than reasonable diligence in prosecuting the demand against the original debtors, and has never required them to run a race against time ; still it has not permitted any unreasonable delay to be passed over. The time here lost is more than any prudent man would have indulged in, when he believed his debt to be in danger, and savors too strongly of indulgence, graciously given, by some understanding between the parties. Considering this case, as we have stated it, uncoupled with any other circumstances in the cause, we must, according to previous decisions of the court, hold the delay as conclusive against the appellee's right to recover."

dispensed with legal pursuit. When it occurred after proceedings begun, he contended, it dispensed with further prosecution. The contrary doctrine would be absurd, the object being to ascertain insolvency. Why proceed, after it had been ascertained? Upon this point, there was a seeming contradiction in the decided cases, but it was not a real one. It was explained by the principle of the decisions, which was this—that parol evidence should not be received to prove insolvency. It must be a legal insolvency, legally or judicially ascertained. This would appear from a brief attention to the cases. In *Collyer* v. *Whitaker*, 2 A. K. Marsh. 197, it is said, "insolvency, in general, only legitimately proved by suit." "The prosecution of suit, however, is essential, barely as the means of ascertaining, &c." In *Young* v. *Cosby*, 3 Bibb 227, "if the assignee prosecute diligently so far as a prudent man would do, in a case where he was solely interested, that is all that is required." In *Stapp* v. *Anderson*, 1 A. K. Marsh. 535, insolvency and removal of the maker from the state were held sufficient, *per se*, to subject assignor, without suit against *maker. "The law," says the court, "does not require any one to do a vain or idle act." If sued [*342 to insolvency on one note, therefore, not necessary to sue upon another. These cases are supposed to be contradicted by *Clair* v. *Barr*, 2 A. K. Marsh. 255. In that case, the maker was living when the note fell due. He died on the third day of the first term, being about two months after the note fell due. The court decided, that proof of insolvency did not absolve the holder from the necessity of suing: "he (the maker) may have had credit, though he had no property." The decision, therefore, amounts to nothing more than that, at a subsequent time, parol evidence shall not be received, to prove that the party was actually insolvent at a prior time. In other words, actual insolvency no excuse. The debtor was going on in business, "had credit," and possibly might have paid. How could this be, if he were legally divested of all his property, and stripped of all his credit, by judicial insolvency? It is a reasonable distinction; the same that is made by the priority laws of the United States; they disregard actual insolvency. This case, therefore, leaves in full force the reasonable doctrine of *Young* v. *Cosby*, and *Stapp* v. *Anderson:* otherwise understood, it would be contrary to the very principle of the law, and would go far towards extinguishing all liability of the indorser, already sufficiently reduced.

3. The discharge by the judge, and the waiver of the thirty days' imprisonment, or thirty days' notice, did not take away the right of the complainants. Why keep him in prison? The insolvency would no more have been ascertained at the end of thirty days, than at the beginning. It would have been mere wanton cruelty, to keep the debtor in prison. The law does not require it. The decisions in Kentucky, which are in the spirit of humanity to the debtor, do not require it. Else, why not require the creditor to pay the prison fees, and thus continue the debtor's imprisonment? It is not necessary to use undue severity or indulge in unproductive cruelty. *Young* v. *Cosby*, 3 Bibb 227. It has been supposed (and perhaps the belief led to this decision), that *Clair* v. *Barr* establishes the doctrine, that a creditor was bound to keep *in prison a destitute and insolvent debtor, in the hope that, though he had nothing himself, [*343 something might be extorted by his sufferings from the charity of his friends. This is not a just motive, nor one that a court can countenance.

Imprisonment of a debtor is not to be used, at this time of day, for inflicting a punishment upon him or his friends. Why then, it is said, is *ca. sa.* given? The answer is very easy. It is to compel the surrender of property which, from its nature or locality, cannot be made amenable to other process. But *Clair* v. *Barr* does not proceed upon the principle imputed to it; rightly understood, it is in harmony with the other cases, and with the obvious dictates of humanity and justice.

As to the supposed neglect to charge Voorhees in execution, he said, he doubted whether it was in any case required, or even admissible; for the decisions in Kentucky made it necessary first to issue a *fi. fa.* But without entering into that question, he said, that in this case, the discharge under the insolvent law dispensed with that step, and, indeed, made it impossible. He submitted, therefore, that the decree below was not warranted by the principles upon which the liability of indorsers rests, nor by the decisions in Kentucky; which had certainly gone far enough in limiting and crippling the rights of the holder.

Wickliffe, for the appellee, stated, that it was denied, that any consideration had been received for his indorsement by Daniel Weisiger; and he also denied, that the bank had used due diligence to obtain payment of the note from the maker. The facts of the case are uncontradicted upon the pleadings and exhibits, as there was no evidence introduced to oppose the statement and allegations in the answer of the appellee in the circuit court.

The court should be aware of the nature and legal character of paper of the description of that upon which the appellants claim to receive. Such instruments are not negotiable, by the laws of Kentucky; the statute of Anne never having been in force in that state. The party who sues may
*344] *do so upon a statute of Kentucky, which authorizes the suit in the name of the assignee, but goes no further. The true principle upon which the responsibility of the assignor depends, and upon which it can alone be supported, is the general liability to refund that which he may have received, on a consideration which has failed. 1 Bibb 545. In 1 A. K. Marsh. 544, it was decided, that this liability was thus restricted, and did not extend to the amount stated in the note. Under the authority of cases in Kentucky, the assignor is not liable, without a consideration received by him; nor unless the consideration be alleged and proved. 1 Bibb 596; 2 Ibid. 425. The only case which impugns the uniform current of decisions in Kentucky upon these principles, is that of *Allen* v. *Prior*, 3 A. K. Marsh. 305. The appellee received nothing for his indorsement of the note; and he is, therefore, protected from all liability upon it, by the decisions of the courts of Kentucky. There cannot be a liability by the appellee, considering him as having guarantied the debt. Such a liability should have been in writing; as, unless it is so, the statute of frauds destroys it.

It is not denied, that the injury a promisee may receive, as well as a benefit given to the promisor, is a good consideration; but if the principle is otherwise, it can be claimed only in favor of an original indorser. In this case, the bank stands independent of such a principle, for to the bank no promise was ever made by the appellee, his engagement having been made to Hanna, the preceding indorsee. But if a responsibility by the assignor

does exist, in a case where he received no benefit, and a chancellor will interpose and enforce the contract; this will only be, where the condition imposed by the law governing the contract has been performed.

The next inquiry is, therefore, has the law creating this liability of the assignor been complied with? The law in Kentucky stands thus: The assignee ought to take every compulsory process of law against the original debtor, until his insolvency is established; or the the suit and all incidental remedies are sound *insufficient to coerce payment. *Smallwood* v. *Woods*, 1 Bibb 546. To omit holding to bail, when bail is of right [*345 demandable, if, on a *ca. sa.*, the return is *non est inventus*, is negligence. 2 A. K. Marsh. 197. The assignee is bound to issue a *fi. fa.* and a *ca. sa.*, and if the debtor is not found, to proceed against the bail; nothing short of this will do. 1 Bibb 147. In *McKinney* v. *McConnell*, Ibid. 239, it was decided, that a delay of fourteen months is, *per se*, negligence, no matter what other steps may have been taken. Averment of insolvency, and consequently, proof of that fact, by any other means than a legal proceeding on the note assigned, will not be sufficient to charge the indorser. 3 Bibb 6.

Mr. Wickliffe also cited the cases of *Hogan* v. *Vance*, 2 Bibb 34; *Thompson* v. *Caldwell*, Ibid. 290; s. c., 3 Ibid. 6; and *Young* v. *Cosby*, Ibid. 227, upon these points. Also, 2 A. K. Marsh. 524; 2 Litt. 134; and *Parker* v. *Owings*, 3 A. K. Marsh. 59. These authorities, he contended, maintain the absolute obligation of industry and vigilance on the part of the assignee; and they also establish the principle, that the rules in relation to a guarantee are to be construed, under the law, with great strictness.

He also argued, that the proceedings under which the maker was discharged from the process against him, by the district judge, were irregular, and subjected the appellants to all the consequences of their illegality. By the pleadings and evidence, it appeared, that the note fell due on the 23d of September. A writ was issued on the 2d of October, in which bail was required; this was returned "executed," on the 6th of November, the defendant having been committed to prison on the preceding day. On the 20th of November, judgment was entered by default, and afterwards, in December, during the same term, the jailer surrendered the body in court. It was the duty of the plaintiff to charge the defendant in execution; and if not so charged *within thirty days, then, and not before, he might [*346 be discharged under the insolvent law. The discharge by the district judge was, before the thirty days, of a prisoner not in execution; and this was done by a waiver of the time required by law. The assignee is not permitted to run ahead of the law, and discharge a debtor, before, under its provisions, he is entitled to it. By not proceeding according to law, and failing to pursue the course the law marks out, he releases the assignor from all responsibility to him. The district judge had no jurisdiction; his authority was to administer the oath; but the act of congress directs him not to do so, until after thirty days. The period of thirty days is given for the benefit of the creditor, and of those who are interested, that the debt should be paid; all such are, therefore, parties interested in the proceeding; and if the consent of the creditors can give the right to discharge, all should consent; the assignor should have consented, as his responsibility became consummate by the discharge. The consent of the counsel for the

appellants alone gave jurisdiction to the district court; or was so considered. If it did not, where is the prisoner? The discharge being illegal, he has escaped, and may be pursued and retaken, or the jailer was liable. It is manifest, that the appellants considered that they had not used the diligence required of them. They proceeded afterwards by a *fi. fa.*, which was issued on the 29th of December, but which did not reach the hands of the marshal until the 9th of January following; and which was, in March, returned "no effects." After the return in March, a *ca. sa.* issued in April, one month having expired. It has been decided, that it is the duty of the party to place his writ in the hands of the officer in a reasonable time. *Trimble* v. *Webb*, 1 T. B. Monr. 100.

He further argued, that if the discharge of the maker by the district judge was not in the suit brought upon the note for which the appellee was now claimed to be liable, and this might be inferred from the record; the discharge in another suit was not evidence of insolvency.

*347] *In reference to one of the cases cited by the counsel for the appellants, he argued, that where it had been considered, that not holding to bail was not *laches*, the case was one in which a speedier remedy was obtained by petition and summons, in which no bail was allowed, and good faith was presumed.

Johnson, Justice, delivered the opinion of the court.—This case turns altogether upon doctrines peculiar to the states of Virginia and Kentucky. It is the case of a suit in equity, instituted by the indorsee, or in the language of the country, the assignee, of a promissory note, to charge an intermediate indorser. All the doctrine on the subject will be found fully stated in the two cases of *Riddle & Co.* v. *Mandeville & Jamieson*, reported among the decisions of this court; and in the cases of *Smallwood* v. *Woods*, and *Spratt* v. *McKinney*, to be found among the decisions of the court of appeals of Kentucky. The defendant here has demurred to the bill, for want of equity, and this raises the first question in the cause.

In the last case decided in this court, between *Riddle & Co.* v. *Mandeville & Jamieson*, which was a case in most respects similar to the present, this court decided, that a suit could be maintained in equity by the holder of an indorsed note against a remote indorser; and upon grounds perfectly familiar to courts exercising equity jurisdiction. It was a Virginia contract, governed by the same law which is of force in Kentucky. This court had before decided, that, by the laws of the country governing the contract, a suit at law could not be maintained between the holder of the note and a remote indorser. But, then, a suit at law could have been maintained by him against the immediate indorser, and by him against the preceding indorser, and so on, through any number of indorsers. This presented the ordinary case of an assignment of a *chose in action*, which transfers an interest, without the right of action.

To maintain this demurrer, then, it was incumbent on the defendant to have shown, that there was some principle in the jurisprudence of Kentucky,

*348] that could sustain a *distinction between his case and that previously decided here; but everything concurs to repel the idea of such a distinction. In the case of *Drake* v. *Johnson*, the court of appeals of Ken-

tucky also decided, that a suit at law could not be maintained in that state by the indorsee against a remote indorser. The conclusion, then, results from our own decisions, that he must be let into equity ; for an indorsement is certainly no relief to the previous indorsers, and the ultimate assignee alone is entitled to the benefit of their liability. And this we understand to be consistent with the received opinions and practice of Kentucky.

The second point made for the defendant is, that as he received no consideration for assigning the note, he is not liable at all. But on this, it is only necessary to observe, that he indorsed it to give credit to Voorhees, the promisor ; and the law, therefore, imputes to him the consideration paid to Voorhees. The most material point in the cause, and that on which the decision below was rendered in favor of the defendant, was the want of due diligence against the maker of the note. The law is settled there, as it is in Virginia, and in this court, upon Virginia contracts of this description ; that every reasonable effort must be made to recover of the maker by suit, before the assignee can have recourse against the assignor or indorser. It is on the question, what constitutes such diligence, that all the difficulties arise on suits upon these contracts. And certainly, this court cannot be called upon to carry the obligations imposed upon assignees on this point, further than the state courts have already extended them.

There are three grounds on which the defendant would impute to the complainant a want of diligence, fatal to his right to recover. The first is, that the *fi. fa.* did not come to the marshal's hands, until the expiration of about thirty-six days after the judgment was obtained, and nineteen after it issued. The second, that the *ca. sa.* did not issue until about three months and a half after the *fi fa.*

Let it be observed, that the note fell due on the 25th of *September, the writ was issued on the 2d of October ; the judgment was entered the November term following ; and the maker, Voorhees, being held in custody for want of bail, was discharged, as insolvent, on the 14th of December of the same year. Justice can hardly be charged with a halting gait thus far. As to her subsequent progress, it does not appear, on what day the court for November term adjourned ; but as the *fi. fa.* bears date on the 29th of December, it is presumable, that it sat on that day. The *fi. fa.* did not reach the office of the marshal, until three weeks after ; and the *ca. sa.* was not sued out at the time when the *fi. fa.* issued. But it was sued out at the term to which the *fi. fa.* was returnable, to wit, on the 11th of April 1822. So that, from the time the note fell due, to the last step in the progress of judicial means for enforcing payment, we count but six months and a half. We do not recognise the supposed obligation or power of the party, in the circuit court, to sue out the *ca. sa.* contemporaneously with the *fi. fa. ;* and with the exception of that interval, we are rather inclined to attribute to the complaint extraordinary diligence than culpable delay. [*349

But why were the executions issued at all in this case, except from abundant caution, and to avoid the imputation of *laches?* Was it necessary? The courts of Kentucky have certainly decided otherwise. In the case of *Stapp et al.* v. *Anderson et al.*, 1 A. K. Marsh. 240, they express themselves thus : " The discharge of an insolvent, under our statute, is a

judicial act, of a record character, and is in its nature, as it must be in contemplation of law, the most satisfactory evidence of the insolvency of the person discharged." This, it is true, was declared respecting a discharge in another suit, on a different cause of action, under the insolvent law of the state, and upon a *ca. sa.* But it would be difficult to assign a reason why it should not apply to a discharge in a suit on the same cause of action, under the law of the United States, and where the defendant was in custody under an order for bail. In both instances, a state of insolvency is judicially established; and as the court expresses itself, in *the same case, "it *350] would have been worse than idle," nay, in this case, it would have been false imprisonment, to have re-taken the debtor; if, as the defendant contends, and no doubt was the fact, he was discharged under the suit upon this note.

The third and last ground of *laches*, and that which it appears by a report handed to us, influenced the court below, was the consent of the agent of the complainant to dispense with the imprisonment to which the maker of the note might have been subjected, before he would have taken the oath, and received a discharge under the act of congress. The correctness of the decision below upon this point must be tested by considerations drawn from the object of the imprisonment; the influence of the discharge upon the loss of the debt; and from adjudged cases. We are inclined to think, that it has been rather too hastily conceded, that no case similar to the present has been adjudicated. That it adds another to the long list of instances of *laches* which have been held to be fatal to the recovery of the assignee against his assignor in that country, cannot be doubted.

This case, it must be recollected, comes within the fifth section of the act of January 6th, 1800, entitled "an act for the relief of persons imprisoned for debt." The second, third and fourth sections of that act make provision for the discharge of persons confined under execution, and the fifth section extends "the privileges and relief" of that act, to persons in confinement, against whom judgment is obtained, but no execution issued. Under the provisions in favor of persons charged in execution, on the day of arrest, a notice may be served upon the person at whose suit they are confined, and at the end of thirty days, they may be discharged. By the fifth section, it is enacted, "that any person imprisoned upon process issuing from any court of the United States, except at the suit of the United States, in any civil action, against whom judgment has been or shall be recovered, shall be entitled to the privileges and relief provided by this act, after the expiration of thirty days from the time such judgment has been or shall be *351] recovered, though the *creditor should not, within that time, sue out his execution and charge the debtor therewith."

It has been argued, that under this section, the defendant must remain in prison, thirty days after judgment, before he can sue out his notice to the plaintiff, thus requiring him to remain sixty days in confinement, in the cases which come under this section; whereas, he remains but thirty days, when confined under execution. There can be no reason for the distinction, and we think that, in favor of liberty, and with a view to consistency, the construction should be otherwise. If such were the true construction, the relief would not be the same as is extended to the debtors of the other class. We think, therefore, that the day of entering judg-

ment, under the fifth section, is the day that corresponds to the day of arrest, under the previous provisions of the law; and therefore, that in thirty days after judgment, he may be discharged, by complying with the other requisitions of the law. The day of entering the judgment appears nowhere in this record, but as the notice was served on the plaintiff's agent, on the 14th of December, we must presume, that the judgment had then been entered; and on the same day, the agent signed that consent to dispense with "the previous imprisonment by law to entitle the defendant to take the oath of an insolvent debtor," by which, it now insisted, that the complainants are barred of their right to recover of the assignor.

The error of the court below obviously consists in this, that it considers the imprisonment to which the defendant is subjected, as among the means of coercing payment. The arrest certainly is so; but the thirty days' confinement that ensues, is only incidental to the notice required to be given to the plaintiff of the defendant's intention to claim his discharge as an insolvent. Now, he must be insolvent, when this notice is given, and what is to be forced from an insolvent man, by the thirty days' imprisonment? It is obvious, that the confinement is not regarded as the means of coercion, but only as a time necessary to the investigation of the defendant's circumstances, or the collection of evidence *to repel his insolvency. The coercive means of the law are to be found in the [*352 searching oath to be administered, and in the fear of prosecution for perjury, and recommitment in the same action. If, then, this imprisonment has no other object than to make the debtor await the investigations of his creditor, it is difficult to assign a reason, why the creditor may not dispense with it, when satisfied that the application is an honest one, and that delay would discover nothing that he was not already acquainted with. In the language of the Kentucky court, it would be "worse than idle," to detain him. Nothing but unavailing hardship upon him, and ultimate expense to his indorser, could result from it.

Nor do we think ourselves unsupported by the Kentucky decisions, in this view of the subject. In the case of *Young* v. *Cosby*, the maker of the note, being in custody under a *ca. sa.* issued by the assignee, was discharged for want of security for the payment of prison fees. This discharge, it was contended, was imputable to the assignee, and barred his recovery against the assignor; unless he could prove that the maker had nothing which might have been wrung from him by a protracted imprisonment. But the court of appeals decided otherwise; and established, that if the assignor had sustained any injury in that respect, it was incumbent upon him to prove it. The language of Chief Justice BOYLE, on that occasion, was this: "It has repeatedly been decided in this court, that to entitle the assignee of a bond or note to recover of the assignor, it was necessary to show that he had used due diligence by suit, to recover the amount from the payer or obligor; but it has never been required of him to prosecute the suit against the payer or obligor, farther than a man of ordinary prudence and diligence would do, in a case where he was solely and exclusively interested. To make it necessary to do so, would be unreasonable and unjust; inasmuch as it would tend to accumnlate costs, without the prospect of any probable advantage to either of the parties." We entirely approve of the opinions here expressed: they are *conceived in the reason and benignity of the law, [*353

and we are unwilling to extend the diligence required of the assignee beyond the limits there laid down. In the case of *Oldham* v. *Bengan*, the doctrine laid down in *Young* v. *Cosby*, is considered and affirmed, and Chief Justice BIBB observes, "that although due diligence has always been required in such cases, yet in no case has all possible diligence been exacted."

And both these cases concur to establish this principle, that it is not on the ground of a mere possible injury that the assignor can claim his discharge; much less where it is improbable, as Judge ROWAN remarks in the case of *Stapp* v. *Anderson*, before cited. The present case presents the maker in a situation in which it is not only improbable, but scarcely possible, that the assignor could have sustained an injury. For a discharge under the insolvent law of the United States is confined in its effects altogether to the particular case, and even as to that, does not exempt the debtor's present effects, or future acquisitions, from the process of the law; nor is his person exempt from confinement for the same debt, should he be detected in a fraud upon the creditor. The bare speculative idea, then, of a possible acquisition of property, within the thirty days, during which Voorhees might have been compelled to await the will or inquiries of his creditor, and of property not tangible by the process of the law; is too feeble a consideration to affect the rights of the complainant. The decree below will be reversed, and a decree entered here that the complainant recover his demand.

Decree reversed.

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*354] *WILLIAM CAMPBELL'S Executors, Appellants, *v.* PRATT, FRANCIS and others, Appellees.

Immaterial error.

The court refused to reverse the decree of the circuit court of the county of Washington, although an error had been committed in proceeding under the mandate from this court; as no benefit would result to the appellant from a reversal.

APPEAL from the Circuit Court of the District of Columbia, and county of Washington. The matters in controversy in this case arose out of proceedings in the circuit court, under a mandate of this court, issued at February term 1815, in the case of *Pratt and others* v. *Campbell*, reported 9 Cranch 456.

In the circuit court, the appellants in this case filed their bill, alleging that they had been injured by the proceedings under the mandate (9 Cranch 58), and that the court gave a decree against their claims, as set forth in the bill. From this decree they appealed. The counsel for the appellants contended, that by the decree passed by the circuit court, in the original cause, the appellants had sustained injury in the following particulars.

1. Of the thirty-six squares mortgaged to Law, thirty-two were attached and purchased by the appellant, and four squares, therefore, remained affected only by Law's mortgage. Campbell was permitted to redeem his thirty-two, by paying their proportion of the whole of Law's debt; thereby making the four remaining squares bear also their proportion of Law's debt. Admitting this to be right, it should have been decreed, upon the same principle, that if the parties did not redeem, the sale should be made so as to

produce the same result; that is, the four squares not purchased by the appellant should have been sold first, and his thirty-two squares should only have been sold to make up the deficiency of Law's debt. The court below put on these four squares only the sum of $2806.29 (much less than their proportion), and decreed *them to be sold last; thereby saving them [*355
to Pratt and others, if the other squares produced enough to pay Law, and thus giving them a preference over the appellant, denied by this court in the original cause.

2. Of the eighteen squares mortgaged to Duncanson, thirteen only were attached and purchased by the appellant; consequently, five remained; and these five the appellant contended, on the same principle, should have been sold first, and the appellant's thirteen only resorted to, to make good the deficiency under that mortgage. It was contended, that these errors could be corrected, by the court's ordering that such of the said squares as had not been sold, to be sold for the benefit of the appellant, and that the money received for such as had been sold, should be decreed to him, or the sales rescinded.

3. The court below also erred in requiring the appellant to redeem from both mortgages, and decreeing that in case he did not redeem from both, the squares should be sold to satisfy both.

The case was submitted to the court on the written arguments of counsel. *Swann* and *Key*, for the appellants; *Jones*, for the appellees.

JOHNSON, Justice, delivered the opinion of the court.—This cause has its origin in the great case of *Pratt, Francis et al.*, which appeared in this court some years ago, with the formidable bulk of nine hundred folios! The rights of the parties had become exceedingly perplexed, in the progress of large and multifarious transactions, originating in the speculations of Morris, Nicholson & Greenleaf, in the land of this city. Thomas Law held a mortgage of thirty-six squares from Morris, Nicholson & Greenleaf, and fourteen of the same squares were mortgaged by them to one Duncanson. Campbell acquired the equity of redemption of Morris, Nicholson & Greenleaf, in thirty-two of the thirty-six squares, the four others not being included in Duncanson's mortgage. The equity of redemption in these four squares has passed by assignment to present appellees, in right of Morris, Nicholson & Greenleaf. Thirteen of the *squares included in Duncanson's mort- [*356
gage were among the thirty-two in which Campbell had possessed himself of Morris, Nicholson & Greenleaf's equity of redemption, and his constant efforts have been, to reduce the sum on Law's mortgage, to put aside that of Duncanson, as a satisfied incumbrance, and to obtain a precedence to Morris, Nicholson & Greenleaf's equity, in the four remaining squares.

This court established the principles on which the sum to be raised to satisfy Law's mortgage should be ascertained; decided against any precedence in Campbell, as a joint holder of the equity of redemption; and sustained Duncanson's mortgage, in favor of a prior equity which Greenleaf held in it. So that, in effect, the cause went down to the circuit court for the sole purpose of having a sale of the squares effected; the proceeds applied, first to pay off Law's mortgage, then Greenleaf's interest in Duncanson's mort-

gage, and the balance only, if any, to go to the equity of redemption. Substantially, this has not been done; for we now find the two squares, which form the subject of the present controversy, in the hands of Pratt et al., the appellees, which could only be in the right of Morris, Nicholson & Greenleaf's equity of redemption; whereas, Duncanson's mortgage, to a large amount, remains unsatisfied, and Campbell, with eight-ninths of the equity of redemption in him, has received nothing. If, then, the appellees should be confirmed in the possession of those squares, it is obvious, that Campbell would have much to complain of, since his equity of redemption in the other thirty-two squares had been, in effect, applied to the extinction of a common incumbrance. This would save him an equity in eight-ninths of these two squares.

But this is a mere delusion, since the holders of the equity of redemption could rightfully receive nothing, until the mortgages were both paid off. This was certainly the case with Morris, Nicholson & Greenleaf; and this court has been constantly inculcating that Campbell stood precisely in their shoes, and was entitled to no higher equity. All the obscurity in which the case is involved, and which has seemed so long to keep both parties from approach-
*357] ing *it, arises from an error committed below, probably by the commissioner, in selling the doubly-incumbered squares, before those singly incumbered were disposed of; the consequence of which is, that these squares, which were not in Duncanson's mortgage, remain unsold, because the sale of the thirty-four satisfied Law's mortgage; whereas, by beginning with the sale of those singly incumbered, two squares (supposing the value to be the same) would have remained, to be applied to the payment of Greenleaf's interest in Duncanson's mortgage.

But there is nothing in this for Campbell to complain of; since, after applying the proceeds of these squares to the payment of the second mortgage, it still remains unsatisfied to a great amount, and leaves Campbell nothing to receive in right of his equity of redemption. The decree of the court below, as against this appellant, will be affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington; and was argued by counsel: On consideration whereof, it is considered, ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*Sundry Goods, Wares and Merchandises, The American Fur Company, claimants, Plaintiffs in error, *v.* United States, Defendants in error.

Principal and agent.—Evidence.—Penal statute.

Whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case, in like manner as if the evidence applied personally to the principal.[1] p. 364.

Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the other.[2] p. 365.

The act of 30th of March 1802, having described what should be considered as the Indian country at that time, as well as at any future time, when purchase of territory should be made of the Indians, the carrying of spirituous liquors into a territory so purchased, after March 1802, although the same should be, at the time, frequented and inhabited exclusively by Indians, would not be an offence within the meaning of the before-mentioned act of congress, so as to subject the goods of the trader, found in company with those liquors, to seizure and forfeiture.[3] p. 368.

Error to the District Court of the United States for the district of Indiana. In the district court of Indiana, the district-attorney filed, on behalf of the United States, a libel or information, stating, that on the 23d day of September, in the year of our Lord 1824, at and within the district of Indiana aforesaid, one William H. Wallace, a citizen of the United States, and having a license and legal authority to trade with Indian tribes within the territory of the United States, did take and carry into the Indian country, to wit, the country lying on the north or west side of the river Tippecanoe, for the purpose of trading with the tribes of Indians, sundry goods, wares and merchandises, enumerating the same; that the said Wallace did, among the goods, wares and merchandises, carry into the said Indian country a large quantity of ardent spirits, to wit, seven kegs of whiskey, and one keg of shrub, for the purpose of vending or distributing the same among the Indian tribes, contrary to the statute in such cases made and *provided, and against the peace and dignity of the said United States. [*359
The libel further alleged, that John Tipton, Indian agent at Fort Wayne, within said district, duly appointed to, and qualified for that office, and being duly authorized and instructed to search the stores and packages of traders among Indian tribes, upon suspicion that ardent spirits had been by the said Wallace carried into the said Indian country, for the purpose of being vended or distributed among the Indian tribes therein, caused the said goods, wares and merchandises to be searched, and upon such search, the seven kegs of whiskey, and the keg of shrub, were found so carried by the said Wallace into the said Indian country, for the purpose of being sold or distributed among the Indian tribes therein, contrary to the statutes aforesaid in such case made and provided, and against the peace and dignity of the said United States—the said goods, wares and merchandises were, on the day and year aforesaid, seized by the said John Tipton, and were by

[1] United States *v.* Martin, 2 Paine 68; Barreda *v.* Silsbee, 21 How. 146; Cliquot's Champagne, 3 Wall. 114; Stockwell *v.* United States, 13 Id. 550.

[2] Nudd *v.* Burrows, 91 U. S. 426.

[3] See Bates *v.* Clark, 95 U. S. 204.

him held, to be disposed of as the court should direct. The libel then proceeded to pray that the goods, &c., so seized, might be deemed to be forfeited, and be disposed of according to law.

A claim and answer were filed by William H. Wallace, attorney in fact and agent for the plaintiffs in error, in which the allegations of the libel were denied, and tendered an issue, upon which the cause was tried by a jury, who found a verdict for the United States. On the trial, three bills of exception were taken by the claimants' counsel to the opinion of the court.

The first exception stated, as ground of error, that on the trial of this cause, the district-attorney offered to give in evidence to the jury, the transactions and declarations of one John Davis, with a view to prove the purpose of the defendant; to which the defendant, by his counsel, objected, and the court permitted the district-attorney to give in evidence to the jury the conduct and declarations of Davis, so far as he acted as the agent of the
*360] said defendant, or in conjunction *with him, in relation to the charge made against the defendant in the information.

The second exception stated, that, on the trial of this cause, the district-attorney moved the court to instruct the jury, that if they should believe from the evidence that had been adduced, that the defendant, as an Indian trader, did carry ardent spirits into the Indian country, and that the same were found therein, among any part of his goods, that it is *primâ facie* evidence of his having violated the acts of congress, on which this prosecution was founded, so as to throw the burden of proof upon the defendant; which instruction the court did give the jury; also instructing them, that an Indian trader might lawfully carry ardent spirits into an Indian country for some purposes, as, for instance, for medical use.

The third exception was, that at the trial of this cause, the defendant, by his counsel, prayed the opinion and direction of the court to the jury, that unless they were of opinion, from the evidence of the cause, that the ardent spirits mentioned in the libel of information, were mingled with the bales of merchandise, at the time of seizure, and carried into the Indian territory, in violation of the act of 1820, entitled "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," and whilst said spirits and goods were remaining in the Indian territory, were seized upon by the officers of government, their verdict must be for the defendant; which opinion and instruction the court refused to give to the jury; but did instruct the jury that if they should be of opinion, from the evidence, that the defendant, as an Indian trader, did carry ardent spirits into the Indian country, which were found with a part of his goods therein, with the purpose of being vended or distributed amongst the Indian tribes, that all the goods of said trader designed for sale under his license to trade with Indian tribes, and seized in the Indian country, whether all or only a part of them were found with the spirits, were forfeited; and that the seizure thereof, in a territory purchased by the United States of the Indians, but
*361] frequented and inhabited exclusively by Indian tribes, was *legal; to which refusal of the court to instruct as requested, and to the instruction given, the defendant, by his counsel, excepted, &c.

The case was argued by *Ogden*, for the plaintiffs in error, and by *Wirt*, Attorney-General, for the United States.

Ogden, for the plaintiffs, stated, that as to the first exception, no other remark would be made upon it, but that if the declarations of Davis were made at the time of the seizure, the evidence was legal; but if at any other time, the testimony was irregular.

On the second exception, he argued, that the statute of the United States being highly penal in its provisions, should be construed with great strictness. It was incumbent on the government to show, not only that the spirits were carried into the Indian country, but that the same was done with an intent to sell them. The jury were to judge of the intention; but this was taken from them, by the instructions given by the court. The power to search must only be exercised within the Indian territory; the goods which may be seized must be in the territory; but the instruction given to the jury is in its terms so general, as to authorize a seizure of goods belonging to Indian traders in any part of the United States. He argued, that this was not the sound interpretation of the law.

In support of the third exception, he said, that the act of congress applied only to those territories in which the Indian title had not been extinguished. Those were exclusively the Indian country. "Indian country," *ex vi termini*, means the country belonging to the Indians; and it was not shown, that the place of seizure was of this description. The provisions of the law relative to licenses to trade with the Indians sustain and illustrate this construction.

Wirt, Attorney-General, considered the instructions given by the court right in every particular. A reference to the act of congress would show, that it was the Indian country, and not the Indian territories, from which it was intended to exclude the sale of spirituous liquors. Their *sale among the ignorant natives of the forest led to war and bloodshed, [*362 and the evils were the same, on whichever side of the Indian line they were sold. Such too is plainly the purpose, from the language of the act of 1802. The descriptive words are Indian "country," and not "territory." The act looks to all places where goods may be carried, with the intent to vend them to the Indians, and the penalty is restricted to such offences. It also takes away the license to the trader.

In reference to the third instruction, he said, that the case stated that the ardent spirits were mingled with the merchandise, which is not the language of the law; the residue of the instruction is in accordance with the law. That language is "all the goods designed for sale under his license to trade with the Indians," and "which are seized in the Indian country." It cannot be a question, whether a country, although ceded to the United States, while inhabited by Indians, continues an Indian country, within the view of the law. The license granted to trade is "with the Indians," and not in the Indian country.

WASHINGTON, Justice, delivered the opinion of the court.—This was an information filed in the district court of Indiana, by the United States, against sundry goods and merchandise, seized as forfeited, under the provisions of two acts of congress, bearing date the 30th of March 1802, ch. 273, and the 6th of May 1822, ch. 58, for regulating trade and intercourse with the Indian tribes.

The information sets forth, in substance, that on the 24th of September 1824, William H. Wallace, a citizen of the United States, and having a license to trade with the Indian tribes, within the territory of the United States, did take and carry into the Indian country lying on the north or west side of the Tippecanoe river, for the purpose of trading with the tribes of Indians, certain goods, which are particularly described, amongst which were seven kegs of whiskey and one keg of shrub, for the purpose of vending or distributing the same among the Indian tribes; contrary to the statute, &c. *That upon suspicion that ardent spirits had been carried by the said Wallace into the said Indian country, for the purpose aforesaid, the said goods, &c., were searched by order of an Indian agent, duly appointed to, and qualified for that office; upon which search, the said kegs of whiskey and shrub were found so carried, for the purpose aforesaid; and were, together with the said goods, &c., seized by the said Indian agent. The information concludes with a prayer that the goods so seized may be declared to be forfeited, and to be disposed of according to law.

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To this information, Wallace, as attorney in fact for the American Fur Company, interposed a claim and answer, which, after protesting against the sufficiency of the information, denies, by way of plea, that he did, among the goods, &c., in the information mentioned, carry into the Indian country, lying on the north or west of the Tippecanoe river, seven kegs of whiskey and one of shrub, for the purpose of trading, or distributing the same, among the Indian tribes, as in the information mentioned. The issue was tried by a jury, who found a verdict in favor of the United States.

Upon the trial of the cause, three bills of exception, to the following effect, were taken: The first is to the opinion of the court, which permitted the district-attorney to give in evidence the conduct and declarations of John Davis, so far as he acted as the agent of Wallace, or in conjunction with him, in relation to the charge laid in the information, with a view to prove the purpose of the said Wallace.

The second bill states, that upon the motion of the district-attorney, the court instructed the jury, that if they should believe, from the evidence, that Wallace, as an Indian trader, did carry ardent spirits into the Indian country, and that the same were found therein, among any part of his goods, it is *primâ facie* evidence of his having violated the acts of congress, on which this prosecution is founded, so as to throw the burden of proof upon the defendant.

The defendant then moved the court to instruct the jury, that, unless they should be of opinion, upon the evidence, *that the ardent spirits mentioned in the information were mingled with the bales of merchandise, at the time of seizure, and carried into the Indian territory, in violation of the act of 1802, and whilst the said spirits and goods were remaining in the Indian territory, were seized by the officers of government, their verdict should be for the defendant. This instruction the court refused to give; and directed the jury, that if they should be of opinion, from the evidence, that the defendant, as an Indian trader, did carry ardent spirits into the Indian country, which were found with a part of his goods therein, with the purpose of being vended, or distributed amongst Indian tribes; all the goods of the said trader, designed for sale under his license, and seized in the Indian country, whether all or only a part of them were found with

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the spirits, are forfeited; and that the seizure thereof in a territory purchased by the United States of the Indians, but frequented and inhabited exclusively by Indian tribes, is legal. The refusal and instruction form the subjects of the third bill of exceptions.

The objection to the evidence of Davis is so fully answered and repelled by this court in the case of the *United States* v. *Gooding*, 12 Wheat. 468, that it seems necessary only to refer to that decision. That was a criminal prosecution against the owner of a vessel, under the slave-trade act of congress; and an objection was taken by his counsel to evidence of the acts and declaration of the master of the vessel, who was proved to have been appointed to that office by the defendant, with an authority to make the fitments for the veesel. The principle asserted in the decision of that point, and applied to the case was, that whatever an agent does or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal. The opinion of the court in the present case is not less correct, whether Davis was considered by the jury as having acted in conjunction with Wallace, or strictly as his agent. *For we hold the law to be, that where two or more persons are associated together for [*365 the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others; and this we understand, upon a fair interpretation of the opinion before us, to be the principle which was communicated to the jury.

The instruction to which the second exception was taken, having been passed over without objection by the counsel for the plaintiff in error, it becomes unnecessary for the court to notice it, otherwise than to say, that it meets our entire approbation.

In order clearly to comprehend the subjects embraced by the third bill of exceptions, it will be proper to examine with attention a few of the sections of the acts on which this prosecution is founded. The first commences, in the first section, by declaring, that a certain boundary line, therein described in general terms, as established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked in such places as the president of the United States should deem necessary, and in the manner he should direct; with a proviso, that if the boundary line between the said Indian tribes and the United States should, at any time thereafter, be varied, by any treaty which should be made between the said Indian tribes and the United States, then all the provisions contained in that act should be construed to apply to the said line, so to be varied, in the same manner as the said provisions apply, by force of that act, to the boundary line therein before recited. The act then proceeds to prohibit citizens of, or residents within, the United States, from crossing over the said boundary line to hunt, &c., and inflicts punishments of various degrees upon persons who should be convicted of certain other acts of aggression within the Indian country. By the 16th section, it is made lawful for the military force of the United States to apprehend every person who may be found in the Indian country, over and beyond the said boundary line, between the United States and the Indian tribes, in *violation of any of the provis- [*366

ions of this act; and to convey them to the civil authority of the United States, in some one of the three adjoining states or districts, to be proceeded against in due course of law. We then come to the 21st section of this act, to which the act of the 6th of May 1822, is an amendment; which authorizes the president of the United States to take such measures, from time to time, as to him might appear expedient, to prevent or restrain the vending or distributing of spirituous liquors among all or any of the Indian tribes. The 2d section of the latter act, in execution of the power vested in the president of the United States by the preceding 21st section, authorizes him to direct Indian agents, governors of territories, acting as superintendents of Indian affairs, and military officers, to cause the stores and packages of goods of all traders to be searched, upon suspicion or information that ardent spirits are carried into the Indian countries by the said traders, in violation of the aforesaid 21st section; and declares, that if any ardent spirits should be so found, all the goods of the particular trader should be forfeited, one-half to the use of the informer, the other to the use of the government; and that his license should be cancelled, and his bond put in suit.

The difference between the instruction asked for by the defendant's counsel, which the court refuses to give, and that which was given in the first part of this exception, consists in this—that the former would seem to insist (for this branch of the exception is very ambiguously expressed, and is on that ground objectionable), that to produce a forfeiture of the trader's goods, the ardent spirits must be found mingled with the bales of goods, at the time of seizure in the Indian country; and that no part of the goods but that with which the spirits were found so mingled, were liable to seizure. It is very apparent, from the manner in which the instruction which was given is expressed, that that asked for by the defendant's counsel was understood by the court below as we have interpreted it. But the instruction which was given asserts the law to be, that if the ardent spirits were found with a part only of the *goods carried into the Indian country, for the illegal purpose stated in the information; all the goods of such trader, designed for sale under his license, and seized in the Indian country, were liable to forfeiture. This construction of the acts of congress which have been referred to, is, in the judgment of this court, well warranted by the words of those acts; as well as by the obvious policy which dictated them. The expressions "all the goods of the said traders," in the second section of the last act, although general enough, if they stood alone, unexplained by the context, to embrace all the goods belonging to the trader wherever they might be found; are clearly restrained by the provision which immediately precedes them, so as to mean those goods only which might be found in company, though not in contact with, the interdicted article.

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The notion that those goods alone are liable to seizure and forfeiture, amongst which the ardent spirits are found mingled, can receive no countenance from any fair construction of this section. That which is contended for, would enable the trader, by the most simple contrivance, to protect the whole of his other goods from forfeiture. To effect this, he would only have to keep the spirits separate from his other goods, during their transportation to, and after their arrival in the Indian country, so as not to contaminate

those goods, by placing them in immediate contact with the offending article. A construction which would sanction so glaring an evasion of the whole policy of the law, ought in no case to be adopted, unless the natural meaning of the words of the act require it. Even penal laws, which, it is said, should be strictly construed, ought not to be construed so strictly as to defeat the obvious intention of the legislature. This was laid down as a rule by this court, in the case of the *United States* v. *Wiltberger*, 5 Wheat. 76. We are, therefore, of opinion, that the instruction asked for by the defendant's counsel was properly refused, and that that which was given, so far as it has been examined, is unexceptionable.

The latter part of this instruction remains now to be considered. After stating to the jury, that if they should be of *opinion, that the defendant, as an Indian trader, did carry ardent spirits into the Indian [*368 country, which were found with a part of his goods therein, with the purpose of being vended, or distributed amongst Indian tribes; all the goods of the said trader designed for sale under his license, and seized in the Indian country, were forfeited; the instruction proceeds as follows: "and that the seizure thereof, in a territory purchased by the United States of the Indians, but frequented and inhabited exclusively by Indian tribes, is legal." We have found no little difficulty in understanding the real meaning of the court, from the language in which this latter proposition is expressed; whether it was intended to state, that after the goods with the ardent spirits had been carried into the Indian country, with the unlawful purpose, they might be seized in a country purchased of the Indians by the United States, under the circumstances referred to; or that being carried into this latter district of country, and there seized, such seizure would be legal. We rather incline to the opinion, that the latter interpretation was the one intended by the court, and that that part of the sentence was merely added as explanatory of the term Indian country, which had previously been used. For if it was merely meant to affirm, that, after the forfeiture had attached in the Indian country, the goods might be seized anywhere, out of that country; no reason is perceived why the place of seizure should be confined to a territory purchased by the United States of the Indians, and inhabited exclusively by them, rather than to a territory not so purchased and inhabited. Besides, the proposition asserted in the preceding part of the instruction, being, that ardent spirits carried into the Indian country, with the unlawful purpose, and found with a part of the trader's goods, and seized in the Indian country, subjected all his goods found with spirits to forfeiture; it would seem something like a contradiction, to lay it down as a distinct proposition, that the seizure spoken of might be made out of the Indian territory. As explanatory of the expressions before noticed, it was entirely appropriate.

*If we have rightly interpreted this part of the instruction, we [*369 feel no hesitation in saying, that we cannot accede to the correctness of the instruction, thus qualified; since it would subject to seizure and forfeiture all the goods of the trader, carried into a country, not only belonging to the United States, but lying without the boundaries of the Indian country, as they are described by the first section of the act of 1802; to which all the provisions contained in that act, and consequently, those contained in the amendatory act of 1822, are by that section expressly confined. If the country referred to in this instruction was purchased of the Indians subse-

quent to the 30th of March 1802, so as that the boundary line thereby became varied; then the above section declares that all the provisions of that act shall be construed to apply to the boundary line, so to be varied, in the same manner as they apply by force of that act to the boundary line therein recited. If we misunderstand the meaning of this instruction, it is so probable, that it might have been misunderstood by the jury, that justice demands a re-trial of the cause.

The judgment of the court below is to be reversed, and the cause remanded to that court, with instructions to award a *venire de novo.*

This cause came on to be heard, on a transcript of the record from the district court of the United States for the district of Indiana, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby reversed and annulled, and that the cause be and the same is hereby remanded to the said district court, with directions to award a *venire facias de novo.*

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*370] *John Dandridge, Appellant, *v.* Martha Washington's Executors, Appellees.

Parties.—Construction of will.—Bequest for education of minors.

The testatrix directed, that the interest of certain funds should be applied "to the proper education" of certain persons, her nephews, "so that they may be severally fitted and accomplished in some useful trade;" and gave to each of them "who should live to finish his education, or reach the age of twenty-one years of age, one hundred pounds, to set him up in his trade; she also gave the whole of her estates, of every description, to be equally divided among certain persons, who should be living, when the interest applicable to the education of her nephews should cease to be required, they being some of the persons among whom the same was to be divided; and she directed, that so long as any one of the three nephews who should live, had not finished his education, or arrived at the age of twenty-one years, the division of the property so devised and given should be deferred, and no longer.

A bill was filed by the appellant, one of the nephews of the testatrix, charging that the executors had not paid the several sums of money bequeathed to him, and praying that they might be decreed to pay the same; no other persons were made parties to the proceeding but the executors; and after a report of the master, the cause came on to a hearing, and the circuit court dismissed the bill, for want of proper parties; the defendants, at the argument, insisted, that not only the two nephews, whose education was provided for by the testatrix, should have been made parties, but also all the residuary legatees.

So far as the bill sought to obtain such a portion of the fund as was, by a fair construction of the will, applicable to the education of the nephews of the testatrix, they alone were required to be parties, and the court reversed the decree of the circuit court, which dismissed the bill, for the purpose of enabling the complainant to make the other two nephews of the testatrix parties.

The court did not consider it necessary to make the residuary legatees parties, in a proceeding, the sole object of which was to ascertain and distribute among the nephews of the testatrix, the amount to which they were entitled for the expenses of education; the residuary legatees have, undoubtedly, an interest in reducing every demand on the estate; whatever remains, sinks into the *residuum;* and that *residuum* is diminished as well by the claims of creditors and specific legatees, as by this. In all such cases, the executors represent the residuary legatees, and guard their interests; it is a part of that duty which requires them to protect the interests of the estate; in such suits, the residuary legatees are never made parties; to require it, would

be an intolerable burden on those who have claims on an estate in the hands of executors.[1] p. 377.

The court do not think, that in ascertaining the amount applicable to the education of the appellant, one of the learned professions may be taken as the standard, with as much propriety as the trade or art of a mechanic; the distinction between a profession and a trade is well understood; and they are seldom, if ever, confounded with each other in ordinary language; if the testatrix had contemplated what, in the common intercourse of society, is denominated a profession; she would scarcely have used a term which is generally received as denoting a mechanical art.

But the bequest is not confined to the expense of acquiring the trade, so as to *be enabled to exercise it in the common way; the testatrix intended such an education as would [*371 fit her relations to hold a distinguished place in that line of life in which she designed them to move. The sum allowed for the object ought to be liberal, such as would accomplish it, if the fund from which it was to be drawn would permit it. p. 377.

Appeal from the Circuit Court of the District of Columbia, and county of Alexandria.

In the circuit court, the appellant filed his bill against George W. Custis and Thomas Peter, as executors of Mrs. Martha Washington, late of Mount Vernon; claiming the payment of a sum of money due to him, under the bequests and will of the testatrix, for the expenses of his education; and also for a distributive share of the residuary estate of the deceased, in the hands of the executors, acting as trustees under the will. The facts of the case are stated at large in the opinion of the court.

The circuit court dismissed the bill for want of parties; and the case was argued in this court, by *Swann* and *Lear*, for the appellant; and by *Taylor*, for the appellees.

For the *appellant*, it was contended, that the circuit court erred in dismissing the bill, and that this court should correct the decree, and direct the payment of so much of the fund in the hands of the executors and trustees, as, by the terms of the will, was to be appropriated to the education of the appellant. The counsel for the appellant admitted, that the general rule in chancery is, that all who are interested in the decree shall be made parties to the proceedings; but the rule is not without exceptions; and it does not prevail, where parties cannot be found, and where great inconveniences would result from its application. 2 Mason 180. Neither creditors nor legatees are required to be parties, unless where one or more residuary legatees sue.

But if all the parties interested under the will should have been absolutely or constructively before the court, still it was error in the circuit court, to dismiss the bill. The proper course was for the defendants below to enter a demurrer. Practical Register 261; 16 Ves. 321, 325; 4 *Munf. 485. If this court could have dismissed the bill, because [*372 all the residuary legatees were not parties, yet, in this case, the complainant below sought to obtain a specific legacy, that sum to which he was entitled for his education; and as to this part of the bill, the dismissal was error. 2 Chan. Cas. 124; 3 Johns. Ch. 555; Finch 243.

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[1] Pritchard *v.* Hicks, 1 Paige 270; Cramer *v.* Pinckney, 3 Barb. Ch. 466. And see Payne *v.* Hook, 7 Wall. 425.

A sound construction of the will does not confine the education of those who were the objects of the bequest to preparation for a "trade." The appellant had obtained an education for the law, which he afterwards studied, and by no interpretation could it be claimed to restrict the expenses of his instruction to the acquisition of such knowledge as was necessary for a mechanic art. The words of the will are to receive a liberal construction, and to be so applied as will fully execute the generous purposes of the testatrix. "Trade" is "business," and not a "manual" or "mechanic" employment. To the profitable use of every business, knowledge is necessary; and in the United States, men are called to the highest stations from every occupation. To limit the education of the appellant only to a preparation for a mechanical employment, was contrary to those principles which should have been applied, taking into consideration the situation and relation of the testatrix, and of the appellant.

Upon general principles, the appellant is entitled to the proportion of the fund claimed by him. Although it was not expended in his education, it was nevertheless his. 5 Ves. 461; 1 Swanst. 35.[1] This court has all the facts before them, upon which a decree may be made, and it may determine what sum out of the fund ought to be appropriated for the education of the nephew of the testatrix. As it would not have been necessary to bring all the parties before the court, if a claim had been preferred, while the education of the appellant was going on, it is not essential, that this should now be done. What is a reasonable and proper sum to be paid to the appellant, depends on no other circumstances but those with which he is exclusively connected.

*373] **Taylor*, for the appellees, stated, that the executors of the testatrix had instructed him to offer to restore the bill to the circuit court, if the appellant would there make all the legatees, the residuary legatees included, parties. The executors are trustees, bound to protect the fund for all who are interested in it. If this court shall decide, that they can make a final decree, and shall do so, it will be entirely satisfactory to the appellees. The residuary legatees are interested in the whole of the funds in the hands of the executors. If the expenses of the education of the appellant, and of Bartholomew and Samuel Henley are limited according to the construction of the will assumed by the executors, that fund, for all, is increased. The rule is settled, that when an interest can be shown to be in a party not before the court, he must be brought in; unless special circumstances authorize an exception to this rule. 1 Ves. jr. 311; 8 Wheat. 451; 2 Atk. 510. Were not the Henleys interested in this proceeding? This is not a specific legacy. The fund is to raised out of the residuary estate, and thus all interested in the *residuum* ought to be parties. No legacy is specific, unless it is clearly so, and the amount of it not dependent on an account. 4 Ves. 573; 2 Madd. 8, 9. By a fair construction of the will, the residuary legatees were interested in the sum to be appropriated to the education of the appellant, and B. and S. Henley, who were to be educated for a trade, not a profession; as, if those expenses were less than the dividends on the stock, the residuary fund would be increased. It was,

[1] Lynch's Appeal, 12 W. N. C. 104.

therefore, proper, that all those thus interested should be before the circuit court.

Want of parties may be objected to at the hearing. This point came before the court of appeals of Virginia, and was so decided in the case of *Clark* v. *Long*, 4 Rand. 451. The court may dismiss the proceedings for want of parties, or order parties to be made. 1 P. Wms. 428.

Marshall, Ch. J., delivered the opinion of the court.—*This suit was brought by the plaintiff against the defendants, the acting executors of Mrs. Martha Washington, late of Mount Vernon, to obtain payment of legacies bequeathed to him in her last will. The testatrix, after several devises and bequests, devised as follows: [*374

"Item. It is my will and desire, that all the rest and residue of my estate of whatever kind and description, not herein specifically devised or bequeathed, shall be sold by the executors of this my last will, for ready money, as soon after my decease as the same can be done, and that the proceeds thereof, together with all the money in the house, and the debts due to me (the debts due from me and the legacies bequeathed being first satisfied), shall be invested by my executors in eight per cent. stock of the funds of the United States, and shall stand on the books, in the name of my executors, in their character of executors of my will; and it is my desire, that the interest thereof shall be applied to the proper education of Bartholomew Henley and Samuel Henley, the two youngest sons of my sister Henley, and also to the education of John Dandridge, son of my deceased nephew, John Dandridge, so that they may be severally fitted and accomplished in some useful trade; and to each of them who shall have lived to finish his education, or to reach the age of twenty-one years, I give and bequeath one hundred pounds, to set him up in his trade.

"Item. My debts and legacies being paid, and the education of Bartholomew Henley, Samuel Henley and John Dandridge aforesaid being completed, or they being all dead, before the completion thereof, it is my will and desire, that all my estates and interests, in whatever form existing, whether in money, funded stock, or any other species of property, shall be equally divided among all the persons hereinafter mentioned, who shall be living at the time that the interest of the funded stock shall cease to be applicable, in pursuance of my will hereinbefore expressed, to the education of my nephews, Bartholomew Henley, Samuel Henley and John Dandridge; namely, among Anna Maria Washington, daughter of my niece, and John Dandridge, son of my nephew, and all my great-grandchildren living at the time *that the interest of the said funded stock shall cease to be applicable to the education of the said B. Henley, S. Henley and John [*375 Dandridge; and the same shall cease to be so applied, when all of them shall die before they arrive to the age of twenty-one years; or those living shall have finished their education, or arrived at the age of twenty-one years; and so long as any one of the three lives, who has not finished his education or arrived to the age of twenty-one years, the division of the said *residuum* is to be deferred, and no longer."

The bill charges that the executors have not paid the several sums of money bequeathed to him by their testatrix; and prays that they may be decreed to pay the same, with interest. The process was executed on one

of the executors only. He failed to answer, and the bill as to him was taken for confessed, and the court ordered the master commissioner to ascertain the period when the complainant attained his age of twenty-one years, and what would have been a competent sum for his education, according to the true intent and meaning of the last will of Martha Washington, and make report to the court. At a subsequent term, the defendants were ordered to settle their accounts before the commissioner. The defendant, Thomas Peter, afterwards appeared, and filed his answer, in which he admits the last will of Martha Washington, deceased, and that his co-defendant and himself alone have qualified as executors thereof. He says, that they have paid the legacy of one hundred pounds, and advanced a considerable sum of money to the guardian of B. Henley, S. Henley and the complainant, to fit them for some useful trade. He also alleges, that the executors have been prevented from dividing the *residuum*, by the unreasonableness of the demand made by the complainant.

The master's report shows that the complainant attained his age of twenty-one years, on the 21st day of November 1817; that the defendants were on that day indebted to the estate for principal, the sum of $7282.30 and for interest accruing thereon and remaining in their hands, the sum of $7345.11. That they had paid the legacy of one hundred pounds, and
*376] *had advanced to the guardian of the complainant, for his education, the sum of $166.67. The cause came on to be heard in April 1827, when the bill was dismissed, for want of proper parties.

At the argument, the counsel for the defendants have insisted, that not only Bartholomew and Samuel Henley, but all the residuary legatees should have been made parties. This court is clearly of opinion, that the two Henleys who participated with the complainant in the fund applicable to their education, ought to have been parties to a suit which asks the distribution of that fund. This would be admitted, if the whole was distributable among them. But the court thinks it also proper, though a different construction should be put on the will. The fund is not so large, that the claims of each, while all were under age, might be satisfied, without taking into view the claims of the other two. In determining how much ought to have been applied to the education of the complainant, the court would find it necessary to take into consideration the amount of the fund and the relative situation of all the persons entitled to it. They ought to have been parties to a suit in which their interests were involved. The question whether the whole interest accruing on the *residuum* ought to be divided among the legatees to whose education it was applicable, or only so much thereof as was necessary for the purpose for which it was given, has been earnestly discussed at the bar. In considering this question, as in all others depending on wills, the intention of the testatrix is to be collected from the will, and from the circumstances under which it was made. In this case, the testatrix does not appear to have intended a pecuniary donation to the parties, in the particular bequest under consideration. Her intention in that respect was effected by the gifts of one hundred pounds to each, to set him up in his trade. This bequest seems to have been made, not with a view of adding to their private fortunes, but with a view to their education and
*377] preparation for that particular business which they were afterwards to pursue. They are not, therefore, entitled to the *whole fund,

whatever may be its amount, but to so much of it as is required for the object it is to accomplish.

In ascertaining the amount which is so applicable, the plaintiffs contend, that one of the learned professions may be taken as the standard, with as much propriety as the trade or art of a mechanic. The court does not think so. The distinction between a profession and a trade is well understood; and they are seldom, if ever, confounded with each other, in ordinary language. If the testatrix had contemplated what, in the common intercourse of society, is denominated a profession, she would scarcely have used a term which is generally received as denoting one of the mechanical arts.

But we do not think the bequest is confined to the expense of acquiring the trade, so as to be enabled to exercise it in the common way. Such does not appear to have been the intent of the testatrix. Her bounty is extended to the proper education of three relatives, so that they may be severally fitted and accomplished in some useful trade. Their education is a primary object, as well as their acquisition of the trade; and when we consider the situation and character of the parties, and the language of the will, we cannot doubt, that the testatrix intended such an education as would fit her relatives to hold a distinguished place in that line of life in which she designed them to move. The sum allowed for the object ought to be liberal, such as would accomplish it, if the fund from which it was to be drawn would admit of it.

In a suit for the distribution of this fund, we do not think the residuary legatees necessary parties. They have, undoubtedly, an interest in reducing the sum to be allowed out of it to the complainant, but they have the same interest in reducing every demand on the estate. Whatever remains sinks into the *residuum*, and that *residuum* is diminished as well by the claims of creditors and specific legatees as by this. In all such cases, the executors represent the residuary legatees, and guard their interests. It is a part of that duty which requires them to protect the interests of the estate. In *such suits, the residuary legatees are never made parties. To require it, would be an intolerable burden on those who have claims [*378
on an estate in the hands of executors.

We do not think that the bill ought to have been dismissed, for want of proper parties, unless the complainant refused to make such as were really necessary; and then it might have been dismissed, without prejudice. The circuit court can make no decree for the distribution of the *residuum*, unless all those entitled to distribution are brought before the court; but it may grant all other relief to which the complainant may be entitled, on making Bartholomew and Samuel Henley parties.

This court is of opinion, that the decree of the circuit court, dismissing the complainant's bill, ought to be reversed, and the cause remanded to the said circuit court, with leave to the plaintiff to make new parties; after which, the cause ought to be referred to the master, with instructions to compute the several sums which ought to be allowed out of the fund applicable to the education of Bartholomew Henley, Samuel Henley and John Dandridge, in conformity with the will of Mrs. Martha Washington, deceased; on which sums, interest ought to be allowed; and also to compute the sum to which the plaintiff may be entitled, as one of the residuary legatees of the said Martha Washington, deceased; provided the other residuary legatees be

brought before the court as parties; on failure to do which, the plaintiff's bill is to be dismissed, so far as it claims a part of the residuary estate, without prejudice.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the country of Alexandria, and was argued by counsel: On consideration whereof, this court is of opinion, that the circuit court erred in dismissing the plaintiff's bill for want of proper parties, and that the said decree ought to be reversed. Whereupon, it is ordered and decreed by this
*379] court, that the decree of the *said circuit court in this cause be and the same is hereby reversed; and this court doth further order, that the said cause be and the same is hereby remanded to the said circuit court, with directions to give leave to the plaintiff to make new parties, that the proper accounts may be taken in order to a final decree, in which decree the plaintiff ought to be allowed interest on the sum due to him for his education, out of the money applicable to that object.

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*380] *John F. Satterlee, Plaintiff in error, *v.* Elizabeth Matthewson, Defendant in error.

Constitutional law.—Legislative power.

S. and M. held land in Luzerne county, Pennsylvania, in common, under a Connecticut title; a division of the land was made between them, and S. became the tenant of M. of his part of the land thus set off in severalty, under a lease, to be terminated on a notice of one year; S. afterwards obtained a Pennsylvania title to the land leased to him by M., and on a trial in an ejectment for the land, brought by M. against S., the court of common pleas of Bradford county, Pennsylvania, held, that S., having held the land as tenant of M., could not set up a title against his landlord; upon a writ of error to the supreme court of Pennsylvania, in 1825, it was held that, "the relation between landlord and tenant could not exist between persons holding under a Connecticut title." The legislature of Pennsylvania, on the 8th of April 1826, passed an act, declaring that "the relation of landlord and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between citizens of the commonwealth." The case came again before the supreme court of Pennsylvania, and the judgment of the court of common pleas of Bradford county, in favor of M., the landlord, was affirmed; that court having decided, that the act of assembly of the 8th of April 1826, was a constitutional act, and did not impair the validity of any contract; S. brought a writ of error to this court, claiming that the act of the assembly of Pennsylvania, of the 8th of April 1826, was unconstitutional: *Held*, that the act was constitutional.[1]

Objections to the jurisdiction of this court have been frequently made, on the ground, that there was nothing apparent on the record, to raise the question whether the court from which the case had been brought, had decided upon the constitutionality of a law, so that the case was within the provisions of the 25th section of the judiciary act of 1789; this has given occasion to a critical examination of the section, which has resulted in the adoption of certain principles of construction applicable to it; one of those principles is, that if the repugnancy of a statute of a state to the constitution of the United States, was drawn into question, or if that question was applicable to the case, this court has jurisdiction of the cause; although the record should not, in terms, state a misconstruction of the constitution of the United States; or that the repugnancy of the statute of the state to any part of that constitution, was drawn into question. p. 409.

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[1] See notes to Vanhorne *v.* Dorrance, 2 Dall. 304.

Satterlee v. Matthewson.

There is nothing in the constitution of the United States which forbids the legislature of a state to exercise judicial functions.[1] p. 413.

There is no part of the constitution of the United States which applies to a state law which divested rights vested by law in an individual, provided its effect be not to impair the obligation of a contract. p. 413.

In the case of Fletcher *v.* Peck, 6 Cranch 87, it was stated by the chief justice, that it might well be doubted, whether the nature of society and of government do not prescribe some limits to the legislative power; and he asks, "if any be prescribed, where are they to be found, if the property of an individual, *fairly and honestly acquired, may be seized, without compensation?" It is nowhere intimated in that opinion, that a state statute which divests a vested right, is repugnant to the constitution of the United States.[2] p. 413. [*381

Satterlee *v.* Matthewson, 16 S. & R. 169, affirmed.

THIS case came before the court on a Writ of Error to the Supreme Court of the state of Pennsylvania.

In 1784 or 1785, Elisha Satterlee, the father of the plaintiff in error, and Elisha Matthewson, the husband of the defendant in error (the defendant in error being the sister of Elisha Satterlee), went to a large body of land in Luzerne county, Pennsylvania, part of which was the land in controversy, and both took possession of the same, under, as is believed, a supposed title from the Susquehanna Company. They worked on the lands, in partnership, the same lying on both sides of the Susquehanna river, until 1790, when it was agreed, that Matthewson, who had a house on the west side of the river, should occupy the land before held in common, on that side, and become the tenant of Satterlee for his portion of the land on the said west side of the river; and Elisha Satterlee moved on the lands on the east side, on precisely the same terms: that is, that he should become the tenant of Matthewson for his portion of the land on the said east side of the river. By this arrangement, each became possessed, in severalty, of the particular portion of the lands thus allotted to him, and the tenant to the other, of portions of the land before held in common; and it was expressly agreed, that either of the parties might put an end to the tenancy, at the end of any one year; and in that case, each was to be put into possession of his own lands.

In 1805, Elisha Matthewson died, having bequeathed, by his will, to his widow, during life, and to his children, after her death, the interest he had in the said land. Elisha Satterlee, repeatedly, after Matthewson's death, acknowledged the original bargain, and that he was a tenant of Matthewson's part; but he wished to buy it; he wished to give other lands for it, &c.; but his sister could only sell for life, and her children were minors. In 1810, she built a house on part of the tract, and put a tenant in it; but her brother would not give her possession of the part he had in cultivation. In 1811, she made application to the land-office of *Pennsylvania, and on the 7th of January 1812, took out a warrant, in her name, in trust for her children, and had the land surveyed, and obtained a patent for it from the commonwealth of Pennsylvania. She stated in her application, an improvement made by her husband in 1785; and paid interest to the state [*382

[1] Livingston *v.* Moore, 7 Pet. 469, 658. But this cannot be done, under the constitution of Pennsylvania. De Chastellux *v.* Fairchild, 15 Penn. St. 18; Baggs's Appeal, 43 Id. 512.

[2] See Watson *v.* Mercer, 8 Pet. 88; Charles River Bridge *v.* Warren Bridge, 11 Id. 420; Florentine *v.* Barton, 2 Wall. 210; Raverty *v.* Fridge, 3 McLean 230; Milne *v.* Huber, Id. 212.

on the purchase-moneys, from the date of the improvement. After his sister's warrant, survey and return, Elisha Satterlee purchased a Pennsylvania title, commencing in 1769, and consummated by a patent from the commonwealth, in 1781, which he alleged covered the land in question; but he directed the deed to be made to his son, J. F. Satterlee, the plaintiff in error; and in 1813, an ejectment was instituted in the name of the son, against the father, in pursuance of a plan of the father's, to release him from the situation of tenant to his sister. By a law of Pennsylvania, then in existence, but since repealed, a rule of reference might be entered the same day the writ was taken out, and by diligence, a plaintiff might obtain a report of arbitrators, which had the effect of a judgment, before the return-day of the writ. This proceeding was, by means of the father's waiving all objections as to time and notice, so carried on, as that the son not only had judgment, but a writ of possession, before the return of the writ. J. F. Satterlee then gave to his father a lease for life, of the land, for the consideration of one dollar. Elizabeth Matthewson instituted an ejectment; J. F. Satterlee, in 1817, procured himself to be entered co-defendant in the suit, and his father being dead, was now sole defendant.

On the trial of the cause, the defendant made title under an application of John Stoner, of 3d of April 1769. Stoner conveyed to Mr. Slough, who, in 1780, conveyed to Joseph Wharton. A patent issued to Wharton, in 1781, and he, in April 1812, conveyed to the defendant. The judge of the court of common pleas of Bradford county instructed the jury, that if they found the ejectment brought by the son of J. F. Satterlee, in whose name the conveyance was taken, was actually instituted by the father, though in his son's name, as agent for himself, and that the suit was all a trick, and so *conducted, on purpose to prevent his sister from interfering or being heard, he was still her tenant, as much as if no such proceeding had taken place. But if the son was the real purchaser, and the suit was instituted and conducted *bonâ fide*, and the lease to the father, during life, for a dollar a year, was *bona fide*, that then, E. Satterlee having been evicted by due course of law, might take a lease from him who recovered; and in that case, the relation of landlord and tenant between him and his sister was at an end, and the cause must be decided upon the respective titles of the parties. But if they found him still a tenant, he could not set up against his landlord an adverse title, purchased during his life. But he must restore his possession to his landlord, and might then institute a suit on the title he had purchased; and if it was the best, recover from his former landlord. The verdict and judgment were for Mrs. Matthewson. The case was removed by writ of error to the supreme court of Pennsylvania. On the argument of this cause before the supreme court, it was decided, "that the relation between landlord and tenant could not exist between persons holding under a Connecticut title." And that court, in 1825, reversed the judgment of the common pleas, and awarded a *venire facias in novo*.

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Immediately after this decision, on the 8th of April 1826, the legislature of Pennsylvania passed an act, by which it was enacted, "that the relation of landlord and tenant should exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between other citizens of the commonwealth." The ejectment depending in the court of common pleas of Bradford county, between the plaintiff in error and the

defendant, again came on for trial, after the law of April 8th, 1826, on the 10th May 1826; and the judge gave in charge to the jury as follows, after stating the above-recited act of assembly, to wit: "It is a general principle of law, founded on wise policy, that the tenant shall not controvert the title of his landlord, and prevent the recovery of his possession, by showing that the title of the landlord is defective. Among *the exceptions to this general rule, the supreme court of Pennsylvania have decided, that [*384 when the landlord claimed (as the plaintiff claimed on the former trial of this cause) under a Connecticut title, the case should form one of the excepted cases. The legislature have thought proper to enact the above-cited law, and by it we are bound. And if the plaintiff in all other respects should be found entitled to a recovery, the mere claiming through a Connecticut title, would not now deprive her of her right to a recovery." A verdict and judgment were obtained in favor of the defendant in error, Elizabeth Matthewson. To the charge of the judge, which was inserted at large and sent up with the record, the defendant excepted, and the judge signed and sealed a bill of exceptions.

A writ of error was taken by the defendant to the supreme court of Pennsylvania, and the following were among the errors assigned, to wit: The court erred in charging, 1. That by the laws of Pennsylvania, the plaintiff's testator could lease the land, and that the rights of landlord do extend to him; he having claimed under a Connecticut title. 2. That the act of the 8th of April 1826, gives a right of recovery, and does away the force of the law, as declared by the supreme court in this case. On the first of July 1827, the supreme court, after argument, affirmed the judgment of the court of common pleas. And on the 6th of July 1827, a petition and prayer for reversal was filed by John F. Satterlee, the plaintiff in error, who survived Elisha Satterlee; on the ground, that the said court had decided the said act of assembly to be constitutional and valid, though he had insisted, that he ought not to be affected and barred of recovery by the said act, for that the said act was not valid, and was repugnant to to the constitution of the United States.

The cause was argued by *Eli K. Price* and *Sergeant*, for the plaintiff; and by *Sutherland* and *Peters*, for the defendant.

**Price*, for the plaintiff, contended:—There was enough apparent on the record to sustain the appellate jurisdiction of this court. If, [*385 in fact, the act drawn in question is unconstitutional, there is sufficient on the record to give jurisdiction, because it appears, that the judge who tried the cause instructed the jury, that the act was binding on them as the law; in accordance with the judge's instruction was the verdict of the jury, on which judgment was rendered, and that judgment was affirmed in the supreme court of Pennsylvania, to which this writ of error was taken. This is, therefore, a case to which the clause of the constitution of the United States is applicable, and which was disregarded; which is all that need appear to sustain the appellate jurisdiction of this court. *Martin* v. *Hunter*, 1 Wheat. 304; *Inglee* v. *Coolidge*, 2 Ibid. 363; *Lanusse* v. *Barker*, 3 Ibid. 147; *Miller* v. *Nicholls*, 4 Ibid. 311; *Williams* v. *Norris*, 12 Ibid. 124; *Hickie* v. *Starke*, 1 Pet. 94.

Is the act unconstitutional, so far as it affects rights existing at the time of its enactment? Of the prospective operation of the act, we have nothing to say, our complaint being of the divestiture of vested rights. These were the rights of Satterlee to the possession of his estate, derived from the commonwealth, and to take the rents and profits, without liability to pay the latter, or surrender the former, to any landlord who, as such, held a Connecticut title. This was the settled law of the land, by the decision in this very case, when first before the supreme court of Pennsylvania. 13 Serg. & R. 133. This decision was evidence of what the law of Pennsylvania had always been. At no time, therefore, did the relation of landlord and tenant exist between these parties. The claimant under the Connecticut title had no rights, and therefore, was not entitled to the aid of the liberal principle, that a tenant shall not dispute the possession with his landlord, though he may hold the better title. The decree of Trenton, in 1782, had settled the right of the disputed soil in the northern border of Pennsylvania, in favor of that state. *The policy thereafter pursued by
*386] that state was utterly to exterminate the Connecticut claims within her borders, at the same time, that she made great sacrifices to furnish the Connecticut settlers with Pennsylvania titles, by expending her treasures to purchase releases from the holders of them. Among the penal acts to destroy the Connecticut claims were the acts of 1795 and 1802; making it highly penal and criminal to intrude under, or convey, a Connecticut title. 3 Sm. Laws 209, 525. A more extended history of this unhappy and often bloody controversy may be found in 2 Dall. 304; 6 Binn. 467; Ibid. 57; 4 S. & R. 281; and 1 Binn. 110. In the last case, it was decided, that a vendor of a Connecticut title could not recover from the vendee the purchase-money, because the contract being in violation of the law, the plaintiff had no rights in a court of justice. On the same salutary principle, was this case first decided. But with the justice and sound legal principle of this decision, which are most apparent, we have nothing to do. It is enough, that by it the law was settled, and a rule of property established. That it did establish a rule of property, is most evident; but it has also been expressly decided by the supreme court of Pennsylvania. 1 S. & R. 521. Under this rule of property, was Satterlee protected in the possession and enjoyment of his estate. By this act, if this judgment is affirmed, will he be dispossessed of his property, made liable to pay the rents and profits to another, and by the conversion of his possession into the possession of the landlord, for ever precluded from regaining his estate.

Does not this act, then, impair the obligation of a contract? The contract is the grant of a title from the state to Satterlee. Such a grant is a contract within the meaning of the constitution of the United States. *Fletcher* v. *Peck*, 6 Cranch 87; *Darmouth College Case*, 4 Wheat. 518, 656, 682; *Green* v. *Biddle*, 8 Ibid. 1. The obligation of a contract is "the law which binds the parties to perform their undertaking." 4 Wheat. 197. The undertaking of the state of Pennsylvania, by her grant, to which the law bound her, was
*387] that Satterlee should have and hold the *premises granted, to take and enjoy the rents and profits thereof, without liability to surrender the possession or pay the profits to any Connecticut claimant, through the relation of landlord and tenant. By the loss of the possession, Satterlee has been unconstitutionally divested of rights, though the right of possession

might remain in him. The possession gives the enjoyment of the rents and profits, which are equivalent to the land itself, and by those terms, a title to the land will pass. Possession is itself a title against everybody who does not exhibit a better title. It gives a home, which may be invaluable to the owner, from the attachments created by long residence, or from its being the place of nativity, or the patrimony derived from a line of revered ancestors. He who is in possession may forcibly defend that possession, nay, slay the invader of his habitation, without a breach of the peace or the commission of a crime; while he who is out of possession cannot forcibly take possession, and if he does, though he may have the right, will be dispossessed by the statute against forcible entry and detainer.

With the title of the commonwealth in his pocket, Satterlee has, by this act, been denied the right of defending his possession by it. He has been obliged to confess his possession to be the possession of an alien claimant, whose it never was, and never could have been, by any judicial decision that was not suicidal to the state sovereignty. He has been bound in fealty to a landlord, to whom, if, according to the ancient custom, he had taken the oath of homage, it would have been an abjuration of his allegiance to the state; for that landlord claims, in breach of his allegiance, the title of a foreign state. Yet, by this act, the strong arm of the state is to be exerted to dispossess her grantee, and to deliver it over to the favored alien claimant, who had asserted a title in criminal violation of her laws. And to consummate the injustice, so far as the most absolute power could do it, her courts of justice are for ever to be closed against a claim on her violated and useless patent. If an individual had thus attempted to re-assume the rights he had granted, he would be met by the doctrine of estoppel. For states who have *the power to execute their arbitrary will, there is no estoppel, but that which is to be found in the paramount law of [*388 the constitution, firmly enforced by an independent judiciary. If this act had given Satterlee's estate to a claimant on a title perfectly void, it could not have committed a more flagrant violation of justice and of the constitution; for this title was not only void, but could not have been otherwise than criminally asserted. It was an attempt by the legislature to encroach upon the judicial power; was passed at the next session, in terms precisely the reverse of the decision of the court, and applied to pending suits, when probably no suit but this was pending to which it was applicable.

If the legislature can thus, by a retrospective act, divest a citizen of his estate, there is no safety for our boasted rights and liberties. It is as impossible to make laws to operate upon the past, without the usurpation of despotic power, as it is to recall the past. Law is a rule of action; but a law which did not exist when an action was performed, could not have been a rule for that action. To make a rule for it, after the action is performed, is to substitute the will of the legislature for a rule, which is despotism itself; for what that will may be, no man can foresee, and it is the same whether it proceeds from an American legislator or an Eastern despot. The court cannot be unmindful, that legislative bodies sometimes act under the impulse of strong and and sudden excitement; sometimes, inadvertently; that sometimes, the good intentions of the many may be misled by the management and intriguing talent of the few; and a case has been referred to which shows that they are not always inaccessible to corrupt influences.

This court would not suffer counsel to argue a question so plain as that a legislature could not declare what a law was. *Ogden* v. *Blackledge*, 2 Cranch 276. This act changes the acknowledged law for the past. It has decided, that state bankrupt laws are unconstitutional in respect to contracts made previous to their passage (*Sturges* v. *Crowninshield*, 4 Wheat. 122); *389] though constitutional in *respect to contracts made after their enactment. *Ogden* v. *Saunders*, 12 Ibid. 261. Retrospective laws are invalid at common law. 7 Johns. 477; 2 Ibid. 263; 13 Serg. & Rawle 353. Nor can property be taken away, not even for public use, without compensation. 2 Dall. 304; 2 Johns. 263; 2 Johns. Ch. 162; 8 Johns. 388. The principle being the same at common law and under the constitution, they are applicable to this case.

The recovery in ejectment is conclusive evidence of the plaintiff's right to recover in an action for the mesne profits. 2 Johns. 371; 2 Dall. 156; 2 Burr. 665. If this judgment is affirmed, Satterlee will lose the rents and profits which he would have held as his own, but for the effect of the act in question. In *Green* v. *Biddle*, this court decided laws of Kentucky to be unconstitutional, which deprived the owner of a right to recover any part of the profits, on a recovery of his land.

The act having brought Satterlee within the operation of the statute of limitations, if he be dispossessed by the affirmance of this judgment, it has totally deprived him of all remedy. By the loss of all remedy, all right is gone. For every right, it is a maxim, that there is a legal remedy for its violation. The converse of this must, therefore, be true, and if there be no remedy, there is no right. If this court has not decided that the destruction of all remedy by a state law, is an unconstitutional act, the several judges have at least expressed such an opinion. Ch. J. Marshall, 4 Wheat. 207; Justice Washington, 12 Ibid. 261, 267; Justice Johnson, Ibid. 286; Justice Thompson, Ibid. 295, 301; Justice Trimble, Ibid. 327; Justice Story, 8 Wheat. 12. And state decisions, 5 Hall's Law Journ. 520; 8 Mass. 423, 430; 12 Serg. & Rawle 358.

Sutherland, for the defendant:—The question submitted in the present case was one of great interest; not only to the defendant, but also to the free exercise of the legislative powers of the state of Pennsylvania. The *390] question arose out of the act of the assembly of *the state, entitled "an act relating to Connecticut settlers," passed the 8th day of April 1826. On the case as presented by the plaintiffs, the act is alleged to have been passed on the 28th, whereas, it was in fact enacted into a law on the 8th of April 1826. It is, therefore, respectfully submitted to the court, as a preliminary point, whether they will not dismiss the writ of error, for want of certainty in the date of the act; as we contend, that under the decisions already made in this court, it should distinctly, and not by reference, appear, that a statute of a state was drawn in question, upon the ground of its being repugnant to the constitution of the United States, and that its decision was in favor of its validity.

But if the court should decide that the record presents a case, so as clearly to bring the question before the court, then it is respectfully contended: 1. That the decision of the supreme court of Pennsylvania, 13 Serg. & Rawle 133, was contrary to law. 2. That the act of the legislature

of Pennsylvania, passed March 8th, 1826, was an explanatory act, and therefore, constitutional. 3. That the judgment of the supreme court of Pennsylvania, which the plaintiff in error seeks to reverse, did not impair, but affirmed the obligation of a valid contract, and was not against the constitution of the United States. 4. The judgment of the supreme court of Pennsylvania, in the case now submitted to this court for revision, was not made under the authority of the act of assembly of the 8th of April 1826, but upon the known and established law of the state.

It is contended, that the first decision of the supreme court of Pennsylvania was erroneous. It appears, from looking back into the early history of Pennsylvania, that a number of persons emigrated from the state of Connecticut, and settled in some of the northern counties of Pennsylvania. They alleged, that the charter of Connecticut, being of an older date, and covering the soil in question, they were legally entitled to settle on the lands in question. Out of this dispute, originated the celebrated Wyoming controversy, that produced the decree of Trenton, which went in favor of the jurisdiction of the state of Pennsylvania. A number *of laws were [*391
passed by the legislature of Pennsylvania, relative to the Connecticut settlers. The most important were, what was denominated the "intrusion act," and the act suspending the operation of the statute of limitation in that region of country. The act to prevent intrusions was highly penal. The first section provided, that if any person should take possession of, enter, intrude or settle on any lands within the counties of Northampton, Northumberland or Luzerne, by virtue, or under color of any conveyance of half-share right, or any other pretended title, not derived under Pennsylvania; he should, on conviction, &c., forfeit and pay $200, &c., and be subject to imprisonment not exceeding twelve months. The second section declared, that every person who should combine, or conspire, for the purpose of conveying, possessing or settling any lands within the limits aforesaid, under any half-share right, or any pretended title aforesaid, or for the laying out townships by persons not appointed or acknowledged by the laws of Pennsylvania, and accessories thereto; should forfeit and pay not less than $400 and not more than $1000, &c.; and be subject to imprisonment at hard labor, not exceeding eighteen months. The eighth section enacted, that on trials of indictments for such intrusion, proof that the person indicted, entered into, intruded, settled on, or was in possession of the land, before the time of finding the indictment, should be sufficient to convict thereof; unless defendant should prove that he or she entered upon, took possession of, and settled on such land, before the passing of the original act of 11th April 1795.

When the case of *Satterlee* v. *Matthewson*, 13 Serg. & Rawle 133, came up before the supreme court of Pennsylvania, the impression, as is evident from the report of the case, upon the minds of the judges of the court, was, that the intrusion act was in full operation. For it nowhere appears, either in the argument of counsel, or the opinion of the judges, that anything had been said about its repeal. The act however had been repealed. This opinion was, no doubt, based upon the case of *Mitchell* v. *Smith*, 1 Binn. 100. The plaintiff there sold the defendant a tract of land, lying in *the [*392
county of Luzerne, and held by him under a deed from a committee of the Susquehanna Company, under the Connecticut title, and not derived

from the authority of this commonwealth, or the late proprietaries of Pennsylvania, and gave his note for $483.33, payable in three years. The suit was on the note. The principal question, says the court in that case, is, whether this be a legal or illegal consideration for the bill, and whether the contract for the sale and purchase of this land is a violation of the laws of this commonwealth, so tainting the whole transaction, as that this court cannot legally afford their aid to carry the contract into execution. The court say, the mischief intended to be remedied by the act of the 11th of April 1795 (the intrusion act), was of a grievous nature. A warfare had been carried on between the claimants of land under Connecticut, and the claimants under Pennsylvania, for many years, and many lives were lost in the contest; the court then go on to state, that the decree of Trenton being in favor of Pennsylvania, "the intrusion act" was passed to enforce the rights of that state, and finally decide, that the action for the note could not be sustained.

But the intrusion act having been repealed, the case of *Mitchell* v. *Smith*, is now no authority; and independant of the repeal of the intrusion act, the decision of the court in 13 Serg. & Rawle 133 was erroneous, because the penalties of that law were never extended to apply to a case like Matthewson's. The eighth section, by special provision, excludes Matthewson from the operation of it. "No person is to be liable to the severities of the law, who could prove that he entered upon and took possession of, or settled on, such lands, before the passing of the act of the 11th of April 1795." Matthewson took possession as far back as 1784 or 1785, ten or eleven years before the existence of the intrusion act.

In the course of a short time after the repeal of the intrusion act, the law suspending the operation of the statute of limitations, in this section of the commonwealth, was also repealed. This was the last and only act remaining upon the statute book, to the prejudice of the Connecticut settlers. So that, *393] if Matthewson had not even settled upon these lands, and *leased them to Satterlee, long prior to these enactments, framed for the purpose of preventing any more intrusion from the settlers of New England; yet, their total and unqualified repeal, afterwards, would have been sufficient to entitle him to the benefits of all the laws to which other persons settling in Pennsylvania were entitled. Under this view of the facts connected with this case, we have but one mode left for accounting for the decision of the supreme court of Pennsylvania, and that is the one heretofore adverted to; by supposing that the repeal of "the intrusion act," as well as "the act suspending the operation of the limitation act," had not reached them. Certainly, their repeal is not to be collected either from the argument or opinion of the court, in the case of *Satterlee* v. *Matthewson*, 13 Serg. & Rawle 133.

It being, therefore, evidently, an oversight on the part of the court, we contend, that the act of the 8th of April 1826, became necessary to effectuate justice between the parties, and to declare what was really the law, at the time the erroneous decision of the court was pronounced. We, therefore, maintain the position, that the act of the 8th of April is constitutional. Indeed, it is nothing more than a declaratory or explanatory act. It was but a re-enactment of what was understood in that part of the state to have been the law, from the year 1785 down to 1813, and certainly ever since the repeal of the acts of restriction. Surely, an undisturbed practice for twenty-eight or thirty years, during which period no tenant in the situation of Sat-

terlee had brought a case of the kind into a court of law, ought alone to settle this question in favor of Matthewson; and to have satisfied the supreme court of Pennsylvania, that the title of the landlord, obtained prior to the intrusion act, could not be contested by his tenant.

But Satterlee became the tenant of Matthewson, prior to the act of intrusion; and when the law was passed, exempting Matthewson from the effects of the intrusion act, Satterlee was his tenant. By referring to the act of the 8th of April, it will be found, that its provisions are to apply to the "trial of any cause, *then pending, or hereafter to be brought;" and it is alleged, that its application to a cause in court, proves it to [*394 be unconstitutional; and that it wears none of the features of an explanatory act. It is not necessary to call an act, in its title, an explanatory act, to make it so. If, in its design and effects, it be explanatory, that is sufficient. If the law of the 8th of April had not applied to the cause in court, it would not have remedied the evil. This was the only cause of the kind that had ever been decided, and the legislature being satisfied that the court had misapprehended the meaning of the law, passed this act by way of explanation.

Again, it has been suggested, that this act violates the obligation of a contract, and affects vested rights; because it "does away the force of the law, as decided by the supreme court in this case." In 16 Serg. & Rawle 169, our present case, the court say, that the case of *Overton* v. *Tracey*, reported in 14 Serg. & Rawle 311, virtually overrules the decision in 13 Ibid. 133, of *Satterlee* v. *Matthewson*, which decides that a tenant may resist the title of his Connecticut landlord. So far, therefore, as the judgment of the supreme court has decided the law, it is in our favor. For it appears, that in the very next volume of reports, a case is decided, virtually revoking the former decision. They had no vested rights, under the first judgment of the court, as it was an erroneous one. This question would have never reached this court, nor would we have heard of the infringement of vested rights, if the supreme court had not given an incorrect opinion in the first instance.

But let us look at the law, as it stood between Satterlee and Matthewson. Matthewson leased the property in question to Satterlee. It was also agreed, that either of the parties might put an end to the tenancy, at the end of one year. All this took place, when there was no act in existence against Connecticut settlers in Pennsylvania; on the contrary, many of the New England men had gallantly defended the northern borders of the state, where this land is located, from Indian barbarities, and many of them lost their lives there. *Under such circumstances, no one could imagine [*395 that the men, who thus exposed their all in defence of their settlements, could be driven from them afterwards, by honest or upright legislation. Hence, we find the assembly of Pennsylvania, in 1784, passed an act for restoring possession from which the Connecticut settlers had been removed. 7 Sm. Laws 531. And when they enacted the law to prevent intrusion from new emigrants, they cautiously, and with a just regard for good faith, declare, that their enactments shall not apply to those who resided there before the passage of the law. Both Matthewson and Satterlee had been there from ten to twelve years before the act adverted to had been passed. By excluding the prior settlers and defenders of the state

from the operation of the intrusion act, they virtually passed a law preventing them from disturbance in their possession. And as such, they were entitled to all the benefits of the law of the state. During this time of peace and quiet, the lease was made; and all the inhabitants of Pennsylvania were subject to the same laws. At that time, the tenant could not resist the title of his landlord. He was bound to deliver up possession, if he claimed through or by an outstanding title. We hesitate, therefore, not to say, that the act of the legislature of the 8th of April 1826, violated no contract; but on the contrary, it prevented injustice, by sustaining a contract, made upon the purest principles of good faith.

Peters, for the defendant, contended, that there was nothing in the record to show upon what principles the supreme court of Pennsylvania decided the case, or what in fact was the decision of the court. The facts of the case may be found on the papers which come up with the record, but there is no certificate by the clerk, that the same are part of the proceedings of the cause. The certificate signed by the clerk affirms nothing more than the docket-entries; and to all the papers in the case the clerk's certificate has no application. If, by the law of Pennsylvania, a judge who tries a
*396] cause *is bound to file his opinion, and the same, when filed, becomes a part of the record; the law enjoins this duty only when the judge is so required; and there does not appear to have been any request in this case. 5 Sm. Laws 197. Neither does the record show, that the paper, which purports to the opinion of the court, was filed by the judge. Its language would authorize the assertion, that it had been drawn up by another. Nor do the exceptions to the charge of the court of common pleas, which were presented before the supreme court, exhibit the particular matters which are presented to this court as ground of error in the court of Pennsylvania; and if this court are to consider these exceptions as bringing up the whole charge of the judge of the court of common pleas, they will have to decide upon the relevancy of all the matter in the charge, and to review the same; some of which this court are not judicially competent to examine. Thus, therefore, as the charge of the court is not legally upon the record, and there is no exception which is sustained by the actual or certified record, nothing is before the court in the form of assigned errors, upon which they can form an opinion. Again, unless in the form of instructions to the jury, the opinion or charge of the court can in no case constitute a part of the record. In *Williams* v. *Norris*, 12 Wheat. 117, this point was explicitly decided, as has been stated. The law of Tennessee, like that of Pennsylvania, requires the judges to file their opinions in writing, among the papers of the cause.

We do not deny the right of this court to decide upon the constitutionality of a law of a state, where the question is fairly and regularly presented for determination, according to the provisions of the act of congress, and the settled rules of this court; nor that an act of a state is unconstitutional, if it impairs the obligation of a contract; nor that the grant of titles to lands by a state, is a contract, within the meaning of the constitutional provision. All the principles claimed by the counsel for the plaintiff in error
*397] upon these points, are, therefore, entirely conceded.

But admitting all these principles, it is submitted, that *this

is not such a case as comes within them, or as this court can judicially notice. To constitute such a case, it must appear from the record, that the constitutionality of the law of the state has been drawn in question, and that the decision of the court was in favor of its validity. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 323, 352. The judgment of the state court, to be reviewed in this court, must not only appear to have been on the validity of the legislative act; but it must also appear, that the judgment of the court was upon no other point. If, on the record, it appears, that the court of the state may have decided upon the rights of the parties before them, without deciding upon the constitutional question, and it is not expressly shown, that the judgment was upon the constitutionality of the law alone, this court will not take jurisdiction. This is in precise harmony with all the principles which have governed this court, and the course of its proceedings. It always respects the decisions of state courts upon the laws of the state, and reluctantly interferes with them.

This record presents a case in which the judgment of the court may have been upon a question in which the constitutionality of the law of Pennsylvania, of the 8th April 1826, was not involved. Two exceptions were made to the charge of the court of Bradford county, before the supreme court. 1. That, by the law of Pennsylvania, the plaintiff's testator could lease the land, and that the rights of landlord extended to him. 2. That the act of the 8th of April 1826, gives a right of recovery, and does away the force of the law, as declared by the supreme court.

Under the first proposition, the inquiry was, what was the law of Pennsylvania in relation to these parties? They were landlord and tenant, and unless there was a special law exempting them from the obligations of this relation, all the rights of landlord did apply to the defendant in ejectment. The supreme court of Pennsylvania had said, in 1825, that this law did not apply. This was the question for the *determination of the supreme court, in the present case, and they decided, that the former decision [*398 of the same court was erroneous. Had they not a right to overrule the former decision of the court? This will not be denied. That this was the fact, and htat the court so overruled the former decision, is manifest from the opinion of the court. Thus, it is manifest, that the opinion of the supreme court, in the case before this court, was, that by the laws of Pennsylvania, the plaintiff's testator could lease the land, and that the rights of landlord did extend to him. Upon this principle, the judgment of the court could have been, and was, in favor of the defendant in error, without touching the question of the validity of the law of the 8th of April 1826. And this decision was in conformity with all the principles which had governed the legislature of Pennsylvania, in relation to the Connecticut claimants.

At no period, did the legislature deny to those claimants the benefits of all the principles of law, except when the preservation of her own rights, and the performance of her own contracts, made it absolutely necessary; and the moment that necessity ceased, she released her restrictions, and at length entirely removed them. The Connecticut settlers had always been indulgently considered by the legislature, until after the decision of the case of *Vanhorne's Lessee* v. *Dorrance*, in 1795, 2 Dall. 304. The decree of Trenton, in 1783, had settled the jurisdiction over the land to be in Pennsylvania; but until 1795, it was not judicially settled, that the right of soil

was in Pennsylvania, and that the Connecticut grants were void. After the decree of Trenton, violent measures were resorted to by the Pennsylvania claimants, to oust the Connecticut settlers. In 1784, the legislature of the state passed an act to stay and prevent these proceedings. It was at this period, that Matthewson settled on the land, under a Connecticut title, but never asserting it under a Pensylvania title. In 1784, an act was passed offering general amnesty to all those who, as Connecticut claimants, had violated
*399] the peace of the state. In 1787, *an act was passed confirming certain Connecticut claims, which act was suspended in 1788, and repealed in 1790. The title of Pennsylvania to the soil being fully established by the decision of the court, in 1795, *Vanhorne* v. *Dorrance*, the state of Pennsylvania then passed the intrusion act, referred to by the plaintiff's counsel. This law was not retrospective. It applied only to settlers after its date. It continued in force until January 1814, when it was repealed. 6 Sm. Laws 122. In 1813, the legislature repealed the law which had suspended the operation of the act of limitations (6 Sm. Laws 61) ; and thus, those who came in under Connecticut claims were restored to all the rights of citizens of the state, and to the enjoyment of all the laws of the state. Well, therefore, might the court in this case reprobate the decision before given, which was against all the spirit of legislation so emphatically declared by the state ; and say that it was not law. That court, in the following term, June 1826, had, therefore, overruled their former decision. *Overton* v. *Tracey*, 14 Serg. & Rawle 311. In that case, it was held, that an improvement made under a Connecticut title was an object of purchase, and they affirmed the obligation of the mortgagor, who had made the purchase. These views show conclusively that the court thought the supreme court, in 1825, was mistaken ; and that the law was not as they declared it. Until the decision of the supreme court of Pennsylvania is overruled, it will be respected by this court. This is conclusive to the case.

2. The counsel for the plaintiff in error say, that the supreme court of Pennsylvania have violated the constitution of the United States, because they have decided that the act of the 8th of April 1826, gives a right of recovery, and does away the force of the law, as declared by the supreme court. It is nowhere found on the record, that the court have said so. All that the record contains is, that five errors in the charge of the court of
*400] Bradford county were assigned, and *that the court gave judgment for the defendant in that court, he being the plaintiff below. The language of the exception is such as deserves notice. The court are said to have declared, that the act of assembly does away the force of the law, as declared by the supreme court ; not that the act of assembly does away the law of the land. This is saying, that the act of 1826 was, as in truth it was, a declaratory act. There can be no doubt of the right of a legislature to pass a declaratory act. A reference to the opinion of the court will show that this was their decision.

The act of 1826 is said to be unconstitutional, because it impaired a contract ; but what is the contract which the counsel assert to be impaired? The right which settlers had to the possession of the land, under the title obtained in 1812, by purchase from Wharton, is said to be affected, and the contract under the patent for the state is said to be impaired. Look at the situation of the parties. They both settled in 1784 or 1785, under Con-

necticut titles. If neither could acquire any legal possession under that title, they stood in the same situation, up to the 10th of January 1812, when Elizabeth Matthewson took out a warrant for the land, and obtained a patent on the 19th of February 1813. If the warrant and survey under the state of Pennsylvania, carries with it a contract for possession, E. Matthewson was to have the benefit of that contract; and the possession of Satterlee being an illegal one, she must be deemed to be in possession. After this, or after the warrant to Matthewson, Satterlee bought of Wharton a title, derived from the commonwealth by patent, in 1781, and which had lain dorman tfrom that time, thirty-one years. He now says, that the law of Pennsylvania, of the 8th of April 1826, has divested him of his possession. This possession was not a possession which was lawful.

The possession upon which the act of assembly operated, was one which the party could not avail himself of, in a court of Pennsylvania; the act of assembly, therefore, in giving *to the heirs of Matthewson, the rights of landlord, impaired no part of the contract of the state under Wharton's patent. It only took away a disability, if any existed, as between two persons who held under the Connecticut possession. That act left all the rights derived under Wharton's patent unimpaired. Ejectment might have been brought, and may now be brought. And unless the act of 1813 is retrospective, which it cannot be, there is no possession to bar a recovery. [*401

This view puts the case out of all the perils it would stand in, if the law interfered with the rights of Satterlee under the state. It is earnestly presented to the consideration of the court, that the act of assembly which is said to be unconstitutional, by impairing a contract, has no such operation. It leaves the contract of the state, under the patent of Wharton, untouched, and the plaintiff in error to the assertion of all his rights derived under it. It does no more than declare that the contract between the plaintiff and defendant, as landlord and tenant, shall operate upon them, and thus it affirms, instead of impairing the obligation of a contract.

From these views it is claimed: 1. That the record does not exhibit a case for the consideration of this court. 2. The decision of the court of Pennsylvania was upon the general law of the land, and not on the act of assembly. 3. The act of the 8th of April 1826, was a constitutional law, and did not impair, but affirmed, a contract, which was lawful, and has been since declared to have been so, by the highest judicial authority of the state.

Sergeant, in reply.—1. As to the jurisdiction of the court to entertain a writ of error in this case, under the 25th section of the judiciary act. It appears, that in the court of common pleas, the act of the 8th of April 1826, was relied upon by the plaintiff below. The court charged the jury, that it was a binding act. To this charge, the defendant excepted, and the judge signed and sealed the bill of exceptions. Was this error? *If it was, the court above, by affirming the judgment, adopted the error, and affirmed the constitutionality of the law. That it was material to the decision, cannot be doubted, but the proof of its materiality does not lie upon the plaintiff. The rule upon this subject is laid down with great precision in *Etting* v. *Bank of the United States*, 11 Wheat. 59: "But if he (the judge) proceed to state the law (though not bound to do it), and state it [*402

erroneously, his opinion ought to be revised, and if it can have had any influence on the jury, their verdict ought to be set aside." It is necessary, therefore, for those who allege that an erroneous opinion of a judge, in his charge to a jury, is not examinable on error, to show that it could not have had any influence on the jury. But it is manifest, that the opinion expressed in the court of common pleas, that the act of assembly was a binding act, had a decisive influence on the issue of the cause; it cut off all defence, by making the defendant, tenant of the plaintiff. It was so considered by court and counsel; and it was the very ground of reversal of the previous judgment. 13 Serg. & Rawle 133. The exceptionable opinion, thus expressed, sufficiently appears. It was filed of record, which, in Pennsylvania, is sufficient to subject it to revision in the superior court. *Downing* v. *Baldwin*, 1 Serg. & Rawle 298. It is set out, too, in a bill of exceptions, signed and sealed by the judge. The supreme court, therefore, could not avoid passing upon it. They did pass upon it; and thus it became a final decision of the "highest court" in the state, to which a writ of error lies from this court.

Does it sufficiently appear, that the constitution of the United States came in question? This is the only remaining inquiry, under this head, and it is settled by decisions heretofore made. It is not necessary, to found the jurisdiction, that it should appear, that the constitution, or an act of congress, or a treaty, was insisted upon. It is sufficient, if it be seen, that either of them was applicable to the case. *Miller* v. *Nichols*, 4 Wheat. 311; *Williams* v. *Norris*, 12 Ibid. 124; *Hickey* v. *Starke*, 1 Pet. 98. But it is
*403] *very apparent, that the unconstitutionality of the act was insisted upon in both courts. The charge was excepted to, in the common pleas, on the ground, that it stated the act to be binding. In the supreme court, it was evidently presented in the first and second errors assigned. It appears also, that the suit was brought in 1817, so that the act passed after the commencement of the action; and it further appears from the charge, what the former decision had been upon the same alleged lease, before the act was passed. The judge decided (and the supreme court of Pennsylvania affirmed the decision), that the court and jury were bound by the act. If it was unconstitutional, it was no law, and they were not bound by it; he, therefore, decided, that it was not unconstitutional. The question is thus directly brought before this court, and it is the only question in the record which is examinable here.

2. Is this act, then, a constitutional act, consistent with the constitution of the United States? Before the act passed, there was no subsisting lease between the parties; the act created one. *Satterlee* v. *Matthewson*, 13 Serg. & Rawle 133. It was impossible, that any valid lease could be derived from, or founded upon, a Connecticut title. That title was, from the beginning, adverse to the sovereignty of Pennsylvania, was maintained by force, was treated by the laws of Pennsylvania as hostile, and its assertion as criminal. For proof of this position, he referred to the history of the controversy, the decree of Trenton which settled the right, and the various laws of Pennsylvania which prohibited, under severe penalties, every form of Connecticut title, of derivation from it, or possession under it. He referred also to judicial decisions, to show that every contract growing out of it was void, and especially to *Mitchell* v. *Smith*, 1 Binn. 110, and the

preamble of the act of 1802. 3 Sm. Laws 525. The period of settlement or claim under that title made no difference. The act of 1795, it was true, gave peculiar powers, in certain cases, to punish and remove certain intruders. But all were intruders, not upon private right merely, but upon the state sovereignty, who came in, or *continued, upon pretence of Connecticut right; and as such, they were public disturbers, obnoxious to [*404 public chastisement. So they were always considered, both in the legislation and in the judicial decisions of Pennsylvania. *Overton* v. *Tracey*, 14 Serg. & Rawle 311, was not to the contrary. It only decided, that it was not unlawful and criminal, for the owner of a Pennsylvania title voluntarily to pay a Connecticut settler for his improvements. That case admits, that it would be unlawful to buy the title.

Independently, then, of the act in question, there could be no relation of landlord and tenant, because there could be no valid lease. The act creates the relation, in a pending suit. It was a law to alter the rights of property between individuals, without their consent, so as to give to one a right to recover from the other which he had not before. It works this result, by making a new rule to govern between the parties, so that A. shall be enabled by means of it to recover the property of B. In other words, it enables A. to turn B. out of the possession of his freehold. This is precisely equivalent to a law declaring that A. shall have B.'s property without his consent. Such a law, penned in plain terms, would excite universal abhorrence in every one who has the least feeling of respect for individual rights. It is not the less dangerous and objectionable, for being more indirectly accomplished.

This act does not profess to be declaratory; if it did, it would still be objectionable. To expound laws is a judicial, and not a legislative, function. *Ogden* v. *Blackledge*, 2 Cranch 277. But, admitting the law to be as it had been laid down by the supreme court, it changes the law, as to existing cases, so as to divest vested rights. To do this, it makes that rightful and valid, which before was wrongful and void. It creates a lease, where none before existed. It makes one a landlord, and the other a tenant, creating for each the capacities and disabilities belonging to that character. It carries this back for thirty-five years. It thus makes A.'s possession the possession of B., and introduces the statute of limitations as a bar. Thus, it creates lease, *tenancy, possession, bar, and completely changes the whole case. The effect is precisely this, that Satterlee shall have no defence [*405 in the pending suit. This cannot be called judicial legislation. It is neither judgment nor legislation, but more. Neither does it merely exercise appellate power. It makes a case for a party, to insure a recovery in an existing case. It is an exercise of power, neither legislative, executive nor judicial, but arbitrary. The intention of the legislature is not material. The time when this act was passed, a few days before the end of the session, warrants a belief, that it was not much considered. But though the legislature did not so intend, it was clearly devised for this very case. The haste with which it was carried to the common pleas of Bradford county, immediately after it was passed, and before the laws of the session could have been published, is proof of its design. It was meant for this case. Is such an act constitutional?

1. It is a violation of contract. In 1781, the state sold the land to Mr.

Wharton, who paid for it; and granted him, by patent, an estate in fee-simple. In 1812, he sold to John F. Satterlee, who succeeded to all his rights. Thus, Satterlee held by contract of the state, who sold the land. Could the state resume the grant? No! *Fletcher* v. *Peck*, 6 Cranch 57, 131. If the state could not resume the grant, could she grant it to another? That would, in fact, be a resumption; for she could not grant, without assuming the dominion over the land. Such a proceeding is entirely indefensible, and is used as the strongest illustration of what rightful legislation cannot accomplish, by Justice PATERSON, in *Vanhorne* v. *Dorrance*, 2 Dall. 304, and Justice CHASE, in *Calder* v. *Bull*, 3 Ibid. 386. Can the state, then, rightfully resume any part of the dominion over the land? The answer is implied, in the universality of the former proposition. She had parted with the whole. To resume a part, violates the contract of sale, as much as to resume the whole. Can the state grant any part of it? Certainly not. Can she, by her mere authority, impose upon it any incumbrance? subject it to mortgage, *judgment or lease? Can the state alter the *406] relation of the owner to his property, or make him less than an owner, or less than a tenant in fee-simple? Can she, directly or indirectly, deprive him of his title, his possession, or right of possession? Either is inconsistent with the grant, and a violation of the contract. These deductions are all legitimately and unavoidably made from the first principle. Now, this act of assembly does take from the owner his possession, and right of his possession, and transfers them to another. It, therefore, violates the contract and transcends the just powers of legislation. If this can be done, what limit shall be assigned to the power? The truth is, that the act gives Matthewson a title; that is its effect; it takes away the right of Satterlee. It is the same exercise of power as to declare that a valid lease should be void, or a younger grant better than an older one.

2. It is retrospective and *ex post facto*. There are three provisions in the constitution which, in defining the limits of legislative power, ought to be taken together: The guarantee of a republican government, in the fourth section of the fourth article, which secures the distribution of legislative, executive and judicial authority; the prohibition to the states of the power to pass bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, in the tenth section of the fifth article; and the fifth amendment, restricting the exercise of the power of eminent domain. They were intended, together, effectually to secure the political and civil rights of the citizen, and to protect from legislative encroachment. They ought always to be liberally construed in favor of the rights of the citizen. Opinion of Judge JOHNSON, 12 Wheat. 256. These provisions were intended to be equal and invariable in their operation, and to embrace all cases of unjust legislation affecting the property or liberty of individuals. Retrospective laws are always unjust, and are contrary to the fundamental principles of our social compact. In these clauses of the constitution, regard must be had to the spirit. Suppose, a law were to declare a valid lease void; this would impair the obligation of the contract between the parties. Sup- pose, a law to declare a void *lease valid; precisely the same *407] injustice is done. Will the constitution be satisfied with a distinction between them, when there is no difference? The spirit of the constitution abhors it. Private property cannot be taken, even for public use, with-

out full compensation, and process of law. To affect the rights of property in any other way, was deemed to be beyond the power of legislation, and therefore, the guard is applied to the taking for public use. The other parts of the constitution had done the rest. Retrospective laws, violating the rights of property, are contrary to the contract of any society established upon a republican basis; they not only impair, they break it. The great object of our constitution is to preserve individual rights, not to destroy them. There is no power in the government but what is given for this end. The freedom of the citizen, the enjoyment of his own, without disturbance or inference, are what constitute his happiness; and in a government where that is consulted, constitute his rights. They are sacred, and ought not to be interfered with.

Washington, Justice, delivered the opinion of the court.—This is a writ of error to the supreme court of Pennsylvania. An ejectment was commenced by the defendant in error, in the court of common pleas, against Elisha Satterlee, to recover the land in controversy, and upon the motion of the plaintiff in error, he was admitted, as her landlord, a defendant to the suit. The plaintiff, at the trial, set up a title under a warrant, dated the 10th of January 1812, founded upon an improvement in the year 1785, which it was admitted was under a Connecticut title, and a patent bearing date the 19th of February 1813. The defendant claimed title under a patent issued to Wharton, in the year 1781, and a conveyance by him to John F. Satterlee, in April 1812. It was contended on the part of the plaintiff, that admitting the defendant's title to be the oldest and best, yet he was stopped from setting it up in that suit, as it appeared in evidence, that he had come into possession, as tenant to the plaintiff, some time in the year *1790. The court of common pleas decided in favor of the plaintiff, upon the [*408 ground just stated, and judgment was accordingly rendered for her. Upon a writ of error to the supreme court of that state, that court decided, in June 1825 (13 Serg. & Rawle 133), that by the settled law of Pennsylvania, the relation of landlord and tenant could not subsist under a Connecticut title; upon which ground, the judgment was reversed, and a *venire facias de novo* was awarded. On the 8th of April 1826, and before the second trial of this cause took place, the legislature of that state passed a law, in substance as follows, viz: "that the relation of landlord and tenant shall exist, and be held, as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between other citizens of this commonwealth, on the trial of any cause now pending, or hereafter to be brought within this commonwealth, any law or usage to the contrary notwithstanding."

Upon the re-trial of this cause in the inferior court, in May 1826, evidence was given, conducing to prove, that the land in dispute was purchased of Wharton, by Elisha Satterlee, the father of John F. Satterlee, and that by his direction the conveyance was made to the son. It further appeared in evidence, that the son brought an ejectment against his father, in the year 1813, and by some contrivance between those parties, alleged by the plaintiff below to be merely colorable and fraudulent, for the purpose of depriving her of her possession, obtained a judgment and execution thereon, under which the possession was delivered to the plaintiff in that suit, who immediately afterwards leased the premises to the father, for two lives, at a rent

of one dollar per annum. The fairness of the transactions was made a question on the trial, and it was asserted by the plaintiff that, notwithstanding the eviction of Elisha Satterlee, under the above proceedings, he still continued to be her tenant.

The judge, after noticing in his charge the decision of the supreme court in 1825, and the act of assembly before recited, stated to the jury the general principle of law, which prevents a tenant from controverting the title of his *landlord, by showing it to be defective, the exception to that principle, where the landlord claims under a Connecticut title, as laid down by the above decision, and the effect of the act of assembly upon that decision, which act he pronounced to be binding on the court. He, therefore, concluded, and so charged the jury, that if they should be satisfied from the evidence, that the transactions between the two Satterlees, before mentioned, were *bonâ fide*, and that John F. Satterlee was the actual purchaser of the land, then the defendants might set up the eviction as a bar to the plaintiff's recovery as landlord. But that if the jury should be satisfied, that those transactions were collusive, and that Elisha Satterlee was, in fact, the real purchaser, and the name of his son inserted in the deed, for the fraudulent purpose of destroying the right of the plaintiff as landlord ; then, the merely claiming under a Connecticut title would not deprive her of her right to recover in that suit. To this charge, of which the substance only has been stated, an exception was taken, and the whole of it is spread upon the record. The jury found a verdict for the plaintiff ; and judgment being rendered for her, the cause was again taken to the supreme court by a writ of error.

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The only question which occurs in this cause, which it is competent to this court to decide is, whether the statute of Pennsylvania which has been mentioned, of the 8th of April 1826, is or is not objectionable, on the ground of its repugnancy to the constitution of the United States? But before this inquiry is gone into, it will be proper to dispose of a preliminary objection made to the jurisdiction of this court, upon the ground, that there is nothing apparent on this record, to raise that question, or otherwise to bring this case within any of the provisions of the 25th section of the judiciary act of 1789.

Questions of this nature have frequently occurred in this court, and have given occasion for a critical examination of the above section, which has resulted in the adoption of certain principles of construction applicable to it, by which the objection now to be considered may, without much difficulty, be decided. 2 Wheat. 363 ; 4 Ibid. 311 ; *12 Ibid. 117. One of those principles is, that if it sufficiently appear from the record itself, that the repugnancy of a statute of a state to the constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause, under the section of the act referred to, although the record should not, in terms, state a misconstruction of the constitution of the United States, or that the repugnancy of the statute of the state to any part of that constitution was drawn into question. Now, it is manifest, from this record, not only that the constitutionality of the statute of the 8th of April 1826, was drawn into question, and was applicable to the case, but that it was so applied by the judge, and formed the basis of his opinion to the jury, that they should find in favor of the plaintiff, if, in other respects, she was entitled to a verdict. It is equally

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manifest, that the right of the plaintiff to recover in that action depended on that statute; the effect of which was to change the law, as the supreme court had decided it to be in this very case, in the year 1825. 13 S. & R. 133.

That the charge of the judge forms a part of this record is unquestionable. It was made so by the bill of exceptions, and would have been so, without it, under the statute of the 24th of February 1806, of that state, which directs, that in all cases in which the opinion of the court shall be delivered, if either party require it, it is made the duty of the judges to reduce the opinion, with their reasons therefor, to writing, and to file the same of record in the cause. In the case of *Downing* v. *Baldwin*, 1 Serg. & Rawle 298, it was decided by the supreme court of Pennsylvania, that the opinion so filed becomes part of the record, and that any error in it may be taken advantage of, on a writ of error, without a bill of exceptions. It will be sufficient to add, that this opinion of the court of common pleas was upon a writ of error, adopted and affirmed by the supreme court; and it is the judgment of that court upon the point so decided by the inferior court, and not the reasoning of the judges upon it, which this court is now called upon to revise.

We come now to the main question in this cause. Is the *act which is objected to, repugnant to any provision of the constitution [*411 of the United States? It is alleged to be so, by the counsel of the plaintiff in error, for a variety of reasons; and particularly, because it impairs the obligation of the contract between the state of Pennsylvania and the plaintiff, who claims title under her grant to Wharton, as well as of the contract between Satterlee and Matthewson; because it creates a contract between parties, where none previously existed, by rendering that a binding contract, which the law of the land had declared to be invalid; and because it operates to divest and destroy the vested rights of the plaintiff. Another objection relied upon is, that in passing the act in question, the legislature exercised those functions which belong exclusively to the judicial branch of the government.

Let these objections be considered. The grant to Wharton bestowed upon him a fee-simple estate in the land granted, together with all the rights, privileges and advantages which, by the laws of Pennsylvania, that instrument might legally pass. Were any of those rights, which it is admitted vested in his vendee or alienee, disturbed or impaired, by the act under consideration? It does not appear from the record, or even from the reasoning of the judges of either court, that they were in any instance denied, or even drawn into question. Before Satterlee became entitled to any part of the land in dispute, under Wharton, he had voluntarily entered into a contract with Matthewson, by which he became his tenant, under a stipulation that either of the parties might put an end to the tenancy, at the termination of any one year. Under this new contract, which, if it was ever valid, was still subsisting and in full force, at the time when Satterlee acquired the title of Wharton, he exposed himself to the operation of a certain principle of the common law, which estopped him from controverting the title of his landlord, by setting up a better title to the land in himself, or one outstanding in some third person. It is true, that the supreme court of the state decided, in the year 1825, that this contract, being entered into with a person claim-

ing under a Connecticut title, was void; so that *the principle of law which has been mentioned, did not apply to it. But the legislature afterwards declared, by the act under examination, that contracts of that nature were valid, and that the relation of landlord and tenant should exist and be held effectual, as well in contracts of that description, as in those between other citizens of the state.

Now, this law may be censured, as it has been, as an unwise and unjust exercise of legislative power; as retrospective in its operation; as the exercise, by the legislature, of a judicial function; and as creating a contract between parties, where none previously existed. All this may be admitted; but the question which we are now considering is, does it impair the obligation of the contract between the state and Wharton, or his alienee? Both the decision of the supreme court in 1825, and this act, operate, not upon that contract, but upon the subsequent contract between Satterlee and Matthewson. No question arose, or was decided, to disparage the title of Wharton, or of Satterlee, as his vendee. So far from it, that the judge stated in his charge to the jury, that if the transactions between John F. Satterlee and Elisha Satterlee were fair, then the elder title of the defendant must prevail, and he would be entitled to a verdict.

We are then to inquire, whether the obligation of a contract between Satterlee and Matthewson was impaired by this statute? The objections urged at the bar, and the arguments in support of them, apply to that contract, if to either. It is that contract which the act declared to be valid, in opposition to the decision of the supreme court; and admitting the correctness of that decision, it is not easy to perceive, how a law which gives validity to a void contract, can be said to impair the obligation of that contract. Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration, whether in existence at the time of passing the statute, or which might hereafter be entered into, should nevertheless be valid and binding upon the parties; all would admit the retrospective character of such an enactment, and that the effect of it was to create a contract between parties, *where none had previously existed. But it surely cannot be contended, that to create a contract, or to destroy or impair one, mean the same thing.

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If the effect of the statute in question be not to impair the obligation of either of those contracts, and none other appear upon this record, is there any other part of the constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so; but retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument.

All the other objections which have been made to this statute admit of the same answer. There is nothing in the constitution of the United States which forbids the legislature of a state to exercise judicial functions. The case of *Ogden* v. *Blackledge* came into this court from the circuit court of the United States, and not from the supreme court of North Carolina; and the question, whether the act of 1799, which partook of a judicial character, was repugnant to the constitution of the United States, did not arise, and consequently, was not decided. It may safely be affirmed, that no case has ever been decided in this court upon a writ of

error to a state court, which affords the slightest countenance to this objection.

The objection, however, which was most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this act was, to divest rights which were vested by law in Satterlee. There is certainly no part of the constitution of the United States which applies to a state law of this description; not are we aware of any decision of this, or of any circuit court, which has condemned such a law, upon this ground; provided, its effect be not to impair the obligation of a contract; and it has been shown, that the act in question has no such effect upon either of the contracts which have been before mentioned. In the case of *Fletcher* v. *Peck*, it was stated by the chief justice, that it might well be doubted, whether the nature of society and of government do not prescribe some limits to the legislative power; and he asks, "if any be *prescribed, where are they to be found, if the property of an individual, fairly [*414 and honestly acquired, may be seized, without compensation?" It is nowhere intimated in that opinion, that a state statute, which divests a vested right, is repugnant to the constitution of the United States, and the case in which that opinion was pronounced, was removed into this court by writ of error, not from the supreme court of a state, but from a circuit court.

The strong expressions of the court upon this point, in the cases of *Vanhorne's Lessee* v. *Dorrance*, and the *Society for the Propagation of the Gospel* v. *Wheeler*, were founded expressly on the constitution of the respective states in which those cases were tried. We do not mean in any respect to impugn the correctness of the sentiments expressed in those cases, or to question the correctness of a circuit court, sitting to administer the laws of a state, in giving to the constitution of that state a paramount authority over a legislative act passed in violation of it. We intend to decide no more than that the statute objected to in this case is not repugnant to the constitution of the United States, and that unless it be so, this court has no authority, under the 25th section of the judiciary act, to re-examine and to reverse the judgment of the supreme court of Pennsylvania, in the present case. That judgment, therefore, must be affirmed, with costs.

Johnson, Justice.—I assent to the decision entered in this cause, but feel it my duty to record my disapprobation of the ground on which it is placed. Could I have brought myself to entertain the same view of the decision of the supreme court of Pennsylvania, with that which my brethren have expressed, I should have felt it a solemn duty to reverse the decision of that court, as violating the constitution of the United States in a most vital part. What boots it, that I am protected by that constitution from having the obligation of my contracts violated, if the legislative power can create a contract for me, or render binding upon me a contract which was null and void in its creation? To give efficacy to a void contract, is not, it *is true, violating a contract, but it is doing infinitely worse; it is [*415 advancing to the very extreme of that class of arbitrary and despotic acts which bear upon individual rights and liabilities, and against the whole of which the constitution most clearly intended to interpose a protection commensurate with the evil. And it is very clear to my mind, that the

cause here did not call for the decision now rendered. There is another, and a safe and obvious ground, upon which the decision of the Pennsylvania court may be sustained.

The fallacy of the argument of the plaintiff in error consists in this, that he would give to the decision of a court, on a point arising in the progress of this cause, the binding effect of a statute or a judgment; that he would in fact restrict the same court from revising and overruling a decision which it has once rendered, and from entering a different judgment from that which would have been rendered in the same court, had the first decision been adhered to. It is impossible, in examining the cause, not to perceive, that the statute complained of was no more than declaratory of the law on a point on which the decisions of the state courts had fluctuated, and which never was finally settled, until the decision took place on which this writ of error is sued out. The decision on which he relies, to maintain the in validity of the Connecticut lease, was rendered on a motion for a new trial; all the right it conferred was to have that new trial; and it even appears, that before that new trial took place, the same court had decided a cause, which in effect overruled the decision on which he now rests; so that when this act was passed, he could not even lay claim to that imperfect state of right which uniform decisions are supposed to confer. The latest decision, in fact, which ought to be the precedent, if any, was against his right. It is perfectly clear, when we examine the reasoning of the judges on rendering the judgment now under review, that they consider the law as unsettled, or rather as settled against the plaintiff here, at the time the act was passed; and if so, what right of his has been violated? The act does no more than what the court of justice had done, and *would do, without the aid of the law; pronounce the decision on which he relies, as erroneous in principle, and not binding in precedent. The decision of the state court is supported, under this view of the subject, without resorting to the portentous doctrine (for I must call it portentous), that a state may declare a void deed to be a valid deed, as affecting individual litigants, on a point of right, without violating the constitution of the United States. If so, why not create a deed, or destroy the operation of a limitation act, after it has vested a title?

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The whole of this difficulty arises out of that unhappy idea, that the phrase "*ex post facto*," in the constitution of the United States, was confined to criminal cases exclusively; a decision which leaves a large class of arbitrary legislative acts without the prohibitions of the constitution. It was in anticipation of the consequences, that I took occasion, in the investigation on the bankrupt question, to make a remark on the meaning of that phrase in the constitution. My subsequent investigations have confirmed me in the opinion then delivered, and the present case illustrates its correctness; I will subjoin a note to this opinion, devoted to the examination of that question.(*a*)

(*a*) Note by Mr. Justice JOHNSON, on the exposition of the phrase, "*ex post facto*," in the constitution of the United States.

The case in which the meaning of the phrase "*ex post facto*," in the constitution, came first to be considered, was that of Calder and wife *v.* Bull and wife, 3 Dall. 386. Mrs. Calder claimed as heiress to one Morrison, Bull and wife claimed by devise, and

Satterlee v. Matthewson.

THIS cause came on to be heard, on the transcript of the record from the supreme court of the state of Pennsylvania, for the middle district of Pennsylvania, and was argued by counsel: On consideration whereof, it is con-

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the question was *devisavit vel non*. The court of probate in Connecticut, having jurisdiction of the question, decided against the will; but there was a right to appeal from that decision to the supreme court of errors, provided it was prosecuted within eighteen months. It was not prosecuted within the limited time, and thereby it was contended, the decision of the court of probate became final against the will, and ought to have quieted Calder and wife in possession of the property. But Bull and wife made application to the legislature of Connecticut for relief, and obtained from them a resolution or law, setting aside the decree of the court of probate, and granting Bull a new hearing in that court. On that new hearing, the decision was in favor of the will; and Calder and wife were, of course, evicted of an interest, which they contended had been finally affirmed in them by the previous decision, and the effect of the limitation barring the right of appeal. The argument of counsel is not reported; but it is obvious, from the opinions ascribed to the judges, that, in behalf of Calder, it was contended, that the act of the Connecticut legislature was an *ex post facto* law, in the sense of the constitution, and void; and in behalf of Bull, that the legislature had exercised a power, constitutional in Connecticut, and therefore, not *ex post facto*, in the sense of the constitution. This appears distinctly the ground upon which CUSHING, the presiding judge, places his opinion: "The case," he says, "appears to me to be clear of all difficulties, taken either way; if the act is a judicial act, it is not touched by the federal constitution; and if it is a legislative act, it is maintained and justified by the ancient and uniform practice of the State of Connecticut." That state, it must be observed, had at that time no written constitution; and as in Rhode Island at the present day, what it could constitutionally do, could only be decided by what it did habitually. The decision, therefore, rendered at this term, in the case of Wilkinson *v.* Leland *et al.*, was precisely that in the case of Calder *v.* Bull.

That the cause did not go off on the ground, that the phrase "*ex post facto*," in the constitution, was inapplicable to civil acts, is distinctly expressed also by Judge IREDELL. "Upon the whole," says he, "though there cannot be a case in which an *ex post facto* law in criminal matters is requisite, or justifiable yet in the present instance, the objection does not arise; because, 1. If the act of the legislature of Connecticut was a judicial act, it is not within the words of the constitution; and 2. Even if it was a legislative act, it is not within the meaning of the prohibition." In the commencement of the opinion, he expresses himself thus: "From the best information to be collected, relative to the constitution of Connecticut, it appears, that the legislature of that state has been in the uniform and uninterrupted exercise of a general superintending power over its courts of law, by granting new trials." And again, "When Connecticut was settled, the right of empowering her legislature to superintend the courts of justice was, I presume, early assumed; and its expediency, as applied to the local circumstances, and municipal policy of the state, is sanctioned by a long and uniform practice. The power, however, is judicial in its nature, and whenever it is exercised, as in the present instance, it is an exercise of judicial not of legislative authority." Here, then, is a positive opinion as to the judicial character of this transaction, and it shows, that his vote upon the decision rendered, must rest upon the first of the alternatives stated in his conclusion. And the mode in which he enters upon the examination of the second alternative, shows that he attaches no importance to it. He enter upon it hypothetically, commencing with the words "But let us for a moment suppose." Judge PATERSON also says, "True it is, that the awarding of new trials falls properly within the province of the judiciary; but if the legislature of Connecticut have been in the uninterrupted exercise of this authority, in certain cases, we must, in such cases, respect their decisions, as flowing from a competent jurisdiction or constitutional organ; and therefore, we may, in the present instance, consider the legislature of the state as having acted in their cus-

sidered, ordered and adjudged by this court, that the judgment of the said supreme court for the state of Pennsylvania in this cause be and the same is hereby affirmed, with costs.

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tomary judicial capacity." Judge CHASE express himself thus: "Whether the legislature of any state can revise and correct by law, a decision of its courts of justice, although not prohibited by the constitution of the state, is a question of very great importance, and not necessary to be now considered; because the resolution or law in question does not go so far." And again, "It does not appear to me, that the resolution or law in question is contrary to the charter of Connecticut, or its constitution, which is said by counsel to be composed of its charter, acts of assembly, and usages and customs. I should think, that the courts of Connecticut are the proper tribunals to decide whether laws contrary to the constitution thereof are void. In the present case, they have, both in the inferior and superior courts, decided, that the resolution or law in question was not contrary to either the state or the federal constitution."

Thus it appears, that all the judges who sat in the case of Calder *v.* Bull, concurred in the opinion, that the decision of the court of probate, and the lapse of the time given for an appeal to their court of errors, were not final upon the rights of the parties; that there still existed in the legislature, a controlling and revising power over the controversy; and that this was duly exercised in the reversal of the first decree of the court of probate. And who can doubt, that the legislature of a state may be vested by the state constitution with such a power? And what invasion of private right can result from the exercise of such power, when so delegated? All the rights claimed or exercised in a state, which thus modify the administration of justice, are held and exercised under the restrictions which such a constitution imposes. How, then, could the question, whether the phrase *ex post facto* was confined to criminal law, arise in this cause? the law complained of was equally free from that characteristic; though the phrase be held to extend to laws of a civil character.

I then have a right to deny that the construction intimated by three of the judges, in the case of Calder *v.* Bull, is entitled to the weight of an adjudication. Nor is it immaterial, to observe, that an adjudication upon a fundamental law, ought never to be irrevocably settled by a decision that is not necessary and explicit. It is laid down, indeed, as a principle of the Roman civil law, "that in cases which depend upon fundamental principles, from which demonstrations may be drawn, millions of precedents are of no value." Ayliffe, 5. And the English law concurs with the Roman in this, "that an extra-judicial opinion, given in or out of court, is no good precedent; for it is no more than the *prolatum*, or saying of him who gives it." "An opinion given in court, if not necessary to the judgment given of record, is, according to Vaughan, no judicial opinion at all, and consequently, no precedent; for the same judgment might as well have been given, if no such, or a contrary, opinion had been brought; nor is such an opinion any more than a *gratis-dictum*." Ayliffe, 9.

That the phrase "*ex post facto*" is not confined, in its ordinary signification, to criminal law, or criminal statutes, admits of positive demonstration; and with great respect for my learned predecessors, but a due regard to what I owe to the discharge of my own duties, I will endeavor to show that they have not proved the contrary. I think it will not be doubted by any one, who has considered the remarks made by the learned judges on the translation and construction of the phrase *ex post facto*, that some misapprehension must have prevailed, as to the parts of speech of which it is composed. By applying the English preposition after, so often, to the translation of *post*, in the sentence, I am warranted in believing, that the latter word was mistaken for the Latin preposition *post;* whereas, it is unquestionably an abbreviation of the adjective *postremo*, as will appear by reference to the maxims of Sir Francis Bacon, and comparing the 8th in the table, with the 8th maxim in the text; in the latter of which *post* is extended to *postremo;* and such must be the fact, to comport with the

sense attached to the phrase in its common use and application. But the phrase is of such antiquity, and so generally used in its abridged form, that its origin and derivation, as is the case with a vast proportion of every language, has been nearly forgotten. I am indebted to a friend for a quotation from the Pandects, in which it appears, even in Justinian's time, to have been used as a quaint phrase; just as a *ca. sa.*, or writ in the *pone*, or *quo minus*, is used at the present day. (L. 34, tit. 4, law 15.) The antiquity of its use among the English jurists may be fairly inferred, from its being ingrafted into the maxims of the law constituting its fundamental rules; as we see, in Elements of the Com. Law, by Lord Verulam, Max. 8 and 21.

But my present purpose is, to fix its signification and legal import, and this is best done by reference to an adjudged case. At the time of the great speculation in England in south-sea stock, it was thought necessary, for the peace of the nation, to pass the stat. 7 Geo. I., c. 8, § 2, which required a registry of contracts for south-sea stock, to be made by the 29th of September 1721, and if not so registered, they were declared void. W. bought of M., stock to a large amount, for which an assignment was duly executed, dated 19th August 1720 (which was prior to the passing of the act); but exception was taken, on the ground of defect in the form of registration, on which the defendant insisted that the contract was avoided by the statute. RAYMOND, Justice:— "This act being *ex post facto*, the construction of the words ought not to be strained, in order to defeat a contract, to the benefit whereof the party was well entitled, at the time the contract was made." Wilkinson *v.* Meyer, 2 Ld. Raym. 1350–52. This case is authority to three points: 1st, To show that the phrase is used in a sense equally applicable to contracts and to crimes. 2d, That it was applied to statutes affecting contracts. And 3d, That as late as Lord Raymond's time, it had not received a practical or technical construction, which confined it to criminal cases.

The learned judges, in the case of Calder *v.* Bull, rely on Blackstone and Wooddeson for a contrary doctrine; but on examining these writers, the latter will be found to be anything but an authority to their purpose; and that in the former, there is nothing furnished that can be held conclusive on the subject. The passage in Wooddeson will be found in vol. 2, p. 641. The author is animadverting upon bills of attainder, bills of pains and penalties, and other laws of that class; and his words are these: "It must be admitted, that in all penal statutes, passed *ex post facto*, except where the innovation mollifies the rigor of the criminal code, justice wears her sternest aspect." Penal statutes, passed *ex post facto;* but why say *penal* statutes, and not simply statutes passed *ex post facto*, if the use of the phrase was exclusively limited to penal statutes? And with what propriety could the phrase be applied to statutes mollifying the rigor of the criminal law, if it had the fixed restriction, since attached to it, which they propose to assign to it, in their reasoning upon that cause?

Judge Blackstone is by no means conclusive, if any authority at all upon the subject. Arch. & Christ. Black. 41, old edit. 46. He is commenting upon the definition of a law generally; and that member of the definition which designates it as "a rule prescribed." And when illustrating the nature and necessity of this attribute of a law, he illustrates it by referring to the laws of Caligula, written in small characters, and hung up out of view, to ensnare the people; and then remarks, "There is still a more unreasonable method than this, which is called making of laws *ex post facto;* where, after an action, indifferent in itself, has been committed, the legislator then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it."

This is precisely what Wooddeson calls a penal statute, passed *ex post facto;* but it by no means follows, that because a penal statute may be *ex post facto*, that none other can be affected with that character; and certainly, his commentator, Mr. Christian, in his note upon the phrase "*ex post facto*," seems to have had no idea of this restrictive application of it. His words are: "an *ex post facto* law may be either of a public or private nature; and when we speak generally of an *ex post facto* law, we, perhaps, always, mean a law which comprehends the whole community. The Roman *privilegia* seem to correspond to our bills of attainder, and bills of pains and penalties,

which, though in their nature they are *ex post facto* laws, yet are seldom called so." Here he speaks of a *law*, not of a *penal* law, which comprehends the whole community; and of certain penal laws, in their nature *ex post facto;* that is, of the description of *ex post facto* laws; which they certainly are, without being exclusively so.

The "Federalist" also is referred to, for an exposition of the phrase. The passage is found in the 44th number, and is from the pen of Mr. Madison. But the writer has made no attempt at giving a distinct exposition of the phrase, as used in the constitution. Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are all considered together; and regarded, as they really are, as forming together "a bulwark, in favor of personal security and private rights;" but on the separate office of each, in the work of defence, he makes no remark, and attempts no definition or distribution.

Some of the state constitutions are also referred to, as furnishing an exposition of the words *ex post facto*, which confine its application to criminal cases. But of the four that have been cited, it will be found, that those of Massachusetts and Delaware do not contain the phrase; and, as if sensible of the general application of its meaning to all laws, giving effects and consequences to past actions, which were not attached to them when they occurred, simply give a description of the laws they mean to prohibit, without resorting to the aid of a quaint phrase which can only be explained by an extended periphrasis. The constitutions of Maryland and North Carolina would seem to have applied the phrase in the restricted sense. And yet there is good reason to think, that in the application of those articles to questions arising in their courts of justice; before the provision in the constitution of the United States superseded the necessity of resorting to their own constitutions in the defence of private rights, when invaded by *ex post facto* laws; a general application of the phrase, as well to civil as to criminal cases, would have been justified by the generality of the prohibition to pass *ex post facto* laws, as used in both those constitutions. But if otherwise, why should the erroneous use of language in two instances only, control the meaning of it everywhere? or anywhere, but in the construction of the particular instrument in which it is so used?

It is obvious, in the case of Calder *v.* Bull, that the great reason which influenced the opinion of the three judges who gave an exposition of the phrase "*ex post facto*," was, that they considered its application to civil cases as unnecessary, and fully supplied by the prohibition to pass laws impairing the obligation of contracts. Judge CHASE says, "if the prohibition against making '*ex post facto*' laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object; the other restraints I have enumerated were unnecessary, and therefore improper; for both of them are retrospective." Judge PATERSON says, "where is the necessity or use of the latter words, if a law impairing the obligation of contracts be comprehended within the terms *ex post facto* law? It is obvious from the specification of contracts in the last member of the clause, that the framers of the constitution did not understand or use the words in the sense contended for on the part of the plaintiffs in error. They understood and used the words in their known and appropriate signification, as referring to crimes, pains and penalties, and no further. The arrangement of the distinct members of this section necessarily points to this meaning." Judge IREDELL considers the extended construction of the phrase as unnecessary for another reason. "The policy, the reason and humanity of the prohibition do not, I repeat," says the judge, "extend to civil cases, to cases that merely affect the private property of citizens."

On these opinions, a variety of remarks may be made. And the first is, that the learned judges could not then have foreseen the great variety of forms in which the violations of private right have since been presented to this court. The case of a legislature declaring a void deed to be a valid deed, is a striking one to show, both that the prohibition to pass laws violating the obligation of contracts, is not a sufficient protection to private rights; and that the policy and reason of the prohibition to pass *ex post facto* laws, does extend to civil as well as criminal cases. This court has had

more than once to toil up hill, in order to bring within the restriction on the states to pass laws violating the obligation of contracts, the most obvious cases to which the constitution was intended to extend its protection; a difficulty, which it is obvious, might often be avoided, by giving to the phrase *ex post facto* its original and natural application. It is then due to the venerable men whose opinions I am combating, to believe, that had this and the many other similar cases which may occur and will occur, been presented to their minds, they would have seen that, in civil cases, the restriction not to pass *ex post facto* laws could not be limited to criminal statutes, without restricting the protection of the constitution to bounds that would import a positive absurdity.

2. High and respectable as is the authority of these distinguished men, it is not unpermitted to say, that when they speak of the known and settled and technical meaning of words, they submit their opinions to that arbiter of truth, to whose jurisdiction all men have an equal right to appeal. I think, I have gone far to show, that their quotations do not fix the meaning of the phrase under consideration, with immovable firmness. Maryland first used it in this restricted sense, and North Carolina copied from Maryland; and if the evidence of contemporaries may be relied on, Mr. Chase was one of the committee who reported the constitution of Maryland; and thus stands the authority for the restricted use. Very many instances of the more general use of the phrase may be added to the authority of Lord RAYMOND, some of which I will mention. Certainly, in Lord RAYMOND's time, it had not received this technical established signification; and how it can be proved to have acquired it since, is not very easy to perceive.

The following instances of its ancient general use will show, that if acquired, it must be in modern times, and therefore the proof ought to be the more accessible.

In Sir F. Bacon's Maxims, Max. 8: *Estimatio pretereti delicti ex post facto nunquam crescit.* And all the cases given to illustrate the maxim, are cases at common law, such as "slander of one who after becomes noble; this is not *scandalum magnatum.*" Thus showing that it has no peculiar connection with statute law. Max. 21. *Clausula vel dispositio inutilis per præsumptionem vel causam remotam ex post facto non fulcitur.* And all the examples furnished on this maxim, are cases of civil rights and liberties.

1 Sheppard's Touchstone, 63. "It is a rule, that if a contract be not in its inception usurious, no matter *ex post facto* shall make it so." Ibid. 68. "Where a deed good in its creation shall become void *ex post facto ;* by razure, &c." Ibid. 20. "Where a deed is void *ab initio*, and where it doth become void by matter *ex post facto.*"

Godolphin's View of the Admiralty, 109. "And the performance of something *ex post facto* within the realm, in pursuance of a preceding contract, &c., doth not make it cease to be maritime." The same, in his Law of Executors, table D. "How a devise originally void may become good *ex post facto.*"

Bulstrode, 17, 5, B, a, p. 416. "Where the first contract is not usurious, it shall never be made so by matter *ex post facto.*"

3. It is a remark of Judge PATERSON, that the arrangement of the distinct members of this section in the constitution, necessarily points to the restrictive meaning which he assigns to this phrase. But with all deference, I must contend, that if anything is to be deduced from the arrangement of the three instances of restriction, the argument will be against him. For by placing "*ex post facto* laws" between bills of attainder, which are exclusively criminal, and laws violating the obligation of contracts which are exclusively civil, it would rather seem that *ex post facto* laws partook of both characters, was common to both purposes.

4. There is one view in which the consistency and comprehensiveness of the views of the learned judges, whose opinions I have ventured to examine, may be well defended. And it presents an alternative to which I have no doubt that this court will sooner or later be compelled to resort, in order to maintain its own consistency, and yet give to the constitution the scope which is necessary to attain its general purposes in this section, and to rescue it from the imputation of absurdity, in guarding against the minor evil, and making no provision against a greater; in leaving uncon-

trolled the exercise of a power to create the contracts of parties, while they restrict the exercise of a power to violate those contracts, when made by parties themselves. That is, to bring cases similar to the present within what the law terms the equity of a statute. According to my construction, this is unnecessary, and I shall never be compelled to resort to this application of a principle so exceptionable in its influence upon a fundamental law. But I see not how those who think differently from me will be able to advocate it, unless by an amendment of the constitution.

If the correct exposition of "the equity of a statute," be "a construction made by the judges, that cases out of the letter of the statute, which are within the same mischief, or cause of making the statute, shall be within the remedy thereby given," 1 Inst. 24; or as another author defines it, "*verborum legis directio effeciem cum una res solumnodo legis cavetur verbis, ut omnis alia in æquali genere eisdem caveatur verbis,*" Plowd. 407; there could be no objection to bringing the case of making a void deed valid within the provision of the constitution against violating the obligation of contracts, if we were construing a statute. And then, the protection which is lost to the constitution by the restricted construction of "*ex post facto* laws" would be, I believe, wholly restored. But whether this latitude of construction can be safely and on principle applied to the constitution, is with me a serious doubt; and hence I have felt an interest in endeavoring to avoid the necessity of resorting to it, by showing that the case of Calder *v.* Bull cannot claim the pre-eminence of an adjudged case upon this point, and if adjudged, was certainly not sustained by reason of authorities

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*417] *John Reynolds, tenant, The United States, Plaintiff, *v.* Duncan McArthur, Defendant.

Land-law of Ohio.

The lands north-west of the river Ohio, between the rivers Scioto and Little Miami, lying west of Ludlow's line, east of Roberts's line, and south of the Indian boundary, reserved by Virginia, in her deed of cession to the United States, of March 1784, for the satisfaction of the military bounties Virginia had promised, were not, prior to 1810, by any legislative acts of the government of the United States, withdrawn from appropriation under and by virtue of Virginia military land-warrants; a patent issued on the 12th of October 1812, founded upon a military warrant, for land within the reserved lands, is valid against a claimant of the same land, holding under a sale made by the United States.

Error to the Supreme Court of Ohio. This was an action of ejectment, brought originally in the court of common pleas for Champaign county, in the state of Ohio, by McArthur, the defendant in error, against Reynolds, the tenant in possession. In that court, a verdict and judgment were rendered, in favor of the plaintiff below. The plaintiff in error appealed to the supreme court of Ohio for that county. On the trial in the latter court (being by the laws of Ohio a trial *de novo*), McArthur again obtained a verdict and judgment in his favor.

McArthur claimed the land in controversy, under a patent from the United States, bearing date October 12th, 1812, founded on entry and survey made in the year 1810, on a warrant granted for services in the Virginia line, on continental establishment, during the war of the revolution. Reynolds, the defendant below, claimed as the assignee of one Henry Van Meter, who, in the year 1805, entered the land in the controversy, at the Cincinnati land-office. It reverted to the United States in the year 1813, for non-payment of the purchase-money, and during the same year, it was entered again by Van Meter, and the certificate of entry assigned by him to Reynolds.

The deed of cession of the country north-west of the Ohio river, from Virginia to the United States, dated in March 1784, reserved the country between the rivers Scioto *and Little Miami, for the satisfaction of the military bounties Virginia had promised to her officers and soldiers [*418 on continental establishment. The sources of the two rivers are between fifty and sixty miles apart, and the country between them makes a part of the western boundary of the reservation, In 1802, Israel Ludlow was directed by the then surveyor-general of the United States, to run the boundary line between these rivers, who, in that year, accordingly, ran a direct line from the source of the Little Miami toward what he supposed to be the source of the Scioto ; to which river he did not extend his line, in consequence of being arrested in his survey, by the Indians, at the Greenville treaty line, that line being then the Indian boundary. The line run by Ludlow, is called Ludlow's line.

In the year 1812, congress passed an act authorizing the appointment of three commissioners, who, in conjunction with commissioners to be appointed by Virginia, were directed to run the boundary line between the sources of these rivers, with authority to agree upon and establish the same. They proceeded to ascertain the sources of these rivers, and employed a surveyor named Roberts, to run a direct line between them. Whilst he was running the line, a misunderstanding arose among the commissioners, as to the principle on which the boundary should be settled. The Virginia commissioners contended for a line from the source of the Scioto to the mouth of the little Miami as the boundary. The United States commissioners claimed the line then running between the sources of the two rivers as the boundary. The commissioners separated, without agreeing upon a boundary.

This line is called Roberts's line. It runs from nearly the same point on the Little Miami, at which Ludlow's line commences, to a point on the Scioto, several miles west of the termination of Ludlow's line, when extended to the latter river. The two lines include a triangular gore of country extending from one river to the other. Shortly after Ludlow's line was run, the surveyors in the employment of the United States proceeded to survey the country west of and bounding upon that line, so far as the Indian boundary, *and the officers at the Cincinnati land-office sold the whole or part [*419 of the country lying between Ludlow's and Roberts's lines, as the land of the United States ; among which was the land in controversy. The act of 1812 declared, that Ludlow's line should be the boundary, until otherwise established by the consent of Virginia and the United States. By another act of congress, passed in 1818, Ludlow's line, to the Greenville treaty line, was made the boundary, until otherwise directed by law. And above the Greenville treaty line to the Scioto, Roberts's line was made by that act the boundary.

The land in controversy was admitted by the parties to lie on Buck creek, a water of the Great Miami river, adjoining Ludlow's line, and south of the Indian boundary line. The plaintiff below, McArthur, further agreed, that if the land in controversy did not lie between the rivers Scioto and Little Miami, a verdict and judgment should be rendered against him.

On the trial in the supreme court of Ohio the counsel for the plaintiff in error prayed the court to give the jury eight several instructions ; all of

which that court refused to give. To this refusal, a bill of exceptions was tendered, upon which the writ of error is founded. The instructions prayed for by the counsel for the plaintiff in the court below, were as follows:

1. That the lands west of Ludlow's line, east of Roberts's line, and south of the Indian boundary line, had been withdrawn from appropriation, under and by virtue of said military land-warrants, prior to the year 1810; and that as the same had, pursuant to the acts of congress in such case made and provided, been directed to be surveyed and sold; and that, as the same had accordingly been surveyed and sold to the defendant, prior to the year 1810; consequently, the plaintiff's patent is void; and their verdict ought to be for the defendant.

2. That as the third section of the act of congress of the United States of 11th April 1818, declares, "that from the source of the Little Miami river to the Indian boundary line established by the treaty of Greenville in 1795, the line designated as the westerly boundary line of the Virginia tract, *420] *by an act of congress passed on the 23d day of March 1804, entitled 'an act to ascertain the boundary of the lands reserved by the state of Virginia, north-west of the river Ohio, for the satisfaction of her officers and soldiers on continental establishment, and to limit the period for locating the said lands,' shall be considered and held as such, until otherwise directed by law;" and as said boundary line was run by Ludlow, under the directions of the surveyor-general, pursuant to an act of congress, entitled "an act to extend and continue in force the provisions of an act entitled 'an act giving a right of pre-emption to certain persons who have contracted with John Cleves Symmes, or his associates, for lands lying between the Miami rivers, in the the territory north-west of the Ohio, and for other purposes,'" approved May 1st, 1802; and offered for sale at public auction, at the Cincinnati land-office, pursuant to the act entitled, "an act making provision for the disposal of public lands in the Indiana territory, and for other purposes," approved March 26th, 1804, must be construed as having relation back to the above-recited act, entitled "an act to ascertain the boundary of the lands reserved by the state of Virginia, north-west of the river Ohio, for the satisfaction of the officers and soldiers on continental establishment, and to limit the period for locating said lands," approved 23d of March 1804, was passed and took effect; and as the plaintiff's patent covers lands west of that line, and south of the Greenville treaty line, and is based on an entry made in 1810, on a Virginia continental land warrant, which had been surveyed and sold to the defendant, pursuant to the act of congress, prior to the year 1810, the plaintiff's patent is void; and their verdict ought to be for the defendant.

3. That according to the true intent and meaning of the act and deed of cession from Virginia to the United States, and the several acts of congress relative to the sale of the public lands of the United States, the lands lying between the rivers Scioto and Little Miami are bounded by a line extending from the source or point of land farthest removed from the mouths of these respective rivers, from which the rain descending on the earth, runs down *421] into their respective *channels, along the top of the ridges dividing the waters of the Scioto from the waters of the Great Miami, which empty into the Ohio below the mouth of the Little Miami, as delineated on

the diagram returned by the county-surveyor for the defendant in this cause; and as the plaintiff's patent covers lands west or without the boundary of the district so bounded as aforesaid, and is based on an entry on a Virginia continental land-warrant, which entry was made in the year 1810, and which said entry and patent cover lands, which had, pursuant to the acts of congress, been surveyed and sold to the defendant, prior to the date of the plaintiff's said entry, the plaintiff's patent is void; and their verdict ought to be for the defendant.

4. That if the line connecting the rivers Scioto and Little Miami cannot, according to the true intent and meaning of the said act and deed of cession, and the several acts of congress for the sale of their public lands, be extended, as stated in instructions last above asked, then that the line connecting the rivers Scioto and Little Miami, so as to include all the lands between the said two rivers, must be extended from the source of the Little Miami, parallel to the general course of the Ohio river, until it intersect the river Scioto; and as the plaintiff's patent is based on a Virginia continental land-warrant, which warrant had been located in 1810, on lands which had, prior to the year 1810, been surveyed and sold to the defendant, pursuant to the acts of congress, the patent of the plaintiff is void; and their verdict ought to be for the defendant.

5. That if the line connecting the rivers Scioto and Little Miami cannot, according to the true intent and meaning of the said act and deed of cession, be extended, as stated in either of the instructions asked for above, then that the sources of the said two rivers must be at that point in their respective channels at which, from the union of several rivulets, brooks or creeks, sufficient water flows, at an ordinary stage, on which to navigate small vessels laden; and that the line connecting said rivers must be a direct line from said sources so ascertained as aforesaid; and if, from the evidence, the jury shall find, that the lands covered by *the plaintiff's patent are based on an entry covering lands without the limits of said Virginia military district, so called, which had, prior to the year 1810, pursuant to the acts of congress in such made and provided, been surveyed and sold to the defendant, the plaintiff's patent is void; and their verdict ought to be for the defendant. [*422

6. That if the line connecting the rivers Scioto and Little Miami, according to the true intent and meaning of the said act and deed of cession, cannot be extended, as stated in either of the instructions asked for as above, then that the sources of the said two rivers must be considered as commencing at that point in their respective channels, from which the water flows at all seasons of the year; and that said rivers must be connected by a direct line, run from said sources; and if, from the evidence, the jury shall find, that the plaintiff's patent is based on an entry, covering lands without the limits of said Virginia military district, so called, which had, prior to the year 1810, pursuant to the acts of congress in such case made and provided, been surveyed and sold to the defendant, the plaintiff's patent is void; and their verdict ought to be for the defendant.

7. That if the line connecting the rivers Scioto and Little Miami, according to the true intent and meaning of the said act and deed of cession, cannot be extended, as stated in either of the instructions asked for above, then, that the source of the said two rivers must be fixed at that point in

their respective channels, farthest removed from their respective mouths, at which water is found at all seasons of the year, and that a direct line, connecting said rivers, must be extended from said points; and if, from the evidence, the jury shall be of opinion, that the plaintiff's patent covers land without said boundary, so fixed as aforesaid, and which is based on an entry covering said land, made in the year 1810, which had, pursuant to the acts of congress of the United States, been surveyed and sold to the defendant, by the United States, prior to the year 1810, the plaintiff's patent is void; and their verdict ought to be for the defendant.

8. That if the line connecting the said rivers Scioto and Little Miami, *423] according to the true intent and meaning of *the said act and deed of cession, and the several acts of congress relative to the sale of the public lands of the United States, cannot be extended, as stated in either of the instructions asked for above, then, that the sources of these streams are at that point, farthest removed from their respective mouths, from which the rain descending on the earth, runs down into their respective channels; and that the lands lying between these rivers are limited by a direct line run from those points; and if, from the evidence, the jury shall be of opinion, that the plaintiff's patent covers land without the limits of said boundary, so stated as aforesaid, and which is based on an entry made in the year 1810, which had, pursuant to the acts of congress of the United States, prior to the said year 1810, been surveyed and sold to the defendant, by the United States, pursuant to the acts of congress, the plaintiff's patent is void; and their verdict ought to be for the defendant.

But the court declined giving the instructions asked for; to which refusal of the court, the defendant, by his counsel, excepted, and prays the court here to sign and seal this bill of exceptions, which is done accordingly, July 19th, 1827.

This case was argued by *Scott*, for the plaintiff in error; and by *Mason* and *Vinton*, for the defendant. *Wirt*, Attorney-General, appeared for the plaintiff, by order of the government of the United States, but was prevented taking part in the argument, by indisposition.

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered by the supreme court of Ohio, for the county of Champaign, in a ejectment in which the lessee of Duncan McArthur was plaintiff, and John Reynolds was defendant. The plaintiff claimed the land in controversy, under a patent issued on the 12th day of October 1812, founded on an entry made in the year 1810, on a military land-warrant granted by the state of Virginia for services during the war of the revolution, in the Virginia line, on continental establishment.

*The title of the defendant is thus stated. The land was sold by *424] the United States, at their land-office in Cincinnati, in the year 1805, to Henry Van Meter. It reverted to the United States in the year 1813, on account of the non-paymeut of the purchase-money; and was again sold, during the same year, at the same office, to Henry Van Meter, to whom a certificate of sale was issued, which he afterwards transferred to the defendant, John Reynolds.

The verdict and judgment were in favor of the plaintiff in the state

court. At the trial, the counsel for the defendant moved the court to instruct the jury on several points made in the cause, and excepted to the refusal of the court to give these instructions. The judgment of the state court, having been against a title set up under several acts of congress, is brought before this court by writ of error, that the construction put on those acts by that court may be re-examined. The inquiry will be, whether the court ought to have given any one of the instructions which were required. The several prayers for this purpose will be considered in the order in which they were made.

1. The first instruction asked is, that the lands west of Ludlow's line, east of Roberts's line, and south of the Indian boundary line, had been withdrawn from appropriation, under and by virtue of military land-warrants, prior to the year 1810; and that as the same had, pursuant to the acts of congress in such case made and provided, been directed to be surveyed and sold, and had, accordingly, been surveyed and sold to the defendant, prior to the year 1810, the plaintiff's patent is void, and their verdict ought to be for the defendant. This motion does not question the bounds of the lands reserved by Virginia for military bounties, but supposing the tract of country west of Ludlow's line, east of Roberts's line, and south of the Indian boundary line, to be within that reserve, asks the court to say, that congress had, prior to the year 1810, when McArthur's entry was made, withdrawn it from appropriation under and by virtue of military land-warrants.

*Before deciding on the propriety of refusing or granting this prayer, it will be necessary to review the legislation of congress on this subject. [*425 The act of the 9th of June 1794 (1 U. S. Stat. 394), taken in connection with the reservation in favor of their officers and soldiers contained in the deed of cession made by Virginia, unquestionably subjected the whole of the military reserve to the satisfaction of those warrants, for which the reserve was made. Had congress, previous to the year 1810, withdrawn that portion of this reserve which lies between the line run by Ludlow, and that run by Roberts, from its liability to be so appropriated?

So early as the year 1785, congress passed "an ordinance for ascertaining the mode of disposing of lands in the western territory" (1 Laws U. S. 563, 569), in which, for the purpose of securing to the officers and soldiers of the Virginia line, on continental establishment, the boundaries granted them by that state, it is ordained, "that no part of the land between the rivers called Little Miami and Scioto, on the north-west side of the river Ohio, be sold, or in any manner alienated, until there shall first have been laid off and appropriated for the said officers and soldiers, and persons claiming under them, the lands they are entitled to, agreeably to the said deed of cession and act of congress accepting the same." The scrupulous regard which this clause, in the ordinance of May 1785, manifests to this condition made by Virginia in her deed of cession, is the more worthy of remark, because at that time no suspicion was entertained, that the military warrants of Virginia would cover the whole territory; and it was even doubted, as the legislation of congress shows, whether any part of that territory would be required for them. Even under these circumstances, congress declared the determination not to sell or alienate any land between the Scioto and the Little Miami.

In May 1796, congress passed "an act providing for the sale of the lands

of the United States in the territory *north-west of the river Ohio and above the mouth of Kentucky river." (1 U. S. Stat. 464). The second section enacts, that "the part of the said land which has not been already conveyed," &c., "or which has not been heretofore, and during the present session of congress may not be appropriated for satisfying military land bounties, and for other purposes, shall be divided," &c. This law, then, from which the whole power of the surveyor-general is derived, excludes from his general authority all land previously appropriated for military land bounties and for other purposes; and consequently, excludes from it the lands between the Scioto and Little Miami.

In May 1800, congress passed an act to amend the act of 1796, which enacts, "that for the disposal of the lands of the United States directed to be sold by the original act, there shall be four land-offices established in the said territory." (2 U. S. Stat. 73.) The places at which these land-offices shall be fixed are designated in the act, and the district of country attached to each is described. One of these is Cincinnati, the place at which the lands in controversy were sold, and the district attached to it is that below the Little Miami. It is perfectly clear, from the language of this act, that it extends to those lands only which were comprehended in the act of May 1796, and that no one of the districts established by it, comprehends the land in controversy. Any general phrases which may be found in the law must, according to every rule of construction, be limited in their application to those lands which the original act authorized the surveyor-general to lay off, for the purpose of being sold. If he surveyed any lands to which that act does not extend, he exceeded his authority, and the survey is not sanctioned by the law. If land thus surveyed by mistake has been sold, the sale was not authorized by the law under color of which it was made.

The counsel for the plaintiff in error has pressed earnestly on the court
*427] the grants made to John Cleves Symmes, and *to the purchasers under him. We are not sure, that the argument on this point has been clearly understood, and have, therefore, examined that transaction, in order to discover its influence, if it can have any, on the question now under consideration. In 1787, John Cleves Symmes applied to congress for a grant to himself and his associates, of the lands lying within the following limits, viz: "Beginning at the mouth of the Great Miami river, thence running up the Ohio, to the mouth of the Little Miami river, up the main stream of the Little Miami river, to the place where a due west line, to be continued from the western termination of the northern boundary line of the grant to Messrs. Sargent, Cutler & Co., shall intersect the said Little Miami river, thence due west, continuing the said western line, to the place where the said line shall intersect the main branch or stream of the great Miami, thence down the Great Miami to the place of beginning." In consequence of this petition, a contract was entered into for the sale of one million of acres of land, to begin on the bank of the Ohio, twenty miles along its meanders above the mouth of the Great Miami, thence to the mouth of the Great Miami, thence up that river, to a place whence a line drawn due east will intersect a line drawn from the place of beginning, parallel with the general course of the Great Miami, so as to include one million of acres within these lines and the said rivers, and from that place upon the said Great

Miami river, extending along such lines to the place of beginning, containing as aforesaid one million of acres. The language of this contract does not indicate any intention on the part of congress to encroach on the military reserve, which the ordinance of May 1785, then in full force, had excepted from sale or alienation.

In 1792, congress, at the request of John C. Symmes, passed an act to alter this contract in such manner that the land sold should extend from the mouth of the Great Miami to the mouth of the Little Miami, and be bounded by the *river Ohio on the south, by the Great Miami on the west, by the Little Miami on the east, and by the parallel of latitude on the [*428 north, extending from the Great Miami to the Little Miami, so as to comprehend the proposed quantity of one million of acres." (1 U. S. Stat. 266.) The lands, then, which might be granted to John C. Symmes, in pursuance of this act of congress, lay between the Great and Little Miami, and were to lie below the Little Miami. The Scioto is above that river; so that congress could not have intended that this grant to Symmes should interfere with the military reserve.

On the 30th of September, in the year 1794, a deed was executed, in pursuance of the act of 1792, conveying to John C. Symmes that tract of land, beginning at the mouth of the Great Miami river, and extending from thence along the river Ohio to the mouth of the Little Miami river, bounded on the south by the river Ohio, on the west by the Great Miami, on the east by the Little Miami, and on the north by a parallel of latitude to be run from the Great Miami to the Little Miami, so as to comprehend the quantity of 311,682 acres of land. It is obvious, that this patent does not interfere with the military reserve. But John C. Symmes had sold to several persons who purchased in the confidence that he would comply with his contract for one million of acres, and be enabled to convey the lands sold to them.

In March 1799, congress passed an act declaring that any person or persons, who, before the first day of April, in the year 1797, had made any contract in writing with John C. Symmes for the the purchase of lands between the Great and Little Miami rivers, which are not comprehended in his patent dated the 30th of September 1794, shall be entitled to a preference in purchasing of the United States all the lands so contracted for at the price of two dollars per acre. In March 1801, congress passed an act extending this right of pre-emption to all persons who had, previous to the first day of January 1800, made any contract in writing with the said John C. Symmes, or with any of his associates, for the purchase of lands between the Miami rivers, within the *limits of a survey made by Israel [*429 Ludlow, in conformity to an act of congress of the 12th of April 1792. The provisions of this act are supposed to contemplate the survey and sale of the lands which had been sold to John C. Symmes between the Miami rivers, in like manner as had been prescribed for other lands lying above the mouth of Kentucky, by the acts of 1796 and 1800. The right of pre-emption was limited to lands within Israel Ludlow's survey; but that survey contained less than 600,000 acres, and the contract of Symmes was for one million of acres; congress, therefore, resumed the consideration of this subject, and in May 1802, extended this right of pre-emption to all those who had purchased from John C. Symmes, lands lying between the Miami rivers, and without the limits of Ludlow's survey. It cannot be

doubted, that this right of pre-emption, allowed to the purchasers under John C. Symmes, was limited to lands lying between the Miami rivers, and lying within his contract. Congress could never have intended that this contract should interfere with the military reserve. That reserve was of lands lying above the Little Miami; the sale to Symmes was of lands lying below that river. It was made while an ordinance was in full force, declaring the resolution of congress not to alienate any part of that reserve. Their contract was made in subordination to that ordinance, and cannot have intended to violate it. The terms of the contract do not purport to violate it. The land sold to Symmes, and the pre-emption rights allowed to the purchasers under him, are so described as to furnish no ground for the opinion, that congress could have suspected them to interfere with the military reserve. If the Scioto and the Great Miami, contrary to all probability, should take such a direction as to produce a possible interference between the lands sold to Symmes and the reserve which congress had declared its intention not to alienate, some difficulty might possibly arise, in a case where one of the parties claimed under a military warrant, and the other under a pre-emption certificate. But that is not this case. The title of the plaintiff in error is under a purchase made at sale of the lands of the United States,

*430] at Cincinnati, by Henry Van Meter, who is *not stated to have held a pre-emption certificate, or to have been a purchaser under Symmes.

The instruction which the court was asked to give is, that the land between the lines of Ludlow and Roberts had been withdrawn from appropriation, under and by virtue of military land-warrants, previous to the year 1810. This withdrawal is not in express terms, but is supposed to be implied, from a direction to survey the lands between the Great and Little Miami, which had been exempted from the operation of the acts of 1796 and 1800, under the idea, that they were comprehended in the contract with Symmes. Congress could not suspect that the lands to be surveyed under this law could interfere with the lands lying between the Little Miami and the Scioto; and consequently, cannot have intended by this act to vary the boundary of the military reserve.

It has been very truly observed, that all the laws on this subject should be taken together. The condition inserted in the deed of cession of Virginia, which reserves the land lying between the Little Miami and the Scioto, for the purpose of satisfying the warrants granted to the officers and soldiers of that state; the ordinance of May 1785, declaring that no part of that reserve should be alienated; the contract with Symmes for the sale of lands lying between the Miamis; the acts relative to pre-emptions, and which direct the survey and sale of the lands lying between the Miamis; without any allusion to the military district; must be taken into view at the same time. It is, we think, impossible to believe, that congress supposed itself, when directing the survey and sale of lands between the Great and Little Miami, to be abridging or altering the bounds of a district which Virginia had reserved in the deed of cession by which the country north-west of the Ohio had been conveyed to the United States. When congress designed to act on this subject, the purpose was expressed; and overtures were made to the other party to the compact, to obtain her co-operation.

*431] In executing the act of May 1800, the surveyor-general had caused a line to be run, from what he supposed to be *the source of the

Little Miami, towards what he supposed to be the source of the Scioto, which is the line denominated Ludlow's, and surveyed the lands west of that line in the manner prescribed by the act of congress. In March 1804, congress passed an act establishing that line as the western boundary of the reserve, provided the state of Virginia should, within two years after the passage of the act, accede to it. (2 U. S. Stat. 274.) Virginia did not accede to it.

In 1812, congress made another effort to establish this line. (2 U. S. Stat. 764.) The president was authorized to appoint commissioners to meet others which should be appointed by Virginia, who were to agree on the western line of the military reserve, and cause the same to be surveyed and marked out. These commissioners met; and after ascertaining the sources of the two rivers, employed Mr. Charles Roberts to survey and mark a line from the source of the one to the source of the other. This line is called Roberts's line. The Virginia commissioners, however, refused to accede to this line. This act provided, that, until an agreement should take place between the commissioners, the line designated in the act of 1804, which is Ludlow's, should be considered and held as the proper boundary line. This enactment is provisional and prospective. In 1818, congress passed an act declaring that from the source of the Little Miami to the Indian boundary line, established by the treaty of Greenville, Ludlow's line should be considered as the western boundary of the military reserve, until otherwise directed by law; and that from the said Indian boundary line to the source of the Scioto river, the line run by Charles Roberts shall be so considered. (3 U. S. Stat. 424.)

When we review the whole legislation of congress on this subject, we think the conclusion inevitable, that in the acts of 1801 and 1802, which have been cited, the legislature did not consider itself as altering the bounds of the military district, or as withdrawing, before the year 1820, any part of the territory lying between the Little Miami and the Scioto *from being appropriated by the military land-warrants granted by the state of Virginia. If those acts have this effect, it is one which was not intended. Before a court can be required to declare the law which would arise between conflicting statutes of this character, the fact that they do conflict ought to be clearly established. The counsel for the plaintiff in error has argued this part of the case, as if the fact was established; as if a line drawn from the source of the Little Miami to the source of the Great Miami would include the land between Ludlow's line and that of Roberts; and this court has thus far treated the question as it has been argued. But this fact is not established in this case. It is not among the facts agreed by the parties, nor was the state court required to instruct the jury, that if they should find the land west of Ludlow's, and east of Roberts's line, to lie between the Little and Great Miami, or within Symmes's purchase, "that it had been withdrawn from appropriation, under and by virtue of said military land-warrants, prior to the year 1810," and that McArthur's patent was consequently void. The court was not required to state the law hypothetically, as being dependent on the fact; but to assume the fact, and to state the law positively upon that assumption. The record, we think, did not authorize the court to consider this fact as established, and to withdraw it from the jury. There is no error in refusing this instruction.

[*432

2. The counsel for the defendant then asked the court to instruct the jury, that as the third section of the act of the congress of the United States, of the 11th of April 1818, declares, "that from the source of the Little Miami river to the Indian boundary line, established by the treaty of Greenville, in 1795, the line designated as the westerly boundary line of the Virginia tract, by an act of congress, passed on the 23d day of March 1804, entitled, 'an act to ascertain the boundary of the lands reserved by the state of Virginia, north-west of the river Ohio, for the satisfaction of her officers and soldiers on continental establishment, and to limit the period for locating the said lands,' shall be considered and held as such, until otherwise directed by law;" and as said *boundary line was run by Ludlow, *433] under the directions of the surveyor-general, pursuant to an act of congress, entitled, "an act to extend and continue in force the provisions of an act entitled, 'an act giving a right of pre-emption to certain persons, who have contracted with John Cleves Symmes, or his associates, for lands lying between the Miami rivers, in the territory north-west of the Ohio, and for other purposes,'" approved May 1st, 1802; and offered for sale at public auction, at the Cincinnati land-office, pursuant to the act, entitled, "an act making provision for the disposal of public lands in the Indian territory, and for other purposes," approved March 26th, 1804, must be construed as having relation back to the time the above recited act, entitled, "an act to ascertain the boundary of the lands reserved by the state of Virginia, north-west of the river Ohio, for the satisfaction of the officers and soldiers on continental establishment, and to limit the period for locating said lands," approved 23d of March 1804, was passed and took effect; and as the plaintiff's patent covers lands west of that line, and south of the Greenville treaty line, and is based on an entry made in 1810, on a Virginia continental land-warrant, which land had been surveyed and sold to the defendant, pursuant to the acts of congress, prior to the year 1810, the plaintiff's patent is void; and their verdict ought to be for the defendant.

The prayer for this instruction is founded on the assertion that Ludlow's line was run under the direction of the surveyor-general, pursuant to the act of congress of the 1st of May 1802, granting pre-emption rights to purchasers from John Cleves Symmes; and that the land in controversy was sold, pursuant to the act of the 26th of March 1804, making provision for the disposal of public lands in the Indian territory, and for other purposes. If by the words "pursuant to an act of congress," as used in this prayer, it is intended to say, that the boundary line run by Ludlow was correctly run, as required by the act of May 1st, 1802; and that the sale of the land in controversy was authorized by the act of the 26th of March 1804, then the court is required to decide facts not admitted by the parties, *which *434] are proper for the consideration of the jury; and then to declare the law arising upon those facts. If those words mean no more than that the line was actually run under the authority of the surveyor-general, and that the land in controversy was actually sold at the land-office in Cincinnati, by the officers of government, the question fairly arises, what influence have these facts on the rights of the parties? Do they, taken in connection with the acts of the 23d of March 1804, and of the 11th of April 1818, justify the inference, which the court is asked to draw, that the act of 1818 relates back

to the act of 1804, and takes effect from its date, so as to avoid a patent issued in October 1812, on an entry and survey made in 1810?

It has already been stated, that the act of the 23d of March 1804, establishes Ludlow's line, not absolutely, but on condition that Virginia should assent to it; and that Virginia never did assent to it. It has also been stated, that in 1812, congress authorized the president to appoint commissioners, who should proceed, in concert with such as might be appointed by Virginia, to run a line which should constitute the western boundary of the Virginia military reserve. These commissioners did meet, and did cause a line to run from the source of the Little Miami to the source of the Scioto; this is called Roberts's line. The commissioners of Virginia did not assent to this line; consequently, it is of no operation. The act of April the 11th, 1818, declares that Ludlow's line shall be considered and held as the true western boundary of the Virginia military reserve, until otherwise directed by law. But from what time shall it be so considered and held? The language of the law is entirely prospective. It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable. No words are found in the act of 1818 which render this odious construction indispensable. The language is, that Ludlow's line shall be considered and held, that is, shall in future be considered and held, as the *true western boundary of that reserve. That this was the understanding of the legislature, is rendered the more probable, from the [*435
clause which relates to patents. It does not annul patents already issued, but declares, that no patent shall be granted on any location and survey that has been or may be made west of this line. Patents which have been granted are not affected directly by the words of this law, and must depend on the pre-existing act of congress.

The argument is, that this act declaring that Ludlow's line shall be considered and held as the westerly boundary line of the reserve, until otherwise directed by law, proves that, according to the true construction of the deed of cession, this line is in reality the true boundary, and therefore, that all titles previously acquired to lands lying west of this line are invalid. We cannot admit the correctness of this argument. That in the state of things which existed in 1812 and 1818, congress might establish the western boundary of the military reserve, so as to affect titles thereafter to be acquired, is not questioned. Congress might fix a reasonable time, within which titles should be asserted, and might annex conditions to the extension of this time. But to look back to titles already acquired, to declare by a law what was the meaning of the compact under which those titles were acquired, is to construe that compact and to adjudicate in the form of legislation. It would be the exercise of a judicial, not of a legislative power. This construction can never be admitted by the court, unless it be rendered indispensable by the language of the act. We do not think, that the language of this act does require it.

If the language of the statute does not require this construction, neither do the facts that Ludlow's line was run by the order of the surveyor-general, and that the land in controversy was sold by the regular agents of government. These facts cannot, we think, carry back the act of 1818 to

1804, and give it a retrospective operation. We do not inquire into the power of congress to pass such an act. There is undoubtedly much force in the argument suggested at the bar, that the general power of *legis- *436] lation, which congress could exercise over the territory north-west of the Ohio, passed to the new government, when the territory was erected into a state; and that congress retained only the power of a proprietor, with a capacity "to dispose of and make all needful rules and regulations respecting the property." But it is unnecessary to pursue this inquiry, because we are of opinion, that this construction is inadmissible. The court, therefore, did right in rejecting this prayer.

3. The third instruction asked by the defendant is in these words: that according to the true intent and meaning of the act and deed of cession from Virginia to the United States, the land lying between the rivers Scioto and Little Miami is bounded by a line extending from the source or point of land farthest removed from the mouths of these rivers, from which the rain descending on the earth runs down into their respective channels, along the tops of the ridges, dividing the waters of the Scioto from the waters of the Great Miami, which empties into the Ohio, below the mouth of the Little Miami, as delineated on the diagram returned by the county-surveyor for the defendant in this case; and as the plaintiff's patent covers land west or without the boundary of the district so bounded as aforesaid, and is based on an entry on a Virginia continental land-warrant, which entry was made in the year 1810, and which said entry and patent cover land which had, pursuant to the acts of congress, been surveyed and sold to the defendant, prior to the date of the plaintiff's said entry, the plaintiff's patent is void; and their verdict ought to be for the defendant In the case of *Doddridge* v. *Thompson*, 9 Wheat. 469, this court said, that the territory lying between two rivers is the whole country from their sources to their mouths; and a straight line drawn from the source of one river to the source of the other was considered, in that case, as furnishing the western boundary of the lands lying between them. One or both of the rivers may pursue such a course that a straight line from the source of one to the source of the other may cross one or both of them. Such a case may form an exception to the universal application of the straight line, *and may go far in showing *437] that no general rule can be laid down which will fit every possible case. But this obvious and reasonable rule has been adopted by congress as well as by this court. The act of 1804 adopts the straight line. The act of 1812 obviously contemplates a straight line, and the act of 1818 adopts Ludlow's line, from the source of the Little Miami to the Indian boundary line established at the treaty of Greenville, and the line run by Roberts, from the Indian boundary to the source of the Scioto. The counsel for the defendant in the state court abandoned the rule adopted by congress and by this court, by taking for his commmencement "that point of land which is farthest removed from the mouths of the respective rivers, and from which the rain descending on the earth runs down into their respective channels:" and to draw a line from that point along the top of the ridges dividing the waters of the Scioto from the waters of the Great Miami. We feel some difficulty in comprehending the principle which has suggested, and can sustain this rule. Why should a line drawn along the top of the ridges which divide the waters of the Scioto from those of the Great Miami constitute the

true boundary of the country lying between the Great and Little Miami? Would such a line certainly lead to the source of the Scioto or to that of the Little Miami? We can give no satisfactory answer to these inquiries. It is some objection, too, to this instruction, that the jury would be much and unnecessarily perplexed in finding the point of land farthest removed from the mouth of each river, and from which the rain descending on the earth runs down into their respective channels. If any point exists which would fit all parts of the description, and could be found by the jury, it is by no means certain, that such point would be in a line which would mark the boundary of the country between the two rivers. The rule which the court was asked to lay down appears to us to be entirely arbitrary; and this prayer was properly rejected.

4. The fourth instruction has been abandoned by the plaintiff in error.

*5. The proposition on which the fifth prayer depends is, "that the sources of the two rivers must be at that point in their respective channels at which, from the union of several streams, sufficient water flows at an ordinary stage on which to navigate small vessels laden." This rule for ascertaining the source of a river is entirely new in this country. A stream may acquire the name of a river, which is not navigable in any part. A river which is navigable, may retain that name, above the highest navigable point. The meaning of words as commonly used must be changed, before the source of a river can be confounded with its highest navigable point. The court did not err in rejecting this prayer. [*438

6. The proposition on which the sixth prayer depends is, "that the sources of the two rivers must be considered as commencing at that point in their respective channels from which the water flows at all seasons of the year." Is this proposition so invariably true, as to become a principle of law? We think it is not. A stream may acquire the name of a river, in the channel of which, at some seasons of extreme drought, no water flows. For a great portion of the year, parts of a stream may flow in great abundance, in which, during a very dry season, we may find only standing pools. It would be against all usage, to say, that the general source of the river was at that point in its channel from which the water always flows. This prayer, we think, ought not to have been granted.

7. The seventh prayer depends on the proposition, that the sources of the two rivers must be fixed at that point in their respective channels, farthest removed from their respective mouths, at which water is found at all seasons of the year. If the terms of this proposition be taken according to the most obvious import, it would seem to vary from the sixth only in this: that the sixth fixes the source of a river at the point in the channel from which water flows at all seasons in the year; while the seventh fixes it at that point which is farthest removed from its mouth, at which water is found at all seasons. Understanding it in this sense, the *proposition would not raise the question, which of several was the main branch; but at what point the source of that main branch was to be found. The remarks make on the sixth prayer would apply with equal propriety to this; and the court would come to the same conclusion on both. But we understand from the argument, that the counsel for the plaintiff in error intended, by this prayer, to furnish a rule by which the main branch might [*439

be designated. That rule is, that the branch in whose channel water might be found farthest removed from the mouth of the river, is its main branch. Is this proposition universally true? That branch of a river, which is entitled to the appellation given to the main river, is a conclusion of fact to be drawn from the evidence in the cause. Consequently, no general rule can be laid down, which will, in all cases, guide us to a correct conclusion. One of the forks may have retained the name of the main river, in exclusion of the others. The Scioto and Miami are both Indian names, and if any one branch of either had received from the natives, and retained exclusively, the name given to the main river, that would have been the stream referred to in the reserve, contained in the deed of cession; although water might have been found, in a dry season of the year, in the channel of some other, at a greater distance from the mouth of the river; or the white men, who explored the country before the deed of cession was executed, may have fixed the name on some one of the branches of the respective rivers.

When France ceded to Great Britain all her pretensions to the country lying east of the Mississippi, "from its source to the river Iberville," no man could have been so extravagant as to assert, that the source of the Mississippi was to be looked for through all its branches, and fixed at that point in the channel of either in which water might be found farthest removed from the mouth of the river. The size of the rivers, and the notoriety of the names by which they were designated, place the unreasonableness of such a pretension in so strong a point of view, that we can scarcely
*440] bring ourselves to suppose, that there is any *resemblance between the case put by way of illustration, and that under consideration. And yet, what is the real difference in principle? If one branch of a small river has, by consent, retained the name of the main river, in exclusion of the others, that branch must be considered, in the absence of other circumstances, as the true boundary intended by the parties, in a deed which calls for the stream by its name. The fact may be less certain and less notorious; but if it exists, it must be followed by the same consequences. If neither branch had notoriously retained the name of the river, the main branch is entitled to it. But the main branch is not necessarily that in whose channel water might be found at all seasons of the year, at the point farthest removed from its mouth. The largest volume of water is certainly one indication of the main stream, which does not necessarily accompany that which the counsel for the plaintiff in error has selected as the sole criterion by which it is to be determined. The length of the stream is another. It is obvious, that two branches may pursue such a course that the source of the longest may be nearer the mouth of the river than that of the shortest. We think, the rule proposed in this prayer does not furnish a certain guide to conduct us to the source of the river; and therefore, the instruction ought not have been given.

8. The eighth prayer requires the court to instruct the jury, that the source of each river is at that point farthest removed from its mouth, from which the rain runs down into its channel. We cannot perceive in the rule which this instruction proposes, any principle which will conduct us to the source of the main stream. Every objection to granting the seventh prayer, applies with equal force to this. They need not be repeated. The court did not err in rejecting it.

The instructions to the jury, for which the plaintiff applied to the state court, are some of them mixed questions, involving fact with law, and requiring the court to decide the fact, and then to declare the law upon that fact. Others propose a rule, as of universal application, to ascertain the main *branch of a river, and the source of that main branch, which [*441 would, unquestionably, in many cases, mislead us. They propose one single circumstance, in exclusion of all others, as being the infallible evidence of a complex fact depending on a number of varying circumstances. The court very properly refused to give any of these instructions.

This court is of opinion, that there is no error in the judgment of the state court, and that it ought to be affirmed, with costs.

Judgment affirmed.

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*Solomon Southwick, Spencer Stafford and John Van Ness Gates, Plaintiffs in error, *v.* The Postmaster-General of the United States. [*442

District courts.

A district court of the United States, performing the appropriate duty of a district court, is not sitting as a circuit court, because it possesses the powers of a circuit court also.

Error to the Circuit Court of the southern district of New York. This suit was commenced originally by the Postmaster-General, in the district court of the northern district of New York, in May 1822, against Solomon Southwick and his co-defendants, who were his sureties, to recover $6000, the penalty of a bond given by them for the faithful discharge of his duties as postmaster of the city of Albany. In 1824, judgment was rendered in favor of the postmaster-general, and a writ of error was thereupon brought, and the record certified to the circuit court of the southern district of New York. The judges of the circuit court divided in opinion upon several points which arose in the case, and the same were certified to this court; where they were considered and decided at January term 1827. The decision of this court having been certified to the circuit court, the judgment of the district court was affirmed by the circuit court, in May term 1828.

Upon this judgment, this writ of error was prosecuted; and now *Wirt*, the Attorney-General of the United States, moved to dismiss the same. He contended, that the phrase in the act of congress, passed April 29th, 1812 (2 U. S. Stat. 719), "sitting as a circuit court," is confined to such causes as are exclusively of circuit court jurisdiction; and does not embrace causes of which district courts as such, and circuit courts as such, have a concurrent jurisdiction. He argued, that this is the correct construction of the act of congress, and is consistent with the judicial system; *because, in no [*443 case has a writ of error been given to reverse the judgment of a circuit court, in a cause brought up from a district court; provided such cause was within the ordinary jurisdiction of a district court. In such cases, the judgment of the circuit court has been uniformly final and conclusive. If the act in question has introduced a different rule, in reference to causes decided in the northern district court of New York, it is an anomaly in our

judicial legislation. The district courts have jurisdiction of post-office bonds. 12 Wheat. 136; *Dox* v. *Postmaster-General*, 1 Pet. 318. He submitted, that the act of 1826 does not reach cases within the ordinary jurisdiction of the district courts. If it be otherwise, it must be shown that, in fact, the district court sat as a circuit court; and this cannot be established in the case before the court. He inquired, if the judgment of the district court in this cause, could have been removed directly to the supreme court, under the act of 1826? Certainly not. The act creating the northern district court, was designed to extend to that district the benefit of a circuit court jurisdiction; not to confer circuit court powers, concurrent with those which it possessed in its appropriate character. It would have been idle and useless to have intended otherwise, and therefore, cannot be presumed.

Taylor, for the plaintiffs in error, in opposition to the motion, urged, that the appropriate original jurisdiction of the district court, in its general features, relates to admiralty and maritime causes, to seizures under the revenue laws, to petty offences, and to civil suits when the United States is plaintiff, and the sum in controversy does not exceed $500. It is the inferior court of the United States. The appropriate original civil jurisdiction of the circuit court, extends to all civil suits, where the United States is plaintiff, and the matter in controversy exceeds $500; or when an alien is
*444] a party, or the suit is between a *citizen of the state where the action is brought, and a citizen of another state. The district court may, indeed, exercise jurisdiction of civil causes in behalf of the United States, where the matter in controversy exceeds $500, but in all such cases, the jurisdiction of district and circuit courts is concurrent. It is to be presumed, that the court sits in its superior character, whenever the matter in controversy will authorize this to be done. This presumption is strengthened by the consideration, that the parties have a right, in the one case, to have the proceedings reversed, and the errors which may happen, corrected by this court, which is of common right, and which is denied to them upon the principles claimed for the postmaster-general.

The propriety of a liberal construction of the act of congress, for the purposes of allowing a review of the district court, for the northern district, will be apparent, when the history of that court, for several years subsequent to 1811, shall be considered. In 1812, the judge of the New York district court became incapable of discharging the duties of his office. Hence, the act of April 29th, 1812, which authorized the appointment of an additional judge of the district court for the district of New York. The act of April 9th, 1814 (3 U. S. Stat. 120), divided the original New York district into two districts, and assigned a district judge to each. It provides, "that the district court in the said northern district of New York, shall, besides the ordinary jurisdiction of a district court, have jurisdiction of all causes, except of appeals and writs of error, cognisable by law in a circuit court;" and writs of error shall lie from decisions thereon, to the circuit court of the southern district of New York, in the same manner as from other district courts, to their respective circuit courts. Writs of error would lie equally in all cases, whether the court was exercising its ordinary or extraordinary jurisdiction.

In the northern district, until the act of the 3d of March 1815,

*there was but one district-attorney, and the marshal was appointed and commissioned for both courts, until the act of March 3d, 1825. Mr. Taylor considered, that the act of the 3d of March 1817, revived and continued the suits and proceedings which had been discontinued in the northern district of New York, and that it authorized the judges of the southern district to hold the courts therein, either singly or jointly, with the judge of the northern district. Under this act, the same difficulties arose in conducting the business of the northern district, which had been formerly experienced in the southern district. To remedy these evils, at the first session of the 15th congress, the act of April 3d, 1818, was passed. That act required the judge of the northern district to hold his courts, unless he gave timely notice of his inability to the judge of the southern district; in which case, the latter was required to act as his substitute. Suits and proceedings were again revived; actions commenced in the former district of New York were transferred; and the actions thereafter to be commenced were limited to the district where they might or did arise; and the original jurisdiction of the circuit court of the southern district was confined to actions arising there. No further legislation took place relative to these courts, until the 22d of May 1826, when the act was passed allowing appeals and writs of error to this court, from decisions of the northern district court, "when exercising the power of a circuit court;" and from decisions thereafter to be made by the circuit court for the southern district, in causes removed to the circuit court from the district court of the northern district, "sitting as a circuit court."

At the time the former writ of error was brought to remove this cause from the northern district court to the circuit court of the southern district, it was not legal to prosecute it to this court. Similar causes may now be removed, and here reviewed. This, he argued, furnished a reason for the second clause of the act of 1826. These acts afford an answer to the inquiry, whether the northern district court, in deciding this cause, "was sitting *as a circuit court." The expression in the act of 1814, is, "causes cognisable by law in a circuit court," and in that of May 1826, it is, [*446 "when exercising the powers of a circuit court." Was not this cause cognisable by law in a circuit court? Would not such a court, in entertaining jurisdiction over it, be in the exercise of its appropriate powers? If so, the district court was "sitting as a circuit court." The parties were proper for the circuit court; the nature of the action was one involving a large sum, and questions were presented of deep interest, both as to their responsibility as sureties, and the character of the principal in the bond. The allegations made by the defendants were supported by the finding of the jury, and they went to show that the sureties were exonerated, and in judgment of law, were discharged from the bond. The doubts and difficulties of the case were manifest, by the division of opinion of the judges of the southern circuit court. These matters are sufficient to give the district court of the northern district jurisdiction as a circuit court. The act of 1826 allows writs of error from the district court, only "when exercising the powers of a circuit court," and this is done, on the presumption that these powers were exercised on subjects proper for them.

He further contended, that the act of 1826 was a remedial statute, and was entitled to be viewed most favorably to parties, to whom it was intended

to give relief. If its provisions do not embrace this case, it will stand almost wholly inoperative on the statute book. Had the circuit court, when the case was first before it, decided that the fact found by the jury discharged the parties to the bond, the United States would, by their law-officer, have considered it altogether reasonable, that the opinion should have been reviewed by this court. The plaintiffs in error claim no more than the application of the same just principle to their case.

*447] MARSHALL, Ch. J., delivered the opinion of the court.—*This is a motion to dismiss a writ of error to a judgment rendered in the court of the United States for the second circuit and southern district of New York, in favor of the postmaster-general. The foundation of the motion is, that this court has no jurisdiction of the cause.

The original judgment was rendered in the court for the northern district of New York, on which congress had conferred jurisdiction as a circuit court also. That judgment was removed into the circuit court sitting in the southern district, by writ of error, and was affirmed in that court. In May 1826, congress enacted, "that appeals and writs of error shall lie from decision in the district court for the northern district of New York, when exercising the powers of a circuit court; and from decisions which may be made by the circuit court for the southern district of said state, in causes heretofore removed to said circuit court from the said district court, sitting as a circuit court, to the supreme court of the United States, in the same manner as from circuit courts." The doubt respecting the jurisdiction of the court is produced by this act.

By the judiciary act, the district courts have cognisance, concurrently with the circuit court, of all cases where the United States sue. By the act of the 3d of March 1815 (3 U. S. Stat. 245), it is enacted, that the district courts of the United States shall have cognisance, concurrent, &c., of all suits at common law, where the United States or any officer thereof under the authority of any act of congress, shall sue, &c. This act gave the district court jurisdiction of all suits brought by the postmaster-general.[1] It has been construed by this court to give the circuit courts cognisance of the same causes.

The district courts which exercise circuit court jurisdiction, do not distinguish in their proceedings whether they sit as a circuit or a district court. That is determined by the subject-matter of their judgments. Their records are all kept as the records of a district court. If the court for the northern district of New York sat as a circuit court, when the original judgment was *448] rendered against the *plaintiff in error, this court can take jurisdiction of the judgment affirming it, which was rendered in the circuit court; if the original judgment was rendered by a district court, no writ of error lies to the judgment of affirmance pronounced in the circuit court. Had the court for the northern district of New York possessed no circuit court powers, it could still have taken cognisance of this cause. By conferring on it the powers of a circuit court, congress has added nothing to its jurisdiction in this case. In taking cognisance of it, a district court has exercised the ordinary jurisdiction assigned to that class of courts. No

[1] United States v. Bougher, 6 McLean 277.

extraordinary powers were brought into operation. We cannot, say that a district court, performing the appropriate duty of a district court, is sitting as a circuit court, because it possesses the powers of a circuit court also. The writ of error must be dismissed, this court having no jurisdiction in the case.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of New York, and on the motion of the attorney-general made in this cause, at a prior day of this term, to wit, February 7th, 1829, to dismiss this cause for want of jurisdiction, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the writ of error in this cause be and the same is hereby dismissed, for want of jurisdiction.

PLOWDEN WESTON and others, Plaintiffs in error, *v.* CITY COUNCIL OF CHARLESTON, Defendants. [*449

Illegal tax.—Error to a state court.

A tax imposed by a law of any state of the United States, or under the authority of such a law, on stock issued for loans made to the United States, is unconstitutional.[1]

The power of this court to revise the judgments of state tribunals depends on the 25th section of the judiciary act; that section enacts, "that a final judgment or decree in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had," where is drawn in question the validity of a statute, or of an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity, "may be re-examined, and reversed or affirmed in the supreme court of the United States." p. 463.

The city council of Charleston, exercising an authority under the state of South Carolina, enacted an ordinance, by which a tax was imposed on the six and seven per cent. stock of the United States; and in the court of common pleas of the Charleston district, an application was made for a prohibition to restrain them from levying the tax, on the ground, that the ordinance violated the constitution of the United States; the prohibition was granted, and the proceedings in the case were removed to the constitutional court, the highest court of law of the

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[1] A state law taxing the loans of the United States is unconstitutional, whether it impose the tax upon the United States stocks *eo nomine*, or include it in the aggregate of the tax-payer's property, to be appraised, like the rest, at its value. The imposition of such a tax is a restriction upon the constitutional power of the United States to borrow money, which might be used, if it existed, so as to defeat the federal power altogether. Bank of Commerce *v.* Commissioners of Taxes of New York, 2 Black 620. A state tax on banks "on a valuation equal to the amount of their capital stock paid in, or secured to be paid in," is a tax on the property of the bank; and so far as it is invested in United States stocks, is void. Bank Tax Case, 2 Wall. 260. So, the capital stock of a national bank, which is invested in government securities, is not liable to state taxation; but the shares of the stockholders are taxable, without regard to the mode of investment. Bank of Louisville *v.* Kentucky, 9 Wall. 353. United States legal-tender notes, issued as currency, are exempt from state taxation. Bank of New York *v.* Supervisors, 7 Wall. 26. And so are certificates of indebtedness, issued by the United States, to creditors of the government, for supplies furnished to it, in carrying on the war of the rebellion. Broadway Bank *v.* Mayor of New York, Id. 16. Both these cases were reversals of the court of appeals of New York, wherein the opinions were delivered by Judge HUNT, now upon the bench of the supreme court of the United States. They exhibit the feeblest attempt to answer his almost unanswerable argument.

state; and in that court, it was held, that the ordinance did not violate the constitution of the United States, and a writ of error was prosecuted on this decision of this court: *Held*, that the question decided by the constitutional court was the very question on which the revising power of this court is to be exercised. p. 464.

A writ of error to this court may be prosecuted, where, by the judgment of the highest court of the state of South Carolina, a prohibition, issued in a state court, to prevent the levying of a tax which was imposed by a law repugnant to the constitution of the United States, was refused, on the ground, that the law was not so repugnant to the constitution. p. 464.

The term "suit" is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, in which an individual pursues that remedy in a court of justice which the law affords him. p. 464.

The words "final judgment," in the 25th section of the judiciary act, must be understood, in the section under consideration, as applying to all judgments and decrees which determine the particular cause; and it is not required, that such judgment shall finally decide upon the rights which are litigated, that the same shall be within purview of the section. p. 464.

It is not the want of original power in an independent sovereign state to prohibit loans to a foreign government, which restrains the state legislature from direct opposition to those made by the United States; the restraint is imposed by our constitution. The American people have conferred the power of borrowing money on the government, and by making that government supreme, have shielded its action in the exercise of that power, from the action of the local governments; the grant of the power, and the declaration of supremacy, is a declaration that no such restraining or controlling power shall be exercised. p. 468.

Weston *v.* Charleston, Harper 340, reversed.

*450] *Error to the Constitutional Court of South Carolina. On the 20th of February 1823, the city council of Charleston passed "an ordinance to raise supplies for the use of the city of Charleston, for the year 1823." The ordinance provided, "that the following species of property, owned and possessed within the limits of the city of Charleston, shall be subject to taxation, in the manner, and at the rate, and conformably to the provisions hereafter specified; that is to say, all personal estate, consisting of bonds, notes, insurance stock, six and seven per cent. stock of the United States, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid (funded stock of this state, and stock of the incorporated banks of this state and the United States Bank excepted), twenty-five cents upon every hundred dollars."

In the court of common pleas for the Charleston district, the plaintiffs in error, in May 1823, filed a suggestion for a prohibition, as owners of United States stock, against the city council of Charleston, to restrain them from levying, on six and seven per cent. stock of the United States, the tax imposed under the ordinance; on the ground, that the said ordinance, so far as it imposed a tax on the stock of the United States, was contrary to the constitution of the United States. The prohibition having been granted, the city council applied to the constitutional court, the highest court of law in the state, to reverse the order, on the ground, that the ordinance was not repugnant to the constitution of the United States; and the proceedings in the case having been removed to the said court, that court, in May term 1823, by a majority of the judges (four being in favor of the constitutionality of the ordinance, and three against it), decided, that the said ordinance did not violate the constitution of the United States, in imposing a tax upon the holders of United States stock. From this decision, the relators appealed by writ of error to the supreme court of the United States.

The error assigned in this court was, that the judgment *of the constitutional court was erroneous, in that it decided the ordinance of the city council of Charleston not to be repugnant to the constitution of the United States.

The case was argued by *Hayne*, for the plaintiffs in error; and by *Cruger* and *Legare*, for the defendants.

The counsel for *plaintiffs* in error submitted, that if the course of proceeding adopted by the plaintiffs in error was not approved of, by requiring a prohibition in the court of common pleas, and on the decision of the constitutional court being against them, by taking the writ of error, some other mode would be employed. It was the wish of all the parties, to have the decision of this court on the question involved in the case; and a ready and entire acquiescence would be yielded to the judgment of the court, by all who are interested. It was submitted to the court, that, for the purposes of justice, the court would give an opinion upon the matter assigned for error; and if the form in which the case had been brought up was not proper, the judgment of the court would be equally operative, and would be yielded to by the parties, plaintiffs and defendants in error.

The subject in controversy is one of proper cognisance for this court. It involves a most important constitutional question; the right of the states, or of state authorities, to tax the funded debt of the United States. The subject-matter of the case belongs to this court. The soundest rule that can be adopted is, that when the matter in question belongs to the jurisdiction of the federal courts, a liberal construction in favor of the powers of the court over it, should be given. The question in this case concerns the vital means of the nation; and the power claimed to be exercised under the ordinance would interfere with those means, on emergencies of the deepest interest. It is a constitutional question, and as such, is peculiarly under the guardianship of this court. The writ of error is to the highest tribunal of the state of South Carolina; and the decision of that court has been in favor of the constitutionality of the ordinance; thus *bringing the case fully within the 25th section of the judiciary act. Let this court cer- [*452 tify its opinion, and the controversy will be at an end. On more occasions than one, when the court has felt some embarrassment as to its jurisdiction, it has expressed its opinion upon important questions; when the general good required a decision. *United States* v. *Kirkpatrick*, 9 Wheat. 720.

2. The act of congress organizing the courts of the United States, authorizes this court to form and mould its process, so as to enforce and carry into effect the objects and purposes for which the federal courts were established. It is conceived, that the writ of prohibition is a mode of exercising jurisdiction which is essential to those purposes. There is a strong analogy between the prohibition asked in this case, and those issued to district courts under the law. But if the writ of prohibition may not be adopted, and the court should decide this case in favor of the plaintiffs in error, the case may be remanded to the court of common pleas for the Charleston district; and should that court refuse to proceed as required, the supreme court may itself enforce its judgment.

Upon the general question, the counsel for the plaintiffs in error argued,

that the ordinance does not impose a tax on all public funds, but specifically on the six and seven per cent. stock of the United States. Thus, there are selected, as the particular object of taxation, those debts of the government of the United States; and the sum the government has stipulated to pay for the loan is diminished to the extent of the tax. The contract of the general government is invaded, and its credit impaired; its competency to negotiate loans may be destroyed, by the admission of this power of taxation. There are two sources of revenue, which are essentially the right of the general government: that of imposing duties, and that of borrowing money on the credit of the nation. The safety of the whole depends upon the free and undisturbed exercise of these powers. In peace, the first is necessary to revenue; in war, the *second is vital to the defence and success. If these powers and rights are not guarded and preserved, the functions and purposes of the Union will be suspended and destroyed.

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There is no warrant for this tax, to be derived from the opinion of this court in the case of *McCullough* v. *State of Maryland*, 4 Wheat. 316. The court, at the close of the opinion delivered in that case, sanction a tax on property held by citizens of Maryland in the Bank of the United States, in common with other property throughout the state; but they say expressly, that "a particular tax upon the operation of an instrument employed by the government to carry its powers into execution, is void."

Mr. Hayne presented, as a part of his argument, the opinion of Mr. Justice HUGER, in the constitutional court; who, with NOTT and BAY, JJ., dissented from the opinion of the majority of the court.(*a*)

(*a*) HUGER, J. (Dissenting.)—This was an application for a prohibition to restrain the treasurer of the city of Charleston from levying a tax, imposed by a city ordinance on six and seven per cent. stock of the United States. The words of the ordinance are: "All personal estates, consisting of bonds, notes, &c., six and seven per cent. stock of the United States, or other obligations, upon which interest has been or will be received during the year, over and above the interest which has been paid, (except &c.), twenty-five cents on every hundred dollars." The prohibition was ordered; a motion is now submitted for the reversal of that order. I am unwilling, on so important a question, merely to express my dissent from the judgment of the court. It is now for the first time agitated, and ought to be fully discussed, that it might be better understood. It affects the use of a power, as essential to the general government in periods of difficulty and danger, as any other which the people have delegated to it. If the city council of Charleston can tax the stock of the United States, *eo nomine*, the states can; and if the states can, it is impossible not to perceive, that the fiscal operations of the general government may be completely frustrated by the states. It will be in vain for congress to pass acts authorizing the secretary of the treasury to borrow money, if the holders of their stock can be taxed for having done so, by the states. Congress may offer ten per cent. for loans, but who will lend, if the states can appropriate the whole to their own use? Whether the states will do so or not, may be problematical, but if they can do so, the risk of their doing so must be covered by the terms on which the loan will be made. There is but one substantial security for the proper administration of our governments, the immediate responsibility of the administrators thereof to the people. If, however, the people have or feel no interest in the measures of a government, its administrators are only nominally responsible; they will only be checked, where they act in derogation of what is understood or felt to be the interest of their constituents. Remote interests are not seen by the better informed, and they always must present grounds for much difference of opinion, even among the best informed. It is not a sufficient guard to the power

Cruger and *Legare*, for the defendants in error, contended, that a writ of error could not be sustained on proceedings in prohibition. [*455 *Should the supreme court reverse the judgment below in this case,

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of the general government, that the constituents of the administrators of the state governments have a remote interest in the preservation of those powers, or in an unembarrassed exercise of them by the general government. They may not be seen, or may not be understood, and the very case before us presents a full illustration of the truth. No government, not revolutionary, has ever attempted to tax its own stock,[1] and among others, for two very satisfactory reasons. 1. Because such a tax must necessarily operate injuriously upon all future loans: 2. Because there is, in fact, a violation of contract in so doing, and therefore, it is immoral and impolitic. Under the influence of these reasons, the legislature of this state has refused to tax the stock of the United States, but it appears, that the city council of Charleston have thought differently, and have taxed it. There are, however, some very obvious reasons why the council of Charleston should be less disposed to impose such a tax than the legislature. In the first place, the city of Charleston, being commercial, is more within the influence of the policy of the general government than the legislature; if, therefore, the council of the city can believe it politic and just to tax the stock of the United States, can it be thought improbable, that the legislature may do so? If they can do so at all, they may do so to any extent; it is equally within their power to tax twenty per cent. or one hundred per cent. as one-half per cent. What shall govern their discretion, it is impossible to foresee. A state or a few states may concur in a policy at variance with that of the government, nay, in hostility to it. This, unfortunately, has already been witnessed. They may, indeed, be indisposed to dissolve the Union, and declare war; when they might have no objection to counteract congress, and control its measures, by the exercise of a power strictly constitutional.

Seven-tenths of the stock of the United States are owned in the cities of Boston, New York, Philadelphia, Baltimore and Charleston. The same causes which have concentrated the stock in these cities, will, in all probability, continue to operate, and the greater part of future loans will be effected there. Should, therefore, even so small a portion of the United States as these cities, unite in taxing stock to any considerable amount, the government may be defeated, and will certainly be impeded in its fiscal operations, to the extent of any tax imposed. It may be supposed, that these cities would be checked in such proceedings by their state legislatures. Whether this could be done, must depend upon the constitutions of the states, and the charters of the cities. It may not suit the prevailing policy of a state, to interfere in such a case, even if it possess the power. We know, from the charter of the city of Charleston, that the legislature of this state can interfere and repeal the ordinance in question; this, however, has not been done, although they have refused to impose such a tax themselves; and South Carolina is, has always been, and I hope will ever continue to be, as national as any other state in the Union. It may be said, that, admit all this to be true, it cannot affect the question before the court; who are call upon to decide what the constitution is, and not what it ought to be. The judicial branch of the government most certainly does not possess the power of legislating; much less, then, can they claim the power of making a constitution. But, in construing the constitution, they must look to the objects it professes to attain, and they cannot, so as to defeat the very end and aim of its creation, nor can they make it inconsistent with itself, if it be possible to avoid it. The general powers of congress may be sufficiently designated in the constitution, but the extent and ramifications of each power, it was not in the wisdom of man to foresee and precisely describe. How they are to operate and exhibit themselves, must depend upon the future contigent circumstances of the nation; and as these must be for ever varying, constitutional questions or doubts

[1] The taxation by a state of its own loans would be a violation of the promises given to the lender. WOODBURY, J., in Jelison *v.* Lee, 3 W. & M. 376.

a mandate will be directed to the inferior state *court. 3 Dall. 342. In the
*457] event of the state court declining or refusing to carry that mandate into effect, a question *will then arise, as to the mode of proceeding

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must arise, so long as the constitution shall exist. These are the certain and legitimate consequences of a written constitution. The numerous questions which the statute of frauds has given rise to, simple as was its object, may afford some intimation of the number which an instrument so complicated and general in its objects as the constitution, may be expected to produce. The great difficulty is, not only in ascertaining and defining the powers which result from those which are expressly given to the government; but (as in this case, and in that of the Bank of the United States) in determining the influence of these on the powers of the different states. In the decision of such cases, there must, at least, be the semblance of legislation. I am not conscious of even a desire to extend unnecessarily the powers of the judiciary; the pursuits and habits of near twenty years, by far the better part of my life, have given at least to my feelings a direction decidedly favorable to the legislative branch of the government; when attached, in fact, as I was in feeling, to that branch, I could not but discern the importance of the judicial branch of the government, and the necessity of leaving to its decisions all questions like the one before the court, though they savored of legislation. I shall certainly not omit to do now, what I formerly regarded as incumbent upon the judiciary to perform. I shall now proceed to inquire: 1st. Whether the tax in question be an income tax? That it is not, appears very clearly from the facts of the case, as well as from the term of the ordinance. The stock of the state; the stock of the city; bank-stock universally, as well as the profits of argiculture, enjoyed by those who reside in the city, are not taxed; nor does the ordinance affect to regard it as an income tax. It is a tax upon the United States stock, *eo nomine*. As this is not a tax upon income, it is unnecessary to inquire, if the city council, or a state, have the power to tax income, and include therein the interest received on United States stock. I shall, therefore, proceed to inquire, if the city council or a state have the power to tax the United States stock *eo nomine?* The first question presented by the inquiry is, the meaning of the term United States stock. It is, I apprehend, a credit on the government for so much money, on which they have agreed to pay a certain interest. He who has the credit, is the holder; and the certificate is the evidence of the credit, and the terms on which the credit has been given. The power to create this credit is expressly given by the 8th section, 1st article, of the constitution of the United States: "Congress shall have power to borrow money on the credit of the United States." The credit of the United States is the essence of the stock; without it, the stock is of no value. The credit of the Uuited States is a creation of the general government, which did not exist, until they brought it into being, and in the production of which the state government did not participate. The state could not tax it, before the constitution was formed, for it did not exist; if, therefore, they can tax it now, it must be by some new power vested in them by that instrument; but there is no such power given: the credit of the United States cannot be taxed by the states. It is contended, that to deny the states a power to tax money loaned to the general goervnment, is to deprive them of a great resource, without any adequate object. In the first place, I must observe, that if the state cannot tax the stock of the United States, the general government will be able to borrow on better terms, and in this way the people of the United States will be compensated for any inconvenience that might result from the exemption of the stock from the taxation of the state governments. In the second place, I must repeat, they have no cause to complain, because it is a creation of the general government, which the states did not possess, before its establishment. But on this subject, I cannot but think, that a very erroneous opinion prevails. It appears to be thought, that for every thousand dollars loaned to the general government, so much taxable property has been withdrawn from the states. But this is certainly not so. Of the $100,000,000 loaned to the general

to be adopted as a remedy. That a futile exercise of jurisdiction may not on this occasion take place, the difficulty ought to be anticipated; for if it be insurmountable, this tribunal will not, from self-respect, hold cognisance of the principal inquiry involved in the present suit. Unless the supreme court acts in this matter, through the intervention of the state tribunal, it must issue a prohibition of itself, addressed to the tax-collector individually. Should he disobey, it will then have to proceed against him for a contempt, and inflict a fine; and thus be thrown into a course of practice unprecedented, and extremely inconvenient. That it will not award compulsory process, directed to a recusant state court, may safely be assumed, upon the strength of the reasoning in *Martin* v. *Hunter's Lessee*, 1 Wheat. 362. If not from a regard to the sovereignty of a state, in its last refuge of the judiciary, this resort will not be had, at least, because it seems to be negatively precluded by the 25th section of the act of the 24th of September 1789. That section provides for the supreme court's "proceeding to a final decision

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government, during the late war, how much of it remains with the government? Not one cent. Where, then, is it? Certainly, in the states. If a certain number of individuals paid it into the treasury of the United States, the government has returned it to individuals living in different states; and if liable to taxation at all, can now be taxed by the states. If the general government had been foreign to the state government, or had they hoarded it up, this objection might have had some force; but as fast as they got it, they returned it, and no means of the state government were affected, but an increased difficulty of borrowing money, owing to the competition of the general government. One of the great objects of the constitution was, to render the general government independent of the state governments, for those pecuinary means which are necessary to effect of the great purpose for which it was established: viz., to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, &c. If, however, means so essential in periods of distress and danger, as loans, can be controlled by the states, congress is yet essentially dependent upon the states. There is another objection to this tax. I regarded it as a violation of the contract made with the holders of the United States stock. The people of the United States, of whom the citizens of Charleston are a part, have contracted to pay so much *per centum* on the stock, by their agents, the general government. To authorize the citizens of Charleston to deduct a part from the interest agreed upon, they must possess the power of altering the contract, without the consent of the holders of the stock, which would be a violation of the obligation of the contract. But the constitution expressly declares, that they shall not violate the obligation of contracts.

To recapitulate my objections to the tax, they are: 1. Because a tax upon stock of the United States, *eo nomine*, is a tax upon the credit of the United States. 2. Because the credit of the United States was not a subject for taxation by the states, anterior to the adoption of the constitution; the credit of the United States being a result of the establishment of the government of the United States; and the constitution has given no new powers to the state governments. 3. Because the objects of taxation by the state governments are not diminished by withholding from them the power of taxing stock of the United States; as the money borrowed by the United States is immediately, by disbursement, returned to the people of the different states. 4. Because it renders the general government dependent upon the discretion of the state governments, for one of its essential means in accomplishing the purposes for which it was established, a result at variance with one of the principal objects of the constitution, which was, to render the general government independent of the pecuinary aid of the state governments. And lastly, because it is a violation of the obligation of contracts.

of the cause, and awarding execution therein, if it has been once remanded before." Whether, under these words, or on the refusal of a state court to fulfil its mandate, this court has jurisdiction in prohibition, so as to enable it to execute its own judgment, by inhibiting the officers personally from collecting the tax under consideration, if adjudged unconstitutional, must first be decided. If the power be wanting, nothing but an act of congress can supply the deficiency. The mode and forms of proceeding under the
*458] appellate authority of this court, are dependent upon the *acts of congress for their regulation. 6 Cranch 307. Although the 14th section of the judiciary act gives to the courts of the United States "power to issue all writs necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law;" this general grant is limited by the 25th section, in the particular instance of writs of error from final judgments of state courts, to "awarding executions." No construction of these words, consistent with technical accuracy, will bring a prohibition within their meaning; and original jurisdiction will scarcely be assumed to admit the procedure.

The power of congress to incorporate a bank, or even to invade the territory of a state, to establish its branches, cannot be controverted, after the decisions in *McCullough* v. *Maryland*, 4 Wheat. 316, and *Osborn* v. *United States Bank*, 9 Ibid. 738; much less could their right to raise loans for carrying on the operations of government be drawn into question. On the other hand, it would be taken as conceded, that the right of the states to impose taxes, is sovereign and concurrent, and that there are no express limitations upon this attribute, except those contained in the 18th section, article 1st, of the federal constitution, as to duties or imposts on imports, exports and tonnage.

Through these mutual admissions, the question now to be disposed of is, simply, can a state constitutionally tax the income accruing to its citizens from six and seven per cent. stock of the United States, owned by them individually? The purpose of plaintiffs in error is to make out by implication, a restriction upon a sovereign and vital, though a concurrent, state right. This is attempted upon substantially three grounds. 1st, That the tax in dispute is a violation of the faith and obligation of a contract. 2d, That the credit of the United States upon which it bears, did not exist until after the constitution was framed. And 3d, Because it interferes with the means of the federal government necessary to carry their powers into effect.

As to the first objection, certainly, if the United States were to impose a tax, going to diminish the interest it had stipulated to pay the purchasers
*459] of this stock, such a *measure would be a violation of faith. But the reason does not hold as to a third person, not a party to the contract; and in this light, the state of South Carolina stands; for her faith is pledged as an integral part of the Union in this respect only, *quoad* federal taxation. She has come under no obligation, individually, not to draw her resources from these funds, though emanating from the common authority, whenever they pass into the hands of her peculiar citizens; and it may be presumed, that the liability of this stock, so situated, to state taxation, was perfectly understood by those who became holders, and entered into their contract with the general government. As well might a tax imposed by a state on the public lands within its limits, when sold out to private persons, be treated as a

departure from good faith, and a violation of the contract of sale; for here, as much as where public stock is created and sold, a state is a party to the engagement, that no more than a certain price is to be paid for the property, and that its profits are not to be diminished. It is said, however, that where lands are sold, the United States parts with the freehold, with no prospect of resumption, and that it is otherwise with stock. Yet, in point of fact, the only difference is between the real and personal property of the government; for in the case of a sale of the former on credit, liable to a foreclosure of mortgage, there will be a chance of its reverting to the public domain; and surely, it will not be exempted from state taxation, until the last cent of the price is paid off.

It is next said, that the stock constitutes the credit of the Union, which, not having existed anterior to the adoption of the constitution, cannot be subjected to state taxes, unless by virtue of some provision in that instrument. This reason, if of any avail, will go to exonerate all the territories and other property of the United States, acquired subsequently to that epoch; and failing of that result, must be discarded altogether.

The objection most strongly urged, however, against this ordinance is, that it interferes with a law of the general government, which being supreme, must predominate, and it is roundly laid down, that "should any state, directly or *indirectly, modify, alter or abridge any of the acts of [*460 sovereignty of the United States, or render any of its measures nugatory or inoperative, or in any manner impeach the credit, or impair the resources, of the Union, by taxation or otherwise; the act would be an interference, repugnant to the constitution," and that "a state cannot tax any of the constitutional means employed by the government of the United States to execute its constitutional powers;" "nor can it by taxation, or otherwise, retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by congress to carry into effect the powers vested in the national government." Throughout this discussion, the state has been treated of as in an antagonist position towards the federal government, and as seeking purposely to incommode and destroy its fiscal operations; while the direct effect of these, upon the resources of the state, has been allowed no consideration. The ordinance in question is assumed to be a measure passed expressly to countervail and defeat a law of congress. But it is nowhere demonstrated, that a tax on this stock, owned by individuals, will be attended by any such consequence. The utmost that may ensue, will be a prejudice to the preference of this stock in market, and perhaps, the citizens of the state imposing the tax may find it more profitable to invest their capital otherwise. This creates a question of policy, at the discretion of the state alone, whether it will drive abroad a particular means of speculation; but the reflection is beside the constitutional inquiry now agitated.

The position broadly taken here is, that if the exercise of a concurrent power by a state interferes with a power of the general government, the former must give way. What is the extent of interference which is to be thus resisted? and how is this interference to be graduated? Here, it is always put as mounting to the point of destruction, and as brought into action, *ipso intuitu*. To pre-suppose hostility on the part of the state, is wholly gratuitous, and greatly to be deprecated. As much may be trus ed

to the liberality and forbearance of a state, as of the federal government; *461] and *comity and cordial confidence should characterize all their relations. All the reasoning in this case is against the abuse of a conceded state right; it is founded upon a *quia timet*, and its materials are extremes. Not even a surmise is thrown out, that this tax has, in point of fact, impeded, much less frustrated, a fiscal operation of government; but it is said, that if the power it involves were pushed further, it might have that effect; and that, as it is without any limit or control, save the discretion of a state, no guarantee against its abuse, short of abolition, should be accepted. This is in a strain of hostility that well warrants the interrogatory, why should an unprescriptible, sovereign and indispensable right of a state be postponed, and put in derogation, in favor of an implied, auxiliary and optional means of the general government? Is not the power to use this means, also a power to destroy, and alike unlimited?

The general government, by carrying their power to extremes in the creation of extensive loans, might furnish facilities of exempt investment, that would entirely absorb from the reach of state taxation all the funds of its citizens, and thus destroy one of its highest prerogatives and very existence. If the possible abuse of the power to tax by a state, is to infringe upon the right, the like objection will assuredly attach to the power of borrowing on the part of the United States. In answer to this, a suggestion has been made, that the general government does not hoard up its revenue, but immediately reinstates, by expenditure, all that has been substracted from the resources of a state. This is only partially true, and yields but indifferent consolation, and affords occasion for another most forcible impeachment of the prevaling system of internal improvements, and other government expenditures of the public money. By the supposed operation, the southern states not only have their capital drawn off from local taxation, but in the existing state of things, supply another means of conferring benefits, or rather gratuities, in which they have no participation.

The doctrine that interference with federal power will suffice, by implication, to neutralize, or even annihilate state rights, is startling in itself, and *462] most pernicious when *carried out to its legitimate results. The degree of interference being entirely unsettled, and incapable of adjustment, however slight or shadowy it may be, the objection can never be started but to a fatal issue. Indeed, it will go to abolish all power in the states, under some circumstances, to levy and collect taxes. In the event of a resort to direct taxation on the part of congress, whatever is subjected to federal assessment must, *ipso facto*, be discharged from all other imposition; inasmuch as a tax by a state, on any given article, must necessarily diminish its capacity of bearing other exactions, and, if carried to excess, must frustrate any attempt on the part of the general government to raise a revenue from the same sources. In fact, there are but few powers reserved to the states, that upon the possibility of abuse, may not be brought under the ban of interference with federal measures.

In the case of *Bulow* v. *City Council of Charleston*, 1 Nott & McCord 527, it has been decided, that United States Bank stock, in the hands of individuals, may constitutionally be taxed by a state. And in *McCullough* v. *Maryland*, it is admitted, that the principle there ascertained "does not extend to a tax paid by the real property of the Bank of the United States,

in common with the other real property in a particular state, nor to a tax imposed upon the proprietary interest which the citizens of that state may hold in this institution, in common with other property of the same description throughout the state," and that, "as to the bank-stock belonging to its own citizens, it still continues liable to state taxation, as a portion of their individual property, in common with all other private property in the state." The stock brought under contribution by the city ordinance now attacked, comes within this exception. When taxed, it had been sold out by government, and was in the hands of individuals, whose proprietary interest in the fund was subjected in common with property of a similar description. The tax here assessed was not in the nature of a penalty on lending to the United States, being neither excessive nor discriminating. If charged on the stock, *eo nomine*, the name was inserted in *the ordinance merely as a description of one among several sources, from whence the income of the [*463 citizens might arise on which it was to bear. The words of the ordinance evince clearly that this species of property was not singled out for proscription, or a sinister purpose, as various others are enumerated; and if an exception is made in favor of stock of the United States Bank, and of local institutions, motives of expediency, or the fact that a *bonus* had been paid in commutation of taxes, probably influenced the departure from, while they recognised the existence of, the general rule.

This tax, then, is not obnoxious to the objections urged against it, and being upon the interest held by individuals in the funded debt of the United States, in common with other property of the same description in South Carolina, it comes within the exception made in the leading case decided by this court upon the subject, and the ordinance imposing it is constitutional and valid.

Marshall, Ch. J., delivered the opinion of the court.—This case was argued on its merits, at a preceding term; but a doubt having arisen with the court respecting its jurisdiction in cases of prohibition, that doubt was suggested to the bar, and a re-argument was requested. It has been re-argued at this term.

The power of this court to revise the judgments of a state tribunal, depends on the 25th section of the judiciary act. That section enacts, "that a final judgment or decree, in any suit in the highest court of law or equity of a state in which a decision in the suit could be had," "where is drawn in question the validity of a statute or of an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity," "may be re-examined, and reversed or affirmed, in the supreme court of the United States.." In this case, the city ordinance of Charleston is the exercise of an "authority under the state of South Carolina," *"the [*464 validity of which has been drawn in question, on the ground of its being repugnant to the constitution," and "the decision is in favor of its validity." The question, therefore, which was decided by the constitutional court, is the very question on which the revising power of this tribunal is to be exercised, and the only inquiry is, whether it has been decided in a case, described in the section, which authorizes the writ of error that has been awarded. Is a writ of prohibition a suit?

The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass. The constitutionality of the ordinance is contested; the party aggrieved by it applies to a court; and at his suggestion, a writ of prohibition, the appropriate remedy, is issued. The opposite party appeals; and in the highest court, the judgment is reversed and judgment given for the defendant. This judgment was, we think, rendered in a suit.

We think also, that it was a final judgment, in the sense in which that term is used in the 25th section of the judiciary act. If it were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than congress could have intended. Judgments in action of ejectment, and decrees in chancery, dismissing a bill, without prejudice, however deeply they might affect rights protected by the constitution, laws or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties, and this court would not revise and correct the judgment. The word "final" must be understood in the section under consideration, as *applying to all judgments and decrees which determine the particular cause. We think, then, that the writ of error has brought the cause properly before this court.

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This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by states and corporations? Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract, the instant it is framed, and must imply a right to affect that contract. If the states and corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt, which will not be exposed to its influence?

But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated, to supply the exigencies, the urgent demands, of the moment. The people, for objects the most important

which can occur in the progress of nations, have empowered their government to make these anticipations, "to borrow money on the credit of the United States." Can anything be more dangerous, or more injurious, than the admission of a principle, which authorizes every state and every corporation in *the Union which possesses the right of taxation, to burden the exercise of this power, at their discretion? If the right to impose [*466 the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power which is given by the whole American people, for their common good, which is to be exercised, at the most critical periods, for the most important purposes, on the free exercise of which the interests, certainly, perhaps, the liberty of the whole, may depend; may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy.

In a society formed like ours, with one supreme government for national purposes, and numerous state governments for other purposes; in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to the state, and one of the most extensive in its operations. The attempt to maintain a rule which shall limit its exercise, is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land, in its application to the cases of individuals. This duty has more than once devolved on this court. In the performance of it, we have considered it as a necessary consequence from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a state cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the states united may rightfully adopt.

This subject was brought before the court in the case of *McCulloch* v. *State of Maryland*, 4 Wheat. 316, when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that *which is involved in this. It was discussed at [*467 the bar in all its relations, and examined by the court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was, that "all subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation." "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission;" but not "to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States." "The attempt to use" the power of taxation "on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give." The court said in that case, that "the states have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress, to carry into execution the powers vested in the general government." We retain

the opinions which were then expressed. A contract made by the government in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any state in which the individual who lends may reside, and is, undoubtedly, an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of *Mc Culloch* v. *State of Maryland*, to be exempt from state taxation, and consequently, from being taxed by corporations deriving their power from states.

It is admitted, that the power of the government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount is allowable. It is, we think, impossible not to perceive the intimate
*468] connection *which exists between these two modes of acting on the subject. It is not the want of original power in an independent sovereign state to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our constitution. The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exereised. The right to tax the contract to any extent, when made, must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government; to any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection it is said, has no more weight when urged against the application of an acknowledged power, to government stock, than if urged against its application to lands sold by the United States. The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country, with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume, is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from
*469] taxation. *But a tax upon debts due from the government stands, we think, on very different principles from a tax on lands which the gevernment has sold. "The Federalist" has been quoted in the argument, and an eloquent and well-merited eulogy has been bestowed on the great statesman who is supposed to be the author of the number from which the quotation was made. This high authority was also relied upon in the

case of *Mc Culloch* v. *State of Maryland*, and was considered by the court. Without repeating what was then said, we refer to it as exhibiting our view of the sentiments expressed on this subject by the authors of that work.

It has been supposed, that a tax on stock comes within the exceptions stated in the case of *Mc Culloch* v. *State of Maryland*. We do not think so. The Bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a state was supposed to be placed in the same condition with property acquired by an individual. The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently, to be repugnant to the constitution.

We are, therefore, of opinion, that the judgment of the constitutional court of the state of South Carolina, reversing the order made by the court of common pleas, awarding a prohibition to the city council of Charleston, to restrain them from levying a tax imposed on six and seven per cent. stock of the United States, under an ordinance to raise supplies to the use of the city of Charleston for the year 1823, is erroneous in this ; that the said constitutional court adjudged that the said ordinance was not repugnant to the constitution of the United States ; whereas, this court is of opinion, that such repugnancy does exist. We are, therefore, of opinion, that the said judgment ought to be reversed and annulled, and the cause remanded to the constitutional court for the state of South Carolina, that further proceedings may be had therein according to law.

*470] *Johnson, Justice. (*Dissenting.*)—Entertaining different views on the questions in this cause from the majority of the court, and wishing generally that my reasons for my opinions on constitutional questions should appear, where they cannot be misunderstood or misrepresented, I will briefly state the ground upon which I dissent from the decision now rendered.

On the first point, I am of opinion, that the cause is not one within either the letter or the policy of the 25th section of the judiciary act. That the suggestion and motion to obtain a prohibition is a suit in its general sense, cannot be questioned ; but that is not enough to give this court jurisdiction; it must be a suit, within the meaning and policy of the law which gives this writ of error. The words of the 25th section are, "a final judgment or decree in any suit ;" from which I think it unquestionable, that it must be a suit capable of terminating in a final judgment or decree. Now, a prohibition, especially, where it is refused, as in this case, is not final, and concludes nobody. If the party against which it was prayed, goes on to carry into effect an unconstitutional law, he to whom it was refused, is at liberty to bring his action of trespass, and the refusal of the prohibition would be no bar to his recovery. Indeed, in cases of prohibition, there is no *consideratum est*, no judgment entered, except, as well as I can recollect, in two cases : in that where it is first granted and then dissolved, and a writ of consultation awarded, authorizing the defendant to proceed ; and in the case where the promovent is ruled to declare, and the cause goes on to judgment in the usual form. When it is refused, there is never a judgment entered, nor

where it is granted in ordinary cases ; and hence, it is laid down generally, that no writ of error lies in prohibition. There is no ground that I can perceive, to suppose that congress intended any innovation in the ordinary rules of law as to suing out writs of error. On the contrary, in authorizing a writ of error to a final judgment, in so many words, the legal conclusion is, that they need not to adhere to the rule, that a writ of error can only issue to recover a judgment as technically understood.

*471] *Again, the suit to which this section has relation must be a suit in which this court possesses or can exercise the power to enter judgment and award execution ; because the latter part of the 25th section enacts, "that the supreme court may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. Now, if the term execution here be taken in its ordinary technical meaning, this is not a case in which it can issue ; the sole object of this prohibition being to stay the proceedings of the city council and city sheriff, under the law complained of ; and if the issuing of a prohibition be considered as coming within the meaning of execution as here used, then this court has no power to issue a prohibition to a state court, or state officer. Congress has not pretended to vest in it such authority. And I am well satisfied, that this power has been withheld from the courts of the United States *ex industriâ*. For every provision in the constitution, and the uniform policy of the government, have been to prevent the immediate action of the one government upon the constituted authorities of the other, a collision which it was a leading object in the constitution to avoid, because its effects were unavoidably and fully anticipated.

If it be asked, as has been argued, why may not this court proceed as far as it can proceed, and reverse the judgment of the state court, or enter a judgment for a prohibition, though it cannot issue it ; I answer, simply, because the case wants those distinctive features which are necessary to make out a case for the interference of this court under the 25th section. And I cannot imagine, that the legislature would place this court in the unenviable dilemma of thus assuming ungranted powers, or of exercising jurisdiction in a case over which it could assume no coercive power. Hence, I conclude, that neither the letter nor the policy of the law sanctions us in exercising this jurisdiction. Nor is there the least necessity for it, since every beneficial end may be answered, when individuals are brought into

*472] controversy, by the ordinary proceedings under an *unconstitutional law ; and until this conflict of interest arise from the actual execution of process, the law remains a mere "*brutum fulmen*."

My views of the question of jurisdiction would exempt me from the necessity of giving an opinion on the constitutionality of the case under consideration. But I have no objection to expressing my opinion upon this question. If I could bring myself to consider this question, in the form in which it is considered by the majority of the court, I should certainly concur in the opinion, that the tax was unconstitutional. For the exercise of power, which, under the mask of imposing a tax, may defeat or impede the operation of the government of the United States in borrowing money, could not be tolerated. But I am strongly impressed with the opinion, that the record does not authorize this state of the question. It is true, the act of the city council of Charleston, which imposes this tax, is most clumsily

worded. But I think it clear, that, taken together, the object is to impose an income tax. This, I think, is necessarily inferred from the fact, that the tax is not imposed upon money at interest, generally, but only on so much as the individual has at interest, above what he owes or pays an interest upon. The operation of this is, to charge no more than his clear income from money at interest. It is objected, that they make discriminations, and exempt from taxation state stock, city stock, and stock of their own chartered banks. But then they exempt also stock of the United States Bank; and there can be no better proof demanded, to show that the law is conceived in the spirit of fairness, with a view to revenue, and no masked attack upon the powers of the general government. Had they, in fact, taxed any one of these excepted objects, we should have had the law brought up here as a violation of the obligation of the contracts; since the statute books of the state will show, that all their banks, with the exception of the state bank, have paid a *bonus* to the state. And it would have been impossible to tax the state bank, because the stock is altogether owned by the state, and the laws of the council are subject to be repealed by the state. *As to the specification of six or seven per cent. stock of the United States as [*473 objects of taxation, this also admits of an explanation, showing that the counsel acted in the spirit of fairness and candor, although certainly not happy in expressing the legislative mind. This specification became necessary, from their imposing the tax by means of a per-centage of twenty-five cents upon the capital at interest, instead of a per-centage on the interest received. Hence, to have brought the four and three per cent. stock of the United States under the tax, would have been unequal and unjust; and there can be little doubt, that to avoid this inequality was their object.

I consider the case, therefore, as one of a tax upon income arising from the interest of money; a very unwise and suicidal tax, unquestionably, and not very judiciously arranged and expressed; but still characterized by no unfairness, and no masked attack upon the powers of the general government. And if so, with what correctness can it be characterized as unconstitutional? Why should not the stock of the United States, when it becomes mixed up with the capital of its citizens, become subject to taxation in common with other capital? Or why should one who enjoys all the advantages of a society purchased at a heavy expense, and lives in affluence upon an income derived exclusively from interest on government stock, be exempted from taxation? No one imagines, that it is to be singled out and marked as an object of persecution, and that a law professing to tax, will be permitted to destroy; this subject was sufficiently explained in *McCulloch's Case*. But why should the states be held to confer a *bonus* or bounty on the loans made by the general government? The question is not, whether their stock is to be exposed to peculiar burdens; but whether it shall enjoy privileges and exemptions, directly interfering with the power of the states to tax or to borrow? I can see no reason for the exemption, and certainly cannot acquiesce in it.

Thompson, Justice. (*Dissenting.*)—This case comes before us under the 25th section of the judiciary act of 1789, *on a writ of error to the constitutional court of the state of South Carolina, the highest court [*474 of appeals in that state. The question in the state court arose upon pro-

ceedings commenced in an inferior court, and the issue of a prohibition to restrain the city council of Charleston, and all other persons acting under their authority, from levying and collecting a tax on stock of the United States, held by the appellants; on the ground, that such tax was a violation of the constitution of the United States. The prohibition having been granted by the inferior court, the order and judgment of that court were reversed in the constitutional court, thereby upholding the constitutionality of the tax.

A preliminary question has been raised, whether this court has jurisdiction of the case, under the 25th section of the judiciary act. I think, we have not. It is not a suit, within the meaning of that section; and if it was, the writ of error is brought to reverse a judgment, refusing to grant the prohibition. And if that judgment or order should be reversed here, this court has no power to enforce its judgment, or give the party any relief or protection against the imposition of the tax. But I shall not enter into an examination of this question; it is one of minor importance; as I understand this court does not claim the power of enforcing its judgment, in any manner whatever, and the ordinance will remain in full force, and the payment of the tax be enforced, unless the city council shall voluntarily repeal it, and revoke the order to collect the tax. The judgment of this court is, therefore, no more than an opinion expressed upon an abstract question, and in its nature and effect only monitory.

In considering this case on the merits, it is to be borne in mind, that this ordinance of the city council is subject to be repealed by the legislature of South Carolina; and not having been done, we must consider it as having tacitly received the sanction of the legislature, and comes before us, therefore, with all the force and authority of a state law, and involves one of those delicate and difficult inquiries of conflicting powers between the general and state governments. It is necessary, in the first place, that we should understand the true character of this tax. Much importance seemed to *be attached to this, both in court below, and on the argument here. *475] In the opinion of the minority of the state court, which has been submitted to us by the appellants' counsel, as a part of his argument, it is said, "this ordinance does not affect to regard the tax as an income tax. It is a tax upon the United States stock *eo nomine*. As it is not a tax on income, it is unnecessary to inquire, if the city council or state have the power to tax income, and include therein the interest received on United States stock. The inquiry is, whether there is any such power to tax United States stock *eo nomine?*" This distinction being so emphatically relied upon by the minority of the court, it is a fair inference, that if it had been considered a tax on income, it would not be objectionable, on constitutional grounds. What are we to understand by its being a tax on United States stock *eo nomine?* Certainly, nothing more than that it is enumerated as one description, in a long list of specified property subject to taxation.

We have not the ordinance at large before us, but the clause upon which the question arises is stated as follows: All personal estate, consisting of bonds, notes, insurance stock, &c., six and seven per cent. stock of the United States, or other obligations, upon which interest has been or will be received during the year, over and above the interest which has been paid, twenty-five cents on every hundred dollars. There is excepted out of this

enumeration, stock of the state, stock of the city, and bank-stock. But this exception cannot certainly affect the present question. No part of the constitution of the United States prohibits the states from exempting from taxation certain species of property, according to their own views of policy or expediency. What, then, is the ordinance, in substance? It is a tax upon the net income of interest, upon money secured by bonds, notes, insurance stock, six and seven per cent. stock of the United States, or other obligations, upon which interest has been received, &c. It is the net interest received, upon which the tax is laid. For the ordinance declares the tax shall be on the interest received, over and above that *which has been paid. For example, he who receives $1000 interest, and pays out [*476
$500 interest, is taxed only upon the balance. It is, therefore, a general tax upon an income from money at interest, and this, too, only included as one item in the enumeration of taxable property. It is not an objection that can be made here, if anywhere, that the tax is not upon the whole income. It is a tax, general in its application to income, from interest derived from investments of every description (with the exception mentioned), and money on loan. It cannot be considered as an exorbitant tax, or in any manner partaking of the character of a penalty, it being only a tax of a quarter of one per cent.

If the objection to this tax is to be sustained, it must be on the broad ground, that the stock of the United States is not taxable, in any shape or manner whatever; that it is not to be included in the estimate of property subject to taxation; and that, I understand, is the extent to which a majority of this court mean to carry the exemption. As I am unable to come to this conclusion, and it being a constitutional question of vital importance, I am constrained to dissent from the opinion of the court, and, contrary to my usual practice, in ordinary cases, briefly to assign my reasons. I shall, for the reason already mentioned, consider this ordinance as standing upon the same grounds precisely as if it had been a law of the state of South Carolina.

It is not pretended, that there is any express prohibition in the constitution of the United States, which has been violated by this law. The only express limitation to the power of the individual states to lay and collect taxes, is to be found in the tenth section of the first article of the constitution. "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, &c. No state shall, without the consent of congress, lay any duty of tonnage." The tax in question can certainly not fall within either of these prohibitions. The objection to the tax is rested chiefly, if not entirely, upon that part of the eighth section of the first article, which *gives to congress the power "to borrow money on the credit [*477
of the United States;" and it is said, that to permit the states to tax the stock, might, by possibility, sometimes embarrass the United States in procuring loans. In the examination of the powers of the general government, under the constitution, "The Federalist" is often referred to as a work of high authority on questions of this kind; and the author has seldom been charged with surrendering any powers that can be brought fairly within the letter or spirit of the constitution. In No. 32 of that work, the writer, in discussing the subject of taxation, and the conflicts that might arise between

the general and state governments, says, "Although I am of opinion, that there would be no real danger of the consequences to the state government, which seem to be apprehended from a power in the Union to control them in the levies of money, yet I am willing to allow, in its full extent, the justness of the reasoning, which requires that the individual states should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm, that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority, in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its constitution. That a negation of the authority of the states to impose taxes on imports and exports, is an affirmance of their authority to impose them on all other articles. That it is not a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty."

The power of the general government to borrow money on the credit of the United States, is not only an express power granted to congress, but one that it must have been foreseen, would be brought into practical operation, and that stock would of course be created; and yet it never entered into the discriminating mind of the writer referred *to, that merely investing property, subject to taxation, in stock of the United States, would withdraw the property from taxation. It is said, the credit of the United States is a creation of the general government, which did not exist, until they brought it into being, and in the production of which the state government did not participate; that the states could not tax it, before the constitution was formed, for it did not exist. This view of the subject is calculated to make an erroneous impression. It is true, it did not exist in the shape of stock, but the property existed in some other form. No one procures stock without exchanging for it an equivalent in money, or some other property; all which was, doubtless, subject to the payment of taxes. Exemption from taxation may hold out an inducement to invest property in stock of the United States, and might, possibly, enable the government to procure loans with more facility, and perhaps, on better terms. But this possible, or even certain, benefit to the United States, cannot extinguish pre-existing state rights. To consider this a tax upon the means employed by the general government for carrying on its operations is, certainly, very great refinement. It is not a tax that operates directly upon any power or credit of the United States. The utmost extent to which the most watchful jealousy can lead is, that it may, by possibility, prevent the government from borrowing money on quite so good terms. And even this inconvenience is extremely questionable; for the stock only pays the same tax that the money with which it was purchased did. And whether the property exists in one form or the other, would seem to be matter of very little importance to the owner. But great injustice is done to others, by exempting men who are living upon the interest of their money, invested in stock of the United States, from the payment of taxes; thereby establishing a privileged class of public creditors, who, though living under the protection of the government, are exempted from bearing any of its burdens. A construction of the constitu-

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tion, drawing after it such consequences, ought to be very palpable, before it is adopted.

But it seems to me, that the right of the state to tax *property [*479 of this description is admitted by the court, in the case of *McCulloch* v. *State of Maryland*, 4 Wheat. 436. The court there considered the tax imposed directly upon the operations of the bank, which was employed by the government as one of the means of carrying into execution its constitutional powers; and in summing up the result, it is said, the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws of congress, to carry into execution the powers vested in the general government; and yet the court say, this opinion does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in the bank, in common with other property of the same description throughout the state. In the case now before us, the tax is not direct upon any means used by the government to carry on its operations. It is only a tax upon property acquired through one of the means employed by the government to carry on its operations, viz., the power of borrowing money upon the credit of the United States; and it is not perceived, how any just distinction can be made, in this respect, between bank-stock, and stock of the United States; both are acquired through the medium of means employed by the government in carrying on its operations; and both are held as private property; and it is immaterial to the present question, in what manner it was acquired.

The broad proposition (laid down in the case of *McCulloch* v. *State of Maryland*) that the states cannot tax any instrument or means used by the general government in the execution of its powers, must be understood as referring to a direct tax upon such means or instrument; and that such was the understanding of the court, is to be inferred from the exemption of bank-stock from the operation of the rule; and the parallel cases put to illustrate the application of the doctrine, lead to the same conclusion. Thus, it is said, the states cannot tax the mint; but this does not imply that they may not tax the money coined at the mint, when held and owned by individuals. Again, it is said, the state cannot *tax a patent-right; [*480 but if the patentee, from the sale or use of his patent, has acquired property, or is receiving an income, it could not be intended to say, that such property or income cannot be taken into the estimate of his taxable property. The unqualified proposition, that a state cannot directly or indirectly tax any instrument or means employed by the general government in the execution of its powers, cannot be literally sustained. Congress has power to raise armies; such armies are made up of officers and soldiers, and are instruments employed by the government in executing its powers; and although the army, as such, cannot be taxed, yet it will not be claimed that all such officers and soldiers are exempt from state taxation. Upon the whole, considering that the tax in question is a general tax upon the interest of money on loan, I cannot think it any violation of the constitution of the United States, to include therein interest accruing from stock of the United States. I am accordingly of opinion, that there is no error in the opinion of the state court

This cause came on to be heard, on the transcript of the record from the constitutional court of the state of South Carolina, and was argued by counsel: On consideration whereof, this court is of opinion, that there is error in the judgment of the said court in this, that the said court decided, that an ordinance passed by the city council of Charleston, for the year 1823, entitled, an ordinance to raise supplies for the use of the city of Charleston for the year 1823, is, so far as the same imposes a tax on the six and seven per cent. stock of the United States, consistent with the constitution of the United States; whereas, it is the opinion of this court, that so much of the said ordinance as imposes the said tax, is repugnant to the constitution of the United States, and void: Whereupon, it is considered, ordered and adjudged by this court, that the said judgment be and the same is hereby reversed and annulled, and that the said cause be, and the same is hereby, remanded to the said constitutional court for the state of South Carolina, that such further proceedings may be had therein, as may consist with law and justice.

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*481] *The President, Directors and Company of the Bank of the United States, Appellants, *v.* David Weisiger, Appellee.

Practice.—Decree.

Where the appellee had died after the commencement of the term, and the court, not knowing his decease, had decided upon the case, after argument, it ordered the decree to be entered as of the first day of the term.

In this case, which had been argued on a previous day of the term, and the opinion of the court delivered in favor of the appellants (*ante*, p. 331), Mr. *Bibb* having informed the court, that the defendant, Weisiger, had died since the commencement of the term; stated that he had been of counsel with the respondent, but he considered that his authority had expired by his death. He objected to the entry of a decree.

Sergeant, for the complainants, moved the court to cause the decree to be entered of a day in the term, before the respondent's death; and cited *Davis* v. *Davis*, 9 Ves. 461; *Campbell* v. *Mesier*, 4 Johns. Ch. 342; *Asburnham* v. *Thompson*, cited 2 Madd. Ch. Pr. 529, as fully establishing the practice according to his motion.

Bibb, contrà.

The Court ordered the decree to be entered as of the first day of the term.

*Joseph Mandeville and others, Appellants, *v.* Romulus Riggs, Appellee.

Parties in equity.—Revivor.—Appeal bond.

Where a bill was filed against the stockholders of a voluntary association for the purposes of banking, and the process was returned "served" upon some of the parties named in the bill, and as to others, who were not within the reach of the process, "not found;" the court stated that it was not meant to say, that in cases of this nature, it is necessary to bring all the stockholders before the court, before any decree can be made. It is well known, that there are cases in which a court of equity dispenses with such a proceeding, when the parties are very numerous and unknown; and the adoption of the rule would evidently impede, if not defeat, the purposes of justice. p. 487.

Upon the death of some of the parties to the bill, who had been served with process, the suit ought to have been revived against their personal representatives, if they could be brought before the court; unless some good reason, such as absolute insolvency, could be assigned, to justify the omission. p. 487.

One of the great principles upon which courts of equity generally require all parties who are known and within the reach of its jurisdiction to be made parties, is, to prevent future litigation and to take away multiplicity of suits; there are exceptions, it is true, to the rule, but they are founded upon special considerations. p. 487.

We know of no instances where a joint liability has been asserted before a court of chancery, on which the decree has not been made against all the parties before it, who did not establish some personal discharge. p. 488.

In a bill filed in the circuit court of Alexandria county, in the district of Columbia, against the stockholders of an association for banking purposes, the bill was dismissed as to those stockholders who were named in the bill, but were not served with process; and it was held to be error. As non-residents, the act of congress of the 3d of May 1803, allows proceedings to be had against them, by publication in the newspapers in the district. p. 489.

Where an appeal from the circuit court to this court was prayed by a number of the defendants, and one only executed the proper appeal bond, the objection to the proceeding ought to have been taken by way of preliminary motion to dismiss the appeal for irregularity, on account of the failure to give the proper appeal bond. p. 490.

Riggs *v.* Swann, 3 Cr. C. C. 185, reversed.

Appeal from the decree of the Circuit Court of the United States for the District of Columbia and county of Alexandria.

In that court, in July 1818, a bill was filed by the appellee, against certain individuals named in the *subpœna*, charging them with having entered into a certain association or copartnership, called the "Merchants' Bank of Alexandria." That the partnership, for a considerable time, issued notes *and bills, and in other respects prosecuted their trading or business as a bank, until about the month of May 1816, at which time they [*483 became so embarrassed, as entirely to put a stop to their proceedings. The bill then alleged, that sundry notes or bills, of various denominations and amounts, issued and sent into circulation by the bank, during its operations, amounting in the whole to $20,000, regularly came into the possession of the complainant, and that no part of them had been paid. The bill proceeded to present other facts and proceedings upon which the complainant claimed relief, and concluded with a demand for general relief.

The process was served on twenty-two of the stockholders and defendants; the whole number being sixty-one. An *alias subpœna* having issued, the marshal returned, as to the others, "not found—non-residents in the county of Alexandria." On the 13th of August 1818, a *pluries subpœna* was issued, on which the marshal returned, "executed on John McPher-

son—the other defendants not found." In November 1818, the bill was taken for confessed, as to those defendants on whom process had been served, and who had not answered, and continued as to the others. At May rules 1820, and at November term 1820, the suit was abated as to such of the deceased defendants upon whom the process was executed; and no proceedings were instituted to bring in their legal representatives. The answers of some of the defendants who were served with process having been filed, depositions taken, reports of the auditor made, and the arguments of counsel heard, the court went on to decree the payment of certain sums to the complainant by the parties thus before the court; apportioning the same according to the time they became stockholders in the bank, and the periods of issuing the notes held by the complainant. The bill was dismissed as to the other defendants who did not answer; and also as to all those who were either not served with process to appear in the case, or who were served with process, and not charged by any evidence on the part of the complainant. The defendants against whom the decree was rendered, prayed an
*484] appeal to this court, which was allowed, on their *giving bond and security, &c. Joseph Mandeville alone of all the defendants, gave bond to prosecute the appeal.

It is not considered necessary to state in this report any of the points presented by counsel, upon which no opinion was expressed by the court; and therefore, those proceedings in the case, and matters set forth in the bill, answers and evidence, which are not connected with, or required to exhibit the only question decided by the court, and the arguments of the counsel upon them, are omitted.

The case was argued upon all the questions presented by the record, by *Jones* and *E. L. Lee*, for the appellant; and by *Wirt* and *Coxe*, for the appellee. The only points upon which the court gave an opinion were: 1. The dismissal of the bill as to the absent defendants who were not served with process. 2. The omission to make the legal representatives of those defendants who had died after they were served with process, parties to the proceedings. 3. The regularity of the appeal to this court, Mandeville only having given bond.

Story, Justice, delivered the opinion of the court.—This is an appeal from a decree rendered in the circuit court of the District of Columbia, sitting in Alexandria, in a suit in chancery, in which the appellants were original defendants. The appellants are stockholders in an unincorporated association, which was formed in 1815, for the purpose of carrying on the business of banking, under the name of the Merchants' Bank of Alexandria; the nature and extent of which association is evidenced by certain articles of agreement, which were at the time published in the newspapers in the district, and are set forth in the case. The first article provides, that the capital stock may consist of $1,000,000, divided into shares of $100 each, which were to be payable by calls, provided for therein. In the other articles, provision is made for the management of the business of the bank by directors, and for the issuing of bank-notes, &c., to be signed by the president and countersigned by the cashier of the bank. The 15th
*485] *article declares the object of the stockholders to be, that the joint-stock of the company "shall alone be responsible for the debts and

engagements of this company ; and that no person who may deal with the company, &c., shall, on any pretence whatsoever, have recourse against the separate property of any present or future member of this company, or against their persons, further than may be necessary to secure the faithful application of the funds thereof to the purposes to which, by these presents, they are liable. But all persons accepting any bond, bill or note, &c., of the company, &c., thereby give credit to the said joint-stock or property of said company, and thereby respectively disavow having recourse, on any pretence whatever, to the persons, or separate property, of any present or future member of this company, except as above mentioned."

The whole stock of $1,000,000 was subscribed, and calls to an amount of about $183,000 were paid in, with money, or by stock-notes discounted for that purpose. The bank went into operation, and circulated its notes to a large amount ; and finally, after about a year, the bank failed, leaving its notes to an amount, as it is said, of about $90,000 in circulation and unpaid, and having assigned all its property to certain assignees (who were not parties to the bill), for the payment of certain preferred debts, and then for the benefit of the creditors generally. These assignees have now no property in their hands for distribution. The original plaintiff is the holder of the bank-notes of the bank to the amount of $20,000 and upwards, which remain unpaid. The form of the notes issued by the bank was as follows, "Capital, one million of dollars. The Merchants' Bank of Alexandria promises to pay to C. McKnight or order, on demand, ——— dollars." These notes were signed by the president and countersigned by James S. Scott, who was cashier, and indorsed by C. McKnight, in blank, without consideration ; and solely to enable the notes to circulate as currency, as notes payable to the bearer. The bill seeks payment out of the separate property of the stockholders, to the amount of $20,000, the notes so held *by the plaintiff. [*486
It states the articles of co-partnership, and charges, that the notes were issued by the bank, and that it prosecuted business until May 1816, at which time its affairs, either by mismanagement or by a fraudulent issue of paper beyond its known means, became embarrassed, and stopped payment. But it contains no direct charge of fraud or fraudulent misapplication of the funds, by the directors or stockholders, in distinct terms. It states the assignment of the property of the bank, after the failure, and charges the preferences therein provided for to be fraudulent ; but if not fraudulent, then that the trust fund is insufficient to pay the creditors of the bank, without resort to the separate property of the stockholders. It further charges, that the plaintiff does not know, whether there are other stockholders or not, than those sued, and that he has no means of ascertaining them, and calls upon the defendants for a discovery. And the prayer of the bill is, that the assignment may be decreed null and void, that the plaintiff's demand may be paid out of the joint funds, as far as they will go, and then, out of the separate funds of the stockholders ; and also for general relief.

In the progress of the cause, some of the original defendants died, and the suit was not revived against their representatives. Some of the defendants put in their several answers, to which the general replication was filed, and against others the bill was taken *pro confesso ;* and after several intermediate proceedings, references to, and reports by a master, in order to ascertain certain facts, &c., the cause was finally set down for a hearing

against the defendants who had answered, and those against whom it was taken *pro confesso*, and a decree rendered for the plaintiff; from which the parties against whom it was made have appealed to this court. The decree, in substance, declares that there are no funds in the hands of the assignee to pay the debt; that certain defendants (naming them) who had answered, do pay the debt to the plaintiff, with interest from the first of January 1818, with costs; that this decree be discharged as to two of the persons so charged, by their paying a less sum, equal to the amount of the notes issued
*487] *by the bank, while they were stockholders; and as to the other defendants, the decree is, that the bill be dismissed, "it appearing to the court, that they are either not served with process to appear in the said cause, or if served with process, not charged by any evidence on the part of the plaintiff."

Such is a very summary statement of the case. Several questions have been elaborately argued at the bar, respecting the form and sufficiency of the bill, as well as the merits of the case. Upon some of these questions, much diversity of opinion, at present, exists among the judges. But as we are all of opinion, that there must be a reversal upon two points, we deem it unnecessary to examine any others. Those points are, the defect of parties, and the erroneous dismissal of the bill as to any of the defendants properly before the court, against whom a decree might have been made.

In the first place, as to the defect of parties: we do not mean to say, that in cases of this nature, it is necessary to bring all the stockholders before the court, before any decree can be made. It is well known, that there are cases in which a court of equity dispenses with such a proceeding, when the parties are very numerous, or unknown, and the adoption of the rule would essentially impede, if not defeat, the purposes of justice. But in the present case, we are of opinion, that upon the death of the parties who were before the court, the suit ought to have been revived against their personal representatives, if they could be brought before the court, unless some good reason, such as absolute insolvency, could be assigned to justify the omission. The reason is obvious. Supposing the decree against the parties jointly to be good, those who shall pay are entitled to contribution from the other stockholders, and their personal representatives. If they are not before the court, they are not bound by the decree; and consequently, in a subsequent suit for contribution, they may controvert every material fact upon which the decree was founded, and put the party seeking contribution to the full proofs of them, as well as of the responsibility over of the party sued. One of the great principles, upon which courts of equity generally require all
*488] *persons who are known, and within the reach of its jurisdiction, to be made parties, is to prevent future litigation, and to take away multiplicity of suits. It is a matter of justice, as well as of convenience, that all the parties who are ultimately liable to contribution, should, when praticable, be brought before the court, so that the equities between them may be adjusted, as well as the rights of the plaintiff. There are exceptions, it is true, to the rule, but they are founded upon special considerations; such as, where a decree of contribution would be useless, or where the proceeding would defeat the jurisdiction of the court, and the parties are not indispensable to a decree, or where the convenient administration of justice forbids it in the particular case.

This reasoning applies with far more force to the dismissal of the bill as to the defendants who where before the court, and who were liable to a decree as stockholders. It is a positive injury to the defendants, who are charged by the decree, not only as to their immediate responsibility, but as to the means and proofs of contribution. The decree of dismissal, so far from aiding the other defendants, puts them to the absolute necessity of instituting a new suit for contribution, and to establish every step in its progress, by plenary evidence. We know of no instance, where a joint liability has been asserted before a court of chancery, in which the decree has not been made against all the parties before it, who did not establish some personal discharge. If the bill had been dismissed against those persons only who appeared and answered, and whose liability was not proved by the evidence, there would have been no difficulty. But it is dismissed as to all the defendants who did not answer the bill, and against whom the bill was taken as confessed, and set for a decree. Now, if these persons were duly brought before the court, and if due proceedings were afterwards had against them, they certainly were jointly chargeable with the other defendants, upon their own default, as in cases of confession.

It is no answer to this objection, that no exception was taken at the hearing, for the want of proper parties. The objection we are now considering is not merely, that the *proper parties were not before the court, but that the bill, being set down for a hearing, as to those who had [*489 answered, and also as to those against whom it had been taken as confessed, the court has decreed against a part only; when it ought to have decreed against the whole who were chargeable as stockholders. The proper parties for such a decree were before the court, and the error was, in dismissing the bill as to any of them. It has been also said, that the decree of dismissal, if an error, is only to the prejudice of the plaintiff. But this is not admitted. It was prejudicial to the rights of all the defendants, who were charged by the decree.

We are also of opinion, that, assuming that the cause might be properly brought to a hearing as to the parties before the court, the decree was erroneous, in dismissing the bill as to any of the defendants named in the bill as stockholders, upon whom process was not served, if, by any proceedings, they could have been brought before the court, before a final decree. They were known to the plaintiff, when he brought his bill, and were named therein; and the other defendants, in proceeding to a hearing, cannot be understood to waive any further proceedings against them. If they were non-residents, still, the act of congress of the 3d of May 1802, allows proceedings to be had against non-residents, by publication in the newspapers in the district; and no reason is assigned, why such a proceeding might not have been effectual to bring them before the court in the present case. We give no opinion, what would have been the case, if they had not been named in the bill, or had not appeared by the bill to have been known to the plaintiff, at the time of filing it. But as they were known and named, the same reasons apply to them as to the other defendants before the court and their personal representatives.

It was asserted at the argument, that the bill had also been dismissed as to some of the defendants, who had answered and admitted themselves liable as stockholders. Upon examining their answers, it is manifest, that they

were nominal stockholders only, their names having been used, without
*490] their consent, or under circumstances which demonstrate *that they never meant to become stockholders. And no attempt was made at the hearing, to charge them with any other proofs. As to them, therefore, the dismissal was properly decreed.

An objection was taken at the argument, as to the regularity of the appeal, it having been claimed by all the defendants against whom the decree was made ; and the appeal-bond having been given by Mandeville only. The objection, if it had been material in this case, ought to have been taken by way of preliminary motion to dismiss the appeal for irregularity, on account of the failure to give the proper appeal-bond. But it is not material in this case, since, if Mandeville be considered the only appellant, the error of the decree is equally fatal, and consequently, reinstates the cause, discharged of that decree, as to all his codefendants.

Upon the whole, we are of opinion, that the decree must be reversed, and the cause remanded to the circuit court, with directions to have the cause reinstated, as to all the defendants as to whom the bill was taken as confessed, and dismissed at the hearing ; and with directions also that the personal representatives of the parties to the bill, who died duriug the pendency of the suit, if they are known, and can be brought before the court, be also made parties ; and also with directions that all the other defendants named in the bill, who were not served with process, but against whom further proceedings may be had to bring them before the court (as to whom the bill was dismissed at the hearing), be brought before the court, if practicable, as parties ; and that, thereupon, such further proceedings be had as to justice and equity may appertain.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel : On consideration whereof, it is the opinion of this court, that there is error in the decree of the said circuit court, in dismissing the bill against the defendants
*491] upon whom process was not served, and also *against the defendants as to whom the bill was taken *pro confesso*, and set down for a hearing ; and also error in the said court, in not requiring the said suit to have been revived, before said decree, against the personal representatives of the parties thereto, who were served with process, and died during the pendency of the said suit, who were known, and might have been brought before the court : It is, therefore, ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed and annulled, and that the cause be and the same is hereby remanded to the said circuit court, with directions to cause the same to be reinstated as to the defendants aforesaid, against whom the bill was taken *pro confesso* and set down for a hearing, and by the decree dismissed : And also, with directions that the personal representatives of the defendants who died pending the suit, who are known and may be brought before the said circuit court, be made parties thereto, and the bill be revived as to them.

*Bank of Hamilton, Plaintiff in error, *v.* Lessee of Ambrose Dudley, Jr., Defendant in error.

Decedents' estates.—Mesne profits.—Equity jurisdiction.

Proceedings for the sale of the real estate of an intestate, for the payment of debts, were commenced, before the repeal of the act of the legislature of Ohio, entitled "a law for the settlement of intestates' estates;" the administrators, notwithstanding the repeal, went on to sell the land, and appropriate the proceeds to the discharge of the debts of the intestate: *Held* that the sale was void.

The power of the inferior court of a state to make an order, at one term, as of another, is of a character so peculiarly local, a proceeding so necessarily dependent on the judgment of the revising tribunal, that the judgment of the same is considered authority, and this court is disposed to conform to it. p. 522.

That a court of record, whose proceedings are to be proved by the record alone, should, at a subsequent term, determine that an order was made at a previous term, of which no trace could be found on its records, and that, too, after the repeal of the law which gave authority to make such an order; is a proceeding of so much delicacy and danger, which is liable to so much abuse, that some of the court question the existence of the power. p. 522.

Where administrators, acting under the provisions of an act of assembly of the state of Ohio, were ordered by the court, vested by the law with the power to grant such order, to sell real estate, and before the sale was made, the law was repealed, the power of the administrators to sell, terminated with the repeal of the law. p. 523.

The lands of an intestate descend, not to the administrator, but to the heir; they vest in him, liable to the debts of his ancestor, and subject to be sold for those debts; the administrator has no estate in the land, but a power to sell, under the authority of the court of common pleas. This is not an independent power, to be exercised at discretion, when the exigency, in his opinion, may require it; but it is conferred by the court, in a state of things prescribed by the law; the order of the court is a pre requisite, indispensable to the very existence of the power; and if the law which authorizes the court to make the order be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but it is the exercise of a legislative power, which every legislature possesses; the mode of subjecting the property of a debtor to the demands of a creditor, must always depend on the wisdom of the legislature. p. 523.

The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law. If, in a case depending before any court, a legislative act shall conflict with the constitution, it is admitted, that the court must exercise its judgment on both, and that the constitution must control the act; the court must determine whether a repugnancy does, or does not, exist, and in making this determination must construe both instruments; that its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which this court can perceive no reason.

*This court can perceive no sufficient grounds for declaring that the legislature of Ohio might not repeal the law of that state by which the court of common pleas was [*493 authorized to direct, in a summary way, the sale of the lands of an intestate; "jurisdiction of all probate and testamentary matters" may be completely exercised, without possessing the power to order the sale of the lands of an intestate; such jurisdiction does not appear to be identical with that power, or to comprehend it. p. 524.

The occupant-claimant law of Ohio, which declares, that an occupying-claimant shall not be turned out of possession, until he shall be paid for lasting and valuable improvements made by him, and directs the courts, in a suit at law, to appoint commissioners to value the same, is repugnant to the 7th amendment of the constitution of the United States, which declares, that "in suits at common law, where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved;" the compensation for improvements is a suit at common law, and must be submitted to a jury. p. 525.

Admitting, that the legislature of Ohio can give an occupant-claimant a right to the value of his improvement, and authorize him to retain possession of the land he has improved, until he shall have received that value; and assuming, that they may annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts; still, the legislature cannot change radically the mode of proceeding prescribed for the courts of the

United States, or direct those courts, in a trial of common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury. p. 526.

The inability of the courts of the United States to proceed in suits at common law, in the mode prescribed by the occupant law of Ohio, does not deprive the occupant of the benefit intended him; the modes of proceeding which belong to courts of chancery, are adapted to the execution of the law; and to the equity side of the court he may apply for relief; sitting in chancery, it can appoint commissioners to estimate improvements, as well as rents and profits, and can enjoin the execution of the judgment at law, until its decree shall be complied with. If any part of the act be unconstitutional, the provisions of that part may be disregarded; while full effect will be given to such as are not repugnant to the constitution of the state, or the ordinance of 1787; the question whether any of its provisions be of this description, will properly arise in the suit brought to carry them into effect. p. 526.

Error to the Circuit Court of Ohio. This is a writ of error to a judgment rendered in the court of the United States for the seventh circuit and district of Ohio, in an ejectment brought in that court, by the defendants in error, against the present plaintiffs, for part of lot No. 103, in the city of Cincinnati.

The plaintiff was heir-at-law of Israel Ludlow, who died seised of the premises in the declaration mentioned. The defendant claimed under a sale and deed made by the administrator of the said Israel Ludlow, in pursuance of certain orders of the court of common pleas for the county of Hamilton.

*494] *The case depended on the validity of that deed.

In August 1788, the territorial government of Ohio enacted, "a law establishing a court of probate." The first section enacted, that "there shall be appointed one judge of probate, in each county, whose duty it shall be, to take the probate of last wills and testaments, and to grant letters-testamentary and letters of administration, and to do and perform every matter and thing that doth or by law may appertain to the probate office, excepting the rendering definitive sentences and final decrees." In 1795, an orphans' court was established, and it was enacted, that where persons die intestate, and leave lawful issue, "but not a sufficient personal estate to pay their just debts, and maintain their children, it shall be lawful for the administrator or administrators of such deceased person, to sell and convey such part or parts of the said lands or tenements, for defraying their just debts, maintenance of their children, &c., as the orphans' court of the county where such estate lies, shall think fit to allow, order and direct, from time to time." In the year 1802, Ohio became an independent state. The constitution, in the article which respects the judicial department, declared that "the court of common pleas in each county shall have jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians, and such other cases as shall be prescribed by law." In April 1803, the judicial courts were organized; and the court of common pleas, after a general grant of original jurisdiction, was empowered to examine and take the proof of wills, to grant administration on intestate estates, and to hear and determine all causes, suits and controversies of a probate and testamentary nature. In June 1805, the territorial ordinance of 1795 was repealed.

At the trial of the ejectment, in the circuit court, after the plaintiff had closed his evidence, the defendants offered in evidence a deed from the administrators of Israel Ludlow, deceased, to Andrew Dunseth, for the premises in the declaration mentioned. "They also offered in evidence, duly

*certified entries and copies of orders from the records of the court of common pleas within and for the county of Hamilton, state of Ohio, of which the following are true copies, viz: '2d of February 1804, Letters of administration granted unto Charlotte C. Ludlow, John Ludlow, James Finlay and James Pierson, on the estate of Israel Ludlow, deceased, and their bond, with William Ludlow and James Smith as securities for their faithful administration.'" At May term, in the year 1804, date 8th of May 1804, the following order was made, viz: "The administrators of the estate of Israel Ludlow, deceased, exhibit an account-current and pray the court to issue an order for the sale of real property to defray the debts due from the estate, &c.; John Ludlow and James Findlay sworn in court. The court order so much of the real property to be sold as will meet the said demand, except the farm and improved land near Cincinnati, together with the house and lots in Cincinnati." At the August term of the said court, in the year 1805, a supplemental order was made of which the following was a copy, viz: "The administrators of I. Ludlow, deceased, on application to the court to extend the order for the sale of property to discharge the debts arising from the estate: whereupon, the court allow the administrators to sell the house and lots in the town of Cincinnati, and any other property, except the mansion-house and farm in the country, so that the sale do not amount to more than $10,000. This entry considered as of May term 1805."

It was in evidence, that the sale was made agreeable to the provisions of the law, adopted from the Pennsylvania code, by the governor and judges of the north-western territory, on the 16th of June 1795, entitled "a law for the settlement of intestate estates;" that the deed was duly executed, acknowledged and proved. The plaintiff, by his counsel, moved to overrule the testimony offered by the defendants' counsel, because the law aforesaid, entitled "a law for the settlement of intestate estates," was repealed before the order was made authorizing said sale, and that at the time of making of the said order, there was no law of the state of Ohio authorizing the court of common pleas to *order the sale of real estate, for the payment of debts, &c., of intestates. The court sustained the motion, and overruled the defendants' evidence. The defendants excepted to this opinion. [*496

The jury found a verdict for the plaintiff; after which, the counsel for the defendants moved the court for the appointment of commissioners, under the occupying-claimant law of Ohio, to value improvements. This motion was overruled, and judgment was rendered for the plaintiffs.

The case was argued by *Benham* and *Baldwin*, for the plaintiff in error; and by *Garrard*, for the defendant.

For the *plaintiff*, it was said, that the defendant in error claims by descent, as heir-at-law of Israel Ludlow, deceased, who died seised of the premises in question; and the plaintiff claims by purchase from his administrator. The case is one of deep interest to the present litigants, as well as to all those who hold real estate in Ohio, under deeds from administrators, and this class is numerous. Its decision depends upon old statutes, which it is proposed to collate, in such a manner as to aid the judgment of the court in expounding them in reference to this case. These statutes will be found between the periods of 1788 and 1805, and to relate: 1. To the establish-

ment of probate and testamentary courts under the territorial government. 2. Their powers and jurisdiction. 3. The abolition of these courts upon passing from a territorial into a state government. 4. The organization of new courts of similar jurisdiction, and the modification and repeal of laws relating to testamentary matters.

The facts of the case in reference to which the court must expound these laws are as follows: Ludlow died the 21st of January 1804; on the 2d of February of that year, administration was granted upon his estate to John Ludlow and others, who gave bond, with sureties, as the law required, for the faithful execution of their trust. On the 10th of May 1804, the following proceedings were had in the court of common pleas of Hamilton county, viz: "The administrators of I. Ludlow, deceased, exhibit an account-current, *497] and *pray the court to issue an order for the sale of real property, to defray the debts due from the estate, &c. John Ludlow and James Findlay sworn in court. The court order so much of the real property to be sold, as will meet the said demands, except the farm and improved lands near Cincinnati, together with the house and lots in Cincinnati." On the 15th of August 1805, the court made another order as follows: "The administrators of I. Ludlow, deceased, on application to the court to extend the order for sale of property to discharge the debts owing from the estate: whereupon, the court allow the administrators to sell the house and lots in the town of Cincinnati, and any other property, except the mansion-house and farm in the country, so that the sales do not amount to more than $10,000; this entry considered as of May term 1805." The administrators, under the above orders or decrees, sold the lot in dispute, and made a deed therefor to Andrew Dunseth, under whom the plaintiff in error claims, which orders and deeds were offered in evidence in the circuit court, and overruled. Whether this evidence were admissible or not, will depend upon the solutions of the following propositions: 1. Had the court of common pleas jurisdiction of the subject-matter? 2. Was it competent for that court, upon the application of administrators, to condemn the real estate of intestates to be sold for the payment of their debts, &c.? 3. Did the sale and deed of the administrators of the lot in question, pass the legal title to their vendee?

1. By the law of the territory, adopted by the governor and judges in 1788, and confirmed in 1799 (Ohio Laws 378–9), a qualified jurisdiction over probate and testamentary matters was confided to a judge of probate, in each county. This judge had power to grant letters-testamentary and of administration, receive guardians chosen by, and appoint guardians for, minors, idiots and insane persons; but he had no power to compel executors, administrators or guardians to execute faithfully their duties. And for this purpose, in 1795, an orphans' court was instituted, with supervisory jurisdiction, to call trustees to account, and to review the judicial proceedings of *498] the judges of probate. Maxwell's Code 81. *At the time the orphans' court was established, in June 1795, a law was adopted from the Pennsylvania code "for the settlement of intestates' estates." Maxwell's Code 90. This statute prescribes the form of administrators' bonds, directs the distribution of the personal estate, under the superintendence of the orphans' court; and provides (§ 7), upon a deficit of personalty to pay the debts of intestates and maintain and educate the children, &c., for the sale

of the lands and tenements for these purposes, by the administrator ; in such manner as the orphans' court "shall allow, order and direct, from time to time."

In May 1798, another act was adopted, which contained a general provision for the sale and distribution of insolvents' estates, which was repealed by an act passed January 1802, on the same subject. Ohio Land Laws 383. Coeval with the last-mentioned act, a law was passed for the appointment of guardians to lunatics, &c., which provides for the sale of their real estates, in the same manner that administrators are authorized to sell the real estates of their intestates. Terr. Laws 120. Thus stood the laws relative to courts probate and testamentary matters, and the apportionment of jurisdiction among them, and relative to the sale and distribution of the estates of intestates, minors, idiots, &c., up to the adoption of the state constitution of 1802. In this political transit from a territorial to a state government, the courts above mentioned were abolished, and new courts instituted, with plenary probate and testamentary jurisdiction. But the abolition of the testamentary courts of the territory did not abrogate the laws above cited, relative to the sale of intestates' estates, for the payment of debts, &c.; the act adopted from the Pennsylvania code in 1795, remained in full force. What court under the state government was charged with its execution, will now be considered.

By the constitution of Ohio, the judicial power of the state is vested in a supreme court, courts of common pleas, and justices of the peace. The common pleas is invested with jurisdiction of all probate and testamentary matters, granting of administration, &c. (article 3, sect. 2), and such other cases as shall be prescribed by law. It also provides, that all *actions, suits, prosecutions, rights, claims and contracts, shall continue as [*499 though no change had been made in the organic law. Schedule, § 1. It is maintained to be clear, that by the words "all probate and testamentary matters," was meant all the duties of executors and administrators, and all matters arising out of the settlement of the estates of decedents. The common pleas was the only court, under the new form of government, that possessed original jurisdiction over the estates of intestates ; and it could not have been the intention to leave the law of 1795 in force, without a court to execute it. Again, it will be seen, that the constitution provides (article 3, sect. 5), that the common pleas shall have jurisdiction "in such other cases as shall be prescribed by law." Now, by the statute of April 15th, 1803, unlimited jurisdiction is given to the common pleas, in all civil cases in law and equity, and all causes, suits and controversies of a probate or testamentary nature." Ohio Laws 40. And the 26th section of this act requires the supreme court and common pleas to take cognisance of all judgments, matters and causes whatsoever, pending in the territorial courts. For the sense in which the words "courts of probate" were used, see the law abolishing territorial courts. 3 Ohio Laws 188. The legislature has throughout used the words "probate and testamentary" in a popular, and not in a restrained and technical sense.

2. If the common pleas had jurisdiction of the subject, either as a court of general chancery powers, or a court of probate, did the orders granted, confer the right upon the administrators to sell this lot ? The order of May term 1804, extends to all the real estate "except the farm and improved lands

and house and lots in Cincinnati." It is asked, if this exception includes the unimproved lots; the lot in dispute was unimproved and unproductive. But if this order did not extend to the lots, the order of 1805 did: whether it be considered as the order of May or August term. If it be a valid order of May term, it ends the controversy; and whether it can be so regarded or not, must depend upon the power of the court to grant it. We affirm the *500] order was made at *May term, and by the mere misprision of the clerk, not recorded; to correct which, it was entered, *nunc pro tunc*, at August term. The exercise of this power rests in the sound discretion of the court, and is indispensable to prevent a failure of justice. Amendments are always allowed, where the omission happens by the oversight or neglect of any of the ministers of justice, as an attorney or clerk. 3 Johns. 443, 144, 519; 1 Binn. 368, 486. The power to correct clerical misprisions is incidental to every court of record. 1 Tidd's Pr. 438; 1 T. R. 638; 2 Tidd 846. Judgments are entered, under powers, after the death of the donor (1 Salk. 87; 3 Ibid. 116; 3 P. Wms. 399; 6 T. R. 368; 2 Str. 882, 1081), and also on verdicts, of a prior term; 1 Salk. 401. The same rule obtains in chancery; 4 Johns. Ch. 432; 9 Ves. 461, 92. If an execution be lost or destroyed, a second will be ordered, *nunc pro tunc;* 3 Johns. 443. In the case of *Lawrence* v. *Richmond*, 1 Jac. & Walk. 241, the chancellor, after the lapse of more than twenty years, ordered a decree filed, *nunc pro tunc.* It may be said, that this is a delicate power, and should be exercised with great circumspection. This is true; but when a court of competent jurisdiction has exercised it, and the validity of the act is drawn collaterally in question in some other court, that court will presume favorably—*omnia esse rite acta.* 2 Binn. 255.

Now, if this order can be considered as of May term, could the administrators sell under it, after the law of 1795 was repealed? For the argument, the law may be considered repealed, before the sale. The order was granted, upon the application of the administrators, *ex parte*, it is true, the law not requiring the heir to be notified; for the administrator is often the heir himself, or next of kin, or the particular friend of the heir, who is presumed to be careful of his rights. The order is a proceeding *in rem;* it condemned the real estate to be sold, and a sale made under it divests the title of the heir, and judgment liens. This order confers more power upon the administrators than a judgment or decree can *501] give to the sheriff; and in *divesting liens, it is more efficacious than either. Why then shall it be regarded as less sacred? Acts done under an existing law are not impugned by its repeal. 6 Bac. Abr. 392; 12 Co. 7; 3 Dall. 379. It is not in the power of either the judiciary or legislature, to render nugatory an existing judgment. 7 Johns. 485. If this order can be regarded in the light of a mere power, it would not affect the conclusion to be drawn. A power in a will to executors to sell real estate, to pay debts, is a power coupled with an interest, and survives. 2 Johns. Ch. 1, 19; 12 Johns. 537; 14 Ibid. 527. This court, in 7 Wheat. 114, recognises as a lien, the power of the administrator to sell real estate of intestates to pay debts, and limits its exercise within a reasonable time, which is to be fixed by analogy to the statute of limitations.

Again, if this order cannot be regarded, upon either legal or equitable principles, as of May term, it is urged, that as a decree of August term, it

authorizes the sale, whether it did or not depend upon the power of the court to grant it at that time; and this proposition involves several nice and difficult considerations, upon which the counsel for the defendant in error will place much emphasis. He will contend, that the court had no power to make the order, independent of the act of 1795, and that this act was repealed, before it was made. He will rely, to maintain this postulate, upon the following statutes, viz: an act passed the 18th of February 1804, "defining the duties of executors and administrators, on wills and intestates' estates," which took effect in May 1804 (2 Ohio Laws 279); an "act directing the manner of executing, proving and recording wills and codicils;" an "act directing the distribution of insolvents' estates;" and an "act defining the duties of executors and adminisirators, on wills and intestates' estates, and providing for the appointment of guardians." 3 Ohio Laws 173, 182, 188. These several acts, did they all conflict with the provisions of the act of 1795, are in terms prospective; they refer to future administrations, and define the duties of executors and administrators in relation to the personal estate of those who may die after they take effect. Neither of them *contains any provision incompatible with the act of 1795, but they stand in perfect harmony with it, at least, so much of it as provides for the disposition of the lands and tenements of intestates. [*502

The act of the 18th of February 1804, repeals "all laws contrary to its provisions," but contains no provision relative to lands. So far from being repugnant, it rather contemplates the life of the act of 1795, as necessary to give complete effect to its sixth section, which requires the administrator to account to the heir, after paying the debts. The act "directing the manner of executing, &c., wills and codicils," repeals "all laws on that subject." § 6. The act "defining the duties of executors, &c., on wills and intestates' estates," repeals the law establishing the courts of probate, of June 1795; the act "empowering the judges of probate to appoint guardians to minors," and "all other laws on the subject of this law." Here, the laws intended to be repealed are expressly designated, and the general clause was added, *ex abundante cautela*, to guard against collision. A subsequent act must be expressly repugnant to a former, or it does not operate as a repeal. 11 Co. 64.

Again, the learned counsel will strenuously insist, that the act of 1795, authorizing administrators to sell the lands, &c., of decedents, was expressly repealed on the first of June 1805, by an act repealing certain laws, passed the 22d of February 1805. This law purports to repeal all the laws adopted or passed by the governor and judges, prior to the first of September 1799, then in force. 3 Ohio Laws 294. At the session this law was enacted, the legislature undertook a revision of the old statutes; not with a view of forming a new code of laws out of new materials, for the course of legislation shows no intention to change the general principles of the laws; but rather to preserve, arrange and classify them, with a view to perspicuity and certainty. It was believed, no doubt, that the committee of revision had fully and faithfully performed this onerous and responsible duty; and that all the elementary principles of the laws repealed, had been incorporated into the new code. Under these circumstances, on the last day of the session, to prevent confusion and *repugnancy, the general repealing law was enacted. This is a question of legislative intention. In [*503

exploring this intention, in all cases of ambiguity, the judgment is submitted to the guidance of certain familiar rules of construction. We look back upon the old law, and trace its effects upon the community, with an eye to its mischievous influence ; and we consider well the remedy, or policy of the law, given in the enactment of the new law. Now, the liability of real estate in the hands of an administrator, for the just debts of his intestate, is a sacred elementary principle, to be found in all the codes of the different states of this Union, introduced originally by an act of parliament. At an early period of their colonial history, it was a relaxation, in favor of the colonies, of that feudal sternness which characterizes the common law in relation to landed property ; and which, for reasons of state policy, has been scrupulously maintained in England ; indeed, upon this principle and that of primogeniture, depends the stability of the peerage. In the United States, land has a less sacred character than in less free governments, and has ever been considered an article of trade ; and it is the policy of our laws, to discourage everything calculated to fetter or embarrass titles, or to lock up estates in families ; such as entailments, &c. Upon the hypothesis that this law was repealed, what remedy was left for creditors against deceased debtor ? They were remediless ; chancery could afford none, and they had none at common law. 2 Saund. 7, note 4; Cruise's Dig. tit. 1, § 63; tit. 32, § 12–16. Now, suppose the partial remedies of the common law existed, after the organization of the state government ; which is denied, because they are incompatible with the judgment and execution laws then in force, and in express violation of the act of February 11th, 1805, for the distribution of insolvents' estates ; still, the simple-contract creditors have no remedy, and the specialty creditors are left to scramble for priority ; some one creditor, and often the least worthy, for such are apt to be most vigilant, monopolizes the whole. Again, whether the legislature did intend to repeal the act of 1795, must be determined by considering as unique *all the laws *in pari materia*, whether repealed or not. 3 Mass. 21 ; 1 Kent's Com. 443 ; 6 Bac. 380, 383.

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Applying these rules of exposition, it is submitted, that not only, *ab inconvenienti*, but from necessity, in order to give effect to the act of the 11th of February 1805, which provides for an equal distribution among all the creditors, the court will be constrained to say the act of 1795 was not intended to be repealed. This idea is also fortified by the act of the 15th of January 1805 (3 Ohio Laws 163), for the "appointment of guardians to lunatics" and others. It provides for the sale of their real estate, "in such manner as executors or administrators are by law enabled to discharge the debts of deceased persons." The plaintiff also relies upon the general understanding of the profession, that this law was not repealed. 5 Cranch 32 ; 1 Dall. 131, 11, 13.

What was the effect of the saving clause in the repealing law ; and whether the repeal of the law could operate on an administration pending?

1. Upon general principles, if the law were repealed, it was prospectively, and could not affect the duties of these administrators, nor their rights, nor the rights of creditors. The maxim is, *nova constitutio futuris formam debet imponere, non præteritis.* Ludlow died on the 21st of June 1804, and administration was granted on his estate on the 2d of February following. The administrators had disbursed all the personal effects in their

hands, and had filed a petition to sell the real estate, upon which a limited order had been granted; which proceedings were pending *in fieri*, before and at the time all the repealing statutes before named took effect. By the laws in force when this administration was commenced, the real estate of intestates were assets, *sub modo*, in the hands of the administrators; and by the act directing the distribution of insolvents' estates, the creditors were prohibited from prosecuting their claims to judgment; by these laws, the rights of the administrators, creditors, distributees and heirs, in said estate were to be ascertained and finally settled; and by these laws, the administrators had *made a partial settlement. The rights of the creditors to look to the real estate (rights paramount to the heirs) as assets, had [*505 attached; had been recognised by the court; and the administrators had instituted the only suit known to the law, to enforce them; the suit was *ex parte*, it is true, so are admiralty, bankrupt and insolvent proceedings, from necessity; they all act under the supervision and direction of the court, at all times liable to be called to account, or subject to be removed for omission or neglect of duty. The administrator brings no adversary into court, but must meet all who choose to come; his proceedings are *in rem*, and must be considered as entire and pending, until finished upon the basis they were begun. He had undertaken a trust, and had entered into a contract, and had given security for its faithful execution. By this contract, in reference to the laws in force at the time of its date, the duties of the administrator were fixed and the rights of the creditors and heirs were to be ascertained. 2 Serg. & Rawle 8; 2 Binn. 299. If this be not true, it would be easy to point out the confusion and injustice of a contrary doctrine. Some creditors have been paid, others have received part, and others nothing. And the administrator may have paid debts out of his own pocket, as he had a right to do, looking to the real estate to be reimbursed, &c. To show that the repeal of the law, even without a saving clause, could not affect an administration commenced and pending, the following authorities were cited: *Dash* v. *Van Kleeck*, 7 Johns, 485; 3 Dall. 397; 20 Johns. 212; 17 Ibid. 203; 3 Johns. Cas. 75; 16 Johns. 252; 7 Ibid. 309; 1 Kent's Com. 419. See also, Ordinance of Congress of 1787, art. 2, made perpetual by the act of 1802, § 5.

2. The repealing law, however, contains this saving clause: "this act shall not be construed to affect in any manner any suit or prosecution pending and undetermined; but the same shall be carried on to final judgment and execution, agreeably to the provisions of any of said laws under which they are commenced, and the practice of the courts." It is asked, what was the object of this saving clause, or rather, *what rights and interests was it intended to protect from the operation of repealing power? [*506 The rights and interests which the saving clause was to protect were all those various rights and interests upon which the laws repealed had acted, or begun to act, in a course of judicial proceeding; it is to affect not, in any manner, any suit or prosecution pending and undetermined, commenced under existing laws, or sanctioned by the practice of the courts. Prosecution is a word still more comprehensive than suit, and which cannot be subjected to technical restraints. It is not a technical term, though sometimes vulgarly used to signify criminal proceedings. 3 Thomas's Coke 348. In addition, to show the sense in which the words suits, actions and prosecutions have been used by the legislature of Ohio, the court will look at Land Laws 323;

1 Ohio Laws 8, 11 ; 2 Ibid. 67 ; 8 Ibid. 257, 284–5, 294. From these it appears, that these words have been used to embrace all manner of judicial proceedings, when transferring jurisdiction, upon passing from a territory to a state, in the organization of new counties and new courts.

It has been said, that this petition of the administrators for the sale of the land, &c., was pending, and that a qualified order had been granted in 1804, and that the order of 1805 was supplementary. Now, it is asked, whether this proceeding did not involve rights and interests as sacred, falling as competely within the mischiefs intended to be guarded against by the saving clause, as any adversary proceeding which can be imagined. In 2 Serg. & Rawle 8, the court decides, that all the orders of sale are parts of the same proceeding, they rest upon the same foundation, and refer themselves back to the filing of the petition. It is, therefore, considered, that if the act of 1795 were repealed, it did not affect the administration.

It has been shown, that the common pleas was a court of original and almost unlimited jurisdiction, and that the principle that lands should be assets in the hands of administrators for the payment of debts, a principle unknown to the common law, had been early introduced into the colonies, and perpetuated after the revolution, by nearly all the states, *and *507] particularly by Pennsylvania, the powerful neighbor of Ohio ; from whom were borrowed not only most of the principles of her organic law, but nearly all of her statutes. Now, if the point of jurisdiction is established, it is claimed, that the order of 1805, which authorized the sale of the lot in question, is valid, until reversed ; it is *res judicata*, and cannot be impeached collaterally. It is not like the order of a judge of probate, or any other judicial officer, whose powers are specified and limited. The principle which this argument maintains prevades all the cases. " What judges of the matter have adjudged, is not traversable." 1 Salk. 396. A contrary principle applies only to courts of special limited jurisdiction.

It was hoped, that as the defendant in error had elected the federal judiciary to decide upon his rights, he would have been content to abide by its unbiased decision ; and that if those whom he has driven to battle were to fall, they would, at least, have the consolation which in legal warfare always arises from an unshaken confidence in the learning and integrity of the arbiter. It is known, that it is the law of this *forum*, that in cases depending upon the laws of a state, this court will adhere to the construction given by the superior court of the state, upon the universally recognised principle, that the judicial department of every government is not only competent to, but is the fit organ to expound its laws. But this rule, from the peculiar form of our governments, is subject to these limitations, namely, that if the exposition of the local laws, by the local judiciary, conflict with the constitution, the laws or treaties of the United States, it is not binding upon this court. To this rule, which is certainly correct, we yield unqualified approbation ; but deny its application. What is the reason upon which it is founded ? Why does this court, possessing so many superior advantages, yield an entire submission to state adjudication ? It is not from courtesy ; but because natural justice requires it, since the local adjudication has become a rule of property which regulates and settles the rights of *meum* and *tuum*, a permanent land-mark which it would be mischievous to remove.

See 5 Cranch 184; 10 Wheat. *199; 7 Ibid. 114; 5 Johns. 290; 9 Ibid. 424; 6 Ibid. 387.

Even if the statute of 1795 were repealed, and had no saving clause, while the act requiring an equal distribution of insolvents' estates continued in force, the court had jurisdiction of the subject-matter, and could grant the order. And the order, once granted, could not be invalidated, by showing, some twenty years afterwards, that the court erred in point of fact, that the estate was solvent: for whether Ludlow's estate was solvent or insolvent does not appear.

This case having been continued under advisement since the last term, we are now met with a decision of the supreme court of Ohio, which it is said, decides the merits of this controversy, and concludes this court. What influence this ought to have upon the judgment of this court as to the law of the case, will now be considered. The decision in Ohio acts retrospectively and annuls past transactions, and not prospectively, to regulate the future acquisition of property. It is the decision of the common pleas which settled the law, if competent to decide upon the subject-matter, which is binding upon this court, until it is reversed. The questions involved in this case can only be decided by the principles of the common law; even the question, whether a statute is repealed or not, can only be determined by the rules of construction which it prescribes. If the supreme court had decided against the jurisdiction of the common pleas to grant the orders, perhaps, it would have been conclusive upon this court; but it sustains the jurisdiction. The order of 1805 is claimed to be an order of May term, before the law was repealed, entered, *nunc pro tunc*, at August term; and if not valid as an order of May, it is good as a supplemental order of August, and relates back to the petition; but the supreme court has decided, collaterally, that it was an act *coram non judice*. All these are questions which depend upon general principles, and not upon the exposition of local laws, and we think we have a right to ask the unbiased decision of this court upon them. This court will never follow the law as decided by the local tribunals, unless it be settled by a series of decisions, *and is acquiesced in by the profession. But it is in this case asked to yield [*509 implicit obedience to an isolated case, in the decision of which the court was divided; a decision, too, as it is solemnly believed, fraught with the most pernicious and ruinous consequences; and which, unless the learning and justice of the profession are greatly mistaken, will never meet its approbation.

The counsel for the plaintiff then proceeded to discuss the question of the constitutionality of the occupying claimant law. The arguments upon this point, for the plaintiff and the defendant, are stated in the opinion of the court.

Garrard, for the defendants, after stating the case, the laws of the territory of Ohio, and the acts of the legislature of that state, which had been referred to by the counsel for the plaintiff in error, proceeded to say: In construing the act of 1803, it should be borne in mind, that the court of common pleas, created by it, is a limited and circumscribed tribunal in its jurisdiction; and that upon the law of 1803, it depends entirely for its existence. If it is a court of limited and not general jurisdiction, the distinction

between them is at once destroyed, if the exercise of general powers shall be deemed consistent with its limited character. The distinction between courts of limited and general jurisdiction should not be abolished. Obligatory effect should not alike be given to acts of a court of limited jurisdiction, when they are done within their real or by assumed powers. If a court of limited and circumscribed jurisdiction can legitimately exercise general powers, no good reason can be given, why the court of common pleas should not be sustained in assuming the peculiar powers and jurisdiction of this court. If an assumed power is valid for one purpose, and for one occasion, it is valid for all and every purpose. There is no rule of construction, by which the limited and circumscribed jurisdiction of the court of common pleas can be made so broad and reaching in its character, as to embrace the orders of 1804 and 1805. The rule of construction *applicable to this case is well settled, and has never been deviated from: it is, that the organic law of the court is the charter of its powers, and that it has no powers beyond that charter, except such as are necessarily incident to it, to carry into effect its orders, judgments and decrees. Such was the rule of construction under which the court of probate and orphans' court acted, who possessed the same power with the court of common pleas, under their respective organic laws. The power to order the sale of an intestate's real estate, by his administrators, was exercised by the orphans' court only in virtue of the act of 1795. That act does not extend to the court of common pleas, but is confined in its terms. The law of 1803 does not extend that power to them, by any express grant; nor can it be implied by any reasonable interpretation of that act. The power, therefore, did not exist, and the orders are consequently "*coram non judice.*" Should the jurisdiction of the court of common pleas be sustained, it will then be contended, that the act of 1795 was repealed, prior to the granting of either of the orders in evidence.

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1. The act of 1795 was repealed by the act of the 18th of February 1804, which took effect the first day of May 1804, entitled, an act "defining the duties of executors and administrators, on wills and intestates' estates." This act strictly confines the duties and powers of executors and administrators to the personal estate of the deceased; it directs how letters of administration shall be granted; what powers they shall confer; how administrators shall proceed; how they shall be called to account; and it repeals "all laws and parts of laws contrary to the provisions of this act." The intention of this law was, to point out and define the whole duties and power to be exercised by executors and administrators, in future, and it restricts them to the personalties of the deceased; a power to sell the real estate does not seem to be contemplated by this statute, in any of its provisions, either by a direct grant, or by reference to former and existing laws giving such power; but it repeals all laws *and parts of laws contrary to the provisions of this law. A power in the administrator to sell the land and pass the title of an intestate's real estate is certainly inconsistent with and contrary to the provisions of a law, that undertakes to prescribe the whole duties and powers of executors and administrators, and limits their management to the personal estate. And whilst this spirit continued to direct the minds of the first legislatures of the state, it is a reasonable and legitimate presumption to say, that whenever they undertook to

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legislate upon any particular subject, they made all regulations and provisions required by the exigencies of the country. That they intended by this act to define the whole duties and powers of executors and administrators, and limit them to those prescribed by this statute itself, which repeals all laws and parts of laws contrary to its provisions.

2. It was repealed by the act of 1805, entitled "an act defining the duties of executors and administrators, on wills and intestates' estates, and providing for the appointment of guardians." This act was passed in connection with two other laws relative to the same matter: one directing the manner of executing, proving and recording wills and codicils, and the other, directing the distribution of insolvents' estates. All of these laws restrict the duties of executors and administrators, and the powers of the courts, to the personalties of the deceased; and each of them contains a repealing clause, and the first, all laws upon the same subject. If the law of 1795 was then in force, it was certainly repealed; as it was upon the same subject with this act. By a reference to the statute book of this year, it will be seen that the legislature of 1804–5 took upon themselves, in an especial manner, the character and duties of revisors of the laws then in force; and they adopted a system which underwent little or no change, till 1808. They passed a general repealing law which will be noticed hereafter; they passed a general law regulating judgments and executions, incorporating in it provisions entirely new, and repealed all other laws upon that subject. That the three laws above mentioned were treated and considered as the only laws in force, from their passage until 1808, is evidenced by the fact, that the law of *the 18th February 1808, which incorporates the provisions of these three laws into one, repeals these laws, by a special reference to them as the only laws then in force upon the subject. Land Laws 459. [*512

3. The act of 1795 was repealed by the act of the 22d of February 1805, entitled "an act repealing certain laws." Land Laws 473. The first section repeals all the laws adopted by the governor and judges, prior to the 1st of September 1799. The act for the settlement of intestates' estates, having been adopted prior to that period, was certainly repealed by this act; and all proceedings by administrators, subsequent to the first of June 1805, which assumed the act of 1795 as their basis, were null and void, unless they were such as came within the meaning of the saving clause of the second section. The second section provides, "that nothing in this act contained, shall be so construed as to affect, in any manner, any suit or prosecution, now depending and undetermined, but the same shall be carried on to final judgment and execution, agreeably to the provisions of any of said laws under which the suit or prosecution may have been commenced, and the practice of the courts." It was contended by the defendant's counsel, that the clause not only saved the unexecuted power derived under the order of 1804, but that it saved a power in the court of common pleas to go on and make additional and supplemental orders, *ad infinitum*, by relation to the first. To support these propositions, it was maintained, that such was the intention of the statute, by a fair construction of the terms used; and secondly, that the legislature had not the constitutional power, under the circumstances of the case, either to annul the order of May 1802, although no rights had been acquired by a sale under it, or to repeal the

act of 1795, so as to prevent the court from making new and additional orders.

In determining the correctness of the first position, as to the meaning of the saving clause, we must look to the language of the statute. The repeal is not to affect in any manner any "suit or prosecution." The definition is thus given of the term suit: "the lawful demand of one's right," *or in the words of Justinian, "*Jus prosequendi in judicio quo alicui debetur.*" 3 Bl. Com. 116. If a "suit" means the lawful demand of one's right, there necessarily must be some one to make the demand, and some one of whom the demand is made, through the medium of a court, and these parties receive the names of plaintiff and defendant. The one complains of the violation of his rights, either growing out of contract or torts committed; the other, defending himself against the injury complained of, either denies the contract or tort, or shows that the one has been satisfied or the other justified. See also, 6 Wheat. 407–8. The term prosecution, both technically and in common parlance, when applied to the proceedings of a court, relates exclusively to criminals, or to suits upon penal statutes. If a murder is committed, the perpetrator is prosecuted by the state. So, with perjury, rape, arson, and the various degrees of felony—the state is plaintiff, complaining of wrongs and violations of her statutes. There are also various statutes attaching penalties in money, for the performance or no performance of certain acts; when the one is done, or the other neglected, prosecutions are commenced in the name of the state, for the amount of the penalties. But the terms "suit and prosecution" are fully explained (if they needed any explanation) by the subsequent part of the saving clause. It provides, that the "suit or prosecution," depending and undetermined, shall be carried on to final "judgment and execution." It is wholly immaterial, whether the term "suit or prosecution" is attempted to be applied to the order of 1804, or the subsequent petition and order of August term 1805.

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If it be said, that the unexecuted order of 1804 is saved by the term, "suit or prosecution," it may be asked, who is the plaintiff in the order? To what tribunal was the appeal made? And against whom was the complaint made? What judgment was the order to be "carried on to?" Against whom and for whose benefit was the judgment to be entered? These queries unquestionably show that the terms "suit or prosecution" cannot be applied to the order of 1804, or to the subsequent petition and order of 1805. But the "suit or prosecution" is to be carried on, *not only to "final judgment," but also to "execution." The term "execution" is certainly used here in the technical sense of the word, as applied to the final process of the court, in the hands of its executive officer, to carry into effect its orders, judgments and decrees. An execution is defined to be the "putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered." 3 Bl. Com. 412, tit. Execution, ch. 26. Neither the order of 1804, nor the subsequent petition and order of August 1805, can, by any reasonable interpretation of language, be construed into a "suit or prosecution:" neither was "pending and undetermined," at the time the repealing law took effect: neither of them was a proceeding of a character upon which a judgment

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could, be entered, or an execution issued ; they are, therefore, clearly without the saving clause of the general repealing law of 1805.

But to this it is replied, that the legislature had not the constitutional power to repeal the law of 1795, so as to affect either the order of 1804, or the subsequent order of 1805. It is said, that by the laws in force at the "death of Ludlow, and when administration was granted, the real estate of an intestate was assets in the hands of his administrators ; and that by these laws, the rights of the administrators, creditors, distributees and heirs in the estate, should be ascertained and settled. That the rights of the creditors to look to the real estate in the hands of the administrators as assets, had attached ; that their rights had been recognised by the court, and the administrators had instituted the only suit known to enforce them." If these orders and proceedings were withdrawn from the scope of constitutional legislation, and the law of 1795 rendered perpetual, it was in virtue of the constitution and the ordinance of congress.

What are the facts relative to the order of 1804, and what rights had been acquired under it, at the date of the repeal of the act of 1795, that were shielded by the constitution and ordinance? It is in evidence, that at the May term *1804, of the court of common pleas, the administrators of Ludlow applied for and obtained an order to sell a portion of [*515 the estate of said Ludlow. No sale, however, was made of any portion of his real estate, until August and September 1805, in the county of Hamilton. None had ever been offered, under that order, at public sale ; no purchase had been made, no contract had been entered into, that was within the power conferred by the order. The order remained a naked authority or power to sell ; it was unexecuted, either in whole or in part ; it was dependent upon the statute for its validity, and when that was repealed, the order fell with it. The rights of the creditors were in no better or worse condition, by the repeal of the law ; they remained as they did at the death of Ludlow, susceptible of having the lands charged with them, in case of a deficiency of personal estate. If, in fact, the court of common pleas had jurisdiction, under the act of 1795, and it was in force, at the date of the order of 1804, and in virtue of that order, the administrators had proceeded to sell at public sale the real estate of Ludlow, prior to the repeal, but had not finally executed the title papers ; it would be a fair and legitimate construction of the repealing law, to say, that the rights of the purchasers thus acquired, would be saved by the reservation of the repealing law, and the administrators would, under those circumstances, have been authorized to proceed and complete the title to the purchasers. The order of 1804, and the rights of the creditors under it, were, at the time of the repeal, as legitimate subjects of legislation, as the execution laws of the state are, which have undergone various changes and modifications without reference to the contracts of individuals. *McCormick* v. *Alexander*, 2 Ohio 76.

What were, in fact, the rights of the creditors of Ludlow, at his death? They consisted of debts due from him, as evidenced by open account, or by bonds or notes of hand. Now, these are the rights which, it is said, were so incorporated with, and mixed up with the laws existing at his death, that the repeal of those laws impaired the obligation of his contracts. *These rights, in their amount and their character, were ascertained and fixed by the contract of the parties. The right to demand, and [*516

the obligation to pay, are the consequences of contract. The repeal of the act of 1795 neither takes away the right to demand, nor diminishes nor discharges the obligation to pay. The amount and quality of the rights of his creditors were left by the repealing law, exactly as they were fixed by the parties; and the obligation to pay, and the liability of his estate to answer the demand of his creditors, are as valid and perfect as they were prior to the repeal. The law does not assume that the debts due shall, from its passage, be considered paid, and the estate discharged; it does not purport to absolve the estate from the contracts of Ludlow, in any other manner than by the payment of the uttermost farthing. If it lessened the rights of the creditor, and impaired the obligation of the debtor, it would not only fill the spirit, but the letter of the inhibiting clause. Whatever power the order may have conferred on the administrators, or whatever rights the creditors may have had, to have their debts collected through that particular mode of enforcing their collection, they were all alike derived through, and dependent upon, the legislation of the country; and it is held to be consistent with sound principles, and the decisions of this court, to say, that so long as the order remained unexecuted, neither purchaser nor creditor had such vested rights under it, as were drawn out of the scope of legitimate legislation. If the order itself, or the supposed vested rights of the creditors to have that order executed, were the result of the contract of the parties, and not the effect of the operation of a law, which in no manner entered into or became a part of their contract, they might, with some propriety, be said to be embraced within the constitution.

All the arguments of the defendant's counsel, whatever form they may have assumed, have been refuted by the very learned and unanswerable opinion of the Chief Justice of the United States in the case of *Ogden* v. *Saunders*, 12 Wheat. 332–57. He seems to have established *incon- *517] trovertibly, the converse of the proposition contended for by the defendants in this case. He has shown, that the right to contract is not conferred by society, but is a natural original right, brought by each individual into society; and that the obligation of contracts is not the result of positive law, but is intrinsic, and is conferred by the act of the parties. The right to coerce the performance of a contract, although as much a natural right as the right to contract, yet is surrendered by every individual, when he comes into a government of laws, and this surrender imposes the duty on the government to furnish adequate remedies. The defendant's counsel assume, that the right to regulate the remedy, and to modify the obligation of a contract, are the same, that the obligation and the remedy are identical—that they are synonymous—two words conveying the same meaning. The answer to this shape of the argument is plain and simple. The obligation of a contract is coeval with the contract itself; it originates with the contract, and exists with it anterior to the time of performance. The remedy operates upon a broken contract, and its office is to enforce a pre-existing obligation. Obligation and remedy, or right and remedy, are, therefore, not identical; they originate at different times, and are derived from different sources; the one flows from the act of the parties; the other is furnished by the government.

The counsel themselves shrink from the conclusion to which their doctrines must inevitably lead, and attempt to show that such would not be

their consequences; but they cannot be disguised. If the rights of the creditors of Ludlow to have their debts collected under the remedial laws in force at the date of their contracts, or at his death, were such as were withdrawn from subsequent legislation, by that clause of the constitution, inhibiting "the passage of any law impairing the obligation of contracts," and a sale could legally be made one day after the repealing law took effect; the same principle can be extended to all cases, without regard to time or circumstances. The act of 1795 would be made perpetual in the settlement of an estate. The order of 1804 would be a springing use, or power in the administrators, *which they could go on to execute at their pleasure, regardless of the subsequent alterations and modifications of the laws [*518 regulating the passage of lands from one to another. The power to modify the remedial law necessarily includes the power to repeal it; and this doctrine equally excludes both.

Upon the subject of this repealing law of February 22d, 1805, another argument has been pressed into the service, of a very singular character. However out of place it is considered, still it has been urged so often, so seriously, and by so many different gentlemen, that it ought not to be passed in silence. In the session of 1804 and 1805 (vol. 3, p. 164), the same legislature that enacted the repealing law, also enacted a statute providing for the appointment of guardians to lunatics and others. This latter statute passed January 15th, 1805, and the second section contains a provision similar to that of the law, on the same subject, of 1792, with a variation of phraseology, using the word "are," instead of "may or shall." "Out of the real estate, in such manner as executors or administrators are by law enabled to discharge the debts of deceased persons," &c. It is urged, that all the acts of the same session should be taken and considered together as one statute. And that, upon this construction, the clause here quoted is to be considered as a declaration, that no repeal of the law of 1795 was intended. The answer already given, to the attempt to create or set up a law, by indirect legislation of this nature, applies with equal force here. But in this place, the argument is destroyed by other considerations. The last enactment of the same session controls the first, if they are in terms contradictory or inconsistent. If, in January, the law of 1795 was supposed to be in force, and if the reference to it may be regarded as a legislative declaration of an intention to continue it; the subsequent enactment of February, expressly repealing it, must nevertheless have operative effect. And, adopting the principle of construction insisted upon by the other side, this consequence follows: the reference in the act of January to the existing law, adopts or revives it for *the special purpose declared; but cannot, contrary to the repealing act, continue it in force for any other purpose. [*519

There remains one point more to be disposed of, in relation to the order of 1805. It is not denied, that the order of May 1804, excludes from its operation the lot now in dispute, and that the defendants are thrown entirely upon the order of August term 1805, to make out their defence. As an order of August term 1805, it is liable to all the objections made to the order of 1804, with this additional and unanswerable one, that it was applied for and obtained, after the repealing act took effect. It is attempted, however, to obviate this objection, by showing that the order was really applied for and granted at May term 1805, prior to the taking effect of the repealing

law; but that it was, through the negligence of the clerk, not entered till the subsequent term, "*nunc pro tunc.*" If this order can be sustained for any beneficial purpose, in this controversy, as an order of May term 1805, it must be upon the principle, that a court of record is not bound to keep a record, but that its proceedings are matters which can be sustained and preserved in the mind of its officers. In this instance, it is an order of May term, only by the testimony of one of the judges, who then composed the court. Admit, for the sake of argument, that the court of common pleas had the power to make the order at the May term, yet that power had ceased before the August term, by force of the repealing law, and it was as competent for them to grant a new order upon an original application, as it was to enter this one "*nunc pro tunc.*"

But suppose the law of 1795 had not been repealed, and the jurisdiction of the court should be admitted, still it is contended, that, upon well-settled principles, heretofore recognised by this court, the order could only be regarded as the judicial act of the court, from the time it actually became a matter of record; and the fact that the court attempted to give it an operative character, prior to its having been entered of record, by ordering it to be entered "*nunc pro tunc,*" gives it no additional validity. If, indeed, the order had been regularly applied for, and the records of the court *520] *furnished evidence of that fact, and the order had been granted, but neglected to be entered by the clerk, and previous to the next term, the administrators had gone on to sell, under the belief that the officers of the court had done their duty, and purchasers had paid their money upon the faith of the validity of the proceeding; it is not doubted, that, at a subsequent term, it could be entered and held valid. The records themselves would furnish evidence of the proceedings in part, and the remainder might be substituted; but its validity, as the order of a previous term, could only be supported, upon the principle, that rights had been acquired in good faith, under a due execution of the power intended to be conferred by the order. It would be to protect and make good that which had already been done in good faith, and under the supposition that the proceedings of the court were spread upon its records; but it cannot be made the order of May term, merely to give color to the power of the court, and to support proceedings which took place subsequent to August 1805.

Marshall, Ch. J., delivered the opinion of the court.—This cause was fully argued at the last term, on the validity of the deed made by the administrators; and several acts, which were supposed to illustrate that question, to which it is unnecessary now to refer, were cited and relied on. As it was a question of great interest, on which many titles depended, which was to be decided entirely by the statutes of Ohio; and as the court was informed, that the very case was depending before the highest tribunal of the state, the case was held under advisement. The cause depending before the state court, which was an ejectment for other land sold by the same administrators, under the same orders of the court of common pleas, has been since decided, and the supreme court of the state has determined: 1. That there was no law in the territory, prior to the act of 1795, authorizing *521] administrators to sell the lands and tenements of an intestate. *2. That this law was repealed, and ceased to have effect, from and after

the 1st day of June 1805. 3. That the order of the court of common pleas of May term 1804, directing the administrators of Israel Ludlow to sell a part of the real estate of said Ludlow, for the payment of his debts, did not embrace the premises in question. 4. That the parol testimony offered in evidence, to prove an order of sale at the May term 1805, was incompetent. 5. That the order of the said court, at the August term 1805, was *coram non judice* and void ; and that the lessors of the plaintiffs could not be divested of their title, in consequence of any act done in pursuance of that order.

At this term, the cause has been again argued, and the counsel for the plaintiff in error have been made several points which they suppose to be still open. They contend, that the repeated declaration of this court, that it will conform to the construction of the statutes of a state made by its own tribunals, does not apply to the decision respecting the order made in August 1805. They insist, that the power of the court to make this entry, as of the May term preceding, depends upon the common law, not on the statutes of Ohio, and that the question is still open for discussion. Supposing it to be open, they maintain, that the omission to enter the order in May, when it was made, was a clerical misprision, which the court might correct in August, and enter the order as of May term. It has, they contend, the same effect as if it had been actually entered in May ; and allowing this, the subsequent repeal of the law, before the sale was made, could not affect the power to sell which was given by the order, and therefore, the sale is valid.

To sustain this argument, all the propositions on which it rests must be true. The decision of the state tribunal must be of a character which this court will consider, undoubtedly, with great respect, but not as conclusive authority. The court of common pleas must have had the power in August, after the repeal of the law under which the order was made, to enter it as of May, and the administrators must have had the power to sell, in virtue of the order, after the law by authority of which it was made had been repealed. If the *plaintiffs in error have failed in sustaining any one of these propositions, the conclusion which has been drawn from them is not [*522 supported. The judges are not united in opinion on these several propositions, but concur in thinking, that the conclusion drawn from the whole of them is not sustained. The power of the inferior courts of a state to make an order at one term, as of another, is of a character so peculiarly local, a proceeding so necessarily dependent on the judgment of the revising tribunal of the state, that a majority considers that judgment as authority, and we are all disposed to conform to it.

But were this question entirely open, the considerations which appear to have influenced the judgment of the supreme court of Ohio, are certainly entitled to great weight. That a court of record, whose proceedings can be proved by the record alone, should, at a subsequent term, determine that an order was made at a previous term, of which no trace could be found on its records, and that too, after the repeal of the law which gave authority to make such an order, is a proceeding of so much delicacy and danger, which is liable to so much abuse, that some of us question the existence of the power. In the case, as depending before this court, there is still a stronger objection to the validity of the order of August 1805. Its language does not import that the administrators had applied to the court, at the preceding May term, for an extension of the order of May 1804, and that the

court had granted their application, and made the order, which the clerk had omitted to enter, and that, therefore, the order is now made, with a direction that it should be entered as of May. This is not its language; it makes no allusion to any proceeding in May; it purports to have been made on an original application by the administrators, in August, for an extension of the order of May 1804. On this original application, the court allows the administrators to sell the house and lots in Cincinnati, and adds, "this entry to be considered as of May term 1805." The entry, on its face, does not import to be the correction of the record, by placing on it an order *523] which had in fact been made in the preceding May, *and which the clerk had omitted to enter; but to be an original proceeding in August, to which the court, by its own authority, gives a retrospective operation. If any explanatory testimony could have been received in the circuit court, none was offered. That court was required to infer from the words, "this entry to be considered as of May term 1805," that it was in fact made at that term, and that the clerk had totally omitted it. The certainty which is necessary in judicial records, and the principle, that they prove themselves, forbade the court to draw this inference. The law being then repealed, the order was certainly *coram non judice.* It is also the opinion of one of the judges, that had the order even been made in May term, the repeal of the law before the sale, terminated the power to sell.

The counsel for the plaintiffs in error have also contended, that the interest of the administrators in the real estate, as trustees for the creditors, was a vested interest, which the repeal of the law could not divest; and that they might proceed to sell, under the sanction of an order made even after the law was repealed. This is a point on which we cannot doubt. The lands of an intestate descend, not to the administrators, but to the heir. They vest in him, liable, it is true, to the debts of his ancestor, and subject to be sold for these debts. The administrator has no estate in the land, but a power to sell, under the authority of the court of common pleas. This is not an independent power, to be exercised at discretion, when the exigency, in his opinion, may require it; but is conferred by the court, in a state of things prescribed by the law. The order of the court is a pre-requisite, indispensable to the very existence of the power; and if the law which authorized the court to make the order be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but is the exercise of a legislative power which every legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor, must always depend on the wisdom of the legislature.

*524] It is also contended, that the jurisdiction of the court of *common pleas, in testamentary matters, is established by the constitution, and that the exclusive power of the state courts to construe legislative acts does not extend to the paramount law, so as to enable them to give efficacy to an act which is contrary to the constitution. We cannot admit this distinction. The judicial department of every government is the rightful expositor of its laws; and emphatically of its supreme law. If, in a case depending in any court, a legislative act shall conflict with the constitution, it is admitted, that the court must exercise its judgment on both, and that the constitution must control the act. The court must determine whether a repugnancy does or does not exist; and in making this determination, must

construe both instruments. That its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which this court can perceive no reason.

But had the question never been decided in Ohio, this court can perceive no sufficient ground for declaring, that the legislature of the state might not repeal the law by which the court of common pleas was authorized to direct, in a summary way, the sale of the lands of an intestate. "Jurisdiction of all probate and testamentary matters," may be completely exercised, without possessing the power to order the sale of the lands of an intestate. Such jurisdiction does not appear to us to be identical with that power, or to comprehend it. The constitution did not mean, and could not mean, to deprive the legislature of the power of exercising its wisdom on a subject so vitally interesting to the people; nor do its words convey such an intent. Were it even true, which we cannot admit, that the constitution established the jurisdiction of the court of common pleas in the case, still, the legislature might prescribe the rule by which that jurisdiction should be exercised. We are satisfied, that there was no error in the instruction given by the circuit court to the jury.

The plaintiffs in error contend, that the court erred in overruling the motion to appoint commissioners to value the improvements, in pursuance of the occupant law of Ohio; *and in rendering judgment, without conforming to that law. The first section of the act provides, that [*525 "an occupying-claimant," circumstanced as was the plaintiff in error, "shall not be evicted or turned out of possession, until he or she shall be fully paid the value of all lasting and valuable improvements made by such occupying-claimant," "previous to receiving actual notice, by the commencement of suit," &c., "unless such occupying-claimant shall refuse to pay the person so setting up and proving an adverse and better title, the value of the land, without the improvements made thereon," &c. The second section proceeds to direct the court to appoint commissioners to make the valuation, which had been prescribed by the preceding section.

The counsel for the defendant in error insists, that this law is repugnant to the tenth section of the first article of the constitution of the United States, and to the ordinance of 1787 for the government of the north-western territory. This court does not think that these questions properly arise in the present actual state of this controversy. The seventh amendment to the constitution of the United States declares, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This is a suit at common law, and the value in controversy exceeds twenty dollars. The controversy is not confined to the question of title; the compensation for improvements is an important part of it, and if that is to be determined at common law, it must be submitted to a jury.

It has been said, that the occupant law of Ohio must, in conformity with the 34th section of the judiciary act, be regarded as a rule of decision in the courts of the United States. The laws of the states, and the occupant law, like others, would be so regarded, independent of that special enactment; but the exception contained in that section must be regarded likewise. The law, so far as it consists with the constitution of the United States and of the state of Ohio, is a rule of property, and, of course, a rule of decision in

the *courts of the United States; but that rule must be applied consistently with their constitution. Admitting, that the legislature of Ohio can give an occupant-claimant a right to the value of his improvements, and can authorize him to retain possession of the land he has improved, until he shall have received that value; and assuming, that they may also annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts; still, that legislature cannot change radically the mode of proceeding prescribed for the courts of the United States; nor direct those courts, in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury.

But this inability of the courts of the United States to proceed in the mode prescribed by the statute, does not deprive the occupant of the benefit it intended him. The modes of proceeding which belong to courts of chancery are adapted to the execution of the law; and to the equity side of the court he may apply for relief. Sitting in chancery, it can appoint commissioners to estimate improvements, as well as rents and profits, and can enjoin the execution of the judgment at law, until its decree shall be complied with. If any part of the act be unconstitutional, the provisions of that part may be disregarded, while full effect will be given to such as are not repugnant to the constitution of the United States, or of the state, or to the ordinance of 1787. The question whether any of its provisions be of this description, will properly arise in the suit brought to carry them into effect. We think, there is no error in the judgment, and it is affirmed, with costs.

Judgment affirmed.

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*527] *The President, Directors and Company of the Bank of the United States *v.* William Owens, Herbert G. Waggoner, George Wagley and Alexander Miller.

Usury.

The branch bank of the United States, at Lexington, Kentucky, discounted a promissory note reserving interest thereon, at the rate of six per cent. per annum; it being agreed, that the owner of the note should receive the proceeds of the discount, in notes of the Bank of Kentucky, at their nominal value, although the same were, at the time, of no greater current value than 54 per cent. of the said nominal value: *Held*, that the contract was usurious, and void; and that the bank could not recover of any of the parties to the discounted note.[1]

A fraud upon a statute, is a violation of the statute. p. 536.

A profit made, or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specific rate of interest;[2] according to this

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[1] Cleveland *v.* Loder, 7 Paige 557; Pratt *v.* Adams, Id. 615. If, in making a loan, the lender impose upon the borrower, as a condition, the acceptance of property as part of the loan, at a higher rate than its value, it is usury. Fitzsimons *v.* Baum, 44 Penn. St. 32.

[2] But an agreement to pay an additional sum, by way of penalty, in case of non-payment of the actual debt, on the day appointed, does not amount to the penal offence of usury; the debtor having it in his own power to avoid payment of the penal sum, by a prompt discharge of his obligation. Sumner *v.* People, 29 N. Y. 337; Pomeroy *v.* Ainsworth, 22 Barb. 118; Cutler *v.* How, 8 Mass. 257; Pollard *v.* Baylor, 4 Hen. & Munf. 252; Long *v.* Storie 9 Hare 542.

principle, the lender in this case has taken 46 per cent. for three years, or at the rate of about fifteen per cent. per annum above the prescribed interest; this is contrary to the provisions of the charter of the Bank of the United States, and against law. p. 537.

Reserving interest as discount, is the same as taking the same; since it cannot be permitted by law, to stipulate for the receipt or reservation of that which it is not permitted to receive. In those instances in which courts are called upon to inflict penalties upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for there, the actual receipt is generally necessary to consummate the offence; but where the restrictive policy of a law alone is in contemplation, we hold it to be a universal rule, that it is unlawful to contract to do, that which it is unlawful to do. p. 538.

The charter of the Bank of the United States forbids the taking of a greater rate of interest than six per centum; but it does not declare a contract on which a greater interest has been taken or reserved, to be void; such a contract is void, on general principles. Courts of justice are instituted to carry into effect the laws of a country, and they cannot become auxiliary to the violation of those laws; there can be no civil right, where there can be no legal remedy; and there can be no legal remedy for that which is in itself illegal. p. 538.

CERTIFICATE of Division from the Circuit Court of Kentucky.

The action was upon a promissory note, signed by the defendants, bearing date the 7th of February 1822, by which they promised to pay to the president, directors and *company of the Bank of the United States, [*528
or order, on the 7th of February 1825, $5000, with interest at the rate of six per centum per annum from the date. The following indorsement was on the note:

"Mem. Interest is to be charged on this note from the 21st day of May 1822, only, and not from the 7th of February 1822, within mentioned, the former being the day on which the amount was actually received by the makers of this note. (Signed) H. CLAY."

The declaration being in the usual form, the defendants, Waggoner, Wagley and Miller pleaded as follows:

"That they ought not to be charged with the said debt, by virtue of the said supposed note or writing, because they say, that they executed the said note, at the instance and for the accommodation of the said Owens, and with the view of enabling him to obtain a loan of the money from the Bank of the United States, upon the discounting of said note; and defendants allege, that afterwards, to wit, at, &c., the said Owens presented the said note for discount to the president and directors of the office of discount and deposit of the Bank of the United States, at Lexington, Kentucky, and that the president and directors of the said office, then and there, failed to discount the said note, or make any loan thereon; and that after the rejection of the said note as aforesaid, at Lexington, in Kentucky, to wit, on the 31st day of May 1822, it was, unlawfully, usuriously and corruptly agreed by and between the said plaintiffs, by their agents, managers and servants employed in the management and business of said office, and the said Owens, that they, the said plaintiffs, would receive and discount said note, and that the said Owens should receive from them therefor, notes of the Bank of Kentucky, or its branches, at the nominal value of said notes; and for the forbearance and loan aforesaid, that said Owens would pay said note in current money of the United States, when it fell due, with interest at the rate of six per cent. per annum, from the 7th day of February 1822, and they aver, that in pursuance of said corrupt and unlawful agreement, the said note was delivered to the said plaintiffs, at their Lexington office, upon the terms aforesaid, they advancing *and loaning therefor, as the whole and sole [*529

consideration of said note (after deducting a large sum from the amount of said note for discount), to wit, the sum of $——, in notes of said Bank of Kentucky, counted and rated at their nominal value. And said defendants aver, that at the time said note was discounted as aforesaid, the notes of said Bank of Kentucky, and its branches, were generally depreciated, so much so that one hundred dollars thereof nominally were of the value of fifty-four dollars only or less, and current only at that depreciation for greater or smaller sums, to wit, at, &c. And the said defendants aver, that said transaction and dealing was contrary to law, and the fundamental articles of said corporation, and the said note founded upon a corrupt and usurious consideration, the said plaintiffs reserving a greater interest that at the rate of six per cent. per annum upon the value of the notes loaned by them as aforesaid, and this they are ready to verify. Wherefore, &c." To this plea, the plaintiffs by their attorney demurred.(*a*)

*530] *Upon the argument of the demurrer, the following questions arose, namely: 1. Whether the facts set forth, and the averments in said plea, make out a case in which the corporation has taken more than at the rate of six per cent. per annum, upon a loan or discount, contrary to, and in violation of, the ninth rule of the fundamental articles of the constitution of the corporation? 2. If the plea does make out such a case, whether the notes sued on, or the contract therein expressed to pay to the plaintiffs $5000, is void in law, so that no recovery can be had thereon in this suit?

(*a*) The demurrer entered in this case prevented that investigation of the facts attending the transaction, which was the subject of the suit; and by which the plaintiffs would have been enabled to present the circumstances under which the loan was made to the maker of the note, so as to fully vindicate the institution from any charge of intentional violation of the provisions of the charter of the Bank of the United States, or the general rules of law. The following authentic and explanatory statement has been furnished to the reporter.

The note in this case is joint and several, and was not offered, as the plea suggests, for a loan, in the ordinary course of discount, in United States Bank notes, or specie (it being generally known that the Lexington office was at that time restrained from making such loans), but especially for notes of the Bank of Kentucky. These notes had been received by the Bank of the United States, at their office at Lexington, at their nominal specie value, a part of them being for government deposits; they had always preserved that value to the bank, by the balance being liquidated, and interest being paid by the bank of Kentucky, periodically, and by the actual payment in specie, within a few (six) months after the loan to Owens, of the balance due. The bank, therefore, would have received in specie, from the Bank of Kentucky, the amount loaned to Owens, with its interest, in addition to the sum actually paid, had the loan not been made to him. The public exhibits of the Bank of Kentucky, at the time of the loan, and before and since, have shown its ultimate ability to pay its notes and deposits in specie; and individuals have, in a great number of instances, received from that bank, by compromise on time, or by assignments of its discounted notes, or by recovery on suit, the nominal amount of their notes and deposits in specie. The great issue of Commonwealth Bank notes, at the period referred to, and their free reception by the Bank of Kentucky, in payment of its debts, had, however, the effect of giving to the notes of the Bank of Kentucky nearly the same nominal depreciated character as those of the Bank of the Commonwealth.[1]

[1] This case came before the court again, in January term 1835, after a trial on the merits, and it was finally decided, that the contract was not usurious. United States Bank *v.* Waggoner, 9 Pet. 378.

3. If not wholly void, whether the plea is sufficient to bar the plaintiffs' recovery of any, and if of any, of what part of the said sum of $5000?

The judges being opposed in opinion upon the questions, they were, upon the request of the plaintiffs, by their counsel, certified to the supreme court of the United States.

Sergeant, for the plaintiffs.—1. Upon the first question, after referring to the ninth rule,(*a*) he proceeded to say, that the case presented by the plea, was not within the words of the rule. The prohibition is against taking more than six per cent. The utmost that can be made out of the allegations of the plea, supposing the construction attempted to be put upon the transaction to be correct, is, that there was an agreement to take more than at the rate prescribed. Nothing was taken but the note. There is no prohibition against an agreement to take more than six per cent. The offence is in taking more, and nothing else. Penal provisions in a statute are to be construed strictly. This is highly penal, for it is made a *violation of the charter, and exposes to the danger of forfeiture. Where a penalty [*531 is given for taking usurious interest, it is well settled, that the penalty cannot be recovered, without proving an actual taking of the usurious interest. *Fisher* v. *Beasley*, 1 Doug. 236; *Maddock* v. *Hammett*, 7 T. R. 184. Here, no discount was deducted, as is most usual in banking operations. The interest was not payable, till the maturity of the note. It is clear, therefore, that there has not been a taking of more than six per cent. in violation of the ninth rule.

2. This question does not arise, unless the first be made out affirmatively. If there has been no taking of more than six per cent. in violation of the ninth rule (as there clearly has not), this question, being by its statement made dependent upon the first, is also decided in the negative. There is nothing in the act to make the contract void. The penalty is specified, and is of a different nature. An additional penalty cannot be imposed. A mere prohibition to take more than six per cent. does not, of itself, avoid a contract agreeing to take more. When the agreement is avoided, it is always in consequence of an express provision by law to that effect. Such is the law in England against usurious contracts, and in many of the states. Such is the law of Kentucky; and this question could only have arisen from the application of that law to the present case. Nor do courts incline to destroy the contract. Even under those laws which avoid the contract for usurious agreement, if chancery get possession of the matter, by the application of the debtor, it will compel him to pay the debt and legal interest, as a condition of relief.

But state legislation has no power over the Bank of the United States or its contracts. This has been decided, and is obvious, from the nature of the case. The Bank of the United States is governed by the law of congress, and is subject to no other jurisdiction. *McCulloch* v. *State of Maryland*,

(*a*) "The said corporation shall not, directly or indirectly, deal or trade in anything except bills of exchange, gold or silver bullion, or in the sale of goods really and truly pledged for money lent, and not redeemed in due time, or goods which shall be the proceeds of its lands. It shall not be at liberty to purchase any public debt whatsoever, nor shall it take more than at the rate of six per centum per annum, for or upon its loans or discounts."

4 Wheat. 316; *Osborn* v. *Bank of the United* *States, 9 Ibid. 859; *Wayman* v. *Southard*, 10 Ibid. 1; *Bank of the United States* v. *Halstead*, Ibid. 51. The rule in the charter, therefore, is the governing rule. That even the taking of more than the legal interest does not, under the charter, avoid the contract, has been already decided by this court. *Fleckner* v. *Bank of the United States*, 8 Wheat. 355. "The taking of interest by the bank, beyond the sum authorized by the charter, would doubtless be a violation of the charter, for which a remedy might be applied by the government; but as the act of congress does not declare that it shall avoid the contract, it is not perceived, how the original defendant could avail himself of this ground to defeat a recovery." Still less, can the agreement to take.

3. Admitting, for the argument's sake, that if the bank had agreed to take more than by law it was authorized to take, the court would not lend its aid to recover the excess, the question arises, whether this was an agreement to take more than six per cent. on a loan or discount. It was not so in terms, for the interest payable was precisely six per cent., neither more nor less. It was not so in extent. The object of the transaction was not to cover illegal interest; the real design was to dispose of the notes of the Bank of Kentucky; it was, in substance, a sale upon a credit of three years, and not a loan.

If the transaction be unimpeachable on this ground, can it be questioned on any other? The plea seems to aim to extricate the defendants from knowledge of the negotiation. But there are two particulars to be observed in it. 1. It does not aver, that the bank knew that the note was given to enable Owens to get a discount in the ordinary way. 2. It does not aver, that the defendants were ignorant of the negotiation for the Kentucky Bank notes. What is not denied in pleading, must be considered as admitted. There is an admission, therefore, that the bank did not know that the note was given for any particular purpose (if such were the fact), and that the defendants did know of the negotiation for the bank-notes. Upon this basis of knowledge and assent, the case is to be considered. *Was there not, then, an adequate consideration given? It was so agreed, voluntarily, without coercion, compulsion or duress—the parties being able and willing to contract, and understanding the subject-matter of the contract. The bank had a perfect right to fix the terms upon which it would part with the notes, and the defendants an equal right, to decide whether they would accede to them. Both were the exclusive masters of their own judgment in making the contract; but that, once made, and not in itself unlawful, becomes the law between them; no one has a right to alter it. The consideration has passed; the contract is executed; and the parties cannot now be restored to the condition they were in at the time of contracting. Sales are made according to the views of the parties, understood by themselves, and influenced by many circumstances. Here, the sale was upon a long credit, enhancing the risk to the seller, and increasing the chances of the buyer. The notes might, and did, appreciate, during the interval.

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It is impossible now to adjust the terms differently. There is no evidence to furnish a rule. What were these notes worth to the Bank of the United States? They were notes for the payment of money, which the Bank of Kentucky was bound to pay, and the payment of which, to the full amount, was compellable by process of law. Who can say, that the full amount

might not have been recovered? Again, what was the value to the buyer? He, too, could enforce the payment, and use the notes, for some purposes, as equivalent to money. It does not appear, that he did not so use them. He may have recovered the full amount, or passed them off in advantageous negotiation.

The case is not new. Bank paper, being a kind of currency, has been variously depreciated, at different periods, and in different parts of the United States; in some, to the extent of more than twenty per cent. Contracts made when specie was the basis of circulation, were satisfied with depreciated bank paper. Was it ever heard, that he who chose to take them in payment (and none could be compelled to do so) could afterwards recover the difference? Contracts *were made in the time of a depreciated currency, and executed since, by payment with specie. Was it ever [*534 understood, that the payee could claim a deduction, or recover back any part of what he had paid? Bank paper, too, which, besides being a currency, was a commodity, was the subject of purchase and sale, for cash and on credit, under all the modifications that affect the dealings in any other article. Those who dealt in it were the judges, as they are with respect to other commodities. It was never thought, that courts of justice could be required to revise and reform their bargains. This would be an exercise of equity power, that would end in anything but equity. It would be wholly without limit or guide. The pleadings, however, do not admit of such a defence in part. The plea is entire, and goes to the whole. If bad for a part, it is bad for the whole. They should have taken defence only for as much as they controverted. 1 Chitty 523; 6 Cranch 136.

That such a transaction could not be considered a cover for usury, was quite evident. An increased rate of interest or profit for the use of the money, was no part of the object. There is no pretence of any such thing. If not, it is unobjectionable, even under the usury laws. A bond or note, or other security, may be purchased at any discount, without incurring the charge of usury. *Musgrove* v. *Gibbs*, 1 Dall. 217; *Wycoff* v. *Longhead*, 2 Ibid. 92. Cases more analogous to the present, and involving the very same sort of negotiation, had been judicially decided upon principles decisive of this. *Northampton Bank* v. *Allen*, 10 Mass. 254; *Stuart* v. *Mechanics' and Farmers' Bank*, 19 Johns. 496.

The question whether the bank had a right to make a sale of notes, was not presented here. If it had been, he would have cited, as deciding it, *Fleckner* v. *Bank of the United States*, 8 Wheat. 349, 351. The same point, he would remark, had been fully discussed and decided in the court of appeals in Kentucky, in the case of the *Bank of the United States* v. *Norton*. (3 A. K. Marsh. 422.) The opinion would be found *at length in the [*535 record of the case of the *Venable* v. *Bank of the United States*, decided at the present term of this court (*ante*, p. 107).

No counsel appeared for the appellees.

JOHNSON, Justice, delivered the opinion of the court.—This suit is instituted for the recovery of a promissory note. The plea is filed by the three last-named defendants, who represent themselves as sureties of Owens, and sets out, in substance, that the note was created for the purpose of enabling Owens to obtain a loan of money from the plaintiff, in the ordinary

course of discount; that it was offered for discount, and rejected, and after such rejection, it goes on to aver, that "it was unlawfully, usuriously and corruptly agreed, by and between the said plaintiffs, by their agents employed in the management and business of the said office, and the said Owens; that they the said plaintiffs would receive and discount the said note, and that the said Owens should receive from them therefor, notes of the Bank of Kentucky, or its branches, at the nominal value of said notes, and for the forbearance and loan aforesaid, that Owens should pay said note in current money of the United States, when it fell due, with interest at the rate of six per centum per annum, from, &c.; the plea then avers, "that in pursuance of said corrupt and unlawful agreement," this note was passed to the plaintiffs, and Kentucky notes received in loan, "as the sole consideration thereof," at their nominal value; and further, "that at the time the said note was discounted as aforesaid, the notes of the said Bank of Kentucky, and its branches, were generally depreciated, so much so, that one hundred dollars thereof, nominally, were of the value of fifty-four dollars only, or less; and current only at that depreciation for greater or smaller sums," &c.; and the defendants further aver, "that the said transaction and dealing was contrary to law, and the fundamental articles of the said corporation; and the said note founded upon a corrupt and usurious consideration, the *536] said plaintiffs reserving a greater *interest than at the rate of six per centum per annum, upon the value of the notes loaned by them, as aforesaid." To this plea, the plaintiffs demurred, and three points are made on which the court below certify a difference of opinion to this court.

The 1st is, whether the facts set forth, and the averments in said plea, make out a case in which the corporation has taken more than at the rate of six per centum per annum, upon a loan or discount, contrary to and in violation of the ninth rule of the fundamental articles of the constitution of the corporation. The proposition here presented to the court, has relation altogether to the violation of the ninth fundamental rule of the act of incorporation, and it brings under consideration the sufficiency both of the facts and averments contained in the plea, to make out a violation of that article. I have, myself, entertained very serious doubts of the sufficiency of the averments in the plea; for it is not a case of a direct reservation of a higher interest than the law allows, since, on the face of the note, only six per cent. is reserved; but the facts are calculated to present one of those cases in which a device is resorted to, by which is reserved a higher profit than the legal interest, under a mask thrown over the transaction; to wit, by taking a note payable in gold or silver, for a loan of depreciated paper; a return, in fact, in specie, for an article of scarcely half the value of specie—a loan of adulterated dollars, for which a note is taken, payable, dollar for dollar, in coin of the United States. That the law will not tolerate such transactions, has long been settled, for a fraud upon a statute, is a violation of the statute.

But the difficulty with me was this, that the plea neither avers an intention to evade the statute, nor a knowledge in the plaintiffs of the actual depreciation of Kentucky money. I am content, however, to unite with the three of my brethren, who make up the majority on this point, in holding the averments to be sufficient; because, in a considerable dearth of authorities on this subject, I find it decided in the case of *Button* v. *Downham*, Cro.

Eliz. 642, that *the confession of the *quo animo*, implied in a demurrer, will affect a cause with usury, when a very similar case, in the same book, in which the plaintiff had traversed the plea, was left to the jury with a favorable charge. *Bedingfield* v. *Ashley*, Cro. Eliz. 741.

In the present instance, the loan; the unconditional return of the sum lent; the illegality, and even corruption of the bargain; are all distinctly averred, and more than once reiterated. If the transaction was corrupt, and in violation of the fundamental laws of the charter, as averred in the plea, and admitted by the demurrer; it could only have been upon the ground of an intention to evade the statute, and with a knowledge of the reduced value of the Kentucky bills. And it is not unnatural here to remark, that the plea sets out a refusal to make a loan in the ordinary course, to wit, in gold or silver, or the plaintiffs' own notes; and a subsequent agreement to make the loan, provided payment would be received in this depreciated paper. This state of facts presents an obvious analogy to the leading case of *Lowe* v. *Waller*, 2 Doug. 736, in which the negotiation commenced for a loan of money, but terminated in a sale of goods, on the resale of which, the borrower (as he was held to be) sustained a great loss. The court charged the lender with that loss, as so much exacted from the necessities of the borrower.

That part of the ninth section of the fundamental rules of the bank charter, which is here drawn in question, is expressed in these words: "The bank shall not be at liberty to purchase any public debt whatever, nor shall it take more than at the rate of six per centum per annum, for or upon its loans or discounts." A profit made, or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specified rate of interest. According to this principle, the lender has here taken *forty-six per cent. for three years, or at the rate of about fifteen per cent. per annum above [*538 the prescribed interest. So that, on this point, the certificate of this court must be in the affirmative.

Some doubts have been thrown out, whether, as the charter speaks only of taking, it can apply to a case in which the interest has been only reserved, not received. But on that point, the majority are clearly of opinion, that reserving must be implied in the word taking, since it cannot be permitted by law, to stipulate for the reservation of that which it is not permitted to receive. 1 Hawk. P. C. 620. In those instances in which courts are called upon to inflict a penalty upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for then, the actual receipt is generally necessary to consummate the offence. But when the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule, that it is unlawful to contract to do, that which it is unlawful to do.

The second question propounded to this court is, "whether, if the plea does make out a case of violation of a provision of the charter, the notes sued on, or the contract therein expressed, is void in law, so that no recovery can be had thereon in this suit." The question here propounded has relation exclusively to the legal effect of a violation of the provision in the charter, on the subject of interest; and does not bring in question the operation of

the statute of usury of Kentucky, upon the validity of this contract. To understand the gist of the question, it is necessary to observe, that although the act of incorporation forbids the taking of a greater interest than six per cent., it does not declare void any contract reserving a greater sum than is permitted. Most, if not all the acts passed in England, and in the states on the same subjects, declare such contracts usurious and void. The question then is, whether such contracts are void in law, upon general principles.

The answer would seem to be plain and obvious, that no court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws *of a country; how can they then become *539] auxiliary to the consummation of violations of law? To enumerate here all the instances and cases in which this reasoning has been practically applied, would be to incur the imputation of vain parade. There can be no civil right, where there can be no legal remedy; and there can be no legal remedy, for that which is itself illegal. That this is true of contracts violating the laws of morality, is recognised in the familiar maxim, "*ex turpi causâ non oritur actio*," as has been exemplified in some modern cases of a house let for immoral purposes. (Cited and admitted in 1 Bos. & Pul. 340, and Esp. N. P. 13.)

In the case of *Aubert* v. *Maze*, 2 Bos. & Pul. 374, it is expressly affirmed, that there is no distinction, as to vitiating the contract, between *malum in se* and *malum prohibitum*. And that case is a strong one to this point, since the contract there arose collaterally out of transactions prohibited by statute. So, the same doctrine was maintained in equity, upon a similar contract, in the case of *Watts* v. *Brooks*, 3 Ves. jr. 612, in which the court observes, "there is nothing immoral in this transaction, but it is against a prohibitory statute. I doubt a little the policy of the act, but I cannot allow it to be argued, that you can break a law covertly. The court will not execute these contracts." So, in the case of *Webb* v. *Pritchett*, 1 Bos. & Pul. 264, where the action was by a tavern-keeper against a candidate, for provisions furnished to the voters at an election, contrary to the statute of William. Although the statute does not declare the contract void, the court declared it void, and in this explicit language: "This action is apparently founded on a contract to disobey the law." "The defence set up proves the principle of the contract." "Then, how shall an action be maintained on that which is a direct violation of a public law? The contract is bottomed in *malum prohibitum* of a very serious nature in the opinion of the legislature; how then can we enforce a contract to do that very thing which is so much reprobated by the act?" "This *court cannot give *540] any assistance to the plaintiff, consistently with the principles which have governed the courts of justice at all times. Persons who engage in such transactions must not bring their cases before a court of law, &c."

So, in the case of assurance on illegal voyages, even where the underwriters have contracted with their eyes open, they are notwithstanding permitted to avail themselves of the plea of illegality *ad libitum;* as in the case of *Camden* v. *Anderson*, 6 T. R. 723, adjudged in the king's bench, and affirmed in the exchequer; where it is declared, that "the defence is founded upon a principle of law which is permanent to all obligation, by which the parties to a contract can bind themselves." 1 Bos. & Pul. 272. And so, in another case of great hardship, *Morck* v. *Abel*, 3 Ibid. 35, where

the insurance was upon a trading in the East Indies, prohibited by an obsolete statute, the plaintiff could not even recover back his premium, although it was admitted that the risk never commenced, because the policy was void in its inception, on the ground of illegality. Nor is it to voyages illegal by statute alone, that this principle applies. A respectable writer on insurance makes these remarks. "Whenever an insurance is made on a voyage expressly prohibited by the common, statute or maritime law of the country, the policy is of no effect. The principle on which such a regulation is founded, is not peculiar to this kind of contracts, for it is nothing more than that which destroys all contracts whatsoever (Park 232), that men can never be presumed to make an agreement forbidden by the laws; and if they should attempt it, it is invalid, and will not receive the assistance of a court of justice to carry it into execution."

Nor is the rule applicable only to contracts expressly forbidden; for it is extended to such as are calculated to affect the general interest and policy of the country. Thus, a note given by a bankrupt, upon a secret compromise with a creditor, is declared void; as it produces inequality in the distribution of the bankrupt's effects, and evades the provisions and policy of the law, which proposes *to put all the creditors upon an equal footing. *Wells* v. *Girling*, 1 Brod. & Bing. 447. And on the same [*541 principle, a note given for a wager on the future amount of a branch of the public revenue, is declared void; because it interests an individual in diminishing the production of the revenue. 2 T. R. 610; 2 Bos. & Pul. 130.

After citing these more modern decisions upon this subject, it may not be amiss to refer to some reporters, whose authority has been consecrated by the respect of ages. They will serve to show the antiquity and universality of this doctrine. Thus, in 1 Bulst. 38, it is laid down, "that wherever the consideration which is the ground of the promise, or the promise which is the consequence or effect of the consideration, be unlawful, the whole contract is void." So, in Hobart 72, and Dyer 356, "if one promises to do a thing that is unlawful, such promise is void." And innumerable ancient cases might be cited from the best reporters, of the application of the rule to maintenance, to simony, and to promises made to public officers, engaging them to act contrary to the duties of their offices, or to individuals imposing upon them restraint inconsistent with the public interest.

For these reasons, and upon these decisions, the majority of the court are of opinion, that an affirmative answer must also be certified upon the second question in the cause. And this renders it unnecessary to consider the third question.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States, for the district of Kentucky, and on the questions and points on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, and was argued by counsel: On consideration whereof, it is the opinion of this court: 1. That the facts set forth, and the averments in said plea, make out a case in which the *corporation has taken more than at the rate [*542 of six per centum per annum, upon a loan or discount, contrary to and in violation of the ninth rule of the fundamental articles of the constitution of the corporation. 2. That the plea does make out such a case where the

notes sued on, or the contract therein expressed to pay the plaintiffs five thousand dollars, is void in law, so that no recovery can be had thereon in this suit. And 3. This court being of opinion in the affirmative, on the first and second points, renders it unnecessary to consider the third question; all of which is ordered and adjudged to be certified to the said circuit court.

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*543] *The President, Directors and Company of the Bank of the United States, Plaintiffs in error, *v.* Thomas D. Carneal, Defendant in error.

Promissory notes.—Notice of non-payment.—Plea puis darrien continuance.

The evidence in the case was, that the day when the note became due, the bank being the holder thereof, and it being payable there, after the usual banking-hours were over, it was delivered to a notary, by the officers of the bank, they informing him, at the time, that there were no funds there for the payment of the note: this was a sufficient proof of due demand of payment. p. 549.

When a note is payable at a bank, it is not necessary to make any personal demand upon the maker elsewhere; it is his duty to be at the bank, within the usual hours of business, to pay the same, and if he omit so to do, and a demand is there made of payment, by the holder, within those hours, and it is refused or neglected to be made, the holder is entitled to maintain his action for such dishonor.[1] p. 549.

It is difficult to lay down any universal rule as to what is due diligence in respect to notice to indorsers; many cases must be decided upon their own particular circumstances, however desirable it may be, when practicable, to lay down a general rule.[2] p. 551.

When notice is sent by the mail, it is sufficient to direct it to the town where the party resides, if it be a post-town; if not, then to the post-office or post-town nearest to his residence, if known. But the rule, as to the nearest post-office, is not of universal application; for if the party be in the habit of receiving his letters at a more distant post-office, or through a more circuitous route, and the fact is known to the person sending notice, notice sent by the latter mode, will be good; and where the party is in the habit of receiving his letters at various post-offices, to suit his own convenience of business, it may be sufficient to send it to either. p. 551.

A suggestion was made at the bar, that the letter to the indorser, stating the demand and dishonor of the note, is not sufficient, unless the party sending it also inform the indorser that he is looked to for payment; but where such notice is sent by the holder, or by his order, it necessary implies such a responsibility over. p. 552.

Plea *puis darrien continuance*, effect of. p. 548.

Error to the Circuit Court of Ohio. This suit was originally brought against William Steele, William Lytle and Thomas D. Carneal. The plaintiffs counted in *assumpsit* for money lent and advanced, under a provision of the statute of the state of Ohio, authorizing a joint suit against all the parties to a promissory note.

The original process was served upon William Steele and William Lytle. *544] As to Thomas D. Carneal, the marshal of *the district of Ohio returned "not found;" and this return being suggested of record, the plaintiffs, at the September term of the circuit court, for the year 1823, proceeded to judgment against Steele and Lytle.

In May 1824, the plaintiffs, in pursuance of another statute of the state

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[1] See Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641.

[2] See Dickins *v.* Beal, 10 Pet. 580; Harris *v.* Robinson, 4 How. 344.

of Ohio, sued out of the clerk's office of the circuit court a writ of *scire facias* against Thomas D. Carneal (as to whom the marshal of the district had previously returned "not found"), the object of which writ was, to call upon him to show cause why he should not be made a party to the judgment against Steele and Lytle, and why execution should not issue against him, agreeable to the provisions of the statute. This writ having been served upon the defendant, a rule was taken against him for a plea. At the September rules 1824, the defendant's default was entered, and judgment "*nisi.*" At the January term 1825, this default was set aside, and the defendant filed the plea of *non assumpsit*, upon which issue was joined. The cause was regularly continued upon the docket, until the July term 1827; at which term, the defendant's attorney filed a further plea.

"And the said Thomas D. Carneal, by the leave of the court first had and obtained, for further plea in this behalf, defends the wrong and injury, when, &c., and says, that the said promise in the said declaration, in the original cause supposed, was made by the said Carneal as co-indorser with William Lytle, upon a promissory note, made and executed by the said William Steele, the said Carneal and Lytle being indorsers, as securities for the said William Steele; and after the makiug of the said promise, and after the commencement of this suit, to wit, on the 17th day of December 1824, in consideration that the said Lytle had transferred to the plaintiffs a large amount of real estate, in payment and satisfaction of the debts of the said William Lytle to the said plaintiffs, including the debt due the plaintiffs upon the indorsement aforesaid, and had given his notes for the payment of a large sum of money, to wit, the sum of $40,000, upon account of, and in satisfaction of, his said *liabilities to the plaintiffs, including the indorsement aforesaid; the said plaintiffs agreed with the said William Lytle, that they would accept and receive the real estate so conveyed, and the notes so made and delivered, in satisfaction of the said debt due from the said William Steele, upon which the said Carneal, with the said William Lytle, were indorsers and securities as aforesaid; and did then and there accept and receive the same, in satisfaction of said debt; and this the said Carneal is ready to verify: wherefore, he prays judgment, if the said plaintiffs their action ought further to have or maintain against him." [*545

At the December term 1827, the plaintiffs filed their replication to the above plea, in the following words: "And the said plaintiffs, by Daniel J. Caswell, their attorney, as to the plea of the defendant, by him last pleaded, to the further maintenance of the said action, say, that for anything in the said plea set forth, they ought not to be barred from further having and maintaining their said action, because, protesting that the said William Lytle did not transfer to the said plaintiffs the real estate in the said plea set forth, nor give his notes for the sum of money in the said plea set forth; for replication to the said plea, they say, that the said plaintiffs did not accept the same in satisfaction of the sum of money due the said plaintiffs, as set forth in their said declaration; and this they pray may be inquired of by the country; and the defendant doth the like, &c."

The cause was tried at the July term 1828, and a verdict and judgment rendered for the defendant. The counsel for the plaintiffs tendered their bill of exceptions, and prosecuted this writ of error.

The bill of exceptions sent up with the record, contained the whole of

the testimony given on the trial. The facts of the case, as they were understood and considered by the court, are stated in the opinion of the court, delivered by Mr. Justice STORY.

On the trial in the circuit court of Ohio, after the evidence was closed, the defendant's counsel moved the court to instruct the jury, as in case of a nonsuit, "upon the ground that the evidence adduced by the plaintiffs was
*546] not sufficient in *law to charge the defendant as indorser of the note aforesaid; and the court, upon the motion aforesaid, decided that the evidence in writing adduced by the plaintiffs was insufficient in law to charge the defendant, and render him liable as indorser of the note aforesaid, and so charged the jury; to which opinion of the court, and charge to the jury, the plaintiffs, by their counsel, except, and pray the court that this, their bill of exceptions, may be signed, sealed and made a part of the record; which is hereby ordered."

The plaintiffs, by their counsel, moved the court to charge the jury, that under the present state of the pleadings in the cause, it was not necessary for the plaintiffs to prove that they gave notice to the defendant of the non-payment of the said note, at the time the same became due and payable, in order to charge the said defendant; which instruction the court refused to give the said jury; and on the contrary, charged the said jury, that it was incumbent upon the plaintiffs to prove such notice. To which opinion and charge of the court, the plaintiffs, by their counsel, excepted, and prayed that this, their bill of exceptions, may also be signed, sealed and made a part of the record; all which was ordered by the court.

The case was argued by *Caswell* and *Sergeant*, for the plaintiffs in error; and by *Benham*, for the defendant.

The counsel for the *plaintiffs* contended:—1. That the court erred, in deciding that it was incumbent upon the plaintiffs to prove that due and legal notice was given to the defendant of the non-payment of the note set forth in the record. In order to sustain this position, they relied upon the fact, that, after the issue of *non assumpsit* was joined by the parties, the defendant, by leave of the court, filed a plea of accord and satisfaction, pending the writ, upon which issue was joined. This plea, it is contended, was a waiver of the former issue. 2. That the proof of notice was sufficient to charge the defendant with the payment of the note; and, consequently, that the court erred in charging the jury as in case of nonsuit.

*For the *defendant* in error, it was argued, that there was no error
*547] in the decision of the circuit court of Ohio. 1. Because the evidence adduced on the trial, by the plaintiffs, to prove a presentment of said note and demand of payment, was not sufficient to charge the defendant as indorser. 2. That the evidence of notice to charge defendant as indorser was insufficient. 3. That the special plea filed by the defendant, at the term of July 1827, in bar of the further maintenance of said writ, did not waive the issue previously joined.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Ohio. The Bank of the United States brought a joint action against William Steele, William Lytle and

Thomas D. Carneal (the defendant in error), upon a promissory note, dated Cincinnati, on the 22d of August 1820, whereby Steele promised to pay Carneal, or order, at the office of discount and deposit of the Bank of the United States, at Cincinnati, the sum of $11,563, in sixty days after date; which note was afterwards successively indorsed by Carneal and Lytle, and was discounted by the bank, and dishonored at its maturity.

The declaration is for money lent and advanced, and the suit is authorized to be brought in this form jointly against all the parties to the note, by a statute of Ohio. The process was served upon Steele and Lytle, but returned "not served" upon Carneal. Judgment was afterwards duly obtained against Steele and Lytle, and a *scire facias* issued, according to another statute of Ohio, against Carneal, to which he appeared, and pleaded the general issue of *non assumpsit*, at the January term of the court, in 1825. The cause was then regularly continued until July term 1827, when, by leave of the court, he pleaded, as a further plea, the receipt of certain real estate of Lytle, by the bank, after the commencement of the suit, in satisfaction of the debt due upon the note, and prayed judgment if the plaintiffs their action ought further to have or maintain against him. To this plea there was a replication, and issue to the *country; and at [*548 June term 1828, the cause was tried and a verdict was found, and judgment thereupon entered for the defendant. A bill of exceptions was taken at the trial, upon which the questions arose which have been discussed at the bar, and upon which the opinion of the court is now to be delivered.

The first question is, whether the plea of satisfaction, so as above pleaded, is a substitution of the former plea of *non assumpserunt*, so as to displace it entirely, or whether it is an auxiliary plea, so that both issues were properly before the jury at the trial, upon which they might pronounce their verdict. The latter is contended for by the defendant in error, and was supported by the judgment of the circuit court. It is admitted, that a plea *puis darrien continuance* is always pleaded by way of substitution for the former plea, on which no proceeding is afterwards had. Stephen on Plead. 81, 83; Com. Dig. Abatement, I. 24. The present plea was in fact pleaded after the last continuance, although is is not so stated in the plea. It differs from a technical plea of *puis darrien continuance*, only in this circumstance, that the satisfaction is alleged to have been after the commencement of the suit, instead of after the last continuance of the suit. In principle, however, they do not differ, since each of them requires the same commencement and conclusion; that is, instead of *actio non*, generally, each must be pleaded with the prayer of *actio non ulterius habere*, &c.; and the judgment must follow the prayer, and is repugnant to, and incompatible with, that of a general judgment upon matters before the suit brought.[1] As, therefore, the same judgment cannot be rendered upon the general issue, and upon such a plea of matters arising after the suit brought, it is difficult to perceive how they can be united. But it is the less necessary to rest any absolute decision upon this point, because we are all of opinion, that the judgment below ought to be reversed, upon the exceptions taken to the merits.

[1] It seems, that an accord and satisfaction, after issue joined, must be pleaded *puis darrien continuance*. Good *v.* Davis, Hempst. 16.

The court below ruled, that the evidence adduced at the *trial, was not sufficient in law to charge the defendant as indorser. That evidence was supposed to be deficient in two respects: 1st, That there was not a proper demand of payment of the note of the maker, at the time when it became due; and 2d, that due notice was not given of the non-payment to the defendant, as indorser.

Upon the first point, the evidence is, that on the day when the note became due, the note was in the bank, at Cincinnati, the bank being the holder thereof, and it being payable there; and that after the usual banking-hours were over, it was delivered to a notary, by the officers of the bank, for protest, they informing him at the time, that there were no funds there for the payment of the note. We are all of opinion, that this was a sufficient proof of a due demand of payment. Where a note is payable at a bank, it is not necessary to make any personal demand upon the maker elsewhere. It is his duty to be at the bank, within the usual hours of business, to pay the same, and if he omit so to do, and a demand is there made, of payment, by the holder, within those hours, and it is refused or neglected to be made, the holder is entitled to maintain his action for such dishonor. But where the bank is itself the holder of the note so payable, no formal demand is necessary to be made of payment. The maker has the whole period of the usual banking-hours to pay it, and if he does not pay it, within those hours, it is equivalent to a demand, and refusal of payment on his part; and the note ought not to be delivered out for protest, until after those hours are passed. If the bank has funds of the maker in its hands, that might furnish a defence to a suit brought for non-payment. But this is properly matter of defence, to be shown by the party sued, like any other payment, and not matter to be disproved by the bank, by negative evidence. This doctrine was recognised by this court in *Fullerton* v. *Bank of the United States*. 1 Peters 604, 617.

Then, as to the other point of notice, the facts are, that the defendant, Carneal, resides in Campbell county, in the state of Kentucky. The note became due on the 24th of October 1820, and on the next day, the notary
*550] put a sealed *notice of the protest and non-payment into the post-office, in Cincinnati, directed "to Thomas D. Carneal, Campbell county, Kentucky," the postage on which was not paid. At that time, Carneal's residence in Campbell county, was without the limits of any post-town, and about two miles from Cincinnati, across the river Ohio; and his residence was well known to the officers of the bank, as well as the post-master at Cincinnati. The county seat of Campbell county is Newport, where there is a post-office, about three miles distance from Carneal's residence, the river Licking being between them; and there is also another post-office at Covington, below the river Licking, about two miles distance from his residence. In October 1820, the mails from Cincinnati passed once a week only through Covington, and three times a week through Newport. Carneal was in the habit of receiving letters at the Newport office, as well as at the offices in Covington and Cincinnati. He was in the habit of receiving all the letters directed to him at Cincinnati, at the office in that place, and had given orders to the postmasters to detain all such letters there, until he called for them. He visited Cincinnati very frequently, and almost daily, having business, and being a director of a bank located at that place. The

postmaster was in the habit of sending letters directed to him, in Campbell county, by the Covington mail, whenever he observed the address, unless, as was sometimes the case, he called for letters at the office, before the Covington mail was sent. But other letters, directed generally to Campbell county, when the place of residence of the party was unknown, were sent by the postmaster to Newport. The notary himself, when he put the present notice into the post-office at Cincinnati, supposed that Carneal received all his letters at that office. The first mail which left Cincinnati for Newport, after the deposit of this notice, was on the 26th of October ; and the first which left for Covington, was on the 28th of the same month. There is no evidence in the case, that the letter in question went either by the mail of the 26th to Newport, or by that of the 28th to Covington. The defendant, Carneal, has not produced the letter, if it was ever *received by him ; and the circumstances afford a strong presumption that it might have been [*551 received at Cincinnati.

Such is a summary of the material facts, upon which this court is called to pronounce, whether there was due diligence in the transmission of the notice to the defendant. The latter having asked the court below to instruct the jury, as in case of a nonsuit, and the court having acceded to his request, that instruction can be maintained only upon the supposition, that there was no contrariety of evidence as to the facts which ought to have been left to the jury ; and, consequently, every inference fairly deducible from the facts, which afforded a presumption of due notice, ought to be made in favor of the plaintiff.

It is difficult to lay down any universal rule, as to what is due diligence in respect to notice to indorsers. Many cases must be decided upon their own particular circumstances, however desirable it may be, when practicable, to lay down a general rule. When notice is sent by the mail, it is sufficient, to direct it to the town where the party resides, if it be a post-town. If it is not, then to the post-office or post-town nearest to his residence, if known. But the rule as to the nearest post-office, is not of universal application ; for if the party is in the habit of receiving his letters at a more distant post-office, or through a more circuitous route, and that fact is known to the person sending notice, notice sent by the latter mode will be good. And where the party is in the habit of receiving his letters at various post-offices, to suit his own convenience of business, it may be sufficient to send it to either. The object of the law, in all these cases, is to enforce the transmission of the notice by such a route as that it may reach the party in a reasonable time. This doctrine is fully recognised by this court in the case of the *Bank of Columbia* v. *Lawrence*, 1 Peters 578.

It has been objected, that the direction of this letter to Campbell county generally, was not sufficient, but that it ought to have been directed to the nearest office, for otherwise it might happen, that it would be sent to a post-office which, though the county seat, might be very distant from *the residence of the party. Whether a mere direction to the [*552 county, without further specification, where the party does not reside in any town therein, would be sufficient, in all cases, and under all circumstances, we do not think it necessary to decide. That question may well be left, until it is necessary in judgment. But where the description is general, if it be in fact, sent to the proper post-office, or if, after due

inquiry, it is the only description within the reach of the person sending the notice, we think it may be safely declared to be sufficiently certain, and that a different doctrine would materially clog the circulation of negotiable paper. We think the description in the present case was, in every view, sufficient. There was no misdirection; for Carneal did live in Campbell county. His actual residence was well known to the postmaster at Cincinnati, and the description did not and could not mislead him. If the direction was observed, it would be sent to Covington, or would be delivered at Cincinnati. If not, it would be sent, at farthest, to Newport.

Then, was the notice in fact duly given, or duly sent through the proper post-office? We are all of opinion, that it was. The post-office at Cincinnati was almost as near to the party's residence as that at Covington. The difference is too trifling to afford any just ground of preference; and Cincinnati was the place where he was most likely to receive the letter promptly, since it was the place of his business, and of his habitual and almost daily resort. If it had never been transmitted from that office at all, we are not prepared to say, that, under such circumstances, the notice left there was not of itself sufficient, since the party was known there, and his description unequivocal. It does not appear, in point of fact, that it ever left that place for any other post-office. If it did not, the strong presumption is, that it was there delivered to the party. But if it was sent to Newport, how can the court say that it was mis-sent? The party was in the habit of receiving letters there; it was the county seat; and the mail by that route was three times a week, and that by Covington only once a week.

*553] The probabilities, therefore, in favor of an early receipt of the *letter, from this circumstance, might fairly balance any in the opposing scale, from the increase of distance, and the intervention of the river Licking. And in fact, the letter would, at that time, have reached Newport two days earlier than it would have reached Covington. We think, it would be inconvenient and dangerous, to lay down any rule, that the person sending a notice ought, under such such circumstances, to direct the letter to the nearest post-office. We think, that the notice would have been good by either route; indeed, good, if left at the post-office at Cincinnati.

A suggestion has been made at the bar, that a letter to the indorser stating the demand and dishonor of the note, is not sufficient, unless the party sending it also inform the indorser that he is looked to for payment. But when such notice is sent by the holder, or by his order, it necessarily implies such a responsibility over. For what other purpose could it be sent? We know of no rule that requires any formal declaration to be made to this effect. It is sufficient, if it may be reasonably inferred from the nature of the notice.

For these reasons, we are all of opinion, that the judgment of the circuit court ought to be reversed; and the cause remanded, with directions to award a *venire facias de novo.*

Judgment reversed.

*David Canter, Appellant, *v.* The American and Ocean Insurance Companies of New York, Appellees.

Motion to dismiss.

A motion to dismiss a suit for want of jurisdiction, applies solely to cases where this court has not jurisdiction of the cause; and not where the circuit court has exceeded its proper jurisdiction in the particular case.

Appeal from the Circuit Court of South Carolina. This case was heard, and decided upon the preliminary question which it involved, in January term 1828. (See 1 Peters 511.) On the hearing, the supreme court decided in favor of the claimant, and decreed restitution of the cotton which was the subject of controversy. By the mandate, directed to the circuit court, it was ordered, "that such execution and proceedings be had as, according to right and justice, and according to the laws of the United States, ought to be had." The mandate being filed in the circuit court, it was ordered, that the same be recorded, "that the case be put on the docket, and it be referred to the officer of this court to examine into the damages sustained by the claimant, David Canter, in consequence of the proceedings of the libellants; and report thereon at as early a day as possible to the court." Upon this order of court being made, Mr. Canter filed a statement of his claim, and the case went before the register. The counsel for the defendants filed with the register the following protest:

And now, on this 16th day of July 1828, the said libellants, by Petegru & Cruger, their proctors, object to the order of reference made by the honorable the circuit court of the United States for the sixth circuit, to ascertain the damages alleged to have been sustained by the respondent in this case, and they article and protest against all acts and proceedings under the same, for these reasons, to wit: 1st. That the mandate of the supreme court of the United States, gives no authority or instructions to the circuit court to inquire into damages. 2d. That the decrees of the district, *circuit [*555 and supreme courts do not award damages to the respondent. 3d, That the libellants are not in any manner liable for damages. 4th, That at all events, the inquiry as to damages cannot extend beyond the amount of libellants' stipulations, by which alone they are before the court.

Petegru & Cruger, Proctors for Libellant.

These objections were disallowed, and the register proceeded to take evidence subject to the protest, and to examine into the claim of damages; and afterwards make a report upon the claim to the circuit court. The circuit court having by their decree disallowed the claims of the appellant to damages, with the exception of a small amount, an appeal was entered to this court.

Cruger, for the appellees, moved to dismiss the appeal, on the ground, that the mandate of this court did not authorize any proceedings in the circuit court for the assessment of damages.

The motion was supported by *Cruger*, for the appellees; and opposed by *Coxe* and *Webster*, for the appellant.

Marshall, Ch. J., delivered the opinion of the court.—The motion made is to dismiss this case for want of jurisdiction. But a motion to dismiss a

suit, for want of jurisdiction, applies solely to cases where this court has not jurisdiction of the cause, and not to cases where the circuit court has exceeded its proper powers in the particular case. In the present case, this court has certainly jurisdiction to revise the decree complained of in the circuit court. Whether that decree was proper or not, after the mandate of this court, is matter for discussion, upon an argument upon the merits of that decree; but not on a motion like the present. The motion is, therefore, overruled.

Motion denied.

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*556] *James Conolly and others, Appellants, *v.* Richard Taylor and others, Appellees.

Jurisdiction.—Parties.

When there is no change of the parties to a suit, during its progress, a jurisdiction depending on the condition of the parties, is governed by that condition as it was at the commencement of the suit.[1] p. 565.

If an alien should sue a citizen, and omit to state the character of the parties in the bill, though the court could not exercise jurisdiction, while the defect in the bill remained, yet it might, as is every day's practice, be corrected, at any time before the hearing, and the court would not hesitate to decree in the cause. p. 565.

The suit was originally instituted by aliens, and a citizen of the United States, as complainants, against the defendants, citizens of the United States; in the progress of the cause, and before the final hearing, the name of the citizen of the United States, who was one of the plaintiffs, was stricken out, and he was made a defendant: *Held*, the substantial parties plaintiffs, those for whose benefit the decree is sought, are aliens, and the court has original jurisdiction between them and all the defendants; but they prevented the exercise of this jurisdiction, by uniting with themselves a person between whom and one of the defendants the court could not take jurisdiction; strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed between the alien parties, and all the citizen defendants; there is no objection, founded on convenience or law, to this course. p. 565.

Appeal from the Circuit Court of the United States for the district of Kentucky, in which court, the appellants were complainants, and the appellees were defendants.

In the circuit court of Kentucky, on the 20th of February 1818, Thomas Conolly, James Conolly, Margaret Conolly, David David and Francis Branley, aliens and subjects of the king of the United Kingdoms of Great Britain and Ireland, and Samuel Mifflin, a citizen of the state of Pennsylvania, filed their bill against certain defendants, claiming to have an equitable title to a large tract of the lands, in right of Colonel John Conolly, deceased, situated at the falls of Ohio, in the state of Kentucky. The defendants in the bill were Richard Taylor, Fortunatus Cosby and Henry Clay, citizens of Kentucky, and William Lytle, described in the *subpœna* as a
*557] *citizen of Kentucky, but who was, in fact, a citizen of the state of Ohio. The *subpœna* was served on all the defendants, Mr. Lytle having been found by the process in Kentucky.

The answer of Mr. Lytle protested against the jurisdiction of the circuit court, he being a citizen of the state of Ohio. In the further progress of

[1] Vattier *v.* Hinde, 7 Pet. 261.

the suit before the circuit court, at May term 1823, on motion on the part of the complainants, the name of Samuel Mifflin was stricken out of the bill as a plaintiff, and he was made a defendant; after which, he answered an amended bill filed against him. When, therefore, the case came on to a hearing in the circuit court, at May term 1826, the parties complainants were all aliens and subjects of the king of Great Britain and Ireland; two of the defendants were citizens of the state of Kentucky; one of them was a citizen of the state of Ohio; and Samuel Mifflin was a citizen of the state of Pennsylvania.

The cause was argued upon an objection to the jurisdiction of the case in the circuit court of Kentucky, and upon its merits. This court being divided upon the merits, and no opinion having been expressed upon any other question in the cause but that of jurisdiction, the reporter does not consider himself permitted to state any of the facts of the case, or the arguments of counsel, other than those connected with that point.

The counsel for the plaintiffs in error were *Wirt*, Attorney-General, *Wickliffe* and *Peters*; for the defendants, *Sergeant* and *Nicholas*.

In support of the jurisdiction of the court, it was argued, that it was a subject of frequent regret, that the whole jurisdiction proposed by the constitution for the courts of the United States, has not been conferred by congress on these courts. The wise policy of the constitution has failed to take effect; and justice has often fallen short and been defeated, by the mere defect of the judiciary system. The court will not be disposed, therefore, to narrow the *defective legislation which has taken place, by putting on it a too rigorous construction. In the present instance, it requires [*558 only a fair construction of the act of congress, to sustain the jurisdiction. All the cases cited on the other side are admitted, but it is conceived, that they do not touch the question of jurisdiction in this case.

The 11th section of the judiciary act of 1789, gives jurisdiction to the circuit courts "of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between the citizen of a state where the suit is brought, and a citizen of another state." Thus, the act presents three distinct classes of cases, where the court takes jurisdiction from the character of the parties: 1st, Where the United States are plaintiffs or petitioners; 2d, Where an alien is a party; and 3d, Where the action is between a citizen of the state where the suit is brought, and a citizen of another state. The counsel for the appellees suppose that this case falls within the third class, and they have cited several cases decided in the circuit courts, to show that where the case does fall under the third class, one of the parties must be a citizen of the state in which the suit is brought. If it were conceived, that the case did belong to the third class, it might well be contended, that the objection came too late from Mr. Lytle; because it is a privilege on which the party may insist, or may waive at pleasure; and that after appearing and answering to the merits, it is too late to make it. *Gracie* v. *Palmer*, 8 Wheat. 699; *The Abby*, 1 Mason 360; 3 Ibid. 158.

Lytle appeared and answered to the merits; and although in his answer,

he suggests an objection to the jurisdiction of the court, he does not state the specific ground of his objection. Besides, according to the chancery practice, a plea in abatement to the jurisdiction, and an answer to the merits, cannot stand together, but the answer overrules the plea. *But
*559] the conclusive answer to the objection of the want of jurisdiction is, that this case does not belong to the third class of cases put by the judiciary act, but belongs to the second. The third class being of suits between citizen and citizen, has been judicially settled to relate to cases, not where citizens were the nominal parties only, but where the interests also are citizen interests. In *Browne* v. *Strode*, 5 Cranch 303, this court decided, that the courts of the United States have jurisdiction of a case between citizens of the same state, where the plaintiffs are only nominal parties, for the use of an alien. The plaintiffs, in that case, were the justices of the peace for the county of Stafford, in Virginia, and were all citizens of that state; the defendant Strode was also a citizen of that state. The action was on an executor's bond; no one could have sued on that bond but the plaintiffs, to whom the bond had been given; they were, therefore, necessary and indispensable parties. But the interests involved in the suit being the interests of an alien; the suit being for the use of the alien; the nominal plaintiffs being, *quoad hoc*, merely trustees for the alien, suing solely for his benefit, without any interest in the subject themselves, the jurisdiction was maintained on this ground, and on this alone. So here, Mifflin, one of the nominal plaintiffs, had, and still has, no manner of interest in the case. He is a mere trustee under the will of John Conolly, for the alien complainants, and the suit is brought solely for the use of aliens. In principle, the case is identical with that of *Browne* v. *Strode*. Like that, it is purely a suit for the recovery of alien interests, and like that, this suit is well founded, as being in substance a suit by aliens.

Again, Mifflin was a party solely for conformity; that is, a merely formal party. The test of a defendant being merely a formal party is, that no decree can be rendered against him, that is, against his interests or affecting his interest; *è converso*, the test of a complainant being merely a formal
*560] party, is, that no decree can be rendered *for him; that is, no decree in favor of his interests; and the joinder or non-joinder of such a party cannot affect his interests. In support of which, were cited the following authorities: *Russell* v. *Clarke*, 7 Cranch 69; *Wormley* v. *Wormley*, 8 Wheat. 421; *West* v. *Randall*, 2 Mason 181.

The suit, then, being substantially, according to *Browne* v. *Strode*, a suit by aliens, is it any objection to the jurisdiction of the court, that some of the defendants are citizens of Kentucky, where the suit is brought, and one of them is a citizen of Ohio? Is it necessary, when the plaintiffs are aliens, that the defendants should be citizens of the particular state where the suit is brought? The judiciary act act does not make this necessary. The 11th section gives the jurisdiction, where an alien is a party, without a word more; there is no qualification of this jurisdiction from the residence of the opposite parties; it is enough, if they be citizens of the United States. Will this court create a limitation on their jurisdiction, when the law has created none?

Is it not the object of the law and of the constitution, in all cases, to give the alien, where he is a party to the suit, an impartial tribunal in the courts

of the nation? And is not this object as strongly demanded, where his antagonists are citizens of different states, as where they are citizens of the same state? The manifest object of the constitution and law, is, to prevent the alien from being driven into the state courts, and there encountering the prejudices which were to be apprehended in the local courts; but this salutary purpose will be totally defeated, if, by the residence of his adversaries in different states, you compel him to go into the courts of the state where some of them reside. Hence, the law founds the jurisdiction in any case where an alien is a party. If you limit his right to a case in which all his adversaries reside in the same state, you defeat, so far, the salutary purpose of the constitution and the law. Reverse the case: suppose, that citizens of different states have a joint claim against an alien, can they not bring a suit *against him in the federal court? The single criterion of jurisdiction put by the law has occurred. "An alien is a party, and it is nowhere said that the opposite parties must all belong to the same state." Will you not apply the same rule, where the alien is the plaintiff, the case being the same? So far as the court appear to have touched this question, in former cases, it may be inferred, that their construction is that which has been indicated. When the case is one between citizens, it is necessary to show the jurisdiction, in the bill or declaration, by averring that the plaintiff is a citizen of one state, and the defendant of another. But when an alien is a party, the jurisdiction has been held to be sufficiently shown, by stating that fact, without averring that the defendant is a citizen of the state in which the suit is brought. *Gracie* v. *Palmer*, 8 Wheat. 699. [*561

The 11th section contains this further provision, "that no civil suits shall be brought before either of the said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of suing the writ." Does this apply to suits brought by aliens, or is it confined to suits brought by citizens? Considered as applying to suits brought by citizens, it has been judicially pronounced to be a very inconvenient restriction on the constitutional grant of jurisdiction. *White* v. *Fenner*, 1 Mason 521. That it should apply to suits by aliens, may be well questioned.

The only substantial and real parties in interest to this suit were the aliens. Mr. Mifflin was made a party complainant, at the commencement of the proeeedings, but it was afterwards found, that in order to carry into effect the object of the bill, and to obtain from him, what the real parties had a right to demand, it was necessary to make him a defendant. Thus, therefore, in the circuit court, when the case was heard, all the parties plaintiffs, even nominally, were aliens; and the defendants were all citizens of the United States, and alleged to be so, on the record.

*For the *defendants* in error, it was contended, that the circuit court of the Kentucky district had no jurisdiction. The bill of complaint, which is the foundation and commencement of the suit in equity, states Samuel F. Mifflin, one of the complainants, to be a citizen of Pennsylvania, and William Lytle, one of the defendants, to be a citizen of Ohio. William Lytle pleaded to the jurisdiction, and thus saved his right to object, even if he had had power to waive it, which he had not. Consent cannot give jurisdiction. The objection is not founded upon the provision, that a [*562

citizen shall not be sued in the courts of the United States, except in the state where he resides, or is found, at the time of serving the process. That is a privilege which he may waive by appearance. It rests upon that part of the act of congress (Act of 1789, § 11) which expressly limits the jurisdiction (and so far as it rests upon the character of the parties) to suits between citizens of different states, one of them being "a citizen of the state where the suit is brought." There is no doubt, that the jurisdiction, under the constitution, might have been more extensive. The terms of the constitution only require, that the parties should be citizens of different states. But the uniform construction of this grant of power has been, that it is to be exercised by the judiciary only, to the extent which congress may authorize. It is perfectly clear, upon this statement, that the circuit court had no jurisdiction between Mifflin and Lytle: § 11 of the act of the 24th of September 1789. The court is bound to notice the question of jurisdiction, whenever it may occur, and however proposed. 2 Dall. 368. The plaintiff may assign as error, the want of jurisdiction, though the tribunal of the United States were resorted to by himself. The court must see that it has jurisdiction. The jurisdiction must appear on the record affirmatively. Every thing must be alleged, that is necessary to give jurisdiction. 3 Dall. 382; 4 Ibid. 8; 1 Cranch, 343; 2 Ibid. 186; 5 Ibid. 185; 6 Wheat. 450. This would be clear, if Mifflin and Lytle were the sole parties. Does their joinder with others make any difference? The answer has long since been given. The plain-
*563] tiffs and *defendants must all be competent to sue and be sued. *Strawbridge* v. *Curtiss*, 3 Cranch 267; *Hope Insurance Company* v. *Boardman*, 5 Ibid. 57; *Bank of United States* v. *Deveaux*, Ibid. 61. If the plaintiffs be not all competent, it is immaterial, whether the joinder is from necessity or voluntary. *New Orleans* v. *Winter*, 1 Wheat. 91, 94; *Ward* v. *Arredondo*, 1 Paine 410. The rule is the same as to defendants.

Some exceptions have been made out of the generality of the proposition; but none that, in its terms or spirit, can comprehend the present case. In *Cameron* v. *McRoberts*, 3 Wheat. 591, it was decided, that if a distinct interest vested in one of the parties defendant, he being the one within the jurisdiction, so that substantial justice could be done, so far as he was concerned, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone. That is, to apply it to the present case, if Lytle were within the jurisdiction, the case might proceed against him alone; for here Lytle was the sole party in interest. It so appears by the bill of complaint, the title having come to be entirely vested in him. But he who was thus the only material party, was the very party who was out of the jurisdiction, and not amenable to the court.

So, it is very true, that the joinder of a mere formal party defendant, does not take away the jurisdiction. *Wormley* v. *Wormley*, 8 Wheat. 421, 451. The criterion in such cases is, whether a decree is sought againt him. *Ward* v. *Arredondo*, 1 Paine 410. If he be a material party, he must be brought in, even though the jurisdiction would thereby be ousted. *Harrison* v *Rowan*, Pet. C. C. 489. But Lytle was not a mere formal party, he was an indispensable party, without whom no decree could be made. So, if improper persons be made parties by mistake, who are not subject to the jurisdiction. *Carneal* v. *Banks*, 10 Wheat. 187, 188. But here, there was no such mistake in joining improper persons.

There is no case, therefore, where the decision has been contrary, to what is now contended for. The opinion that *in a suit at common law, in Pennsylvania, where *non est inventus* is returned as to one who is not subject to the jurisdiction (2 W. C. C. 505; Pet. C. C. 431 note), the proceedings may go on against others, has no application. It is true, that in this case, the court, in 1821 (three years after suit brought), permitted the complainants to amend their bill, by striking out Mr. Mifflin as complainant, and making him a defendant. But this was itself an exercise of judicial authority, which could not rightfully take place, but in a case over which the court had previously a power. The court could not make the amendment, unless it first had jurisdiction. The time of suit brought, is the period to which the question of jurisdiction applies. *Mollan* v *Torrance*, 9 Wheat. 537. It cannot afterwards be either vested or divested. [*564

Marshall, Ch. J., delivered the opinion of the court.—As an objection was made to the jurisdiction of the court in this case, it may be proper, in order to prevent a possible misunderstanding of the principle on which jurisdiction is sustained, briefly to state it. The bill is filed in the court of the United States, sitting in Kentucky, by aliens and by a citizen of Pennsylvania. The defendants are citizens of Kentucky, except one who is a citizen of Ohio, on whom process was served in Ohio. The jurisdiction of the court cannot be questioned, so far as respects the alien plaintiffs. As between the citizens of Pennsylvania and of Ohio, neither of them being a citizen of the state in which the suit was brought, the court could exercise no jurisdiction. Had the cause come on for a hearing, in this state of parties, a decree could not have been made in it, for the want of jurisdiction. The name of the citizen plaintiff, however, was struck out of the bill, before the cause was brought before the court; and the question is, whether the original defect was cured by this circumstance? whether the court, having jurisdiction over all the parties then in the cause, could make a decree?

The counsel for the defendants maintain the negative of *this question. They contend, that jurisdiction depends on the state of the parties, at the commencement of the suit; and that no subsequent change can give or take it away. They say, that if an alien becomes a citizen, pending the suit, the jurisdiction which was once vested, is not divested by this circumstance. So, if a citizen sue a citizen of the same state, he cannot give jurisdiction, by removing himself, and becoming a citizen of a different state. This is true, but the court does not understand the principle to be applicable to the case at bar. Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit. The court, in the first case, had complete original jurisdiction; in the last, it had no jurisdiction, either in form or substance. But if an alien should sue a citizen, and should omit to state the character of the parties in the bill; though the court could not exercise its jurisdiction, while this defect in the bill remained; yet it might, as is every day's practice, be corrected, at any time before the hearing, and the court would not hesitate to decree in the cause. So, in this case. The substantial parties plaintiffs, those for whose benefit the decree is sought, are aliens; and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction, [*565

by uniting with themselves a person between whom and one of the defendants the court cannot take jurisdiction. Strike out his name, as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed between the alien plaintiffs and all the citizen defendants. We can perceive no objection, founded in convenience or in law, to this course.

Upon examining the record, the judges are divided in opinion, on the question, whether the defendants, who are purchasers, have taken the lands charged with the equity which was attached to it, while in possession of Campbell and his heirs; or are to be considered as purchasers without notice. It would be useless to state the arguments and facts in support of each opinion. The decree is affirmed, by a divided court.

Decree affirmed.

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*566] *Charles A. Beatty and John T. Ritchie, Appellants, *v.* Daniel Kurtz and others, Trustees of the German Lutheran Church of Georgetown, Appellees.

Charitable uses.

A lot of ground had, in the original plan of an addition to Georgetown, been marked "for the Lutheran church," and by the German Lutherans of the place had been used as a place of burial, from the dedication; they had erected a school-house on it, but no church; exercising acts of protection and ownership over it at some periods, by committees appointed by the German Lutherans; the original owner acquiescing in the same. This may be considered as a dedication of the lot to public and pious uses; and although the German Lutherans were not incorporated, nor were there any persons who, as trustees, could hold the property, the appropriation was valid, under the bill of rights of Maryland. The bill of rights, to this extent, at least, recognises the doctrines of the statute of Elizabeth for charitable uses; under which, it is well known, that such uses would be upheld, although there was no specific grantee or trustee. This might, at all times, have been enforced as a charitable and pious use, through the intervention of the government, as *parens patriæ*, by its attorney-general or other law-officer; it was originally consecrated for a religious purpose; it has become a depository of the dead; and it cannot now be resumed by the heirs of the donor.[1] p. 584.

If the complainants in the circuit court were proved to be the regularly appointed committee of a voluntary society of Lutherans, in actual possession of the premises, and acting, by their direction, to prevent a disturbance of that possession; under the circumstances of this case, there does not appear to be a serious objection to their right to maintain a suit for a perpetual injunction against the heirs of the donor, who sought to regain the property, and to disturb their possession. p. 584.

The only difficulty which presents itself, upon the question, whether the complainants in the circuit court have shown, in themselves, sufficient authority to maintain their suit, is, that it is not evidenced by any formal vote or writing. If it were necessary to decide the case on this point, under all the circumstances, it might be fairly presumed; but this is not necessary; because this is one of those cases in which certain persons belonging a voluntary society, and having a common interest, may sue in behalf of themselves and others, having the like interests, as part of the same society, for purposes common to all, and beneficial to all. p. 585.

Appeal from the Circuit Court of the District of Columbia and county of Washington.

The appellees filed their bill in the circuit court against Charles A. Beatty and John T. Ritchie, which stated, in substance, that the late Colonel

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[1] See Ould *v.* Washington Hospital, 95 U. S. 303.

Beatty v. Kurtz.

Charles Beatty and George Frazier Hawkins, in the year 1769, laid out, on lands belonging *to them, and adjoining the town of Georgetown, a certain town known by the name of "Beatty and Hawkins's addition [*567 to Georgetown;" the lots whereof were laid down and distinguished on a plat, and disposed of by lottery. That Beatty, in laying out the said addition, distinguished and set apart a certain lot or portion of ground in the said addition, for the sole use and benefit of the German Lutheran church; declaring the same to be their absolute right and property, to be held by them for religious purposes, and the use of said congregation, and caused the same to be so entered and designated in the plat of said addition, as appeared by the plat and papers on record in the clerk's office for Washington, to which they begged leave to refer; which plat and papers were recorded under authority of the act of Maryland, 1796, ch. 54; which lot was described in the said plot of said addition, as the German Lutheran church lot, and also in the general plot of the town of Georgetown and its additions, deposited in the office of the clerk of the corporation of Georgetown. That soon after the lots of the said addition were laid off and disposed of as aforesaid, the said lot was taken possession of by the said German Lutherans, and was inclosed, and a church erected thereon; and had been kept and held by them ever since, during a period, as they believe, of upwards of fifty years, and had been used by them as a burying ground for the members of the said church, with the avowed intention of building thereon another church or place of worship (the building first erected being decayed), whenever their funds would enable them to do so. That during all this period, neither their possession nor title had ever been questioned, and the lot had been exempted from taxation, at their request, by the corporation of Georgetown, as being church property. That Charles Beatty died about sixteen years ago, and without having made any conveyance of the said lot, and that Charles A. Beatty was his heir-at-law. They, therefore, prayed, that he might be made defendant, and be compelled to convey the title to the complainants, in trust for the German Lutheran church. They further stated, that the defendant, John T. Ritchie, without any pretence of title, disputed the title of complainants *and their right of [*568 possession, and had undertaken to enter on part of the lot, and to remove tombstones, &c.; and they feared that he meant to dispossess them: wherefore, they pray *subpœna*, &c., and that they might be quieted in their possession of said lot, and that the defendant, Ritchie, might be enjoined from disturbing their possession; and for general relief.

The answer of the defendants in the court below, admitted that Charles Beatty, deceased, did designate a lot in his addition to Georgetown, by inscribing on the plat thereof these words, "for the Lutheran church;" that they always understood and believed, that he meant by that inscription, to manifest an intention to appropriate that lot to the use of the Lutherans, provided they would build on it, within a reasonable time, a house of public worship, which would conduce to diffuse piety, to enhance the value of his property, and to adorn his addition to Georgetown. But they denied, that this inscription was ever meant, or could be interpreted, to be a contract with the Lutheran church, to convey to that body the property in question. That the writing itself could not operate as a conveyance, and there was no consideration to sustain it as a contract. They denied, that Charles Beatty

ever declared the lot in question to be the absolute right and property of the Lutherans; or did, in any manner, by means thereof, hold out inducements to them, or the public, to purchase tickets in the pretended lottery mentioned in the bill, or to purchase and improve lots in that part of the town. They averred, that no church had ever been built on it, and that its occupation by graves and a school-house, was a use of it by no means beneficial to defendants, or him under whom they claimed.

The answer denied the possession averred in the bill; and also that there ever was an organized congregation of German Lutherans, in Georgetown. It averred also, that the lot in question had remained uninclosed for at least three-fourths of the time since it became a part of Georgetown; and that the inclosures which occasionally surrounded it were not erected by the com-
*569] plainants, nor those whom they pretended to represent. The *respondents admitted, that the lot was used as a burying-ground; but averred, that it was thus used by Beatty's permission, and not exclusively by the Lutherans, but the public generally. But they further said, that if the Lutherans had enjoyed the possession alleged in the complainant's bill, they might and should have enforced the rights thereby acquired, at law, and ought not to have come into equity for a remedy. Finally, confessing that they had resumed possession of the property, they denied the authority of the complainants to act in behalf of the pretended German Lutheran church, and prayed the same benefit of these defences as if they had been urged by plea to the bill.

The plaintiffs amended their bill, by stating the German Lutheran church, mentioned in their bill, was composed of the members of the German Lutheran church, in Georgetown, duly organized as such; "that the lot was set apart by C. Beatty," from and out of that "part of the said land, composing said addition," of which he, the said Beatty, was seised. "He, said Beatty, by the said designation, declaration, and setting apart, holding out to the public, and to the German Lutherans particularly, inducements as well to purchase tickets in a lottery, by which the said lots were disposed of, as to purchase and improve this part of the town in other ways. And thereby meaning to transfer to the said German Lutherans, as soon as they should organize themselves into a congregation or church, all his right to said lot in fee, to be used for the religious purpose of such congregation or church, and thereby declaring that intention. That they organized themselves into a congregation or church, and erected a church or house of worship on the said lot." That the complainants, and the congregation for whom they acted, had called upon C. A. Beatty, and required a conveyance, according to the promise and declared intent of the said Charles Beatty, deceased: that upon organizing the church or congregation aforesaid, certain officers, called a committee, were appointed to take charge of the concerns of the church; which appointments were, from time to time, made and renewed; and that complainants were appointed in 1824, and had continued to hold
*570] such appointment ever since. *To those amendments, the defendants answered, and denied all the allegations in the amended bill.

It was in evidence, that soon after this lot was that set apart for the Lutherans, it was, with Colonel Beatty's permission, taken possession of by certain persons of that sect in Georgetown, who had a log-house erected on it, which was called a church, and used as such frequently, and also as a

school-house by the German Lutherans. That in the year 1796, a German minister came from Philadelphia and was employed by them, and preached in this house for three months, being employed and paid by the German Lutherans of Georgetown; and about the year 1799, the congregation of German Lutherans, of which Travers, the witness in this cause, was one, employed a German minister, who officiated in said house, for about nine months. Though divine service was frequently held in that building, there was, at no other periods than those just mentioned, a stationed preacher who ministered to a congregation in regular attendance there, except a Mr. Brooke, who was an Episcopal clergyman, and who, Dr. Balch testifies, had possession of that building as a church, in 1779. In the same, or the following year, a steeple was erected on the same house, in which a bell was hung, at the expense and by the direction of the German Lutherans of Georgetown. This building, some years afterwards, went to decay, and no church had been since rebuilt on the lot; though efforts had been since made for that purpose, and so late as 1823, a considerable subscription was raised, but not sufficient for the object.

During the whole period from 1769 to the bringing of this suit, the lot in question was generally under inclosures, put up at the expense of the Lutherans of Georgetown, and under the care and custody of a committee appointed by them. It had been continually so inclosed for more than twenty years, before the entry and claim set up by the defendants in this suit. The said lot had been also used by the Germans as a burying-ground, from the year 1769, till a short time before the bringing this suit, and had been called and known as the Dutch burying-ground, and one of the witnesses, Styles, acted as sexton, under the orders of the committee of the *congregation. It did not appear, that the German Lutherans, in Georgetown, ever were incorporated by law as a religious society. [*571

It also appeared from the evidence, that from the year 1769, till within a month or two before the bringing this suit, no claim to the possession or property in the lot now in dispute, was ever set up by Col. Charles Beatty, or by either of the defendants; but on the contrary, Col. Charles Beatty, up to the time of his death, always declared it to be the property of the German Lutherans of Georgetown; his administrator, Abner Ritchie, who, it was stated, sold all his lots in said addition, left by him, at his death, never claimed or offered to sell the lot in question, as part of his property; that his son and heir, the defendant, Charles A. Beatty, had repeated the same declarations to a witness (Mountz), a few years before this suit—he expressed "his surprise, that the Germans had been so indifferent about getting their title to this property, as he was always ready and willing to give them a deed for it." A witness, Mr. Rhæffer, testified, that in 1823, the defendant Beatty, in his presence, declared, "that the lot aforesaid was the property of the Lutherans, and that he was very anxious to make them a deed." He also confirmed the evidence of the other witnesses.

It also appeared from the evidence, that since the year 1769, the said lot had never been assessed for taxes to Colonel Beatty, or his heirs, nor had any taxes ever been paid by them. That it had always been recognised by the corporation of Georgetown, since their charter in 1789, as the church property of the Lutherans; and as such had been exempted from taxation with other church property in the town. It was in evidence, that the Luther-

ans of Georgetown always had a church committee to act for them, and to take charge and custody of the lot in question; and the appellees constituted that committee from 1816, till the bringing this suit, and to the present time. In virtue of that appointment, when Ritchie entered on the premises, and threw down the fence and tombstones, they filed this bill for a convey-
*572] ance *in fee of the lot, to complainants, as trustees for said church; to be quieted in the possession thereof; and for an injunction to restrain the appellants from disturbing their possession, or trespassing on said lot.

The circuit court decreed a perpetual injunction against the defendants, the appellants; who, by their appeal, brought the case before this court.

The cause was argued by *C. C. Lee*, for the appellants; and by *Key* and *Dunlop*, for the appellees.

For the *appellants*, it was claimed, that the decree of the court below should be reversed, and the bill dismissed. 1. Because neither C. Beatty nor his son ever did any act which divested either of them of the right of property and possession in the lot in question. 2. Because neither of them ever entered into any contract (and least of all, such a one as a court of equity would enforce) with the appellees, or those whom they pretended to represent, to convey to them or their pretended *cestui que trusts*, the lot in question. 3. Because the appellees, or those whom they pretended to represent, had never had such an adverse possession of the lot as gave them a title to it. 4. Because, if they had, it was such a title as they might and should have enforced at law and not in equity. 5. Because the appellees had failed to show any authority in themselves to prosecute this suit.

Lee contended, that the only act done by C. Beatty or his heirs, which can be pretended to have divested them of the title to the lot in question, is the inscription by C. Beatty on the plat of the lot, of the words "for the Lutheran church." No possible interpretation of these can make them act as a conveyance; and the bill itself, which attempts to interpret them into a contract, and which seeks to have that contract specifically performed, necessarily admits the title of the lot to be still remaining in the appellants.

Dismissing, then, this point, as scarcely made in the case, it will be most perspicuously treated, by considering the bill in reference to its different
*573] prayers, which are for the specific *performance, and to be quieted in possession. This leads directly to the point, that the bill shows no contract of which equity will decree performance. The words relied on as creating a contract are the aforesaid inscription, "for the Lutheran church." But of the three requisites of a contract, two are wanting here, viz., parties and a price; and, interpret them as you will, no mutuality can be pretended. This of itself is sufficient to prevent the assistance of a court of equity. *Howell* v. *George*, 1 Madd. 12. Moreover, the contract alleged concerns lands, and must, therefore, by the statute of frauds, be in writing. But there is no consideration mentioned in the contract as set out; and this has been too often decided to be an essential part of a contract, and therefore, to be embraced in the written instrument, to need illustration from cited authorities. True, the plot of Beatty & Hawkins's addition to Georgetown,

with the said inscription thereon, was recorded, as alleged in the bill, by the act of 1796, ch. 54; but the court will perceive, by inspecting that act, that it does not affect this discussion.

The appellees will doubtless insist on a part performance of the pretended contract, to relieve themselves from operation of the statute of frauds; this is a matter of fact, which the court must decide on from the evidence. They will, at least, remember, that if the appellees rely on their pretended erection of a pretended church, as an execution on their part of the pretended contract, they admit, that they were bound by that contract to erect a church; while it will be impossible to regard a log school-house, afterwards converted into a dwelling-house, and now destroyed, whoever may have called it a church, and have preached in it, as such a building to be applied to such a purpose as is called for by a contract to build a church. And it may also be observed, upon this part of the case, that this prayer of the bill was refused by the court below, and no appeal was taken from that decision.

As to the second prayer of the bill, he argued, that it might be viewed under two aspects. 1. As regarding the complainants below, dispossessed by the defendants, and seeking to be repossessed and quieted: and 2. As regarding the *complainants in possession, and seeking protection against the defendants, as intruders or trespassers. Either view of [*574 the case is equally fatal to the bill; and for the same reason, because the proper remedy is at law. For, regarded under the first aspect, the bill is what is reproachfully termed an ejectment bill, and clearly condemned. Cooper's Plead. 125; *Loker* v. *Rolle*, 3 Ves. 4; and *Ryves* v. *Ryves*, Ibid. 343. And regarded under the second aspect, no precedent can be found to authorize it. The only species of bills which can be mistaken, as affording such a precedent, are bills of peace, and bills founded on the *timet*. But the least reflection will show, that this is not a case for a bill of peace; which is "made use of, where a person has a right which may be controverted by various persons, at different times, and by different actions," and "where there have been repeated attempts to litigate the same question by ejectment, and repeated and satisfactory trials." 1 Madd. Ch. 166. In short, bills of peace lie to prevent multiplicity of actions; and this is not pretended to be brought for that purpose. Bills founded on the *timet* are used "where a man is entitled to a rent out of lands, as chief rents or quit-rents, and from length of time, the remedy at law is lost, or become very difficult;" relief has, in such case, been given in equity, on the sole ground of long and undisputed payment of the rent. 1 Madd. Ch. 29. But the appellees in this case, or those whom they pretend to represent, never had such an adverse possession of the lot in question as gave them a title to it; and if they had, the argument supposes them in possesion, and they can maintain all their rights at law, without the aid of the court of equity.

He also contended, that whatever rights any society of German Lutherans might have to the lot, the appellees had shown no authority in them to prosecute their claims to those rights; and that the bill they had filed, regarded in its true light, was a bill to establish a legal title and to obtain a perpetual injunction. That such a bill is *inadmissible, is clearly [*575 established by *Welby* v. *Duke of Rutland*, 2 Bro. P. C. 41.

Mr. Lee, in reply to the argument of the counsel for the appellees, said, the true sources of the success of the appellees in the court below were in the clamor about the pollution of the remains of the dead, in the declamation about violating the sanctuary of the tomb ; which triumphed before the inferior tribunal; and which now places the appellants, literally, in the situation which was but figuratively ascribed to Sextius—

> Jam te premet nox, fabulæque manes
> Et domus exilis Plutonia.—Hor.

And after all, the only thing done was by one of the appellants, who threw down a part of the inclosure of the lot in dispute ; but it was that part which separated it from his own garden. Yet that is complained of, as such a nuisance, as that the chancellor will prevent it by injunction! But while this is complained of as a nuisance, why is not that considered to which the appellants are subjected? It may well be, that one will consent to have a graveyard in his vicinity, if it be hallowed by a church. The spire which points us to the skies, may reconcile us to the mound which tells of what is mouldering in the earth. But we object to the bane, without the antidote, the objects which awaken the mortal shudderings, without that which inspires the immortal hopes.

He contended, that the old acts of Maryland referred to, were entirely inapplicable to this cause. That the case cited from 7 Johns. Ch. 332, did not refer to perpetual injunction ; and that in the one cited from the 4th vol. of the same book, there was a dispute about boundaries, to ascertain and establish which had long formed a head of chancery jurisdiction ; and that the extraordinary powers of one of the parties entitled the other to the extraordinary aid of the chancellor.

As to the possession contended for, Mr. Lee insisted, that no persons were pointed out who held that possession ; that the temporary committees were never incorporated, and there could have been no holding by succession ; and that the appellees, so far from showing any authority vested in them
*576] to institute these proceedings, had even failed to show *any congregation or religious society which could confer such an authority.

For the *appellees*, it was contended : The decree below, for a perpetual injunction, was right, if the appelles had title, either under the grant or by possession, and we contend, that they had title under both.

1. Under the grant, three objections are made to it : that it is without consideration ; that there is no certain grantee ; that it is within the statute of frauds. As to consideration, we admit the general rule to be, that equity will not lend its aid to enforce a mere voluntary agreement. But here there is a consideration. The diffusion of piety and promotion of religion are sufficient to support it. Besides, there was a money consideration. The designation of this lot as a church lot, caused the tickets to sell, and enabled the grantor to dispose of his property. It is in proof, that the Germans were by this means induced to buy.

" That there is no certain grantee." It is agreed, that upon general principles, this grant could not be executed in favor of a voluntary, unincorporated society, and that the statute of 43 Eliz., ch. 4, having been decided not to be in force in Maryland, no aid can be derived from that statute. But this grant has had a legislative recognition. Act of assembly of Maryland,

1796, ch. 54. § 3, 4. That act is as strong a recognition of the grant by the Maryland legislature, as if they had passed a special law, with the assent of Beatty, declaring the lot in question to be the property of "the German Lutherans of Georgetown." If such a special law had passed, would not the courts be bound to give effect to the intent of the legislature and donor? Would they not apply to the principles of construction adopted by England, in relation to the 43 Eliz., and the charities provided for by that statute? See 4 Wheat. app'x, p. 11. It is also contended, that this grant is protected and made valid by the 34th article of the bill of rights of Maryland. The grant is within the exception contained in the 34th article, and that exception ought to have a liberal construction. *Within the narrow limits [*577
prescribed by the exception, the principles of construction, adopted in England as to the 43 Eliz., ought to be applied. Within these limits, it was, and had been, the policy of the people and legislature of Maryland to favor the church. Acts of assembly of Maryland, 1704, ch. 38; 1722, ch. 4.

The last objection urged against the grant is, that it concerns lands, is not in writing, and is avoided by the statute of frauds. We answer, that the contract is in writing. The inscription on the plat is by Beatty himself, and describes the lot with certainty. But if it was not in writing, the contract has been performed, the gift executed, and possession delivered and retained, for more than fifty years. If the grant was void for uncertainty of the donee, then it is contended, that the appellees, and those under whom they claim, have a good title by possession. The lot has been in their adversary possession, by actual inclosure, for more than twenty years.

Having title either under the grant or by possession, the only remaining question is, is there a right to the interference of a court of equity, to restrain Ritchie, the trespasser, by injunction. It is said, the only remedy is at law, for damages; that a court of equity has no jurisdiction to enjoin trespass. It is known, that in ordinary cases of private trespass, the proper remedy is at law, for damages; and this has been found sufficient for the protection of property. But in cases of trespass, of a peculiar nature, where the mischief is irremediable, which damages could not compensate; where the injury reaches to the very substance and value of the estate, and goes to the destruction of it, in the character in which it is enjoyed; the English court of chancery, and the courts of chancery of this country, are in the habit of granting injunctions. To this point, and in support of the distinction here taken, was cited the case of *Jerome* v. *Ross*, 7 Johns. Ch. 332; also 6 Ves. 147; 7 Ibid. 307; 1 Bro. C. C. 588; 10 Ves. 290; 17 Ibid. 128; 18 Ibid. 184. If any case could justify the strong and menacing hand of *an injunction, this is it. What damages can redress the [*578
feelings of the injured, or punish, as they ought, the aggressor? What trespass could more effectually destroy the property in the character in which it is enjoyed?

If the appellees had no other title but possession, the case of *Varick* v. *Mayor, &c., of New York*, 4 Johns. Ch. 53, fully sustains the decree of the court below. In that case, Varick, who applied for and got the injunction, set up no other title but possession for twenty-five years. Chancellor KENT says, "after such a length of time, it is right and just, that the plaintiff should be protected in his property, &c. The defendant must first acquire possession of the ground in dispute, not by forcible entry, but by regular

process of law. The principle upon which the injunction is to be upheld is, that after a claim of right, accompanied with actual and constant possession for twenty-five years and upwards, the corporation of New York cannot be permitted, without due process of law, to enter upon possession, pull down buildings," &c. In the case at bar, our adversary possession is long enough to take away the appellant's right of entry.

Story, Justice, delivered the opinion of the court.—This is an appeal in a suit in equity from a decree of the circuit court of the district of Columbia, sitting for the county of Washington.

Georgetown was erected into a town, by an act of the legislature of Maryland, passed in 1751, ch. 25. By subsequent acts, additions were made to the territorial limits of the town; and the town was created a corporation, with the usual municipal officers, by an act of the Maryland legislature, passed in 1789, ch. 23. The charter of incorporation has been subsequently amended by congress, by various acts passed upon the subject, since the cession.

In the year 1769, Charles Beatty and George F. Hawkins laid out a town, known by the name of Beatty and Hawkins's addition to Georgetown, and which is now included within its corporate limits. The lots of this addition
*579] were disposed *of by way of lottery, under the direction of commissioners appointed to lay out the same, and conduct the drawing of the lottery. The books of the lottery and the plan of the lots, and a connected survey thereof, were afterwards, by act passed in 1796, ch. 54, ordered to be recorded in the clerk's office for the territory of Columbia, and copies thereof to be good evidence in all courts of law and equity in the state. Upon the original plan, so recorded, one lot was marked out and inscribed with these words, "for the Lutheran church;" and this lot was in fact part of the land of which Charles Beatty was seised.

The bill was brought by the original plaintiffs, alleging themselves to be trustees and agents for the German Lutheran church, composed of the members of the German Lutheran church of Georgetown, duly organized as such, in behalf of themselves and the members of the said church. It charges the laying out of the lot in question, for the sole use and benefit of the Lutheran church, to be held by them for religious purposes, and the use of the congregation, as above mentioned. That soon afterwards, the lot was taken possession of by the said German Lutherans, in Georgetown, who organized themselves into a church or congregation, and erected a church or house of worship thereon; and the lot was inclosed by them, and a church erected thereon; and hath been kept and held by them, during a period of fifty years; and has been used as a burying-ground for the members of the church, with the avowed intention of building thereon another church or place of worship (the first building erected thereon being decayed), whenever their funds would enable them so to do. That during all this period, their possession has never been questioned, and the lot has been exempted from taxation, as property set apart for a religious purpose. It further charges, that upon the organization of the church or congregation, certain officers, called a committee and trustees, were appointed to take care of the said church, which appointments have been, from time to time, renewed; that in 1824, the plaintiffs were re-appointed as such, hav-

ing been so appointed at former times. It further charges, that Charles Beatty died about sixteen years ago, *without having made any conveyance of the said lot, and that Charles A. Beatty, the defendant, [*580 is his heir, and has the title by descent; and it prays that he may be compelled to convey it to them. It further charges, that Ritchie, the other defendant, has unwarrantably disputed their title, and has entered upon the lot, and removed some of the tombstones erected thereon, and means to dispossess the plaintiffs and to remove the tombstones and graves. The bill, therefore, prays, that they may be quieted in their possession, and that a writ of injunction may issue, and for further relief.

The defendants put in a joint answer. They admitted, that the lot was so marked in the plat, as the bill states, and that it was Charles Beatty's intention to appropriate the same to the use of the Lutheran congregation, provided they would build thereon, within a reasonable time, a house of public worship. They deny, that the German Lutherans were ever organized, as stated in the bill; or that any such church has been built; or that there has been any such possession or inclosure as the bill asserts; or that Charles Beatty ever made any conveyance of the property to transfer his title. They admit, that the lot has been used as a graveyard, but not exclusively appropriated to the use of the Lutheran congregation. They admit, that a building was erected thereon, but that it was used as a school-house. They admit, that the defendant, Beatty, is heir-at-law, and as such, that he claims the lot in question, and has authorized the defendant, Ritchie, to take possession thereof. They deny all the equity in the bill, as well as the authority of the plaintiffs to sue, declaring them to be mere volunteers, and demanding proof of their authority, &c. The general replication was filed, and the cause came on for a hearing, upon the bill, answer, exhibits and depositions; and the court decreed a perpetual injunction against the defendants, with costs. The appeal is brought from that decree.

Upon examining the evidence, it appears to us, that the material allegations of the bill are satisfactorily established. It is proved, that, shortly after the appropriation, and more *than fifty years ago, the Lutherans of Georgetown proceeded to erect a log-house on the lot, which [*581 was used as a church for public worship, by that denomination of Christians; and was also occasionally, and at different times since, used as a school-house, under their direction. That at a much later period, a steeple and bell were added to the building; that the land was used as a church-yard; that a sexton appointed by Lutherans had the direction of it; that more than half of the lot is covered with graves; and others as well as Lutherans have been buried there; that the Lutherans have caused the lot to be inclosed, from time to time, as the fences fell into decay, and procured subscriptions for that purpose; that the possession of the Lutherans, in the manner in which it was exercised over the lot, by erecting a house, by public worship, by inclosing the ground, and by burials, was never questioned by Charles Beatty in his lifetime, nor any manner disturbed, until a short period before the commencement of the present suit. That Charles Beatty, in his lifetime, constantly avowed, that the lot was appropriated for the Lutherans, and that they were entitled to it.

The Lutherans have constituted but a small number in the town of Georgetown; they have not been able, therefore, to maintain public wor-

ship constantly in the house so erected, during the whole period ; and sometimes, it has been intermitted for a considerable length of time. But efforts have been constantly made, so far as practicable, to keep together a congregation, to use the means of divine worship, and to support public preaching. The house, however, in consequence of inevitable decay, fell down some time ago ; the exact period of which, however, does not appear ; but it seems to have been more than forty years after its first erection. Efforts have since been made to rebuild it, but hitherto they have not been successful. The Lutherans in Georgetown who have possessed the lot in question, are not, and never have been, incorporated as a religious society. The congregation has consisted of a voluntary society, acting, in its general arrangement, by committees and trustees, chosen from time to time by the Lutherans belonging to it. There do not appear to have been *any formal records kept
*582] of their proceedings ; and there have been periods of considerable intermission in their appointment and action. There is no other proof that the plaintiffs are a committee of the congregation, than what arises from the statement of witnesses, that they were so chosen, by a meeting of Lutherans, and that their appointment has always been acquiesced in by the Lutherans, and they have assumed to act for them, without any question of their authority. That they are themselves Lutherans, living in Georgetown, and forming a part of the voluntary society, is not disputed. There is decisive evidence, also, that the defendant Beatty has, since the decease of his father, repeatedly admitted the claim of the Lutherans to the lot, and his willingness that it should remain for them, as it had been originally appropriated. No assertion of ownership was ever made by him, until the acts were committed, which form the gravamen of the present bill.

Such are the material facts ; and the principal questions arising upon this posture of the case, are, first, whether the title to the lot in question ever passed from Charles Beatty, so far at least as to amount to a perpetual appropriation of it to the use of the Lutheran church, or to the pious uses to which it has been in fact appropriated? And secondly, if so, whether it is competent for the plaintiffs to maintain the present bill ?

As to the first question, it is not disputed, that Charles Beatty did originally intend, that this lot should be appropriated for the use of a Lutheran church, in the town laid off by him. But as there was not at that time any church, either corporate or unincorporated, of that denomination in that town, there was no grantee capable of taking the same, immediately, by grant. Nor can any presumption of a grant arise from the subsequent lapse of time, since there never has been any such incorporated Lutheran church there, capable of taking the donation. If, therefore, it were necessary, that there should be a grantee, legally capable of taking, in order to support the donation in this case, it would be utterly void at law, and the land might be
*583] resumed at *pleasure. To be sure, if an unincorporated society of Lutherans had, upon the faith of such donation, built a church thereon, with the consent of Beatty, that might furnish a strong ground, why a court of equity should compel him to convey the same to trustees in perpetuity, for their use ; or, at least, to execute a declaration of trust, that he and his heirs should hold the same for their use. For such conduct would amount to a contract with the persons so building the church, that he would perfect the donation in their favor ; and a refusal to do it, would be a fraud

upon them, which a court of equity ought to redress. And if the town of Georgetown had been capable of holding such a lot, for such uses, there would be no difficulty in considering the town as the grantee, under such circumstances; since the uses would be of a public and pious nature, beneficial to the inhabitants generally. But it does not appear, that Georgetown, in 1769, nor indeed, until its incorporation in 1789, was a corporation, so as to be capable of holding lands as an incident to its corporate powers.

If the appropriation, therefore, is to be deemed valid at all, it must be upon other principles than those, which ordinarily apply between grantor and grantee. And we think it may be supported, as a dedication of the lot to public and pious uses. The bill of rights of Maryland gives validity to "any sale, gift, lease or devise of any quantity of land, not exceeding two acres, for a church, meeting or other house of worship, and for a burying-ground, which shall be improved, enjoyed or used only for such purpose." To this extent, at least, it recognises the doctrines of the statute of Elizabeth for charitable uses, under which it is well known, that such uses would be upheld, although there were no specific grantee or trustee. In the case of the *Town of Pawlet* v. *Clarke*, 9 Cranch 292, 331, this court considered cases of an appropriation or dedication of property to public or religious uses, as an exception to the general rule requiring a particular grantee, and like the dedication of a highway to the public.(*a*) There *is no pretence to say, that the present appropriation was ever attempted to be withdrawn by Charles Beatty, during his lifetime, and he did not die until about sixteen years ago. On the contrary, the original plan and appropriation were constantly kept in view by all the legislative acts passed on the subject of this addition. The plan was required to be recorded, as an evidence of title, and its incorporation into the limits of Georgetown had reference to it. We think, then, it might at all times have been enforced as a charitable and pious use, through the intervention of the government as *parens patriæ*, by its attorney-general or other law-officer. It was originally consecrated for a religious purpose; it has become a depository of the dead; and it cannot now be resumed by the heirs of Charles Beatty. [*584

The next question is, as to the competency of the plaintiffs to maintain the present suit. If they are proved to be the regularly appointed committee of a voluntary society of Lutherans, in actual possession of the premises, and acting by their direction, to prevent a disturbance of that possession, under circumstances like those stated in the bill, we do not perceive any serious objection to their right to maintain the suit. It is a case, where no action at law, even if one could be brought by the voluntary society (which it would be difficult to maintain), would afford an adequate and complete remedy. This is not the case of a mere private trespass; but a public nuisance, going to the irreparable injury of the Georgetown congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement, is to be taken from them, the sepulchres of the dead are to be violated; the feelings of religion, and the sentiments of natural affection of the kindred and friends of the deceased are to be wounded; and the memo-

(*a*) See also, Brown *v.* Porter, 10 Mass. 93; Weston *v.* Hunt, 2 Id. 500; Inhabitants of Shapleigh *v.* Gilman, 13 Id. 190; Buzzard's Case, 12 Jac. I., C. B., 2 Mod. Ent. 413 *b*.

rials erected by piety or love, to the memory of the good, are to be removed so as to leave no trace of the last home of their ancestry to those, who may visit the spot in future generations. It cannot be, that such acts are to
*585] be *redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery, operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living. The only difficulty is, whether the plaintiffs have shown in themselves a sufficient authority, since it is not evidenced by any formal vote or writing. If it were necessary to decide the case on this point, we should incline to think, that under all the circumstances it might be fairly presumed. But it is not necessary to decide the case on this point; because, we think it one of those cases, in which certain persons, belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society, for purposes common to all, and beneficial to all. Thus, some of the parishioners may sue a parson to establish a general *modus*, without joining all; and some of the members of a voluntary society or company, when the parties are very numerous, may sue for an account against others, without joining all. Cooper's Eq. Plead. 40, 41; Mitf. Plead. 145. And upon the whole, we are of opinion that the decree of the circuit court ought to be affirmed, with costs.(*a*)

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is considered, ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*586] *William S. Buckner, a Citizen of New York, *v.* Finley and Van Lear, Citizens of the state of Maryland.

Bills of exchange.

Bills of exchange drawn in one state of the Union, on persons living in another state, partake of the character of foreign bills, and ought to be so treated in the courts of the United States.[1]

For all national purposes embraced by the federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws; in all other respect, the states are necessarily foreign and independent of each other. p. 590.

Certificate of Division from the Circuit Court of the United States for the Maryland district. The action was instituted in the circuit court, on a bill of exchange, drawn on the 16th of March 1819, by the defendants, at

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(*a*) If a layman, by the dissolution of monasteries, hath a monastery in which there is a church, part of it, and he suffers the parishioners for a long time to come there to hear divine service, and to use it as a parish church; that shall give a jurisdiction to the ordinary to order the seats; because that now, in fact, it becomes the parish church, which before was not subject to the ordinary: adjudged 12 Jac. I., C. B., Buzzard's Case, 2 Mod. Ent. 413 *b*.

[1] Dickins *v.* Beal, 10 Pet. 579; United States Bank *v.* Daniel, 12 Id. 54.

Baltimore, on Stephen Dever, at New Orleans, in favor of Rosewell L. Colt, or order, of Baltimore, and by him indorsed, for value received, to the plaintiff, a citizen of New York. A judgment was confessed by the defendants for $2100, subject to the opinion of the court, upon a case stated; and which presented the question, whether the circuit court had jurisdiction in the case.

The defendants objected to the jurisdiction, on the ground, that the bill was an inland, and not a foreign, bill of exchange; and therefore, the defendants, and the drawee, Rosewell L. Colt, being citizens of Maryland, although the bill was regularly in the hands of the plaintiff, as indorsee, who was a citizen of a different state, the circuit court had no cognisance of the claim.

The provision of the act of congress upon which the question arose, is in the 11th section of the "act to establish the judicial powers of the courts of the United States," passed September 24th, 1789. The words of the act are, "nor shall any district or circuit court have cognisance of any suit to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made; except in cases of foreign bills of exchange."

*The judges of the circuit court divided in opinion on the question of jurisdiction, and ordered the record to be certified to this court. [*587

The case was argued by *Hoffman*, for the defendants, no counsel appearing for the plaintiff. He contended:

1. That in all cases of promissory notes, inland bills of exchange, and other *choses in action*, an assignee, or an indorsee, is incompetent to sue the maker in the courts of the United States, except where such suit might have been there prosecuted, had there been no assignment or indorsement; and that as the payee of this bill of exchange, when calling on the drawers, must have resorted to the state tribunals, the indorsee must be referred to the same tribunals.

2. That this being a bill of exchange drawn within this Union, and payable there, viz., between citizens of sister states, cannot be regarded as a foreign bill, within the sound interpretation of the 11th section of the judiciary act of 1789; but that it is an inland bill, which, like promissory notes, remains for ever subject to state jurisdiction, though transferred to citizens of another state.

3. That congress did not design, by the exception contained in that section, to legislate in reference to citizens of the different states of this Union, or to confer on the circuit courts a jurisdiction in regard to them, so as to comprehend in their favor, as "foreign bills," those that should be drawn between citizens of sister states.

4. That congress used this expression in its popular sense, which, indeed, is the only one in which that body could have thus legislated; and that bills foreign to the Union, viz., bills drawn in or on countries alien to the sovereignity of the United States, were the only foreign bills that either the policy, or the obvious meaning of the exception embraces.

5. That foreign countries, and foreign bills, are correlative expressions; whereas, no sister state is foreign to the Union, nor is any sister state truly

foreign to any other state of the Union. Congress, therefore, when legislating in reference to jurisdiction, must have had that Union and foreign
*588] states *in its view; and designed to legislate, under this exception, only in reference to bills drawn in or on the Union, but in or on any country other than one of the states of this Union; they being, in regard to the Union itself, one, and not foreign; and also in regard to each other, not foreign, either in a popular or strictly legal sense.

6. That the exception in regard to foreign bills was, perhaps, founded on the policy of extending to aliens (who were most likely to become the holders of bills drawn here on foreign countries, or drawn in foreign countries on this) the benefit of the national tribunals; and was not designed to embrace citizens of different states, or to distinguish such bills from promissory notes, which remain with the state courts, though in the hands of citizens of different states, or to distinguish such bills from promissory notes, which remain with the state courts, though in the hands of citizens of different states. Such citizens, though *bonâ fide* indorsees, and by full value, being incompetent to sue makers in the federal courts, though they are competent to sue their own indorsers, because every indorsement is a new and independent contract, as between indorser and indorsee.

7. That the legal, no less than the popular, understanding, has classed such bills under the head of inland; and that being the *norma loquendi*, renders it highly probable, that congress had no other bills in view, than such as are drawn in or on counties wholly foreign to the jurisdiction and sovereignty of this Union.

8. That although most of the legislatures of the different states have allowed damages on the protest of bills drawn on sister states; yet nearly, without exception, the word "inland" has been applied to such bills, and the word "foreign" to those drawn in or on other countries. For the popular and legal sense of the expression "inland bills," Griffith's Law Register, 627, 696, 697, 799, 943, 1006, 1007, 1067, 1140.

9. The question is *res nova* in this court, but has been the subject of judicial discussion in three instances, viz., in *Miller* v. *Hackley*, 5 Johns. 375;[1] 1 Const. Rep. (S. C.) 100; and in *Lonsdale* v. *Brown* (4 W. C. C. 149).

*589] *Mr. Hoffman stated, that he was not informed, whether in this last case, the point turned on the question of jurisdiction, or only on the necessity of protest, as was the case in two other cases. The case in New York holds such bills to be inland. But had the decisions in the state courts been uniformly otherwise, it is difficult to conceive, how the states are to be regarded as foreign to each other in the national tribunal. A bill may well be foreign in the state courts, and inland in the federal courts; and the constitutionality of the very exception contained in the 11th section of the judiciary act, if designed to embrace within its jurisdiction bills between state and state, seems to have been doubted by Mr. Justice Story in 1 Mason 251. But if this point be waived, the only inquiry is, as to the probable intention of congress; which, the plaintiff contends, was to embrace only such bills as are drawn between countries actually foreign to

[1] The case of Miller *v.* Hackley was overruled in Halliday *v.* McDougall, 20 Wend. 81; s. c. 22 Id. 264.

each other. Chancellor KENT, in his Commentaries, vol. 3, p. 63, inclines to the opinion, that bills between the states of the Union are foreign in all courts; but the point of protest appears to have mainly occupied the mind of the learned writer; and the question of jurisdiction, arising from the sound construction of the act of congress, does not specially claim his attention.

WASHINGTON, Justice, delivered the opinion of the court.—This is an action of *assumpsit*, founded on a bill of exchange, drawn at Baltimore, in the state of Maryland, upon Stephen Dever, at New Orleans, in favor of R. L. Colt, a citizen of Maryland, who indorsed the same to the plaintiff, a citizen of New York. The action was brought in the circuit court of the United States for the district of Maryland; and upon a case agreed, stating the above facts, the judges of that court were divided in opinion, whether they could entertain jurisdiction of the cause, upon the ground insisted upon by the defendants' counsel, that the bill was to be considered as inland. The difficulty which occasioned the adjournment of the cause to this court, is produced by the 11th section of the judiciary act of 1789, which declares that no district or circuit court shall have "cognisance of *any suit [*590
to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." The only question is, whether the bill on which the suit is founded, is to be considered a foreign bill of exchange?

It is to be regretted, that so little aid in determining this question is to be obtained from the decided cases, either in England or in the United States. Sir William Blackstone, in his Commentaries (vol. 2, p. 467) distinguishes foreign from inland bills, by defining the former as bills drawn by a merchant residing abroad, upon his correspondent in England, or *vice versâ*; and the latter, as those drawn by one person on another, when both drawer and drawee reside within the same kingdom. Chitty, p. 16, and the other writers (Bayley and Kyd) on bills of exchange, are to the same effect; and all of them agree, that until the statutes of 8 & 9 W. III., c. 17, and 3 & 4 Anne, c. 9, which placed these two kinds of bills upon the same footing, and subjected inland bills to the same law and custom of merchants which governed foreign bills, the latter were much more regarded in the eye of the law than the former, of being thought of more public concern in the advancement of trade and commerce.

Applying this definition to the political character of the several states of this Union in relation to each other, we are all clearly of opinion, that bills drawn in one of these states, upon persons living in any other of them, partake of the character of foreign bills, and ought so to be treated. For all national purposes, embraced by the federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign to, and independent of, each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. This sentiment *was expressed, with great [*591
force, by the president of the court of appeals of Virginia, in the

case of *Warder* v. *Arell*, 2 Wash. 298; where he states, that in cases of contracts, the laws of a foreign country, where the contract was made, must govern; and then adds as follows: "The same principle applies, though with no greater force, to the different states of America; for though they from a confederated government, yet the several states retain their individual sovereignties, and, with respect to their municipal regulations, are to each other foreign." This character of the laws of one state in relation to the others, is strongly exemplified in the particular subject under consideration; which is governed, as to the necessity of protest and rate of damages, by different rules, in the different states. In none of these laws, however, so far as we can discover from Griffith's Law Register, to which we were referred by the counsel, except those of Virginia, are bills drawn in one state upon another, designated as inland; although the damages allowed upon protested bills of that description are, generally, and with great propriety, lower than upon bills drawn upon a country foreign to the United States, since the disappointment and injury to the holder must always be greater in the latter than in the former case. It is for the same reason, no doubt, that, by the laws of most of the states, bills drawn in and upon the same state, and protested, are either exempt from damages altogether, or the rate is lower upon them than upon bills drawn on some other of the states.

The only case which was cited at the bar, or which has come to our knowledge, to show that a bill drawn in one state upon a person in any other of the states, is an inland bill, is that of *Miller* v. *Hackley*, 5 Johns. 375. Alluding to this case, in the third volume of his Commentaries, p. 63, in a note, Chancellor KENT remarks very truly, that the opinion was not given on the point on which the decision rested; and he adds, that it was rather the opinion of Mr. Justice VAN NESS than that of the court. It is not unlikely, besides, that that opinion was, in no small degree, influenced by what is said by Judge TUCKER, in a note to 2 Bl. Com. *467; *592] which was much relied upon by one of the counsel, in the argument, where the author would appear to define an inland bill, as being one drawn by a person residing in one state on another within the United States. He is so understood by Chancellor KENT, in the passage which has been referred to: but this is undoubtedly by a mistake, as the note manifestly refers to the laws of Virginia; and by an act of that state, passed on the 28th of December 1795, it is expressly declared, that all bills of exchange drawn by any person residing in that state, on a person in the United States, shall be considered in all cases as inland bills. The case of *Miller* v. *Hackley*, therefore, can hardly be considered as an authority for the position which it was intended to remain. We think it cannot be so considered by the court of New York, since the principle supposed to be decided in that case, would seem to be directly at variance with the uniform decisions of the same courts upon the subject of judgments rendered in the tribunals of the sister states. In the case of *Hitchcock* v. *Aicken*, 1 Caines 460, all the judges seem to have treated those judgments as foreign in the courts of New York; and the only point of difference between them grew out of the construction of the first section of the fourth article of the constitution of the United States, and the act of congress of the 26th of May 1790, ch. 38, respecting the effects of those judgments, and the credit to be given to them in the courts of the sister states.

It would seem, from a note to the case of *Bartlet* v. *Knight*, 1 Mass. 430, where a collection of state decisions on the same subject is given, that these judgments had, generally, if not universally, been considered as foreign by the courts of many of the states. If this be so, it is difficult to understand, upon what principle, bills of exchange drawn in one state upon another state can be considered as inland ; unless in a state where they are declared to be such by a statute of that state. It has not been our good fortune to see the case of *Duncan* v. *Course*, 1 South Carolina Constitutional Reports 100 ; but the note above referred to in 3 Kent's Com. informs us, that it decides that bills of this description are to be *considered in the light of foreign bills ; and the learned commentator concludes, upon the whole, and [*593 principally upon the ground of the decision just quoted, that the weight of American authority is on that side.

That it is so, in respect to the necessity of protesting bills of that description, was not very strenuously controverted by the counsel for the defendant. But he insists, that under a just construction of the 11th section of the judicary act, concerning the jurisdiction of the federal courts, these bills ought to be considered and treated as inland. The argument is, that the mischief intended to be remedied by the provisions in the latter part of that section, by the assignment of promissory notes and other *choses in action*, is the same in relation to bills of exchange of the character under consideration. We are of a different opinion. The policy which probably dictated this provision in the above section, was to prevent frauds upon the jurisdiction of those courts, by pretended assignments of bonds, notes and bills of exchange, strictly inland ; and as these evidences of debt generally concern the internal negotiation of the inhabitants of the same state, and would seldom find their way fairly into the hands of persons residing in another state, the prohibition as to them would impose a very trifling restriction, if any, upon the commercial intercourse of the different states with each other. It is quite otherwise as to the bills drawn in one state upon another. They answer all the purposes of remittances, and of commercial facilities, equally with bills drawn upon other countries, or *vice versâ ;* and if a choice of jurisdictions be important to the credit of bills of the latter class, which it undoubtedly is, it must be equally so, to that of the former. Nor does the reason for restraining the transfer of other *choses in action*, apply to bills of exchange of this description ; which, from their commercial character, might be expected to pass fairly into the hands of persons residing in the different states of the Union. We conclude, upon the whole, that in no point of view ought they to be considered otherwise than as foreign bills.

*This cause came on to be heard, on the transcript of the record [*594 from the circuit court of the United States for the district of Maryland, and on the questions and points on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, and was argued by counsel : On consideration whereof, it is the opinion of this court, that the bill of exchange on which this action is brought, ought to be considered as a foreign bill, within the meaning of the 11th section of the judiciary act of the 24th of September 1789, and that the said circuit court has jurisdiction of this cause ; whereupon, it is considered, ordered and adjudged by this court, that it be certified to the

said circuit court for the district of Maryland, that the bill of exchange on which this action is brought, ought to be considered as a foreign bill, within the meaning of the 11th section of the judiciary act of the 24th of September 1789; and that that court has jurisdiction of the cause.(a)

(a) Opinion of Mr. Justice WASHINGTON in the circuit court of the United States for the eastern district of Pennsylvania, in 1821, in the case of Lonsdale *v.* Brown.

Among the reasons assigned for a new trial is the following: That a protest for non-acceptance of an inland bill of exchange was admitted in evidence. The inquiry then is, whether a bill drawn in New Orleans, upon a person living in Pennsylvania, is an inland or a foreign bill? To this inquiry my attention has been directed, because to this alone, the arguments of the counsel were applied. The question is in a great measure new, as well as difficult, and involves general principles in relation to the federal union of these states, which I consider as being highly important.

Foreign and inland, when applied to bills of exchange, are terms merely technical, which we have borrowed from the English law, to which it is proper we should refer for their true meaning. The English elementary writers, in distinguishing the one kind of bill from the other, make use of different expressions, all of which, however, seem to be intended to mean the same thing. Kyd, in his treatise, p. 8, describes foreign bills to be those which pass from one country to another, and inland bills, such as pass between persons residing in the same country. Evans, p. 2, states a foreign bill to be one which is drawn by a creditor in one kingdom, upon his debtor in another, and an inland bill, as one where the drawer and the drawee reside in this kingdom. Blackstone, in his Commentaries, Vol. 2. p. 407, uses the word abroad, when speaking of a foreign bill; and kingdom, in reference to an inland bill.

If the phrase *kingdom* is to be taken in the strict sense, to mean the territories belonging to the king, it would follow, that bills drawn in the West Indies upon England, would be considered as an inland; which they most unqestionably are not. No direct authority was produced by the counsel on either side, nor have I been able to meet with any, as to the particular character of bills drawn out of England, but within the king's dominions, on England. It was said by TREBY, in the case of Bromwick *v.* Lloyd, 2 Lutw. 1582, "that bills of exchange, at first, extended only to merchant strangers, trading with English merchants, and afterward to inland bills between merchants trading, the one with the other, here in England, and afterwards to all traders, and of late to all persons, trafficking or not:" from which expression, it would seem, that inland bills were confined to persons residing in England.

In the argument of this cause, it was said by counsel, that bills drawn in Scotland upon England, since the union, were treated as inland, and if any direct decision to that effect had been produced, I should have deemed it worthy of serious consideration. I have spared no pains, during the vacation, in searching for such a decision, but without success. Marius, p. 2, uses some loose expressions to that effect, but it would be very unsafe to rely upon them as authority. In Swift's Treatise on Bills, p. 291, the learned authority lays it down, that bills drawn in Ireland, before the union, and in the colonies, on England, were treated as foreign bills. He adds: "I know not whether the question has arisen, how a bill shall be considered, drawn in any other state in the Union; but the practice has been, to admit protests for non-acceptance and non-payment of bills, under the official seal of notaries-public, to be conclusive evidence of the fact, in like manner as in the case of foreign bills; of course, they may be considered to be foreign bills." I refer to what is here stated, not as the kind of authority which I was in search of, but as the statement of a learned judge, in a highly commercial state, in relation to the practice of lawyers and merchants upon the subject. In the case of King *v.* Walker, 1 W. Bl. 286, it was said by counsel, and not contradicted by the bench or bar, "that it has been questioned whether Scotch bills of exchange were inland or foreign bills, and been determined by Chief Justice RYDER, at Guildhall, that they were foreign bills."

That inland bills, prior to the statute of the 8 & 9 Wm. III., c. 17, were considered

as confined to England, is strongly to be inferred from the provisions of that statute, which speaks of bills drawn at any place in the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed; although Wales and Berwick had been, previous to that statute, as firmly united to England as Scotland was after the union. It is possible, that naming Scotland and the town of Berwick, was unnecessary, and that they might have been considered as included under the general terms, kingdom of England. However this might have been, it would seem, that the legislature which enacted that statute thought otherwise, or it is not likely that they would have been included by express words.

If bills drawn in England on Scotland be inland bills, they are of a particular character, as it is perfectly clear, that they are not within the provision of the above statute, and consequently cannot be protested; nor are they entitled to any of the other privileges bestowed by that statute upon inland bills. And if, in fact, they are so treated, it is inconceivable, that that portion of the British dominions, and even England, should for so long a period, have been subjected to the inconvenience of having a species of commercial paper, which is neither a foreign bill nor a statutory inland bill. Unless they are considered and treated as of the former description, it is highly probable, that the statute 8 & 9 Wm. III. would have been extended to Scotland, as it was to Wales, and the town of Berwick.

If, in point of fact, those bills are treated as foreign (a conclusion to which my mind strongly inclines), it cannot but have a strong bearing upon this case. The union between England and Scotland is, politically speaking, as intimate as between England and Wales, or between the different counties of either. They form one kingdom; are subject to the government; and are represented in the same legislative body; and although the laws and customs of Scotland, in force at the time of the union, were suffered to continue, yet they are alterable by the parliament of the Great Britain, even as they relate to private rights; if the alternation should be deemed for the evident utility of the people of Scotland. How different is the union of these states! They are, in their separate political capacities, sovereign and independent of each other, except so far as they have united for their common defence and for national purposes. They have each a constitution and form of government, with all the attributes of sovereignty. As to matters of national concern, they form one government, are subject to the same laws, and may be empathically denominated one people. In all other respects, they are as distinct as different forms of government and different laws can render them. It is true, that the citizens of each state are entitled to all the privileges and immunities of citizens in every other state; that the sovereignty of the states in relation to fugitives from justice, and from service, is limited; and that each state is bound to give full faith and credit to the public acts, records and judicial proceedings of her sister states. But these privileges and disabilities are mere creatures of the constitution; and it is quite fair to argue, that the framers of that instrument deemed it necessary to secure them by express provisions.

In the case of Warder *v.* Arell, 2 Wash. 282, the question, in part, was, whether the tender laws of Pennsylvania, where the contract was made, ought to be regarded by the courts of Virginia, where the suit was brought? and throughout the opinions delivered by the judges, Pennsylvania was treated as a foreign country. The president of the court is express upon this point. He observes, that "in cases of contracts, the law of a foreign country, where the contract is made, must govern. The same principle applies, through with no greater force, to the different states of America; for though they form a confederated government, yet the several states retain their individual sovereignties, and with respect in their municipal laws, are to each other foreign." If the union between the states be so complete, that a bill drawn in one state upon another is to be treated as an inland bill; one would suppose that a discharge under the insolvent laws of one state, though the creditor resided in another state, would be regarded as a discharge, in every other state. And yet the law is otherwise laid down in Massachusetts and New York, and perhaps, in other states. Van

Raugh *v.* Arsdaln, 3 Caines 154 ; Smith *v.* Smith, 2 Johns. 236. These decisions are in strict conformity with the rule in England, that a discharge under a foreign bankrupt law, is no bar of a debt contracted in England, due to a creditor residing there. 1 East 6. In Pennsylvania, the rule of reciprocity is observed, and the courts here will discharge on common bail, a person who has been discharged by the insolvent laws of another state; if the court of that state use the same courtesy towards the citizens of Pennsylvania. 2 Binn. 20. Even the judgments of other states are considered, in the courts of Vermont, Massachusetts and New York, as being so far foreign, that the grounds of them may be inquired into, when impeached by the defendant. Bartlet *v.* Knight, 1 Mass. 401; Hitchcock *v.* Aicken, 1 Caines 460. In Hubbell *v.* Coudrey, 5 Johns. 132, the court considered a judgment rendered in the state of Connecticut as a simple-contract debt; and so a judgment rendered in a French tribunal, would be considered in the English and American courts.

It seems very clear, that all the above cases proceed upon the principles laid down by President Pendleton, before noticed, "that with respect to their municipal laws, the states are foreign to each other." And if this be so, I am at a loss to conceive, how a bill of exchange, drawn in one state upon a person residing in another, can be considered as an inland bill. The inconvenience which would result by so considering them, would lead me to hestiate long, before I could be induced to do it; unless, indeed, I were pressed by decisions of the courts of the United States, or a current of state decisions. It may be sufficient to point out one of the inconveniences alluded to, viz., the necessity of proving by depositions or witnesses, in every suit upon such a bill, presentation and a demand; since the protest could not be given in evidence to prove the fact. It is greatly to be feared, that such a necessity would, in no small degree, cramp the circulation of this species of paper.

The only case I have met with, in which these bills have been considered as inland, is that of Miller *v.* Hackley, 5 Johns. 375; which I acknowledge to be the decisison of a court greatly to be respected. It is, however, a single authority, and this particular question does not appear to have been very minutely examined by the bench or bar. Indeed, as the cause was decided upon the ground of want of notice of the protest, it was immaterial, whether the bill was foreign or inland; since the objection was equally fatal in both cases; and it was, therefore, the less necessary to examine with attention the other point. It may be worthy of remark, that the counsel for the plaintiff in that case placed great reliance upon a note in the 2d vol. of Tucker's Blackstone, p. 467; in which the learned editor, speaking of inland bills of exchange, in reference to Virginia, describes them as bills drawn in that state or any other of the states. But the counsel could not have been apprised of the circumstance, that by a law of that state, passed on the 28th of December 1798, it was decided, that the bills of exchange drawn by any person residing in Virginia, on any person in the United States, should be considered as an inland bill; and the act proceeds to give damages and interest in case the same should be protested. I remark further, that it is not easy to reconcile the decision in Miller *v.* Hackley, as to this point, with those before mentioned, which treat the states, in respect to their municipal laws, as foreign to each other.

I believe, that the general opinion of commercial and legal men in the United States, has not corresponded with the doctorine laid down in the above case. This may fairly be concluded, from the circumstance, that those bills have uniformly been protested; and, so far as I am informed, this is the second case only in which the validity of those protests, or their admissibility in evidence, has been questioned. In Swift's Essay on Bills, before referred to, p. 336, the author observes, that "it is generally understood by merchants in this state, that on bills drawn here on a foreign country, and returned protested, twenty per cent. damages is allowed; and that on bills drawn on any other state in the Union (which are to be considered as foreign bills), two and a half per cent. shall be allowed, in lieu of all costs, charges and damages." Upon the whole, I am of opinion, that upon principle, as well as for the sake of commercial

convenience, the bill in question is to be considered as a foreign bill, and therefore, that the protest was promptly admitted in evidence.[1]

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*English, Smith, Mackall and Hoffman, Appellants, *v.* Catharine Foxall, Appellee. [*595

English, Smith, Mackall, Hoffman, McKenny and others, Appellants, *v.* Catharine Foxall, Appellee.

Marriage-settlement.—Relief in equity.

A marriage-settlement provided, that the trustees, after the death of the husband, should stand possessed of a bond, executed to them by the husband, and of the sum of $37,038 to be received by them, upon trust to place out the same, when it should come into their hands, at interest, on freehold securities, or invest it, or any part of it, in the purchase of stock of the United States of North America, or bank-stock there, with the approbation of the wife; and to call in and replace the same, and re-invest the same, and the produce thereof, from time to time, upon or in such securities or stock, with the approbation of the wife.

It is not an unreasonable interpretation, to say, that the wife, who survived the husband, was to have a controlling agency, within the limitation prescribed by the contract; she has not an arbitrary and unlimited discretion. The investment is restricted to three objects: freehold securities, United States stock, or bank-stock; and the trustees are not authorized to make any other investment; the trustees are bound to make the investment in any one of the funds mentioned, which the wife might request or direct.

The husband, by his will, confirmed the marriage-settlement, and he further declared, that if the sum of $37,038, secured to be paid to the trustees, should, at any time, be found insufficient to raise and bring into the hands of the trustees the clear annual sum of $2222.22, the annuity secured to be paid to his wife by the settlement, then, the trustees of his will should from time to time, transfer to themselves, as trustees of the settlement, out of the residuum of his estate, such sum or sums of money as might, from time to time, be found necessary to make up any deficiency there might happen to be between the current amount of the interest and produce of the principal sum, and the amount of the annuity; so that, in no event, less than $2222.22 should be raised annually for his wife, or for her benefit, in the United States.

The personal estate of the husband, exclusive of the sum placed in the hands of the trustees of the annuity, was so invested as to produce six per centum per annum, and the direction of the wife to keep invested in six per cent. stock of the United States the $37,038, produced a deficiency in the annuity, which she claimed to have made up from the residuary estate. The wife had a right to claim this deficiency to be so made up.

There is no doubt, but that, under the general prayer, in a bill in chancery, for general relief, other relief may be granted than that which is particularly prayed for; but such relief must be agreeable to the case made by the bill.[2]

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[1] By an act of the state of Pennsylvania, passed the 2d of January 1815, it is enacted, "that the official acts, protests and attestations of all notaries-public, acting by the authority of the commonwealth, certified according to law, under their respective hands and seals of office, may be read and received in evidence of the facts therein certified, in all suits that now are or hereafter shall be depending; provided, that any party may be permitted to contradict by other evidence any such certificate." The question, of course, in the above case, whether the protest, was or was not an official act, depended, in the view of the counsel who argued this cause, upon the main question, whether the bill was foreign or inland. If the former, the protest was necessary, and was, therefore, an official act. The case of Browne *v.* Philadelphia Bank, 6 Serg. & Rawle 484, in which it was decided, that a notarial protest is evidence of demand, and of notice to the indorser of a promissory note, under the above act, was not in point; nor was it cited by counsel, when the above case was decided.

[2] S. P. Holt *v.* Rogers, 8 Pet. 420; Texas *v.* Hardenberg, 10 Wall. 86; Hayward *v.* National Bank, 96 U. S. 614–15.

APPEAL from the Circuit Court of the District of Columbia, and county of Washington. *The appellee in these cases was the widow of *596] Henry Foxall; and the appellants in the first case were the trustees named in a marriage-settlement, executed by Henry Foxall, at the time of his marriage with the appellee; and in the second, they were the trustees, executors and legatees named in the will.

On the marriage of Henry Foxall with the appellee, in England, in 1816, a contract was entered into for an annual income of 500*l.* sterling, or $2222.22, for the life of Mrs. Foxall; to commence at his death, for her jointure, and in lieu of her dower, and on the decease of Mr. Foxall, the sum of $37,038, was then to be raised and paid to the trustees, for the purpose of securing the same. In the settlement, it was declared, that upon the treaty for the marriage, it was agreed between the parties thereto, Henry Foxall and Catharine Holland, that should she survive him, he would provide and settle on her an annual income 500*l.* sterling, equal to $2222.22, in the nature of a jointure for life, and in bar of dower; that he should devise to her his messuage in Georgetown, and assign her his furniture and carriage for life, in increase of her jointure; that her property, which was wholly personal, should vest in her, but that all future property should be at her disposal, as if she was a *feme sole;* and that the children of the marriage, as well as a present daughter of Henry Foxall, should be dependent on him for support. The marriage-settlement also recited, that in part performance of the same, Henry Foxall had made his bond in the penalty of $74,116, to the trustees, to be void on payment by his executors, within six months from his death, of $37,038, with interest at six per cent. It was then declared by the deed, that in case the appellee should survive said Henry Foxall, the said trustees should stand possessed of said bond, and said $37.038, to be received by them "upon trust to place out the same, when it shall come into their hands, at interest, on freehold securities, or invest it, or any part of it, in the purchase of stock of the United States of North America, or bank-stock there, with the approbation of said Catharine Hol- *597] land, and to call in *and replace and re-invest the same, and the produce thereof, from time to time, upon or in such securities or stock, with the approbation of said Catharine Holland; and to pay the interest and dividends of the said sum, securities or stocks, from time to time, as the same should be received, to her the said Catharine Holland, or her assigns, or permit her or them to receive such interest or dividends for her life, for her separate use," &c. And after her death, upon trust to pay transfer and assign said $37,038, and the securities or stocks in or upon which it should be placed out or invested, and the dividends, &c., unto the executors or assigns of the said Henry Foxall.

Mr. Foxall died, in England, in 1823, having left a will dated the 12th of April 1823. The first clause in the will was in these words: "First, I do hereby ratify and confirm in every respect the settlement made upon my marriage with my dear wife Catharine, and do direct the provisions and trusts of the same, and the condition of the bond entered into by me upon my said marriage, to be faithfully performed and observed;" and afterwards, "I do further direct that if the sum of $37,038, secured to be paid to the trustees of said settlement, should, at any time, and from time to time, be found insufficient to raise, within these United States, and bring into the

hands of the said trustees of said settlement there, the clear annual sum of $2222.22, the annuity secured to be paid to my said wife by the said settlement; then and in such case, the trustees of this my will do and shall, from time to time, transfer to themselves, as trustees of said settlement, out of the residuum of my estate, such sum or sums of money as may, from time to time, be found necessary to make up any deficiency there may happen to be between the current amount of the interest and produce of said principal sum, and the amount of said annuity, so as that, in no event, less than the said sum of $2222.22 shall be annually raised for my said wife, or for her benefit, within the United States." He also gave her, over and above the provisions made for her benefit by said settlement, a legacy of $500; the *plate, &c., purchased since the marriage, and all his servants. He then gave the $37,038, "stipulated to be raised and paid to the [*598 trustees of his marriage settlement," after the death of his said wife, "to the children of the marriage, absolutely;" and if none, directed it, after the death of his wife, to sink into the residuum of his estate. The will contained a proviso, that any depreciation in the value of his property should be borne equally by all his legatees, "his wife, and any child or children he might have by her, excepted."

Hoffman, Smith, McCall and McKenney were appointed executors of the will. There were no children of the marriage, and but one daughter, Mrs. McKenney, by a former wife. The estimate placed by Mr. Foxall upon his property, at the time of his decease, was $270,000. In December 1827, the trustees valued the real estate at $70,000, and the personalty at $88,000. At the decease of Mr. Foxall, in 1823, $32,645 of six per cent. stock of the United States, stood in his name; and at that time, the government stocks were as much above par as they were when this bill was filed. Mr. Foxall was, at that time, well acquainted with the price of government stocks, and of the stocks of the local banks, the latter of which, it was in evidence, could have been purchased at that time at ninety-six per cent.

On the 17th of July 1824, Mrs. Foxall being then in England, the executors addressed the following letter to her: "The executors of your late husband are desirous of paying over to the trustees of the marriage-settlement the sum of $37,038, according to the directions in the will. It is deemed necessary that you should give instructions to the trustees named in the marriage-settlement, before they can feel themselves authorized to invest the money. You will please to communicate, at as early a date as convenient, your wishes on this subject."

And on the same day, the trustees addressed the following: "The executors of your late husband, 'the Reverend Henry *Foxall,' are ready [*599 to pay over to us, the trustees named in the marriage-settlement, the sum of $37,038, for the purpose of providing the annuity secured to you in said settlement. In said settlement, it is stipulated, that we are to place it out 'at interest on freehold security, or invest it, or any part of it, in the purchase of stock of the United States of North America, or bank-stock there, with the approbation of Mrs. Foxall:' we are, therefore, compelled to wait for your instructions. The will, you will doubtless have perceived, has made provision, that in case the said fund of $37,038 should not produce in interest the annual payment to be made to you of $2222.22, there shall be provided from his estates whatever may be deficient, so that in no case shall

you receive a less amount. It is presumed, therefore, you will give the trustees a general authority to manage said trust fund, so as to produce the best interest which can be safely done; unless such general authority be given, we should have to wait for new instructions, whenever any payment of principal may come into our hands. It is hightly probable, that when you answer the letter sent with a copy of the will, you will give such directions as we have alluded to. If you have not, you will perceive the necessity of having it done without delay; as we cannot move in the business, until we have your directions, which may be given either by letter or any other authentic writing. It will be necessary, in case you do not come to this country, that you authorize some person here to receive for you the annuity, as we are bound to pay it within the United States. We are thus particular, as it takes at least three or four months to get an answer from the interior of England."

To these letters the following answer was written by Mrs. Foxall, and received by the executors and trustees:

"Gentlemen:—In reply to your letter of the 17th of July last, in which you request my approbation relative to the investment of the $37,038, to provide my annuity according to my marriage-settlement, I acquaint you, that in the judgment of my late husband, and according to my own, the stock of the United States of North America is preferred by *me, to freehold security or bank-stock; and that I shall approve of the investment of the principal sum in that fund, and not on real security or bank-stock, and beg it may be so invested."

*600]

Mrs. Foxall returned to the United States in December 1824, and a similar application was made to her by the trustees, with the same effect; and she remained in the belief that the investment was made, according to her wishes, in stocks of the United States: $10,645, six per cent. stock, were afterwards paid off by the government, without the knowledge of Mrs. Foxall; and of this sum, $10,000 were also, without her knowledge, loaned to one of the trustees and to another person, on their promissory note, and secured by a pledge of $12,000, stock of the Farmers' and Mechanics' Bank of Georgetown. In 1826, Mrs. Foxall came to know that no separate investment had been made for her annuity; and she then, in writing, requested that the sum of $37,038 should be invested in stock of the United States for that purpose. This was refused by the executors and trustees; they contending that the right was with them to make the investment as they should think best, free from the control of Mrs. Foxall, and without her approbation.

Upon this refusal, Mrs. Foxall filed the bill in the circuit court, against the trustees, claiming to have the provisions of the marriage-settlement carried into effect, and to have the amount of the same invested in some of the government stocks, in her and their joint names. The bill called for a discovery where the $37,038 had been invested, and to whom in particular it had been loaned; and for general relief.

The trustees, in their answer, submitted themselves to the court, admitting they had ample funds for the purpose, but raised the question, whether Mrs. Foxall has the right to have the $37,038 invested in the stock of the United States, referring to a cross-bill filed by them, for the reasons why

they suppose she has not that right. They stated, that $22,000 were then invested in United States stock, and that all the residue of the personal estate was in their hands and invested in real *securities of the most undoubted safety, producing an interest of six per centum per annum. [*601 They denied the right of Mrs. Foxall to the benefit of the provision of the settlement requiring her approbation to the investment, and of that of the will, throwing the loss of such investment upon the residue of the estate, averring them to be inconsistent; and required that she be held to elect between them. And that if her bill, already filed, be considered as an election to take under the settlement, and the investment prayed by her should be decreed, that it should be further decreed, that she should receive the interest of the same, so to be invested, in bar of all claim upon the residuum of the estate, under the provision of the will, for any deficiency. In December 1827, a statement was filed by the trustees, showing the nature of the securities in which the estate was invested; and to whom the moneys paid in had been loaned.

The trustees in the marriage-settlement, the executors of the will of Mr. Foxall, and the daughter of Mr. Foxall, with her husband, Samuel McKenney, filed a bill against Mrs. Foxall, the appellee, the object of which was, to keep the $37,038 in the hands of the trustees of the will, mixed up with the general mass of Mr. Foxall's estate, and to prevent the investment of that sum in the stock of the United States; because so invested, the stocks being above par, it would not produce the full amount of the annuity. The bill denied the right of Mrs. Foxall to select the fund for the investment of the sum of $37,038, and asserted that if she had that right, she must forego the same, in order to enjoy the benefit of the provisions in the will; asserting that the testator, by inserting that clause in his will, providing that every deficiency in the amount of the annuity should be borne by his general estate, intended to curtail the rights of the settlement; and that she must be put to her election between the provisions of the will and those of the settlement.

The answer of Mrs. Foxall to this bill, denied the inconsistency between the provisions of the settlement and the will; contended, that she was entitled to the benefit of both; that she had a right to choose the funds for investment, and to call on the residuum of the estate to made good the deficiency *that might arise from its not producing six per centum to pay her annuity; and declaring, that her husband always advised and recommended her to invest it in United States stock, and intimated her desire to insist on its being so done, even if the loss to arise from it was to fall upon her. [*602

The causes were, by consent, heard together in the circuit court; and that court decreed, in the first cause, that the investment of the $37,038 should be made as she desired, and the interest paid annually to her; and that if such interest fell short of producing $2222,22 (that is, six per cent.) per annum, the deficiency should be paid to her, annually, out of the residuum of the estate in the hands of the trustees. In the second case, the court decreed the bill to be dismissed.

From these decrees, the defendants in the court below, in the first case, and the complainants, in the second case, appealed to this court.

The cases were argued by *Key*, for the appellants; and by *Jones*, for the appellee.

For the *appellants*, it was contended: 1. That the provisions of the deed of settlement and of the will are inconsistent, and that the widow is not entitled to the benefit of both; that she cannot choose the fund for investment, under the deed, and throw the loss from such investment upon others, under the will. 2. That part of the decree which directs the payment of the deficiency from the residuum is erroneous, according to the true construction of the will, which only authorizes such payment, when the funds shall be found insufficient to raise, within the United States, the clear income of $2222.22; and the proof taken in the cause shows that the funds are sufficient, and are now so invested as to produce that sum. 3. The construction of the clause of the deed of settlement giving the widow the exclusive direction of the investment is erroneous. The deed requires it to be made by the trustees, with her approbation, so that both must concur in the investment.

*603] *For the *appellee*, it was argued, that she can require the $37,038 to be separated from the general estate, and invested in the stock of the United States. And if there be any deficiency in the income from the investment, she can charge the same to the general estate: 1st, under the settlement; and 2d, under the will.

Thompson, Justice, delivered the opinion of the court.—These cases come before the court on appeal from the circuit court of the district of Columbia, and have been argued together. The first was a bill filed by Mrs. Foxall against the appellants, as trustees in a marriage-settlement contract, entered into between her and her late husband, Henry Foxall, deceased. The object of this bill was to compel the trustees to carry into effect the marriage contract, according to her construction of it, by separating $37,038 from the general mass of her late husband's estate, and investing the same in stock of the United States.

The appellants, in their answer, admit that they have received funds of the estate of Henry Foxall, to a much larger amount than the $37,038, but allege, that they are also trustees under the provisions of the will of Henry Foxall, and have not invested it in stock of the United States, because it could not be done, without great loss; and that they considered such an investment injudicious and prejudicial to the estate, and to the rights of others interested in the residuum of the estate, and its income. And they aver, that they have securely invested in real securities and bank-stocks, producing an interest of six per cent., the whole of the personal estate except $22,645, in United States stock, purchased by H. Foxall in his lifetime. They admit, they have ample funds, and are willing to make the investment required by the appellee, if the construction of the deed of settlement, which she contends for, should be deemed by the court to be correct.

With this answer, and referring to it, was filed the cross-bill in the second cause, in which the trustees in the marriage-settlement, and Samuel McKenney, who are the executors named in the will of Henry Foxall,
*604] together with *sundry other persons, who are the *cestuis que trust* under the will, are complainants, and Catharine Foxall, defendant.

In this bill, the appellants set forth the will of Henry Foxall, and aver, that by it the whole real and personal estate of the testator is bound to secure to the appellee her annuity. That the investment in the United States stock of the $37,038, would occasion a loss in the income of the whole estate of $600 or $700 a year, which would fall, according to the will, upon the other *cestuis que trust.* They deny the right of the appellee to claim the benefit, of the provisions of the settlement requiring her approbation to the investment, and also that of the will to make up the deficiency, and thereby throwing the loss of such investment upon the residue of the estate ; averring the two provisions to be inconsistent, and requiring the appellee to elect between them ; and praying, that if her bill, already filed, be considered an election to take under the settlement, and the investment prayed by her shall be decreed, that it may be further decreed, that she shall receive the interest of the same, so to be invested, in bar of all clain upon the residuum of the estate, under the provisions of the will, for any deficiency. The answer in this case denies the inconsistency between the provisions of the will and the marriage-settlement, and claims that the appellee is entitled to the benefit of both. That she has the right to choose the funds for investment, and to look to the residuum of the estate to make good the deficiency that may arise from the investment not producing six per cent., so as to pay her annuity of $2222.22.

The court below decreed, in the first cause, that the appellants, as trustees in the will, should transfer to themselves, as trustees in the marriage-settlement, the sum of $37,038, should invest the same in the purchase of stock of the United States, and pay the dividends, from time to time, as received, to Catharine Foxall, for and during the term of her life ; and that the appellants should make the investment of the said principal sum, jointly in the names of themselves and the said Catharine ; and cause the trust upon which the same is to be invested, to be expressed in the certificates of investment, and upon the books of the treasury department. And *further, in case the said principal sum of $37,038, so invested, should be found sufficient to raise and pay the annuity of $2222.22, that the [*605 deficiency should, from time to time, be made good out of the residuum of the estate, &c. And in the second cause, the court decreed the bill to be dismissed. From both these decrees, appeals have been brought to this court.

The two questions which arise upon these cases are : 1. Whether the appellee, Mrs. Foxall, has a right, under the marriage-settlement, to require the trustees to separate the $37,038 from the general mass of the estate, and invest the same in stock of the United States? 2. If such investment should be insufficient to pay her the annuity of $2222.22, has she a right to have the deficiency made up out of the general estate, either under the marriage settlement, or under the will of her deceased husband? The answers to these questions will depend upon the construction to be given to the marriage-settlement, and the will of Henry Foxall.

The settlement recites, that a marriage was intended to be solemnized between Henry Foxall and the appellee, then Catharine Holland ; that upon the treaty for such marriage, it was agreed between the said Henry Foxall and Catharine Holland, that he should provide and settle on her, in case she should survive him, an annual income of $2222.22, equal to 500*l.* sterling, in

the nature of a jointure of her, for life, and in bar of dower, &c. ; and also reciting, that in part performance of said agreement, the said Henry Foxall had made his bond, in the penalty of $74,116, to the trustees named in the settlement, to be void on payment by his executors, within six months from his death, to the said trustees, of $37,038, with interest at six per cent. from his decease. It is then declared by the deed, that in case the said Catharine Holland should survive the said Henry Foxall, the trustees should stand possessed of said bond, and the $37,038 to be received by them, upon trust, to place out the same, when it shall come into their hands, at interest, on freehold securities, or invest it, or any part of it, in the purchase of stock
*606] *of the United States of North America, or bank-stock there, with the approbation of said Catharine Holland ; and to call in and replace, and re-invest the same, and the produce thereof, from time to time, upon or in such securities or stock, with the approbation of the said Catharine Holland ; and to pay the interest and dividends of said sum, securities or stocks, from time to time, as the same shall be received, to her or her assigns, or permit her or them to receive such interest or dividends, for her life, for her separate use.

That the appellee has a right to require the $37,038 to be separated from the general mass of the estate, and invested in funds for her use, according to the trusts declared in the marriage-settlement, cannot admit of a doubt. The circumstance that the trustees are also executors named in the will, cannot affect the rights of Mrs. Foxall. This contract was entered into, in the year 1816, long before the will was made, or it could be known who would be appointed executors ; and besides, the trustees are not the only executors. But it would be immaterial, if they were. They are acting in separate and distinct capacities, and are bound to execute the respective trusts, according to the provisions of the marriage-settlement and the will. This settlement was accompanied with a bond given by H. Foxall, by which he bound his executors to pay over to the said trustees the $37,038, within six months from his death. And the settlement declares that the trustees shall stand possessed of said bond, and the $37,038 to be received by them, upon trust to place out the same, when it shall come into their hands, at interest, &c., in the manner therein directed. Whether Mrs. Foxall had a right to control the investment of this money, when it came into the hands of the trustees, may admit of more doubt.

The trust declared is, that the $37,038, when it shall come into the hands of the trustees, shall be placed out at interest, on freehold security, or invested in the purchase of stock of the United States of North America, or bank-stock there, with the approbation of the said Catharine Holland ; and the re-investments, when necessary, were to be made in like manner with her
*607] approbation; and the interest and *dividends to be paid to her, during her life, for her separate use. The question is not, whether she is at present in danger of losing her annuity, nor does she in her bill charge the trustees with misconduct. She is, in judgment of law, a purchaser of this annuity, her rights rest in contract, and she seeks to have that contract carried into execution. And whether this will work an injury to third persons or not, cannot control her rights, secured to her by the marriage settlement. When this contract was entered into, there was no existing interest in any third parties. And no subsequent act of one of the contracting parties can

change the rights of the other. This fund, or the securities or stock in which it should be invested, were, after her death, to be transferred to the executors or assigns of Henry Foxall. But no disposition which he could make of them, could abridge the rights of Mrs. Foxall, under the settlement. What then is to be understood by the stipulation, that the investment was to be made with her approbation? That she was to have some agency in this investment, cannot be questioned, And is it an unreasonable interpretation to say, that she was to have a controlling agency, within the limitation prescribed by the contract? She has not an arbitrary and unlimited discretion. The investment is restricted to three objects: freehold securities, United States stock, or bank-stock; and the trustees are not authorized to make any other investment. Nor can she approve or disapprove of any other. All such acts, both in them and her, would be without authority. She is the party benefically interested in the investment; and it is fairly to be presumed, that her intended husband meant to leave it to her to elect between the different objects of investment. It cannot be presumed, that she would withhold her approbation from all, and if she did, the loss would be her own, and not to the prejudice of any one else. It is very probable, that different persons, with equally honest and upright motives, might differ in opinion with respect to the three different modes of investment pointed out in the settlement. And when that occurs between Mrs. Foxall and the trustees, one *or the other party must yield; and the contract must determine their respective rights. That declares, that the investment [*608 is to be made with her approbation; which would seem necessarily to imply, that it could not be made without it, and, at all events, not directly against it. And such appears to have been the construction put upon it by the trustees themselves. For, in July 1824, after the death of her husband, they wrote her two letters; one in their character as executors, and the other as trustees in the settlement. In the first they say, "The executors of your late husband are desirous of paying over to the trustees of the marriage-settlement the sum of $37,038, according to the directions of the will. It is deemed necessary that you should give instructions to the trustees named in the marriage-sttlement, before they can feel themselves authorized to invest the money." And in their letter, written as trustees, they say, "The executors are ready to pay over the sum of $37,038 to the trustees named in the marriage-settlement; for the purpose of providing the annuity secured to you in the settlement. In which it is stipulated, that we are to place it out at interest, on freehold security, or invest it in the purchase of stock of the United States of North America, or bank-stock there, with the approbation of Mrs. Foxall. We are, therefore, compelled to wait for your instructions."

In September following, she answered their letters, in which she says, "I acquaint you that, in the judgment of my late husband, according with my own, the stock of the United States of North America is preferred by me, to freehold security or bank-stock; and that I shall approve of the investment of the principal sum in that fund, and not on real security or bank-stock, and beg it may be so invested." We think, the trustees were bound to make the investment, according to this request; that it was a right secured to her under the marriage-settlement.

We will not say, but that a state of things might exist, in which a court

of chancery would be authorized to control her election, as if she should act from mere caprice, and with a manifest purpose of throwing a loss upon the
*609] *residuum of the estate. But there is nothing in this case to warrant such an imputation against her. And it is not very certain, that she even erred in judgment, if she had herself to sustain the loss. The object of the settlement was to give her a certain, safe and secure income. And it was not unreasonable for her to place more confidence in government stock than in mortgages, where it is well known there is less punctuality in the payment of interest; or in bank-stock, with the hazard of insolvency. She acted, as she states in her letter to the trustees, according to the judgment of her late husband; and which, no doubt, had great influence with her, in preferring such investment. And the sincerity of his advice is manifest from the circumstance, that he left, as a part of his estate, upwards $32,000 in United States stock.

2. The next inquiry is, whether, if the investment of the $37,038 in stock of the United States should be insufficient to raise the annuity of $2222.22, the deficiency is chargeable upon the residuum of the estate. In determining this question, it is unnecessary to say, how it would stand, if the claim rested entirely upon the marriage-settlement. The provision intended to be made for Mrs. Foxall was clearly an annuity; and where that is the nature of the settlement, the cases in the books are very strong to show how far courts of equity will go to guard against any deficiency. But in the present case, the will of Henry Foxall puts that question at rest.

This will bears date the 12th of April 1823, the first part of which is as follows, "I do hereby ratify and confirm, in every respect, the settlement made upon my marriage with my dear wife Catharine, and do direct the provisions and trusts of the same, and the conditions of the bond entered into by me upon my said marriage, to be faithfully performed. I do further direct, that if the sum of $37,038, secured to be paid to the trustees of said settlement, should at any time, and from time to time, be found insufficient to raise, within the United States, and bring into the hands of the said
*610] trustees of said settlement there, the clear annual sum *of $2222.22, the annuity secured to be paid to my said wife by the said settlement; then and in such case, the trustees of this my will do and shall, from time to time, transfer to themselves, as trustees of said settlement, and out of the residuum of my estate, such sum or sums of money, as may, from time to time, be found necessary, to make up any deficiency there may happen to be between the current amount of the interest and produce of said principal sum, and the amount of said annuity; so as that, in no event, less that the said sum of $2222.22 shall be annually raised for my said wife, or for her benefit, within the United States."

It is difficult to conceive, how a more ample provision could have been made, to secure to the appellee the full amount of her annuity, and is a strong corroboration of what she stated to the trustees, that in selecting United States stock for the investment, she acted in accordance with the judgment of her late husband. For, it is admitted, that when the will was made, government stock was above par, and that the stock of the local banks of the District of Columbia might be so purchased as to pay six per cent. interest, and that this was known to the testator, H. Foxall. A deficiency must, therefore, necessarily arise from an investment in government stock,

but not from an investment in bank-stock; and his being so very particular in providing by his will for a deficiency, shows he had reasons to believe it would occur.

It has been urged, by the appellants' counsel, that the provisions of the deed of settlement and of the will are inconsistent; and that the appellee is not entitled to the benefit of both, but must make her election between them. That she cannot choose the fund for investment, under the deed, and throw the loss from such investment upon others, under the will. It is not perceived, how this can in any sense be considered a case for election. There is no inconsistency whatever between the two provisions. The will expressly refers to and confirms the settlement, and provides for any deficiency that might occur, by reason of an investment that would not raise the stipulated annuity. There is nothing *in the will, affording the least color for the conclusion, that the testator intended any provision therein made [*611 for his widow, should be in satisfaction of the settlement; but clearly as an accumulated bounty over and above it.

Again, it is said, the will only authorizes payment of the deficiency, when the funds shall be found insufficient to raise, within the United States, the clear income of $2222.22; and that the proofs taken in the cause show that the funds are sufficient, and are now so invested as to produce that sum. The answer to this objection is given in the examination of the first point, that such investment was not authorized under the marriage-settlement, it having been made, without the approbation of the appellee, and directly against her instructions. We are, accordingly, of opinion, that the appellee has a right to claim of the trustees in the marriage-settlement, by virtue of the will of her deceased husband, out of the residuum of his state, whatever the annual amount of the product of $37,038, invested in stock of the United States, shall, from time to time, fall short of the annuity of $2222.22, secured to her in the marriage settlement.

The merits are, therefore, with the appellee in both cases, and the only difficulty presented is, as to the form of the decree in the first cause. The bill in that case, filed by Mrs. Foxall, is founded altogether upon the marriage-settlement. It prays a discovery as to the situation of the fund of $37,038, and that the whole of it may be invested in stock of the United States, and concludes with a prayer for general relief; but sets up no claim under the will for any deficiency. It is in the cross-bill, that the question in relation to the deficiency arises under the will. This bill was filed for the purpose of compelling Mrs. Foxall to elect between the provisions of the marriage-settlement and those of the will. The appellants, in their answer to the first bill, refer to the cross-bill and the will set out therein, and pray that they may be taken as a part of their answer, and that the two causes may be heard and determined together. They are, however, two distinct causes, with additional parties in the *cross-bill, and require separate [*612 decrees. The decree as to deficiency cannot be sustained, unless it can be done, under the prayer of general relief. There is no doubt but that, under the general prayer, other relief may be granted than that which is particularly prayed for. But such relief must be agreeable to the case made by the bill; and there is nothing in the first bill to sustain the particular relief granted as to the deficiency. This part of the deed must, therefore, be reversed. The residue is affirmed, omitting the name of Mrs. Foxall in

the investment directed to be made. There is nothing in the marriage-settlement which entitles her to be joined with the trustees in the investment. In the other cause, the decree dismissing the bill is affirmed.

In the first case, the following decree was rendered.—This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, this court is of opinion, that the decree of the said circuit court in this cause is erroneous in this, that there is nothing in the first bill to sustain the particular relief granted as to the deficiency; whereupon, it is considered, ordered and decreed by this court, that the decree of the said circuit court, so far as it grants the particular relief as to the deficiency, in this cause, be and the same is hereby reversed and annulled; and that the residue of said decree, in all things else, be and the same is hereby affirmed, omitting the name of Mrs. Foxall in the investment directed to be made; and that the cause be and the same is hereby remanded to the said circuit court for further proceedings to be had therein, according to law and justice.

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*613] *Anthony Taurin Chirac and others, Plaintiffs in error, *v.* George Reinecker, Defendant in error.

Evidence.—Pedigree.—Descent.

After the plaitiffs had proved, by a surveyor, that most of the lines and streets in "Howard's late addition to Baltimore town" had been run by him, as the same were marked in a particular plat, upon which was the lot of ground for which the ejectment was brought, they gave the plat so authenticated in evidence; this was contained in a volume in which were also other plats; the defendant then offered in evidence another plat, in the same volume, but gave no evidence to authenticate it, claiming to use the same in evidence, as it was authenticated in the same volume in which was that exhibited by the plaintiffs: it was *held*, that the whole volume was not in evidence; and if the defendant meant to use any plat in the same, it was his duty to establish it, by competent proof of its particular authenticity. p. 619.

Evidence to establish heirship and pedigree, had been obtained under a commission issued for that purpose to France, in an action of ejectment, in which the plaintiffs had recovered the lots of ground for which this suit was instituted; in the course of that trial, a bill of exceptions was tendered by the plaintiffs, and sealed by the court, in which the evidence contained in the commission was inserted; the commission and the testimony obtained under it were afterwards lost. In an action for mesne profits, brought by the plaintiffs in the ejectment, against the landlord of the defendant in the suit, who had employed counsel to oppose the claims of the plaintiffs, but who was not a party to the suit on the record; it was *held*, that the testimony, as copied into the bill of exceptions, was legal and competent evidence of pedigree. p. 620.

It is well known, that in cases of pedigree, the rules of law have relaxed in respect to evidence, to an extent far beyond what has been applied to other cases; this relaxation is founded on principles of public convenience and necessity. p. 621.

Where A. was the real landlord of the premises in controversy in an ejectment, and employed counsel to defend the suit, but was not a party defendant on the record, the record of the recovery in the ejectment, when offered in evidence in an action, of trespass for mesne profits against B., is not conclusive evidence of title in the plaintiffs; but is *primâ facie* evidence thereof, and is evidence of the plaintiff's possession; but B. may controvert the title of the plaintiffs; as to third persons, strangers to the suit, the record is evidence to show possession of the property in the plaintiffs. p. 622.

Where the court was asked to instruct the jury upon a particular point, if they believed from the evidence, certain facts, and there was not the slightest evidence from which the jury had a right to believe the existence of any such facts, the court not to have given such instructions, since they were calculated to mislead them and raise a mere speculative question.

Chirac v. Reinecker.

By the law of descent of Maryland, a person claiming as heir must prove himself heir of the person last seised of the estate; and if an intestate leaves a brother of the whole blood, who survived him, and died without issue, and without having ever been actually seised of the estate, it will descend to the half blood of the person so seised. p. 625.

*Error to the Circuit Court of Maryland. An action of trespass, for mesne profits, was instituted by the plaintiffs in error, in the circuit court of the United States for the Maryland district, Anthony Taurin Chirac and others, against the defendant in error; upon the recovery of certain real estate in the city of Baltimore, by the judgment of this court, at February term 1817. (2 Wheat. 259.) The ground lay in a section of Baltimore, called "Howard's late addition to Baltimore town," and was part of the lot designated in that addition, by the No. 802. The parties, plaintiffs in this action, were the same with those in the ejectment, with the addition of the husband of Maria Bonfils Desportes, one of the plaintiffs, with whom he had since intermarried. The defendant in the ejectment was John Charles Francis Chirac. [*614

This action was brought against the defendant in error, on the ground that he was, in fact, the real defendant in that suit; he having taken on himself the defence, employed counsel, and being the real party in interest; as he had been the receiver of the rents and profits of the estate, during the whole period for which they were claimed by the plaintiffs in this action.

After a trial of the case in the circuit court of Maryland, it was removed by the plaintiffs, by writ of error, to this court; and at February term 1826, the court decided, among other points which were presented by the record, "That the action for mense profits may be maintained against him who was the landlord in fact, who received the rents and profits, and resisted the recovery in the ejectment suit; although he was not a party to that suit, and did not take upon himself the defence thereof upon the record, but another did, as landlord." Also, that "a recovery in ejectment is conclusive evidence, in an action for mesne profits against the tenant in possession, but not in relation to third persons. But when the action is brought against the landlord in fact, the record in the ejectment suit, is admissible to show the possession of the plaintiff, connected with his title; although it is not conclusive upon the defendant, in the same manner as if he had been a party on the record."

*At the trial of this case, in the circuit court, in December 1827, after the same had been returned to that court, under the mandate of this court, the plaintiffs gave evidence to show, that the defendant in error was, before the institution of the ejectment, the claimant and actual landlord of the property, and had continued such, until the recovery of the same; and that he had employed counsel, and had sustained the defence by his funds exclusively. They also proved, that the property had been conveyed to him, by the defendant in the ejectment. The evidence of title exhibited by the plaintiffs, showed the property to be in John Baptist Chirac, as whose heirs the plaintiffs claimed and recovered the same in the ejectment; and, in order to show the location of the ground, the plaintiffs exhibited in evidence to the jury, the public plat of "Howard's late addition to Baltimore town;" by which it appeared, that the lot embraced part of a street called Walnut street, which, the plaintiffs further proved by the city records, had been shut [*615

up, and the ground included in it divided between the owners of lots bounding upon it.

The plaintiffs then offered in evidence the record of the proceedings, judgment and writ of possession in the ejectment; but the defendant objected to the reading of the same, except to show the possession of the property of the plaintiffs mentioned in the record. The court admitted the parts of the record as *primâ facie* evidence of title in the plaintiffs, and permitted them to be read in evidence, as such proof of title.

The defendant then offered to exhibit in evidence, a plat from the volume of plats, in which was that already mentioned, of "Howard's late addition;" to show that the whole of Walnut street was out of the limits of "Howard's late addition;" and that the parties under whom John B. Chirac claimed, and John B. Chirac, had no title to a certain portion of the ground recovered in the ejectment. The plaintiffs objected to the use of the plat in evidence, and for that purpose. The court allowed the testimony, and the plaintiffs excepted.

The plaintiffs then read in evidence certain depositions, taken under a commission, issued in this cause, to France, *showing the kindred of John Baptist Chirac, and the marriage of Maria Bonfils; and also offered evidence, by Mrs. Lafolloniere, of the death, before John B. Chirac, of Gabriel Chirac, the only brother, or relation in that degree, of the whole blood, of John Baptist Chirac. And they then proved, that the original depositions taken in the ejectment cause were lost; and therefore, in order to show the pedigree of the plaintiff's family, offered to read in evidence the bill of exceptions, which embodied these depositions, contained in the record and proceedings of the recovery in ejectment; but the court, upon the defendant objecting, refused to allow it to be so read in evidence, and the plaintiffs excepted.

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After this evidence was given, and the testimony was closed on both sides (none having been offered on the part of the defendant, except that stated in the first exception, on the point of location), the plaintiffs offered in evidence the record of recovery in the ejectment, as conclusive evidence of the right and title of the plaintiffs to the premises, against John Charles Francis Chirac, and against the defendant holding under that title: but the court refused to admit the evidence so offered. The plaintiffs excepted.

The plaintiffs then prayed the court to instruct the jury, that if the jury believed the evidence given, the plaintiffs had shown a sufficient title to the premises in the declaration, to entitle them at law to maintain this action against the defendant. The court refused to give this instruction; and the plaintiffs took a further exception.

The defendant then prayed the court as follows: 1. That if, from the evidence, the jury believed that John B. Chirac, who died seised of the premises in the declaration mentioned, had any brother or brothers, sister or sisters, of the whole blood, or their descendants, who survived the said John B. Chirac, the younger; then, the plaintiffs are not entitled to recover. 2. That if the jury believe, that the said John B. Chirac, the elder, had, by his second wife, another son, besides the said John B. Chirac, the intestate, then it is incumbent upon the plaintiffs to show, before they can entitle themselves to *recover, that such son died before the said John B. Chirac, the intestate, without lawful issue. 3. That if the jury believe, that

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the said John B. Chirac, the elder, had, by his first wife, a daughter, who married a certain Samuel Bonfils, by whom she had a son named John Baptist Bonfils, who married Ann Coton, who had a daughter named Maria Bonfils, who married Desportes, one of the plaintiffs; then it is incumbent upon the plaintiffs, before they can entitle themselves to recover, to show the death of the great-grandfather, grandmother, and father, before the impetration of the original writ in this cause; and that the plaintiffs have offered no evidence of these facts. All these prayers of the defendant were granted by the court, and the plaintiffs excepted to all of them; and they prosecuted this writ of error.

The case was argued by *Hoffman* and *Mayer*, for the plaintiffs in error; and by *Wirt*, Attorney-General, for the defendant.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Maryland. The original suit was an action for mesne profits, brought by the plaintiffs in error against Reinecker; and is the same cause which came before this court, and is reported in 11 Wheat. 280. The cause now comes again before this court, upon certain bills of exception, taken by the plaintiffs in error, at the new trial had under the mandate issued upon the former judgment of reversal.

Without going at large into the facts, as they came formerly before us, it is sufficient to state, that the action is for taking the mesne profits of a certain parcel of land, lying in a part of Baltimore, called Howard's late addition to Baltimore town, and is designated as lot No. 802, in that addition. Before the commencement of this suit, a recovery of the same premises was had in ejectment, by the same plaintiffs (the husband of one of them being now added as *a party), as lessors, against one John C. F. Chirac, who was admitted, upon his prayer as landlord, to defend the premises. The record of that recovery was offered in evidence at the former trial against Reinecker, and rejected by the court; and that rejection constituted one of the grounds of the reversal. [*618

At the new trial, after the introduction of certain evidence, which will be hereafter stated, the plaintiffs offered the same record in evidence, including the execution of the writ of possession, and other proceedings in the same cause; to the admissibility of which, as evidence of the plaintiffs' possession, the defendant's counsel did not object; but did object to it as evidence of the plaintiffs' title to the property. The court, however, admitted the record as *primâ facie* evidence of the plaintiffs' title; and thereupon, the defendant filed an exception, which, however, is not now before this court. The evidence alluded to consisted of the testimony of witnesses to establish the facts, that Reinecker had received, as landlord, the rents of the premises, during the period sued for; that he exercised the rights of ownership over the same; that he was, at the time of the ejectment brought, the real landlord, and had notice of the suit, employed counsel to defend it, and was, in fact, the substantial litigant party; and that he derived his title to the premises under the defendant in ejectment, John C. F. Chirac, by intermediate conveyances, executed before the ejectment. The evidence further established a strict deduction of title, by mesne conveyances of the lot in

question, down to John Baptist Chirac (the intestate), under whom the plaintiffs claimed the same as heirs.

The plaintiffs then proved, by a surveyor, that he had surveyed most of the lines and streets in Howard's late addition to Baltimore town, in 1782, according to the official plat and location thereon in the mayor's office (which plat was also then given in evidence by the plaintiffs to the jury), that he had run the lines of Lun's lot, according to the patent or certificate thereof,
*619] and that the premises described *in the plaintiff's declaration, and in the writ of possession, were in Lun's lot, and also within the said addition, and were known as lot No. 802, &c. The plaintiffs, after having given in evidence the plat aforesaid, upon which was located lot No. 802, and Walnut street, then gave in evidence, from the original book of entry and record in the mayor's office, certain proceedings, condemning Walnut street to be shut up, and ordering that each person interested by having lots in the street, be entitled to one-half of such street, on each side, &c.

The defendant then offered in evidence another plat in the same volume of city plats, being a plat of Howard's addition to Baltimore, in 1766, in order to show that the whole of Walnut street was contained within such last-mentioned addition, already read in evidence, to the admission of which the plaintiffs objected, but the court overruled the objection, and permitted the plat to go to the jury. The admission of this evidence constitutes the first exception of the plaintiffs. It is, in the first place, said, that it was not proper evidence against the plaintiffs, after the recovery in ejectment, even if the plat in question had been duly authenticated. But, at all events, it is contended, that it is not *per se* evidence, merely from the fact that it is found in a volume of city plats, which contained the general plat already in evidence, and which had been specially authenticated by the surveyor. We are of opinion, that this last objection is well founded. The book itself had not been authenticated as a book of public plats regularly made ; but a single plat only in the volume had been authenticated. The whole volume therefore, was not in evidence ; and if the defendant meant to use any other plat, it was his duty to establish it, as evidence, by competent proofs of its particular authenticity.

The other objection assigned for rejection of it admits of more doubt. It is said, that the effect of this evidence would be to establish, that John B. Chirac (the intestate) had no title to a certain portion of the land recovered in the ejectment. Unless the defendant was absolutely concluded by the judgment in that suit, he was certainly at liberty to dispute any part
*620] of that title. And if it were material for the *plaintiffs to prove the actual location of the lot No. 802, and Walnut street, in Howard's late addition, in 1782, no reason occurs to us, why the defendant was not at liberty to disprove the fact, by showing that Walnut street was in Howard's former addition, in 1766. It is merely evidence to rebut other parol evidence of the plaintiffs, as to the location.

The plaintiffs then further read in evidence the depositions of certain witnesses in France, taken under a commission, to establish their pedigree. The testimony was to this effect: that J. B. Chirac, the father of the intestate, had three wives ; that by his second wife, he had two sons, the intestate, and one Gabriel B. R. Chirac ; that the intestate died in 1799 ;

that his brother Gabriel left France, and went to the islands. One of the witnesses said, he died in the islands. Another witness stated, that before 1797, she resided in St. Domingo, and lived on a plantation near that of J. B. Chirac (the intestate); that she heard, in St. Domingo, that his brother came to the intestate's residence there, and it was publicly reported in the neighborhood, that the said brother had died; that she heard this, at the house of a friend where the intestate visited, and heard it very often, and that it was generally stated as a fact; that she never saw the brother, and never heard that he was married, and never heard of him as being alive, since the report of his death; that she is no relation of the family, and never was at the intestate's house, while he was at St. Domingo; and did not know or believe that there were any ladies living there, when the brother died.

The plaintiffs then offered to prove, that the original commission for taking the testimony issued in the said ejectment cause, with the depositions taken under the same, were lost; and then offered to read to the jury the bill of exceptions, contained in the record aforesaid, in order to show the pedigree of the plaintiff's family. But the court refused to allow the same to be read in evidence to the jury. This refusal constitutes the second exception of the plaintiffs. The bill of exceptions, so rejected, was taken by the plaintiffs, and did not refer to any depositions; but it stated, that the plaintiffs gave in evidence to the jury, that the intestate was a *native of France; that the lessors of the plaintiffs (naming them) were the [*621 brothers and sisters, and grand-niece, &c., of the intestate, &c.; "and that neither the father nor mother, nor any brother or sister of the whole blood of the said intestate, nor their issue or descendants, were living, at the time of his death." Upon consideration, we are of opinion, that under the circumstances of this case, the evidence was admissible, for the purpose of establishing the pedigree of the plaintiffs' family; and this is the only view in which it was presented to the court. It is well known, that in cases of pedigree, the rules of law have been relaxed in respect to evidence, to an extent far beyond what has been applied to other cases. This relaxation is founded upon principles of public convenience and necessity. In a case between the parties to the suit, in which this bill of exceptions was taken, the evidence would have been conclusive. Although Reinecker was not the defendant in that suit, yet he was the real landlord and party in interest, and conducted the suit; and the evidence of the facts so proved as to pedigree, ought, under such circumstances, we think, to be admitted as *primâ facie* evidence against him. He had the means of contesting those facts, and if he did not avail himself of those means, it may fairly be presumed, that he yielded to the sufficiency of the proofs.

This was the whole evidence in the cause; and it being closed on both sides, the plaintiffs offered the same record of the recovery in the ejectment cause, as conclusive evidence of their right and title to the premises, against J. C. F. Chirac (the defendant therein), and against the defendant Reinecker, holding under that title, which the court refused to admit. This refusal constitutes the third exception of the plaintiffs. The plaintiffs then prayed the court to instruct the jury, that if they believe the evidence, the plaintiffs have shown a sufficient title to the premises in the declaration, to entitle them in law to maintain their action against the defendant, which the court

refused to give. And this refusal constitutes the fourth exception of the plaintiffs. There was a fifth exception, but it is unnecessary to refer to it, because it is a mere repetition (apparently by mistake) of the fourth.

*622] *Before proceeding to consider these exceptions, it may be proper to say a few words explanatory of that part of the former decision of this court, as it stands reported in 11 Wheat. 280, *et seq.* The record of the ejectment suit had been rejected by the court below as any evidence against Reinecker, although it was offered, in connection with other evidence, to establish that Reinecker, although not a party on the record, was the real landlord, and had received the rents and profits, and had notice of the suit, and had employed counsel to defend it, and resisted the recovery. In the opinion of the court upon this point, it was stated, that, in general, a recovery in ejectment, like other judgments, binds only parties and privies. It is conclusive evidence, in an action for mesne profits, against the tenant in possession, or other defendant on record. But in relation to third persons, the judgment is not conclusive; and if they are sued in an action for mesne profits, they may controvert the plaintiff's title at large. In such a suit (that is to say, against third persons), the record of the ejectment is not evidence to establish the plaintiff's title, but is admissible to show the possession of the plaintiff. This proposition has been supposed, at the bar, to indicate an opinion, that in the case then before the court, with reference to all the circumstances of notice, and rating of the rents, &c., by Reinecker, the record was only evidence of the possession and not of the title of the plaintiffs. Such was not the understanding of the court. The proposition was asserted as to third persons, generally, who were strangers to the suit. Even as to such persons, it was asserted, that the record was admissible to show the possession of the plaintiff. The particular circumstances of Reinecker's case, as connecting him with the parties, were not, in that part of the opinion, in the view of the court. In the subsequent commentary of the court on the case of *Hunter* v. *Britts*, 3 Camp. 455, a doubt was intimated, whether a mere notice *in pais* to the landlord, who was not a party to the record, was conclusive upon him; but not the slightest doubt was intimated, that it was *primâ facie* evidence of title, as well as of possession, against him,

*623] under such circumstances. The point, whether the record in the *ejectment suit was not *primâ facie* evidence of title in the plaintiffs, as against a person standing in the predicament of Reinecker, was not decided at that time, and was not necessary to the decision.

Upon consideration of the question presented by the third exception above mentioned, we retain the opinion, that the record in the ejectment suit was not conclusive evidence upon persons not parties to the record; but we are also of opinion, that it was *primâ facie* evidence of the plaintiff's title and possession, against Reinecker, under the circumstances adduced in evidence. He had full notice of the suit, and had the fullest means to defend it. The parties upon the record were his agents or tenants, and he, in effect, though not in form, took upon himself the defence of the suit. The case is stronger than that of *Hunter* v. *Britts*, and fairly within the reach of the principle decided by it. There was, then, no error in the court, in refusing to give this instruction.

The fourth exception can be sustained only upon the ground, that there was no fact in the cause, upon which there was any doubtful or contradic-

tory evidence. If there was any such evidence, it would have been improper for the court to withdraw the question of its credibility from the jury. And if the evidence was merely of a presumptive nature, it was not for the court to decide, as a point of law, how much it ought to weigh with the jury. It was properly their province to draw the conclusions of fact arising from such presumptions. They might have believed the evidence, but at the same time, not have been satisfied, that it justified them in inferring from it other facts not positively proved.

The real difficulty in the case arises from the peculiar structure of the prayer of the plaintiffs, and the introduction of parol evidence, at the trial, by them, to fortify what had been already declared by the court to be *primâ facie* record evidence of title. If the court had been asked to instruct the jury, that the evidence of the plaintiffs, if believed by the jury, was competent, in point of law, from which they might infer all the necessary facts to maintain the action, unless it was rebutted on the part of the defendant, it would have been *unobjectionable. It would have left [*624
the matters of fact for the just consideration of the jury, upon the *primâ facie* evidence of the plaintiffs. But the difficulty is, that a matter of fact, of vital consequence to the plaintiffs, was, whether Gabriel B. R. Chirac, the brother of the whole blood of the intestate, was dead, without leaving lawful issue, upon the death of the intestate. The plaintiffs very unnecessarily introduced parol evidence on this subject, after the court had ruled, that the recovery in the ejectment was *primâ facie* evidence of their title. The parol evidence did not pointedly establish the death of Gabriel (for the bill of exceptions had been rejected as evidence), although it was exceedingly strong, as presumptive proof ; and as such, it was the province of the jury to pass upon it. The court was right, therefore, in refusing the prayer of the plaintiffs, because it trenched upon the proper province of the jury, by requiring the court to assume a fact, which was not absolutely proved, but was matter of inference and presumption upon the whole testimony.

The defendant afterwards prayed the court to instruct the jury as follows: 1. That if, from the evidence, the jury believed, that J. B. Chirac, who died seised of the premises in the declaration mentioned, had any brother or brothers, sister or sisters of the whole blood, or their descendants, who survived the said J. B. Chirac, the younger, then the plaintiffs are not entitled to recover. 2. That if the jury believe, that the said John B. Chirac, the elder, had, by his second wife, another son besides the said son, J. B. Chirac, the intestate, then it is incumbent upon the plaintiffs to show, before they can entitle themselves to recover, that such son died before the said intestate, without lawful issue. 3. That if the jury believed, that the said John B. Chirac, the elder, had by his first wife, a daughter, who married a certain Samuel Bonfils, by whom she had a son named John Baptist Bonfils, who married Ann Coton, who had a daughter, Maria Bonfils, who married Desportes, one of the plaintiffs, it is incumbent upon the plaintiffs, before they can entitle themselves to recover, to show the death of the great-grandfather, grandmother and father, before the impetration of the original writ in this case ; and that the plaintiffs have offered no evidence of these facts. The court gave the *instructions so prayed for, and [*625
the plaintiffs filed their exception thereto.

The first instruction is open to two objections. It asks the court to instruct the jury, that if, from the evidence, they believed (among other things), that the intestate had any sister or sisters of the whole blood, or their descendants, who survived him, &c., the plaintiffs were not entitled to recover. Now, there was not the slightest evidence from which the jury had a right to believe the existence of any such sister or sisters; and without such evidence, the court ought not to have given the instruction, since it was calculated to mislead them, and to raise a mere speculative question. But a still more decisive reason against it is, that by the law of descent of Maryland, a person, claiming as heir, must prove himself heir of the person last actually seised of the estate; and if the intestate had left a brother of the whole blood, who survived him, and died without issue, and without ever having been actually seised of the estate, the plaintiffs would still have been entitled to recover as heirs of the half blood of the person last seised.

The second instruction was rightly given. It was not sufficient for the plaintiffs to show, that Gabriel was dead, but that he died without lawful issue; for otherwise, such issue were entitled to recover. The *onus probandi* was upon them, to establish every fact necessary to their own heirship; and it cannot admit of doubt, that this was necessary. The same rule is laid down in 3 Starkie on Evidence 1099, and is supported by the case of *Richards* v. *Richards*, there cited from Mr. Ford's MSS., and also by *Doe* v. *Griffin*, 15 East 293.

The third instruction assumes to decide a question of fact, upon which we think there was evidence before the jury. The record of the recovery in the ejectment suit was *primâ facie* evidence of the plaintiffs' title; and the depositions in the cause, and the structure of the interrogatories and answers, pre-supposed the death of the great-grandfather, grandmother and father of the intestate. There was error, then, in the court, in giving this instruction.

*626] *Upon the whole, the judgment must be reversed, and the cause remanded, with directions to award a *venire facias de novo.*

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel: On consideration whereof, this court is of opinion, that the said circuit court erred in admitting the plat offered in the evidence by the defendant's counsel, as stated in the plaintiffs' first bill of exceptions; and also erred in refusing to admit as evidence, the bill of exceptions stated in the plaintiffs' second bill of exceptions; and the said circuit court also erred in granting the instructions firstly and thirdly prayed for by the defendants, as stated in the plaintiffs' sixth bill of exceptions: Whereupon, it is considered, ordered and adjudged by this court, that, for the errors aforesaid, the judgment of the said circuit court in this cause be and the same is hereby reversed and annulled; and that the said cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo.*

*David Wilkinson, Plaintiff in error, *v.* Thomas Leland and others, Defendants in error.

Legislative power.—Decedents' estates.—Construction of statutes.

J. J. died in New Hampshire, seised of real estate in Rhode Island, having devised the same to his daughter, an infant; his executrix proved the will in New Hampshire, and obtained a license from a probate court, in that state, to sell the real estate of the testator for the payment of debts; she sold the real estate in Rhode Island for that purpose, and conveyed the same by deed; giving a bond to procure a confirmation of the conveyance by the legislature of Rhode Island; the proceeds of the sale were appropriated to pay the debts of the intestate: *Held*, that the act of the legislature of Rhode Island, which confirmed the title of the purchasers, was valid.[1]

The legislative and judicial authority of New Hampshire were bounded by the territory of that state, and could not be rightfully exercised to pass estates lying in another state; the sale of real estate in Rhode Island, by an executrix, under a license granted by a court of probate of New Hampshire, was void; and a deed executed by her of the estate was, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein. p. 655.

By the laws of Rhode Island, the probate of a will, in the proper probate court, is understood to be an indispensable preliminary to establish the right of the devisee, and then his title relates back to the death of the testator. p. 655.

That government can scarcely be deemed to be free, where the rights of property are left solely dependent on the will of the legislative body, without any restraint; the fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred; at least, no court of justice in this country would be justified in assuming, that the power to violate or disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people; the people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention. p. 657.

It is admitted, that the title of an heir, by descent, in the real estate of his ancestor, and of a devisee of an estate unconditionally devised to him, is, upon the death of the party under whom he claims, immediately devolved upon him, and he acquires a vested estate; but this, though true, in a general sense, still leaves his title incumbered with all the liens which have been created by the party, in his lifetime, or by law, at his decease; it is not an unqualified, though it may be a vested, interest, and it confers no title, except to what remains after every such lien is discharged. p. 658.

By the laws of Rhode Island, as well as of all the New England states, the real estate of intestates stands chargeable with the payment of their debts, upon a deficiency of assets. p. 658.

A legislative act is to be interpreted according to the intention of the legislature, apparent upon its face; every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature.[2] p. 662.

*Error to the Circuit Court of Rhode Island. This case came before the court, upon a bill of exceptions tendered by the plaintiff in error, who was defendant below, on the trial of the cause in the circuit court. [*628

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[1] The legislature has power to validate a prior acknowledgment of a deed or mortgage. Journeay *v.* Gibson, 56 Penn. St. 57. Or to validate a void contract. Watson *v.* Mercer, 8 Pet. 88. Such as the prior conveyance of a married woman, Jones's Appeal, 57 Penn. St. 369. To the objection, that such laws violate vested rights of property, it has been forcibly answered, that there can be no vested right to do wrong. Claims contrary to justice and equity, cannot be regarded as of that character; consent to remedy the wrong is to be presumed. The only right taken away, is the right dishonestly to repudiate an honest contract or conveyance, to the injury of the other party. Even where no remedy could be had in the courts, the vested right is generally unattended with the slightest equity. Randall *v.* Kreiger, 23 Wall. 149.

[2] Oates *v.* National Bank, 100 U. S. 239.

In that court, the defendants in error instituted an ejectment for the recovery of a lot of ground called "The Swamp Lot," lying in North Providence, in the state of Rhode Island; which lot of ground was, with other lands, devised by Jonathan Jenckes, of Winchester, in the state of New Hampshire, by his last will and testament, dated the 17th of January 1787, to his daughter Cynthia Jenckes; subject to a life-estate therein of his sister Lydia Pitcher, who was then in possession of the same, and so continued until her death, on the 10th of August 1794. Jonathan Jenckes was also seised of other lands in North Providence, and in Smithfield, Rhode Island; and also of real estate in New Hampshire and in Vermont, most of which were devised to his daughter Cynthia. A small part of his New Hampshire lands was devised for the payment of his debts. Cynthia Jenckes, his wife, and Arthur Fenner, of Providence, Rhode Island, were appointed the executors of his will. Cynthia Jenckes alone qualified as executrix. The testator died at Winchester, in New Hampshire, on the 31st of January 1787, a few days after making his will. No probate of the will of Jonathan Jenckes was made in the state of Rhode Island. The plaintiffs in the ejectment were the heirs of Cynthia Jenckes, and claimed the premises under a devise to her, she having afterwards intermarried with Joel Hastings.

The title of the plaintiff in error was as follows: Cynthia Jenckes, the widow and executrix of Jonathan Jenckes, having been qualified in New Hampshire to act as executrix, on the 18th of August 1790, returned to the probate court of the county of Cheshire, an inventory of the real and personal estate in New Hampshire and Vermont, amounting to 1792*l.* 12*s.* 9*d.* A commission of insolvency was afterwards granted by the probate court, and on the 3d of January 1792, the commissioners reported the whole amount of debts due by the estate; of which 920*l.* 19*s.* were due to citizens of Rhode Island. In February 1792, the executrix *settled her account in the probate court, and a balance of 15*l.* 7*s.* 7*d.* remained in her hands, "the guardian of the heirs appearing and consenting" to the settlement. On the 22d of July 1790, a license to sell the real estate of Jonathan Jenckes, to pay and discharge the debts of the estate, was granted by the probate court of Cheshire county; and on the 12th day of November 1791, Cynthia Jenckes, as executrix of Jonathan Jenckes, sold and conveyed by deed to Moses Brown and Oziel Wilkinson, the reversion of the three acre swamp lot, the premises in dispute. The other real estate in Rhode Island was also sold and conveyed by her the same time.

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On the day the sale was made, Cynthia Jenckes executed a bond to the purchasers, reciting, that by virtue of the license, and in pursuance of its directions, a sale had been made of all the estate which belonged to the testator, in the towns of Providence, Smithfield and North Providence, in the county of Providence, and state of Rhode Island, and that she had received pay for the same; "and whereas, some doubts may arise, whether a sale and conveyance so made by virtue of the license of the judge of probate, in the state of New Hampshire, will give a good and sufficient title to lands and tenements lying in the state of Rhode Island and Providence plantations; now, for the clearing of all doubts respecting the premises, I, the said Cynthia Jenckes, in my said capacity, do covenant and engage, for myself, my heirs, executors and administrators, to and with the said Moses Brown,

Oziel Wilkinson and Thomas Arnold, their heirs, executors and administrators, that I will procure an act to be passed by the legislature of the state of Rhode Island, ratifying and confirming the title by me granted and conveyed as aforesaid, to them and their heirs and assigns for ever; or in failure thereof, that I will repay the purchase-money which I have received for the same, with lawful interest, and such reasonable cost and damages which they may or shall thereby sustain, as shall sufficiently indemnify, and save them free from loss in the premises, to all intents and purposes." At the June sessions of the legislature, Cynthia Jenckes, *by her attorney regularly constituted, petitioned the legislature of the state [*630 of Rhode Island, representing "that the personal estate of the said Jonathan Jenckes, being insufficient to pay his debts, your petitioner obtained authority from the Honorable John Hubbard, judge of probate for the county of Cheshire, in said state of New Hamphise, where the said Jonathan last lived, to make sale of so much of the real estate of the said Jonathan Jenckes as should be sufficient for the purpose of paying his debts; that your petitioner, in pursuance of said authority, sold and conveyed a part of said deceased's estate, situated in this state; that for the said estate, your petitioner received a part of the consideration-money, and the residue thereof is to be paid when the deed executed by your petitioner shall be ratified by this assembly; your petitioner would further show, that the residue of the said purchase-money is absolutely necessary to pay the debts due from said estate, and which are now running on interest. She, therefore, humbly prays your honors will be pleased to ratify and confirm the sale aforesaid, being by a deed made by your petitioner unto Moses Brown and others, on the 12th day of November, A. D. 1791, for the consideration of five hundred and fifty dollars; whereby your petitioner conveyed the right of redemption to a certain mortgaged estate, and also other lands in said deed mentioned, situated in Springfield and North Providence." Whereupon, the legislature passed the following act:

State of Rhode Island, sc. At June session of the General Assembly, A. D. 1792. Whereas, Cynthia Jenckes, late of Winchester, in the state of New Hampshire, now of the state of Vermont, executrix of the last will and testament of Jonathan Jenckes, late of Winchester aforesaid, deceased, preferred a petition and represented unto this assembly, that his personal estate being insufficient for the payment of his debts, she obtained authority from the Honorable John Hubbard, Esq., the judge of probate for the county of Cheshire, in the state of New Hampshire aforesaid, where the said Jonathan last lived, to make of sale of so much of the real estate of the said Jonathan Jenckes, as should be sufficient to pay his debts; that *by virtue of said authority, she made sale to Moses Brown and others, of part of [*631 the said real estate, situated within this state; that she hath received part of the consideration-money, and the remainder is to be paid when the sale aforesaid shall be ratified by this assembly; and that the residue of said purchase-money is necessary for the payment of said debts; and thereupon, the said Cynthia prayed this assembly to ratify and confirm the sale aforesaid, which was made by a deed executed by her on the 12th day of November last past, for the consideration of five hundred and fifty dollars, whereby she conveyed the right of redemption to a certain mortgaged estate, and also other lands in the said deed mentioned, situated in Smithfield and North

Providence. On due consideration whereof, it is enacted by this general assembly, and by the authority thereof, that the prayer of the said petitioner be granted, and that the said deed be, and the same is hereby, ratified and confirmed, so far as respects the conveyance of any right or interest in the estate meutioned in said deed, which belonged to the said Jonathan Jenckes, at the time of his decease.

A judgment *pro formâ*, for the plaintiffs, was entered in the circuit court, and this writ of error was sued out.

The case was argued by *Whipple* and *Wirt*, for the plaintiff in error; and by *Webster*, with whom was *Hubbard*, for the defendants.

Whipple, for the plaintiff in error, after stating the facts of the case, proceeded to say, that the whole case before the court turns upon the constitutional validity of the act of the legislature of Rhode Island. All the lands of Jonathan Jenckes, in the state of New Hampshire, were sold for the payment of debts. A large amount of debt was due in Rhode Island, and it is admitted, that the proceeds of the sale of the swamp lot were applied to the payment of the debts of the testator. It is also admitted, that all the personal estate had been absorbed by the payment of debts in New Hampshire. The question arising from these facts of the case is, whether a deed of land in Rhode Island, made by a New Hampshire executor, qualified *in
*632] New Hampshire, and not in Rhode Island, the sale being fairly made, for the payment of debts, and the deed being subsequently ratified and confirmed by the legislature of Rhode Island, constitutes a valid conveyance. It is contended, that it does: and it is, at the same time, conceded, that such a deed, without such confirmation, is absolutely void. This view of the case presents necessarily the question of the power of the legislature to pass the law.

No other limit to the power of the legislature of Rhode Island is known, than that which is marked out by the constitution of the United States. If any clause in that instrument is expressly or virtually infringed by the confirmatory act of 1792, such a violation would render the act a nullity. The national constitution being the only limitation, the court has no right to pronounce a law of Rhode Island void, upon any other ground. It has been said in England, that an act of parliament, contrary to the principles of natural justice, would be void. Such an opinion, in reference to a law of a state, has never been intimated in this court. But suppose the people to make an express grant, authorizing the legislature to appoint a man a judge in his own case; or to pass any law contrary to natural justice: so long a none of the prohibitions of the constitution are violated, what right has this court to interfere?

What was done in the case before the court, was with the full knowledge, concurrence and assent of the people of Rhode Island. Acts authorizing foreign executors to sell real estate, and acts confirming void deeds, have been passed, ever since the settlement of the state. Having no written constitution, usage is the law of Rhode Island. The papers in the case clearly show, that the legislature of that state always has exercised supreme legislative, executive and judicial power.(*a*) There is an executive magistrate,

(*a*) In the course of the argument of the case, the counsel of the plaintiff in error

but he *is totally destitute of executive power. He cannot pardon the slightest offence; he has no veto on legislation; and he *cannot [*634 appoint a single officer in the state; all the executive powers are exer-

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cited from the statutes of the state of Rhode Island, a number of laws passed by the legislature of the state in which the powers asserted to be vested in that body were exercised.

August 1773. Randall *v.* Robinson. A petition for a new trial, after a new trial had been given by the court. Granted.

Ross *v.* Stow. Petition for a new trial, after two verdicts had passed against the petitioner, and to remove the cause into another county. Granted.

August 1774. Petition of Augustus Mumford, for leave to amend a judgment he recovered against Simon Hazard, from $24 to $74. Granted.

Petition from John Randall, stating that he had again obtained a verdict against Matthew Robinson for thirty-five pounds, which the supreme court, on motion of Robinson, had set aside, and praying that the judgment be set aside, and "the verdict remain fair as at first received, and that the next superior court may be empowered to enter up judgment thereon in his favor, for his damages and costs by the said last jury found." Granted.

Petition of George Elam, stating that a final decree of the king in council had been obtained by him against John Dorkray, and praying that the supreme court be ordered to carry the same into effect. Granted.

March 1776. Petition of Benoni Pearce, administrator, to sell real estate to pay debts. Granted.

June 1776. Petition of Mary Mason, to appoint some person to settle the estate of orphans, one of them having gone to sea, two years ago, and not since heard of. Granted.

December 1776. Petition, stating that judgment had been obtained against the petitioner for more than the debt due. Granted, and the judgment declared null and void, and the court directed to chancerize the bond.

March 1777. Petition of Caleb Fuller, stating that he and Shore Fuller, of Rehobeth, Massachusetts, are joint owners of a ferry, and that Fuller refuses to use it by turns, the one during one week, and the other the next; and praying "the assembly to grant that he shall improve said ferry with Fuller in turns, exchanging every other week and that his turn may begin the first day of next week, as has been customary for a number of years heretofore, &c." Granted.

Petition of Samuel Brown, administrator, stating that the intestate covenanted to give a deed to Nathan Crary, of the state of Connecticut, of a house and lot, but died before executing it; that the estate of the intestate is insolvent, and prays to be authorized to give the deed to Crary, in pursuance of said covenant. Granted.

February 1778. Petition of Benoni Pearce, praying to be released from his executorship, on paying the balance in his hands to the town council of Providence. Granted.

August 1779. Petition of Othniel Goston, stating that administration had been granted upon his daughter's estate, and that the administrators had brought actions against him; and praying that the administration might be set aside. Granted, and that the town council be directed to revoke the same, and to grant administration to the petitioner.

1781. Petition of Sylvester Gardner, deputy-quartermaster, stating that he, by order of his superior officer, seized a quantity of stock, and sold it for the benefit of the United States; that he is sued for taking said stock, and prays that the action may be stopped. Granted.

Petition of Martha Hartshorne, stating that her husband devised certain real estate to her for life, remainder to his son in fee, praying that she may sell part of the estate for her support. Granted.

1782. Petition of Archibald Young and others, praying that part of the real estate

cised by the legislature. So of its judicial powers. We have courts acting under standing laws; but one of those standing laws authorizes the legislature, upon a petition for a new trial, to set aside judgments, at its pleasure. Originally, the legislature was the only court in the state; it exercised common law, chancery, probate and admiralty jurisdiction. Its chancery jurisdiction it has never parted with. It is the best court of chancery in the world. Its probate power, though conferred upon inferior courts, has always been exercised concurrently with them. Accordingly, we find frequent instances of wills proved, and administration granted, by the legislature. The power of granting license to sell real estate, of proving wills, and of confirming void deeds, has been so long and so frequently exercised, that it has been known by almost every man in the state. The people, knowing this usage, have acted under it, and there is hardly an acre of land in Rhode Island which, in some period or other, has not been sold by executors, administrators or guardians, licensed by the general assembly; or conveyed by void deeds, confirmed by that body. To draw into question the validity of such conveyances, would shake almost every title in the state.

*635] *Resort, however, to the extraordinary powers of the Rhode Island legislature to protect the present conveyance, is unnecessary. Every legislature in the Union possesses similar authority, unless expressly restrained by its local constitution. The subject-matter of the conveyance was land lying within the state; and, consequently, exclusively within the jurisdiction of the state. How the land shall pass from one man to another, whether by deed, under seal, or by mere delivery; how it shall be appropriated to the payment of debts, whether by attachment and sale, or by mesne or final process; or whether it shall be totally exempted from attachment; what form shall be observed by executors and administrators, selling for the payment of debts; how they shall be qualified, and from whom they shall obtain a license; whether the deed shall precede the license, or the license precede the deed; are all questions to be decided by the legislature: and their decision is conclusive upon all mankind. Whether they decide by a general law, or a special act, is matter exclusively of legislative discretion.

It is, however, considered unnecessary to attempt to ascertain the

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of a *non compos* may be given in fee to such person as will give bond to support her; remainder to be divided among the heirs in fee, provided they give bond to restore it, in case she is restored to her mind. Granted; and the superior court ordered to carry the prayer of the petition into equitable execution.

1783. Petition of Z. Hopkins, stating that he was treasurer of Gloucester, was sued upon notes given by him officially, and judgment has been recovered against him, and praying that execution may be issued against the present treasurer. Granted.

1783. Petition of William Haven, praying that a decree of the admiralty court may be set aside and a trial allowed. Granted.

1784. On petition, a deed of gift from Gideon Sissor to his infant children was declared void and fraudulent, and the estate was restored to him.

1786. Stephen and Daniel Stanton were appointed guardians of their father, and allowed to sell his real estate to pay debts, &c.

1791. Petition of Mary Dennison, of Stonington, Connecticut, executrix, for the sale of real estate in South Kensington, to pay debts, and to account with the judge of probate in Connecticut. Granted.

extreme limits of state power in regard to its domain. All the power over that subject, whatever may be its measure, is in the states. A very small portion of it was exercised in the present case; the principles of natural justice were not violated, unless it is unjust to appropriate the property of a debtor to the payment of his debts; no vested rights were disturbed, because Cynthia Jenckes, the devisee, took the estate subject to the debts of the testator. The general law of Rhode Island furnished the creditors with various direct remedies against the estate itself. It was liable, in an action against the devisee, to have been attached on an original writ, and sold upon execution. A creditor might have taken administration, and petitioned the supreme court for license to sell. The right of the devisee, therefore, was subject to such remedies, as had been previously provided by the general law, and also to such remedies as the legislature chose subsequently to provide. The application of the general or the special remedy would alter but not impair the rights of the parties. Previous to the sale, the *right of the creditor was to obtain payment, either from the devisee or the [*636 estate. The right of the devisee was to hold the estate subject to this elder right of the creditor. It was at her election to discharge the debts voluntarily, and remove the incumbrance from the estate; or to allow the creditor to proceed under the best remedy he could obtain. The deed of the executrix and the act of the legislature, constituted a cheap and summary remedy for the enforcement of the rights of the creditor. If the estate had not come to the hands of the devisee loaded with the lien of the creditors, it might have been difficult to have considered the act as merely remedial; for it would have bestowed new rights upon the creditor, and heaped new obligations upon the devisee.

Three propositions, then, may safely be advanced in relation to this act: 1. That no injustice was done. 2. That vested rights were not disturbed. 3. That the obligation of contracts was not impaired.

The power of the legislature to furnish remedies in favor of existing rights, was exercised to a much greater extent, in the cases of *Calder* v. *Bull*, 3 Dall. 386; *Underwood* v. *Lilly*, 10 Serg. & Rawle 97; and *Foster* v. *Essex Bank*, 16 Mass. 245, than in the case before the court.

It may be urged, that no notice was given to the devisee; that her title was divested by the void deed of an unauthorized executrix, confirmed by an act to which she was not a party, and the existence of which she was ignorant of, until her estate was taken from her. If notice was necessary, it may safely be presumed, at the end of thirty-six years. 15 Mass. 26. But notice was not necessary. It was not an adversary proceeding. If the creditors had petitioned for a remedy against the estate, common justice would have required notice to the devisee. But the petition was by the legal representative of the estate; the legal representative in Rhode Island, as well as in New Hampshire. The power of an administrator is confined to the state for which he is appointed; he is not the representative of the intestate in any other state. But the power of an executor is co-extensive with the estate of the testator; he derives his power from the will, and he has *an exclusive right to administer, wherever any estate may be [*637 found. The moment the testator died, the power of his executrix over his estate in Rhode Island was precisely the same as over his estate in New Hampshire. It was complete in both states, except as to the bringing

actions, and the sale of real estate. She could bring no action in either, until she qualified, by giving bond; she could not sell real estate in either, until she had obtained a license. In all other respects, her power was the same in both states; the will gave her the exclusive right to administer in both states; she had a right to apply for a probate of the will, and for license to sell, in both states. The will was the power; the executrix was the attorney; and every act which the power authorized her to do, she could rightfully perform, without notice; there is no difference, in this respect, between a will and any other power. The executrix, in petitioning the legislature of Rhode Island for power to sell, was acting as the representative of Jonathan Jenckes, was taking a step she had a right to take, without consulting heirs or devisees, and without giving them notice. The general law of Rhode Island authorized an executor to petition the supreme court for a license, without giving notice. Why should she give notice, when she petitioned the legislature? There is a wide difference between the right to sell, and the right to apply for a license to sell. The former is derived from the decree of a court or legislative act; the latter is from the will itself. These positions are fully sustained in Toller on Executors 41, 65, 66, 70; 1 Ld. Raym. 361; 1 Str. 672; 1 Dane's Abr. 558; *Burnley* v. *Duke*, 1 Rand. 108; *Jackson* v. *Jeffries*, 1 A. K. Marsh. 88; *Rulluff's Case*, 1 Mass. 240; *Rice* v. *Parkman*, 16 Ibid. 326.

It must be admitted, then, that as this act of the legislature impaired no contracts, and interfered with no vested rights, they had the constitutional power to pass it. It must also be admitted, that the executrix had a right to apply for a license to sell, wherever real estate could be found, until the debts were paid; and that there was no more necessity *of giv- *638] ing the heirs notice of such an application in Rhode Island, than there would have been, upon a similar application in New Hampshire. The cases in 3 Dall. 386; 12 Wheat. 378; 9 Mass. 151, 360; 4 Conn. 209; and 16 Mass. 260, also show, that it is no objection to the act, that it is retrospective and private.

These constitute all the objections that are anticipated against the legal validity of the act. The principal, if not the only, objection that will be much relied upon, relates to its legal effect, rather than to the power of the legislature to pass it. The grounds that will be mainly contended for, it is supposed, will be these; that admitting that the legislature had sufficient power to have authorized the executrix to make a future sale, yet instead of this, they undertook to confirm a previous sale; that they passed an act, in June 1792, confirming a void deed, made in November 1791. As the executrix, in November 1791, acted under the license of the court of probate in New Hampshire, and had obtained no authority to sell from any court in Rhode Island, it is very clear, that the deed, without such authority, was a mere nullity. The bond entered into by the parties, providing that unless the executrix obtained a ratification of the sale by the legislature, is satisfactory evidence, that the parties considered the deed of no validity. The act of the legislature, then, confirms a void deed, and the old principle of the common law, that a deed of confirmation will not validate a previous void deed, will be relied upon. In Co. Litt. 295 *b*, it is said, "a confirmation doth not strengthen a void estate, for a confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void in

law." This is the uniform language of the ancient books, and the reason of the principle is found in Gilbert's Tenures 75, 78. "A confirmation passes no new estate to the grantee; it is the assent of the confirmor, that the grantee may hold the estate previously granted." This being the rule between parties to conveyances, it is supposed, *that a confirmation by the legislature, is to be construed by the same rule. Cynthia [*639
Jenckes, the executrix, in November 1791, made a deed of all the right, title and interest of Jonathan Jenckes, the testator, in the demanded premises. Having obtained no previous license, the deed was void. The argument is, that a deed of confirmation by Cynthia Jenckes, the devisee, would have been of no force, and that, therefore, a confirmation by the legislature was equally void.

Two answers may be given to this very plausible reasoning. 1. We deny that a confirmation, by the devisee, of the void deed of the executrix, would have been invalid; and if it would, we deny, 2. That it necessarily follows, that a confirmation by the legislature, is of the same character.

Would a confirmation by the devisee have been binding? It is admitted, that in general, a confirmation of a void deed, is inoperative. An examination of the reason of the rule, however, will show its inapplicability to this case. It applies to a deed void for want of estate in the first grantor. As, for instance, A. is the owner in fee of a lot of land; B., having no title, makes a deed to C., which is a mere nullity; afterwards, A. confirms to C. the deed of B. What does this amount to? Why, in the language of the books, "to the assent of the confirmor, that C. may hold the estate conveyed by B." What was that estate? The title of B. If Cynthia, the mother, had conveyed to Brown and Wilkinson, her title to the land of Jonathan Jenckes, a confirmation of such a deed, upon strict principles, would have been inoperative. But she acted as executrix; she conveyed, not her own, but the title of Jonathan Jenckes. A confirmation by the devisee, would have been an assent that the grantee should hold "the estate" conveyed by the deed. Whose estate? Why, the estate of the grantor. Who was the grantor? Jonathan Jenckes, by his agent, Cynthia Jenckes. A confirmation of a deed is a confirmation of the title professed to be conveyed by that deed. Had Cynthia Jenckes conveyed her title, a confirmation would have established her title. As she conveyed the title of Jonathan Jenckes, it [*640
*established his title in the grantee. The deed of the executrix was void for want of authority, not for want of estate; and a subsequent confirmation of a void authority is equivalent to a previous grant. It is, therefore, denied, that a confirmation, by the devisee, of such a deed, would have been inoperative. But suppose it would; does the consequence drawn from that position necessarily follow, that a confirmation by the legislature must share the same fate? Is an act of the legislature to be construed by technical rules of conveyances, or by its main scope and design? What was the sole object of applying to the legislature? The answer must be, to authorize the executrix to convey the title of Jonathan Jenckes to the grantee. The language of the petition and the act are very pointed to this effect. The whole doctrine of confirmation, however, is applicable only to deeds which contain no other than technical words of confirmation. Whenever an intention is manifested to enlarge the estate of the grantee, such intention shall prevail. Co. Litt. 296 *a*. Without any further refining upon obsolete

rules, however, it is enough for our purpose, that even in England, none of these rules ever applied to a confirmation by act of parliament.

One other view may be taken of the case, which will relieve it of all objections arising from its retrospective and confirmatory character. This view is, to consider the deed, the bond, and the act of the legislature, as one conveyance, having a present operation. The parties knew that the deed was void; they knew that no title passed to the grantee. How then could they intend, that it should operate, until after the act was obtained? It would be idle to contend, that the parties meant a deed to operate, which they themselves declare to be inoperative and void. The deed was executed and delivered in November 1791, but the deed was only a part of the conveyance. The act of the legislature was contemplated as another essential part; and *641] when the act was obtained, *it was, in its legal effect, a license to sell the estate, and the deed was given subsequent to, and under the license. The authorities fully sustain this position. "In the execution of a power, in order that the deficiency of an instrument may be supplied by the sufficiency of another, it must appear, that the parties intended they should operate conjointly." 3 East 410, 438; *Earl of Leicester's Case*, 1 Vent. 278; *Herring* v. *Brown*, Carth. 22; 3 Mass. 138; 1 Johns. Ch. 240.

If, however, there had been originally an incurable defect in this conveyance, an acquiescence of thirty-six years estops the parties from now making their claim. "Yet even heirs and creditors are concluded after a long acquiescence; and a legal presumption of the regular exercise of authority is accepted instead of proof." 15 Mass. 26.

Webster, for the defendant in error.—The history of the case is, that there lived a man of the name of Jenckes, who had acquired real estate in Rhode Island; he made his will in 1774, in which he devised his estate to his daughter Lydia, for life, and the reversion to his son Jonathan Jenckes. Lydia survived Jonathan Jenckes, who, eight years after the death of his father, made his will, and gave the reversion of the estate to his daughter Cynthia Jenckes. At this time, Jonathan Jenckes lived at Winchester, in New Hampshire, where he died in 1787. He appointed his wife, whose name was Cynthia, the executrix of his will, with another person who never acted. The will provided for the payment of debts; and if there was a deficiency in the personal estate, that specific portions of the real estate should be sold for the purpose. Unhappily, the executrix intrusted a person who was employed by her, and who took upon himself to do everything. He acted as agent, commissioner and purchaser. He also got an agreement for her dower, and sent her to Vermont, where she died. It also happened, that a large estate, at that time, turned out to leave but *642] 15*l.* 7*s.* 6*d.* *The minors came of age; by good conduct they raised themselves from penury, and have brought their case before this court.

There is no dispute, down to the will of the elder Jonathan Jenckes, or of his son. The plaintiffs below claim under the will. The will was proved and admitted, and the question is, whether the plaintiffs in error are entitled to hold the property. First, it was pleaded, that the plaintiffs below were barred by the statute of limitations, but this has been overruled. They had a title by devise and inheritance, and the question is,

whether any one has derived a title from their ancestor, which can take it away.

The question turns only on the validity of the title of the plaintiffs in error, who say they are purchasers under Moses Brown and Oziel Wilkinson. That the land in controversy went out of the family; Jonathan Jenckes, the ancestor, having died, leaving debts, and the executrix having made sale of the lands for their payment. The will of Jonathan Jenckes was proved in New Hampshire, in 1787; the debts there were all paid. The defendants in the circuit court produce a deed from Cynthia Jenckes to Moses Brown and Oziel Wilkinson, of November 12th, 1791, and a confirmation by the assembly of Rhode Island. What is the character, and what are the powers, of the legislature of Rhode Island, will be examined in the course of the argument. The deed purports to proceed by the authority of a license, granted by the judge of probate of New Hampshire. It is not material now to show, that all the proceedings in New Hampshire were void; they were all contrary to the law of the state. If the land laid there, the deed would be declared void.

One view is to be taken of this question, which is not to be lost sight of. The laws of the New England states make lands subject to debts. What is the nature of this liability? Where is the title of the land, until it shall be known that it will be wanted for the payment of debts? It is in the heir or devisee, and the personal representative has nothing but a power to sell it for the payment of debts. *He has a power to sell only on [*643
the arrival of certain events; and he who is to exercise that power, must show that those events have arisen. This power does not exist, until the event happens to make it necessary to sell the land. Every principle of law requires, that when this power is exercised, it shall be proved that the case exists to require its employment. The cases decided in the courts of Massachusetts, upon the statute of that state, which is like the statute of New Hampshire, show, that the party claiming under a deed for lands sold for the payment of debts, must show that the event on which the power to sell depended had occurred. By the laws of New Hampshire, the heirs are always to have notice, when the estate is to be sold. They also require an inventory of the estate, and an order to sell; in this case, there was nothing of that kind; there was only a license to sell, without any other proceedings. No account was filed in New Hampshire, which took any notice of the debts or property in Rhode Island. 11 Mass. 511; 12 Ibid. 503; 6 Ibid. 149; 3 Ibid. 259; 1 Ibid. 40, 46. It will be seen, from the record, that the will was proved in March, and the license to sell was granted in July, without an inventory and account being made out. The cases cited show, that the judge of probate has no jurisdiction, unless it appear that there was occasion to sell. It is contended, that if the proceedings in New Hampshire could give no authority there, they could give none in the state of Rhode Island. There were no proceedings in Rhode Island, except the *fiat* of the legislature. It is not pretended, that there were any proceedings in Rhode Island required by the laws of New Hampshire.

Then, the first proposition is, that the deed from Cynthia Jenckes to Brown and Wilkinson was a nullity. It created no right, in law or equity It was as the act of a stranger, to grant land which did not belong [*644
to him. *This follows, because, 1st, the deed would have been void

in New Hampshire. 2d. Because proceedings to divest rights to land, must be according to the law of the land.

It is contended, that the powers of the legislature of Rhode Island are unlimited and unrestrained, that they transcend all the powers of the other branches of the government. It is not sufficient, to show that the power to divest this property would be limited in England, for the powers of legislature of Rhode Island are beyond those of the English parliament. It would be well to consider how Rhode Island can be a member of this Union, with such a form of government as is asserted to exist there. By the constitution of the United States, every state must be a republic, every state must have a judiciary, legislature and executive, or it has no constitution. It is said, that Rhode Island has no constitution; that she has grown up, without a constitution. If her government has no form, it cannot be a republic, and has no right to come into the Union. But it will be found, that Rhode Island has a constitution. The charter of Charles II. contains all the provisions for the organization of a government with legislative, judicial and executive branches. It declares, that courts of justice shall be established, and thus to them is given the exercise of judicial functions. The legislature is established by the same charter, and its functions cannot be judicial. The powers of a court and of a legislature cannot be blended; nor are they, properly, under the charter referred to. If the legislature of Rhode Island has judicial powers, why does not a writ of error lie from this court to its judgments? Writs of error go from this court to the highest judicature of the states; but it is not denied, that Rhode Island has courts of judicature, separate from the legislature, taking cognisance of all cases for judicial decision. The legislature, therefore, in assuming the powers of a court, which was done when they authorized the sale of the land for the payment of the debts, did what, even under the Rhode Island constitution, they could not do.

*645] *A long list of instances of legislative interference has been exhibited by the counsel for the appellees. Some of these cases prove too much. Authority is given in one of them to sell lands in New Hampshire. It is necessary for the plaintiffs in error to show that the power has been exercised against the will, *in invitum*. Parliament, in England, never proceeds upon any private bill, without notice to all the parties; and there is no case in which parliament exercises its authority to dispose of land, without the consent, in writing, of every one who is interested. The consent of the heirs of Jonathan Jenckes is not recited in the act of the legislature of Rhode Island, To establish a usage for legislation of this kind, it should be shown, that there have been a series of proceedings against the will of parties interested, and without notice. There is but one of the cases referred to, in which the legislature of Rhode Island has undertaken to act in reference to private rights, which shows that they have given authority to sell lands out of the state. The power must be exercised legislatively or judicially. Is the resolution of 1792 an act or a decree? Is it a decree of a probate court? If it is, then it should be shown, that the parties were before the court, or that notice was given to them. It is immaterial, which it is. The case will always be, that the devisees of Jonathan Jenckes had this land until the deed; and that deed is, by the counsel of the plaintiffs,

admitted to be void. It remained, therefore, with the heirs, until the resolution or act of the legislature.

Even taking the land to be public domain, the deed would not pass it. It is not operative. It contains no terms of grant, or language of transfer. The resolution only establishes the deed in its form. There are no words giving, granting, vesting or divesting of the estate; all that is done is to ratify and confirm the deed. If the confirmation contained words of grant, it would inure as a grant; but this is not the fact. If the preceding act, that of making the deed for the land to Brown and Wilkinson, was void, there are no words in the law to give it validity. *From Bracton down, it has been law, that a confirmation cannot help a void deed. [*646
2 Thomas's Coke 516; Gilbert on Tenures 75, 78. If there is no precedent estate, the confirmation is void. 2 D'Anv. Abr. 140. There is no case where confirming words go further than to apply to the thing itself. The deed was a nullity; to confirm it in its then state, was to keep it such. At that moment, it was void; to confirm it, was to render it void permanently. It is as if A., a creditor of B., should go to the legislature and ask that B.'s property be transferred to him, without a trial. It is a condemnation without a hearing, a confiscation of property in time of peace. There is no case in which such legislative proceedings have stood the test of this court. It is a case where land was vested in those who claim it, and has been taken from them. There was no application to the legislature of Rhode Island by the creditors; no evidence that the interference of the legislature was claimed by them. What, then, are the facts of the case? The lands descended to the heirs of Jonathan Jenckes; the heirs were in New Hampshire; no creditors applied for the aid of the legislature; there was no notice to the heirs. The deed of the executrix was entirely void; and there is no pretence for saying, that the interests of the heirs were, in any manner, regarded in the course of the proceedings. Under these facts, the law was passed; and whatever words were used, it could not have any effect, for want of power in the body which enacted it. This is a private act; and upon every principle and rule of legislative proceedings, all the parties to be affected by it, should have had notice, and should have consented to it. This is the course of legislation in the British parliament. 3 Bl. Com. 345.

It is of no importance to the question before the court, whether there are restrictions or limitations to the power of the legislature of Rhode Island, imposed by the constitution. If, at this period, there is not a general restraint on legislatures, in favor of private rights, there is an end to private property. *Though there may be no prohibition in the constitution, [*647
the legislature is restrained from committing flagrant acts, from acts subverting the great principles of republican liberty, and of the social compact; such as giving the property of A. to B. 2 Johns. 245; 3 Dall. 386; 12 Wheat. 303; 7 Johns. 93; 8 Ibid. 511. In this case, it may be considered, that the legislature gave the act, but they did not guaranty its validity. They gave it, because it was asked for, but subject to all exceptions. They put in the power of the persons who were interested in its operation, to make it valid, by obtaining the assent of the devisees, and of doing all other acts which were necessary to give it validity.

It is said, that were the statute of Rhode Island under the restrictions of a written constitution, like other states, the power to pass such a law might

not exist; but there the legislature acts by the sovereign authority of the people, who may build up and destroy. This is denied. Rhode Island must be a republican state, and the government must be divided into departments, and must be a government of laws. These departments may exist, although the same body exercises the functions of both. This is done in New York. But where a legislature acts judicially, it proceeds according to the forms, and upon the principles which regulate courts. In this case, the legislature acted legislatively. The language is, "resolved;" judicial tribunals decree, adjudge.

As to the precedents which have been referred to, from the proceedings of the legislature of Rhode Island, it may be well observed, that the same irregularities will be found in the early proceedings of the governments of all the states, before the principles of government were understood or applied. The answer to them is, thas the rights of property were not then well understood.

Or, if we consider the words operating, not on the instrument, but on the title; if they had been, "confirm and ratify the title set forth in the deed;" still it passes no title. There was nothing in the grantees to confirm. Confirmation, to enable it to operate, requires privity. *Where was the
*648] fee in the property, from November 1791 until 1792? It was with the heirs, and from them it could not be taken but by a course of judicial proceeding. The legislature, by no form of words, could have divested the land out of the heirs, and vested it in the purchasers. The general ground assumed by the defendants in error is, that the act of the legislature is inoperative, because it does not divest their rights; for the legislature of Rhode Island has no right to pass such a law. The law itself is intended as a remedy, and was no more. Its purport is to establish a sale made for the payment of debts, and its terms import no more.

It is said, that no interest in the land existed in the devisees of Jonathan Jenckes, because they took the estate loaded with the debts of the devisor. This inference is incorrect; that their estate might be made subject to these debts, did not prevent its vesting in the claimants, and those under whom they make title. It is agreed, that this estate might be divested; but only by judicial proceedings. The argument is, that the property could not be taken away, without proceedings of a judicial character. It is said, the statute gave a remedy, because the creditors had a right to be paid out of the estate, and that this was an interference for their benefit. If it had been a proceeding to bring rights into adjudication, it would be so; but in this case, the rights of the devisees were adverse to those of the executors, and to the claims of the creditors.

Wirt, in reply.—It is a matter of surprise, how the strongest minds will err, when they look through the mist of prejudice. Nothing more has been done in this case, than is done by the courts of probate in Vermont and Massachusetts. What is the monster that the gentleman has created? It is, that the legislature has authorized an executrix to sell lands for the payment of debts. "This is the very head and front of their offending." It was a mere act of common justice, due and performed in the course of justice, in all the states of the Union.
*649] *The facts of the case may be briefly stated from the *bill of

exceptions. Jonathan Jenckes died in 1787, seised of the lands, subject to a life-estate to Lydia, his sister; that estate was devised to his daughter, subject to the life-estate. Cynthia Jenckes, his wife, was executrix, and qualified. At the time of his death, there were debts which absorbed all his personal estate, and ultimately all his real estate, but a small portion. The judge of probate, after examination, gave a license to sell the real estate. It was sold by the executrix to those under whom the plaintiff in error claims, the sale to be confirmed by an act of the legislature of Rhode Island, where the lands laid. The legislature passed a confirming act, and the purchase-money was paid, and the debts of Jonathan Jenckes were discharged. The purchase was made on the faith of the law of Rhode Island; the money paid upon the faith of that law; and all this was done, thirty-four years before the ejectment was brought in the circuit court of Rhode Island. In the meantime, other *bonâ fide* purchasers have become possessed of the land: and who come forward now to claim it?—not other *bonâ fide* purchasers, but the heirs of Jonathan Jenckes. The attempt here is, to make the lands fulfil two purposes. 1. The payment of the debts of their father by the sale; and 2. Then to recall that sale, that the lands may support the heirs of the debtor. The claim is against all the policy, and the course of proceeding, in New England.

The case comes here under a *pro formâ* judgment of the circuit court. The inquiry is, whether the court erred in giving the instructions asked for; in saying that the conveyance and proceedings, by which the title was intended to be vested in the purchasers, did not divest the legal estate of the heirs of Jonathan Jenckes. In Massachusetts and Rhode Island, all the estate real and personal of the deceased is subject to the payment of debts. All the statutes of the northern states, although they vary in detail, contain this principle. Bigelow's Digest 350; 4 Mass. 354; 18 Ibid. 157; 4 Ibid. 654; 3 Ibid. 258; 1 Ibid. 340. By a reference to these authorities, it will appear, that in order to justify a license to sell, in either of those states, *nothing more is necessary but to satisfy the judge that the personal estate is not sufficient to discharge the debts of the deceased. No [*650 form of proceeding is required. It is done by presenting the account of the debts and personal estate, and the judge then gives the license.

Objections have been made by the counsel for the defendants in error, to the proceedings in New Hampshire. It is said, they were a nullity; that they were irregularly granted. This is denied, and no authorities have been shown in support of the objections. It has been urged, that notice should have been given to the heirs. There has been no case cited in Massachusetts, which looks to the necessity of notice to the heirs, of the application for a license to the judge of probate. The regularity of the proceedings is to be presumed, after so long a lapse of time; if notice is required; if evidence different from that which is shown to have been exhibited before the judge of probate, was necessary; it is, and ought to be, considered, that it was furnished.

In legal contemplation, both the real and personal estate of a deceased person, go into the hands of the executor for the payment of debts. 4 Mass. 354; 18 Ibid. 157. Executors have no right to take possession of the lands, but it is often done, with the approbation of courts. To show how completely lands are in the hands of executors, where a judgment is obtained

against executors for the debt of the testator, the plaintiff may issue his execution against the lands, in the hands of the heir. 3 Mass. 258. It is true, the title descends to the heir, but it descends subject to the debts. The heir takes the lands, liable to their being taken from him, when the debts require it, without proceedings against him, and without notice to him. Bigelow's Dig. 355. Nor is it only in the hands of the heir they are thus liable, they continue so, when they have passed to his alienee. Such is the law of vested estates, with which it is said the legislature has interferred. The estate upon which the law operated, was held by the heirs, subject to the exercise of the very power by which it was taken from the heir. *The law of
*651] New Hampshire is the same as that of Massachusetts. In New Hampshire, the proper tribunal to authorize the sale of the land was applied to, and thus the acts done by the executrix were those which the testator, who directed a sale of his real estate for the payment of his debts, authorized her to do.

But if these proceedings were irregular, it would not affect the case. It is not meant to contend, that the license to sell, given by the judge in New Hampshire, authorized the sale in Rhode Island. What was the power of the executrix, under the will? As an executrix, she had the power to do all and everything an executrix could do by law. In some of the states, executors who have been qualified in one state can act in all. This is the law of Pennsylvania, and of North Carolina and of Mississippi. Under the will of her husband, Cynthia Jenckes could do anything in Rhode Island which she could do in New Hampshire. She entered Rhode Island, as the regular agent to pay the debts due by the testator. The probate of the will only was necessary. In this character, she made a sale of a portion of the estate, having no authority to do so; this is admitted. In order to induce the purchase, she gave her bond, by which it was stipulated, that she would obtain an act of the legislature to make the sale valid, and this was done. Thus, the principles of the laws of Rhode Island were applied, and the estate became the means of discharging the debts of the testator. By a comparison of the acts of the courts of other states, we shall see how far the act of Rhode Island exceeded the powers exercised by them. It is said, that this is a case of a trial without notice; a confiscation! In no case where proceedings against executors are resorted to, for the purpose of making lands a fund to pay debts, is notice given to heirs (not in the courts of other states), but in the court of probate in Rhode Island, or New Hampshire. The reproaches which have been cast upon the acts of Cynthia Jenckes, apply, therefore, with equal right, to all proceedings of this description; nor is there any reason why notice should be given to the heirs; they take the estate as has been stated, subject to the debts of the ancestor.

*It has been said, that in the proceedings there was fraud, that the
*652] legislature were deceived. This is denied: but if it were so, would this court set aside the law; the remedy in such a case would be by an application to the sovereign who had been deceived. The legislature passed the law for the purpose of giving validity to an act, which all knew, without it, would not pass the estate. The petition of Cynthia Jenckes was not that they should ratify the deed, but the sale; that is, that the sale should be effectual to convey the estate of the testator. Who is the sovereign that can give validity to measures which are intended to pass the title to lands

within the state? Is it not the legislature of the state, and are not its acts effectual to do this, unless they come in contact with the great principles of the social compact? What power has this court to say this deed shall not pass the estate? With which of the principles of the constitution of the United States is it in conflict? Where is the provision which it opposes? It is not an *ex post facto* law. The prohibition in the constitution in reference to *ex post facto* laws applies to criminal enactments. Is it a law which impairs the obligation of a contract? It affirms a contract. It is said to be incompatible with a republican government. It is denied, that legislative, executive and judicial powers must be in different hands, to constitute a republican form of government. That this should be so, is a great and important principle, but it is not a test of republican government. There is nothing which prohibits the exercise of all the powers of government by a legislature. If the guarantee of a republican form of government by the United States was violated by the government of Rhode Island, why had not the United States interfered? The charter of the government of Rhode Island is a skeleton; it does not form the government. It is the usages of Rhode Island that compose the constitution. The people say their legislature shall have certain powers, and be unlimited; this is, therefore, the form of government with which they are satisfied. Politicians may protest, and orators may *declaim; but this does not affect the case. This court will not take away from them what they have said they will have. [*653

The references which have been made to the proceedings of the legislature, show that it exercises all kinds of power. It is said, this is a new case; suppose it is so, is it necessary to show the authority for the first law? The authority is that of the people. The legislature always has acted as the emergency presented. Whom do they injure? They do not infringe their own constitution; and when they do so, it is for the people of the state to interfere. They do nothing which is contrary to the constitution of the United States. If the legislature of Rhode Island possessed the power to order a sale, why not have power to confirm a sale? There is no exercise of a greater power here; a court of probate might not do it, but that court is limited in its powers. A subsequent ratification is equivalent to a prior authority. It is said, that the state has done what parliament could not have done. Blackstone has been referred to, to show that private acts do not pass, without notice. Parliament cuts the knot, and destroys contracts, and therefore, notice is necessary. There is no violation of contract in this act; the law only supposes an omitted case, and gives a remedy where the principles of law require it. It is contended, that the confirmation has no effect, because it operates on a void deed. A reference to authorities will show the error of this assumption. 1 Roll. Abr. 483; 1 Ld. Raym. 292, 297. Cannot parliament confirm a void deed? They can do so, and the right has never been questioned.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Rhode Island, in a case where the plaintiff in error was defendant in the court below. The original action was an ejectment, in the nature of a real action, according to the local practice, to recover a parcel of land in North Providence, in that state. There were several pleas pleaded, of the statute of limitations, upon which it is unneces-

sary to *say anything, as the questions thereon have been waived at the bar. The cause was tried upon the general issue; and, by consent of the parties, a verdict was taken for the plaintiffs, and a bill of exceptions allowed upon a *pro formâ* opinion given by the court in favor of the plaintiffs, to enable the parties to bring the case before this court for a final determination. The only questions which have been discussed at the bar, arise under this bill of exceptions.

The facts are somewhat complicated in their details, but those which are material to the points before us, may be summed up in a few words. The plaintiffs below are the heirs-at-law of Cynthia Jenckes, to whom her father, Jonathan Jenckes, by his will, in 1787, devised the demanded premises in fee, subject to a life-estate then in being, but which expired in 1794. By his will, Jonathan Jenckes appointed his wife Cynthia, and one Arthur Fenner, executrix and executor of his will. Fenner never accepted the appointment. At the time of his death, Jonathan Jenckes lived in New Hampshire, and after his death, his widow duly proved the will in the proper court of probate in that state, and took upon herself the administration of the estate as executrix. The estate was represented insolvent, and commissioners were appointed in the usual manner, to ascertain the amount of the debts. The executrix, in July 1790, obtained a license from the judge of probate in New Hampshire, to sell so much of the real estate of the testator as, together with his personal estate, would be sufficient to pay his debts and incidental charges. The will was never proved, nor administration taken out, in any probate court of Rhode Island. But the executrix, in November 1791, sold the demanded premises to one Moses Brown and Oziel Wilkinson, under whom the defendant here claims, by a deed, in which she recites her authority to sell as aforesaid, and purports to act as executrix in the sale. The purchasers, however, not being satisfied with her authority to make the sale, she entered into a covenant with them, on the same day, by which she bound herself to procure an act of the legislature of Rhode Island, ratifying and confirming the title so granted; and on failure thereof, *655] *to repay the purchase-money, &c. She accordingly made an application to the legislature of Rhode Island for this purpose, stating the facts in her petition; and thereupon, an act was passed by the legislature, at June session 1792, granting the prayer of her petition and ratifying the title. The terms of this act we shall have occasion hereafter to consider. In February 1792, she settled her administration account in the probate court in New Hampshire, and thereupon, the balance of 15*l.* 7*s.* 7*d.* only remained in her hands for distribution.

Such are the material facts; and the questions discussed at the bar, ultimately resolve themselves into the consideration of the validity and effect of the act of 1792. If that act was constitutional, and its terms, when properly construed, amount to a legal confirmation of the sale and the proceedings thereon, then the plaintiff is entitled to judgment, and the judgment below was erroneous. If otherwise, then the judgment ought to be affirmed.

It is wholly unnecessary to go into an examination of the regularity of the proceedings of the probate court in New Hampshire, and of the order or license there granted to the executrix to sell the real estate of the testator. That license could have no legal operation in Rhode Island. The

legislative and judicial authority of New Hampshire were bounded by the territory of that state, and could not be rightfully exercised to pass estates lying in another state. The sale, therefore, made by the executrix to Moses Brown and Oziel Wilkinson, in virtue of the said license, was utterly void; and the deed given thereupon was, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein. It was a mere nullity. Upon the death of the testator, his lands in Rhode Island, if not devised, were cast by descent upon his heirs, according to the laws of that state. If devised, they would pass to his devisees, according to the legal intendment of the words of the devise. But by the laws of Rhode Island, the probate of a will in the proper probate court, is understood to be an indispensable preliminary to establish the right of the devisee, and then his title relates back to the death of the *testator. No probate of this will has ever been made in any court of probate in Rhode Island; but that objection is not now insisted on; and if it were, and the act of 1792 is to have any operation, it must be considered as dispensing with or superseding that ceremony. [*656

The objections taken by the defendants to this act, are, in the first place, that it is void, as an act of legislation, because it transcends the authority which the legislature of Rhode Island can rightfully exercise, under its present form of government. And in the next place, that it is void, as an act of confirmation, because its terms are not such as to give validity to the sale and deed, so as to pass the title of the testator, even if it were otherwise constitutional.

The first objection deserves grave consideration, from its general importance. To all that has been said at the bar upon the danger, inconvenience and mischiefs of retrospective legislation, in general, and of acts of the character of the present, in particular, this court has listened with attention, and felt the full force of the reasoning. It is an exercise of power, which is of so summary a nature, so fraught with inconvenience, so liable to disturb the security of titles, and to spring by surprise upon the innocent and unwary, to their injury, and sometimes, to their ruin, that a legislature invested with the power, can scarcely be too cautious or too abstemious in the exertion of it. We must decide this objection, however, not upon principles of public policy, but of power; and precisely as the state court of Rhode Island itself ought to decide it.

Rhode Island is the only state in the Union which has not a written constitution of government, containing its fundamental laws and institutions. Until the revolution in 1776, it was governed by the charter granted by Charles II. in the fifteenth year of his reign. That charter has ever since continued, in its general provisions, to regulate the exercise and distribution of the powers of government. It has never been formally abrogated by the people; and, except so far as it has been modified to meet the exigencies of the revolution, may be considered as now a fundamental law. By this charter, the power to make laws is granted to the *general assembly in the most ample manner, "so as such laws, &c., be not contrary and repugnant unto, but, as near as may be, agreeable to the laws, &c., of England, considering the nature and constitution of the place and people there." What is the true extent of the power thus granted, must be open to explanation, as well by usage as by construction of the terms in which it [*657

is given. In a government professing to regard the great rights of personal liberty and of property and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed, that the great principles of *Magna Charta* were to be disregarded, or that the estates of its subjects were liable to be taken away, without trial, without notice, and without offence. Even if such authority could be deemed to have been confided by the charter to the general assembly of Rhode Island, as an exercise of transcendental sovereignty, before the revolution, it can scarcely be imagined, that that great event could have left the people of that state subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming, that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention. In *Terrett* v. *Taylor*, 9 Cranch 43, it was held by this court, that a grant or title to lands, once made by the legislature, to any person or corporation, is irrevocable, and cannot be re-assumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to
*658] the free enjoyment of their property lawfully *acquired. We know of no case, in which a legislative act to transfer the property of A. to B., without his consent, has ever been held a constitutional exercise of legislative power, in any state in the Union.[1] On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. We are not prepared, therefore, to admit, that the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties. The counsel for the plaintiffs have themselves admitted, that they cannot contend for any such doctrine.

The question then arises, whether the act of 1792 involves any such exercise of power. It is admitted, that the title of an heir, by descent, in the real estate of his ancestor, and of a devisee, in an estate unconditionally devised to him, is, upon the death of the party under whom he claimed, immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title incumbered with all the liens, which have been created by the party in his lifetime, or by the law at his decease. It is not an unqualified, though it be a vested, interest; and it confers no title, except to what remains after every such lien is dis-

[1] The legislature has no power to direct the sale of the real estate of persons *sui juris*. Ervine's Appeal, 16 Penn. St. 256; Kneass's Appeal, 31 Id. 87; Sexton *v.* Mitchell, 78 Id. 479.

charged. In the present case, the devisee under the will of Jonathan Jenckes, without doubt, took a vested estate in fee, in the lands in Rhode Island. But it was an estate still subject to all the qualifications and liens which the laws of that state annexed to those lands. It is not sufficient to entitle the heirs of the devisee now to recover, to establish the fact, that the estate so vested has been divested; but that it has been divested in a manner inconsistent with the principles of law.

By the laws of Rhode Island, as, indeed, by the laws of the other New England states (for the same general system pervades them on this subject), the real estate of testators and intestates stands chargeable with the payment of their debts, upon a deficiency of assets of personal estate. The deficiency being once ascertained in the probate court, a license is granted by the proper judicial tribunal, upon the *petition of the executor [*659
or administrator, to sell so much of the real estate as may be necessary to pay the debts and incidental charges. The manner in which the sale is made is prescribed by the general laws. In Massachusetts and Rhode Island, the license to sell is granted, as matter of course, without notice to the heirs or devisees; upon the mere production of proof to the probate court of the deficiency of personal assets. And the purchaser at the sale, upon receiving a deed from the executor or administrator, has a complete title, and is in immediately under the deceased, and may enter and recover possession of the estate, notwithstanding any intermediate descents, sales, disseisins, or other transfers of title or seisin. If, therefore, the whole real estate be necessary for the payment of debts, and the whole is sold, the title of the heirs or devisees is, by the general operations of law, divested and superseded; and so, *pro tanto*, in case of a partial sale.

From this summary statement of the laws of Rhode Island, it is apparent, that the devisee under whom the present plaintiffs claim, took the land in controversy, subject to the lien for the debts of the testator. Her estate was a defeasible estate, liable to be divested, upon a sale by the executrix, in the ordinary course of law, for the payment of such debts; and all that she could rightfully claim, would be the residue of the real estate, after such debts were fully satisfied. In point of fact, as it appears from the evidence in the case, more debts were due in Rhode Island than the whole value for which all the estate there was sold; and there is nothing to impeach the fairness of the sale. The probate proceedings further show, that the estate was represented to be insolvent; and, in fact, it approached very near to an actual insolvency. So that, upon this posture of the case, if the executrix had proceeded to obtain a license to sell, and had sold the estate, according to the general laws of Rhode Island, the devisee and her heirs would have been divested of their whole interest in the estate, in a manner entirely complete and unexceptionable. They have been divested of their formal title in another manner, in favor of creditors entitled to the estate; or rather, their formal title has been made subservient to the paramount title of the creditors. *Some suggestions have been thrown [*660
out at the bar, intimating a doubt, whether the statutes of Rhode Island, giving to its courts authority to sell lands, for payment of debts, extended to cases, where the deceased was not, at the time of his death, an inhabitant of the state. It is believed, that the practical construction of these statutes has been otherwise. But it is unnecessary to consider,

whether that practical construction be correct or not, inasmuch as the laws of Rhode Island, in all cases, make the real estate of persons deceased chargeable with their debts, whether inhabitants or not. If the authority to enforce such a charge by a sale be not confided to any subordinate court, it must, if at all, be exercised by the legislature itself. If it be so confided, it still remains to be shown, that the legislature is precluded from a concurrent exercise of power.

What, then, are the objections to the act of 1792? First, it is said, that it divests vested rights of property. But it has been already shown, that it divests no such rights, except in favor of existing liens of paramount obligation; and that the estate was vested in the devisee, expressly subject to such rights. Then, again, it is said to be an act of judicial authority, which the legislature was not competent to exercise at all; or if it could exercise it, it could be only after due notice to all the parties in interest, and a hearing and decree. We do not think, that the act is to be considered as a judicial act; but as an exercise of legislation. It purports to be a legislative resolution, and not a decree. As to notice, if it were necessary (and it certainly would be wise and convenient to give notice, where extraordinary efforts of legislation are resorted to, which touch private rights), it might well be presumed, after the lapse of more than thirty years, and the acquiescence of the parties, for the same period, that such notice was actually given. But by the general laws of Rhode Island upon this subject, no notice is required to be, or is, in practice, given to heirs or devisees, in cases of sales of this nature; and it would be strange, if the legislature might not do, without notice, the same act, which it would delegate authority to another to do, without notice. If the legislature had authorized a
*661] future sale by the *executrix, for the payment of debts, it is not easy to perceive any sound objection to it. There is nothing in the nature of the act, which requires that it should be performed by a judicial tribunal, or that it should be performed by a delegate, instead of the legislature itself. It is remedial in its nature, to give effect to existing rights.

But it is said, that this is a retrospective act, which gives validity to a void transaction. Admitting that it does so, still it does not follow, that it may not be within the scope of the legislative authority, in a government like that of Rhode Island, if it does not divest the settled rights of property. A sale had already been made by the executrix, under a void authority, but in entire good faith (for it is not attempted to be impeached for fraud), and the proceeds, constituting a fund for the payment of creditors, were ready to be distributed, as soon as the sale was made effectual to pass the title. It is but common justice, to presume, that the legislature was satisfied, that the sale was *bonâ fide*, and for the full value of the estate. No creditors have ever attempted to disturb it. The sale, then, was ratified by the legislature, not to destroy existing rights, but to effectuate them, and in a manner beneficial to the parties. We cannot say, that this is an excess of legislative power, unless we are prepared to say, that in a state, not having a written constitution, acts of legislation, having a retrospective operation, are void as to all persons not assenting thereto, even though they may be for beneficial purposes, and to enforce existing rights. We think, that this cannot be assumed, as a general principle, by courts of justice. The

present case is not so strong in its circumstances as that of *Calder* v. *Bull*, 3 Dall. 386, or *Rice* v. *Parkman*, 16 Mass. 226; in both of which, the resolves of the legislature were held to be constitutional.

Hitherto, the reasoning of the court has proceeded upon the ground that the act of 1792 was in its terms sufficient to give complete validity to the sale and deed of the executrix, so as to pass the testator's title. It remains to consider, whether such is its predicament, in point of law. For the purpose of giving a construction to the words of the act, we have been referred to the doctrine of confirmation *at the common law, in deeds between private persons. It is said, that the act uses the appropriate words [*662 of a deed of confirmation, "ratify and confirm;" and that a confirmation at the common law will not make valid, a void estate or act, but only one which is voidable. It is, in our judgment, wholly unnecessary to enter upon any examination of this doctrine of the common law, some of which is of great nicety and strictness; because the present is not an act between private persons having interests and rights to be operated upon by the terms of their deed. This is a legislative act, and is to be interpreted according to the intention of the legislature, apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature. It cannot be doubted, that an act of parliament may, by terms of confirmation, make valid a void thing, if such is its intent. The cases cited in Plowden 399; in Comyn's Dig., Confirmation, D; and in 1 Roll. Abr. 583, are directly in point. The only question, then, is, what is the intent of the legislature in the act of 1792? Is it merely to confirm a void act, so as to leave it void, that is, to confirm it in its infirmity? or is it to give general validity and efficacy to the thing done? We think, there is no reasonable doubt of its real object and intent. It was to confirm the sale made by the executrix, so as to pass the title of her testator to the purchaser. The prayer of the petition, as recited in the act, was, that the legislature would "ratify and confirm the sale aforesaid, which was made by a deed executed by the executrix, &c." The object was a ratification of the sale, and not a mere ratification of the formal execution of the deed. The language of the act is "on due consideration whereof, it is enacted, &c., that the prayer of the said petitioner be granted, and that the deed be, and the same is hereby, ratified and confirmed, so far as respects the conveyance of any right or interest in the estate mentioned in said deed, which belonged to the said Jonathan Jenckes, at the time of his decease." It purports, therefore, to grant the prayer, which asks a confirmation of the sale, and confirms the deed, as a conveyance of the right and interest of *the testator. It is not an act of confirma- [*663 tion by the owner of the estate; but an act of confirmation of the sale and conveyance, by the legislature in its sovereign capacity.

We are, therefore, all of opinion, that the judgment of the circuit court ought to be reversed, and that the cause be remanded, with directions to the court to award a *venire facias de novo*.[1]

Judgment reversed.

[1] This case was again before the court in 6 Pet. 317, and 10 Id. 298.

*Claudius F. Le Grand, Appellant, *v.* Nicholas Darnall, Appellee.

Manumission of slaves.

The act of the legislature of Maryland, passed in 1796, ch. 47, § 13, declares, "that all persons capable in law to make a valid will and testament, may grant freedom to, and effect the manumission of, any slave or slaves belonging to such person or persons, by his, her or their last will or testament, and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other period as may be limited in such last will and testament; provided always, that no manumission by last will and testament shall be effectual to give freedom to any slave or slaves, if the same shall be to the prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood at the time the freedom given shall commence;" the time of freedom of the appellee in this case, commenced when he was about eleven years old: *Held*, that his manumission by will was valid.

The court of appeals of Maryland has decided, that a devise of property, real or personal, by a master to his slave, entitles the slave to his freedom by necessary implication; this court entertains the same opinion. p. 670.

Appeal from the Circuit Court of the United States for the district of Maryland. The facts of the case appear in the argument of the counsel for the appellee, and in the opinion of the court.

Taney, for the appellant, submitted the case, without argument; stating, that it had been brought up merely on account of its great importance to the appellee; which rendered it desirable that the opinion of the supreme court should be had on the matters in controversy.

Stewart, for the appellee.—The case presented by the bill, answers and depositions, is as follows: Bennett Darnall, of Anne Arundel county, in the state of Maryland, by his will, dated August 4th, 1810, devised to his son Nicholas Darnall, the defendant in this case, certain lands lying in the county and state aforesaid. The mother of the said Nicholas was the slave of the testator, and Nicholas was born a slave to his father. *Bennett Darnall, in his will, refers to two deeds of manumission executed by him, one in 1805, and the other in 1810, in both of which, it seems, Nicholas was included with other slaves designed to be emancipated by these deeds. By some omission, neither of these deeds are exhibited. The testator made two codicils to his will, the last of which is dated January 20th, 1814, and was proved before the register of wills, January 31st, 1814. Bennett Darnall must, therefore, have died in January 1814. Nicholas Darnall, the defendant, sold the land referred to in the proceedings, to Le Grand, the complainant, and it appears by the agreements exhibited with the bill, that at the time the contract was first made, neither party supposed there was any question about the title. But afterwards, it seems, doubts were suggested to Darnall, which he communicated to Le Grand, and the agreements above mentioned were thereupon made, with full knowledge on both sides of the supposed defect in the title, and were framed with reference to it. Le Grand gave his notes for the purchase-money, according to the agreement, and a suit was brought on one of them, and judgment recovered in the circuit court for the district of Maryland; whereupon, he filed his bill in that court, praying an injunction, on the ground that Darnall was unable to convey him a good title to the land.

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The defect supposed to exist, and alleged in the bill, is this: that Darnall was not more than ten years of age, at the time of his father's death, and at that tender age, was unable to work and gain a sufficient maintenance and livelihood, and was incapable, therefore, of receiving manumission by the laws of Maryland. The answer of Nicholas Darnall insists, that he was, at the time of the testator's death, able to work and gain a sufficient livelihood and maintenance. Four witnesses were examined. John Mercer and Robert Welch prove, that Nicholas was about eleven years of age, at the time of his father's death, and describe him as a fine, healthy, intelligent boy, able by his work to maintain himself. Dr. James Stewart and Samuel *Moore state that boys of eleven years of age, in Maryland, are able to support themselves by their own labor, and specify the kind of [*666 work in which they may be usefully employed. Upon this answer and evidence, the court dissolved the injunction and dismissed the bill.

It is proper to say, that the whole of these proceedings have been amicable; that Le Grand is willing to pay, if his title is a safe one, and that Darnall does not wish Le Grand to pay, unless he can make a good title to him.

By the act of 1796, ch. 67, § 13, slaves may be manumitted, in Maryland, by last will; provided they be under forty-five years of age, and able to work and gain a sufficient maintenance and livelihood, at the time the freedom given shall commence. In the case of *Hall* v. *Mullin*, 5 Har. & Johns. 190, the court of appeals have decided, that a devise of property, real or personal, by a master to his slave, entitles the slave to his freedom, by necessary implication. Under this decision, the will of Bennett Darnall gave freedom to Nicholas, provided he was in a condition to receive it, at the testator's death. The omission, therefore, to produce the deeds of manumission is not material. If they are regarded as not proved, or as not effective, for the purpose intended, still the defendant may rely on his title under the will. In the case of *Hamilton* v. *Cragg*, 6 Har. & Johns. 16, it was held, that an infant slave (only three years of age at the time of the death of the testator who attempted to manumit him), unable to gain a sufficient maintenance and livelihood, could not be manumitted. It was this decision that created the doubt in regard to the title of Nicholas Darnall; for until that case was decided, it had been generally supposed, that this provision in the statute was intended to guard against the manumission of slaves who, although under forty-five years of age, were suffering under incurable diseases or constitutional infirmities, which would most probably always disable them from maintaining themselves by their own labor, and make them a charge upon the public. It had *not been generally supposed to apply [*667 to the case of children, for whose maintenance provision could, perhaps, always be made, by binding them to serve as apprentices, and especially was considered inapplicable to those children for whose support abundant provision was made by the testator who gave the freedom. But without attempting to disturb the authority of that case, the proof in this cause brings it expressly within the principle decided in *Hamilton* v. *Cragg*, and entitles the party to his freedom. The defect of title alleged in the bill is, consequently, without foundation, and the decree of the court below fully justified.

DUVALL, Justice, delivered the opinion of the court.—This case is brought up by appeal from a decree of the circuit court for the district of Maryland, sitting as a court of equity; and is submitted on written argument. The principal facts are the following:

Bennett Darnall, late of Anne Arundel county, Maryland, on the 4th day of August 1810, duly made and executed his last will and testament, and thereby devised to his son, the appellee, several tracts of land in fee, one of which was called Portland Manor, containing by estimation 596 acres. The mother of Nicholas Darnall was the slave of the testator, and Nicholas was born the slave of his father, and was between ten and eleven years old, at the time of the death of the testator. Bennett Darnall, in his will, refers to and confirms two deeds of manumission executed by him; one bearing date in 1805, and the other in 1810. In both of those deeds, Nicholas Darnall and a number of other slaves were included, and emancipated after his decease. The testator died in the month of January 1814.

Nicholas Darnall, on his arrival at full age, took possession of the property devised to him, and on the 26th of April 1826, he entered into a contract with Le Grand, the appellant, for the sale of the tract called Portland Manor, for the consideration of twenty-two dollars per acre, amounting to the sum of $13,112, *payable, by agreement, in six annual payments *668] with interest. Le Grand passed his notes pursuant to the terms of the agreement, and received the bond of Darnall to convey to him the property in fee-simple, upon payment of the purchase-money. Le Grand was thereupon put into possession of the land. At the time the contract was made, the parties believed the title to the land to be unquestionable. Soon afterwards, however, doubts were suggested to Darnall, and he communicated them to Le Grand, and they entered into a supplementary and conditional agreement, without varying in substance the original contract. Darnall was not more than ten or eleven years of age, at the time of the death of his father; and, by a law of the state of Maryland, it is provided, that no manumission by last will and testament shall be effectual to give freedom to any slave, unless the said slave shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood, at the time the freedom intended to be given shall take place.

A decision had lately been made by the court of appeals of Maryland, in the case of *Hamilton* v. *Cragg*, that an infant (whose age did not exceed two years when his title to freedom commenced) was not able to work and gain a sufficient maintenance and livelihood, and was, therefore, adjudged to be a slave. The decision of the highest court of law in the state, gave rise to doubts concerning the capability of the appellee to make a good title to the land which he had sold to the appellant. Darnall deposited the amount of the first payment, that is to say, $3000, in the hands of Benjamin Tucker, of Philadelphia, to be held, with the consent of the appellant, subject to the result of an examination into the title. In consequence of the decision of the court of appeals of Maryland, the heir-at-law of Bennett Darnall, the testator, made claim to the land, and threatened to commence suit for the recovery of it. Le Grand, being alarmed about the title, refused to make any further payment; and an action was commenced against him, and judgment recovered for the second payment. To prevent an execution, and to ascertain, under all the circumstances of the case, whether the

appellee could make a good title to the land which he has sold *to him, he filed his bill of complaint in equity, in the circuit court, stating the circumstances, and obtained an injunction against any further proceedings at law. The appellee put in his answer, admitting all the facts stated in the bill, except that of his inability to gain a maintenance and livelihood by labor, when his right to freedom commenced. This case was submitted to the court upon the bill, answer, exhibits and proofs, which had been taken; and the court, upon due consideration, ordered the injunction to be dissolved, and decreed the bill to be dismissed. From this decree, an appeal was taken to this court, and the cause is now to be finally decided.

There is one question only to discussed. If the appellee, at the time of the death of the testator, was entitled to his freedom under the will and deeds of manumission before mentioned, then his title to the land sold was unquestionable. His claim to freedom, under the instruments above referred to, depends upon a just construction of the act of the legislature of Maryland, passed in the year 1796, ch. 47, § 13. The words of the act are these: "That all persons capable in law to make a valid will and testament, may grant freedom to, and effect the manumission of, any slave or slaves belonging to such person or persons, by his, her or their last will and testament; and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other period as may be limited in such last will and testament; provided, always, that no manumission by last will and testament shall be effectual to give freedom to any slave or slaves, if the same shall be to prejudice of creditors; nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood, at the time the freedom given shall commence." The time of the freedom of the appellee commenced immediately after the death of the testator, when, according to the evidence, he was about eleven years old. Four respectable witnesses of the neighborhood were examined. They all agree in their testimony, that Nicholas was well-grown, healthy and intelligent, and of good bodily and mental capacity; that he and *his brother Henry could readily have found employment, either as house-servant boys, or on a farm, or as apprentices; and [*670 that they were able to work and gain a livelihood. The testator devised to each of them real and personal estate to a considerable amount. They had guardians appointed, were well educated, and Nicholas is now living in affluence. Experience has proved, that he was able to work, and gain a sufficient maintenance and livelihood. No doubt as to the fact has ever been entertained by any who know him. Of course, he was capable in law to sell and dispose of the whole or any part of his estate, and to execute the necessary instruments of writing to convey a sufficient title to the purchase.

The court of appeals of Maryland, in the case of *Hall* v. *Mullin*, decided, that a devise of property, real or personal, by a master to his slave, entitles the slave to his freedom, by necessary implication. This court entertains the same opinion.

It is not the inclination of this court, to express any opinion as to the correctness of the decision of the court of appeals of Maryland, in the case of *Hamilton* v. *Cragg*. It is unnecessary, in reference to the case under consideration. The decree of the circuit court is affirmed; and by consent of parties, without costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel: On consideration whereof, it is considered, ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, without costs.

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*671] *Bank of Columbia, Plaintiffs in error, *v.* George Sweeney, Defendant in error.

Summary remedies.

The act of the legislature of Maryland of 1793, incorporating the Bank of Columbia, one of the sections of which gives to the bank a summary proceeding against debtors to the bank, did not intend to interfere with any legal defence against the claim of the bank the party might have; it does not prescribe the nature of the defence, nor deprive him of any which might have been used, had the action been commenced in the usual way.

Bank of Columbia *v.* Sweeney, 2 Cr. C. C. 704, affirmed.

Error to the Circuit Court of the District of Columbia, and county of Washington. The same case was before this court at January term 1828, on a motion for a *mandamus*. (1 Peters 567.)

Upon issue being joined in the circuit court, on the plea of the statute of limitations, that court decided, that the defendant was entitled to avail himself of the statute, against the claims of the plaintiff, proceeding under the provisions of their charter, which gives them summary process against their debtors.

The case was submitted to this court, on a written argument, by *Jones* and *Key*. The plaintiffs below prosecuted this writ of error, and sought to reverse the judgment of the circuit court.

Marshall, Ch. J., delivered the opinion of the court.—In 1793, the state of Maryland passed an act incorporating the Bank of Columbia, which contains the following section: "And whereas, it is absolutely necessary that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them: Be it enacted, that whenever any person or persons are indebted to the said bank, for money borrowed by them, or for bonds, bills or notes given or indorsed by them, with an express consent
*672] *in writing, that they may be made negotiable at the said bank, and shall refuse or neglect to make payment, at the time the same become due, the president shall cause a demand in writing on the person of the said delinquent or delinquents, having consented as aforesaid, or if not to be found, have the same left at his place or abode; and if the money so due shall not be paid within ten days after such demand made, or notice left at his place of abode as aforesaid, it shall and may be lawful for the president, at his election, to write to the clerk of the general court, or of the county in which the said delinquent or delinquents may reside, or did, at the time he or they contracted the debt, reside, and send to the said clerk the bond, bill or note due, with proof of the demand made as aforesaid, and order the said

clerk to issue *capias ad satisfaciendum*, *fieri facias*, or attachment by way of execution, on which the debt and costs may be levied, by selling the property of the defendant for the sum or sums of money mentioned in the said bond, bill or note; and the clerk of the general court, and the clerks of the several county courts, are hereby respectively required to issue such execution or executions, which shall be made returnable to the court whose clerk shall issue the same, which shall first sit after the issuing thereof, and shall be as valid, and as effectual in law, to all intents and purposes, as if the same had issued on judgment regularly obtained in the ordinary course of proceeding in the said court; and such execution or executions shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, appeal or injunction from the chancellor; provided, always, that before any execution shall issue as aforesaid, the president of the bank shall make an oath (or affirmation if he shall be of such religious society as allowed by this state to make affirmation), ascertaining whether the whole, or what part of the debt due to the bank on the said bond, bill or note, is due; which oath or affirmation shall be filed in the office of the clerk of the court from which the execution shall issue; and if the defendant shall dispute the whole or any part of the said debt, on the return of the execution, the court before whom it is returned shall and may order an issue to be joined, and trial *to be had in the same court at which the return is made; and shall make such other proceedings that justice may be done in the speediest manner." [*673

In pursuance of these provisions of the act, a *capias ad satisfaciendum* was issued by the bank, against the defendant, on a promissory note, signed by him and indorsed to the bank. The defendant appeared in court, and claimed the right allowed by the act to dispute the debt; upon which the court ordered an issue to be made up between the parties. The plaintiff offered to file a declaration, tendering an issue on a wager, to which the defendant objected, and the court sustained the objection. A declaration in *assumpsit* was then filed, to which the defendant pleaded the statute of limitations. On the trial, the defendant moved the court to instruct the jury, that if they should be satisfied by the evidence, that three years had elapsed, between the expiration of the time limited for the payment of the said note, and the issuing of the execution by the clerk in this cause, upon the letter and paper sent by the president of the bank, and given in evidence; they ought to find a verdict for the defendant, on the issue joined on the plea of the statute of limitations. The court gave the instruction required, and the jury found a verdict for the defendant. The counsel for the plaintiff excepted to the opinion, and has brought the cause into this court by writ of error.

The execution being the first process under this extraordinary act, its emanation must be equivalent, so far as respects the bar created by the act of limitations, to suing out original process in a suit commenced in the usual way. There is, therefore, no error in that part of the instruction which relates to the period to which time was to be calculated; and the only inquiry is, whether the defendant could avail himself of the act of limitations. The great object of the incorporating act appears to have been to give the bank the most expeditious remedy possible, for the collection of the money due to it. The affidavit of the president supplies the place of a judgment, and those proceedings after judgment, which are followed for the

*purposes of justice, but may be used for mere delay, are taken away. The execution "shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, appeal or injunction from the chancellor." But the law did not intend, by this summary process, to deprive the debtor of all defence. Although all delay was cut off, he was permitted, on the return of the execution, to dispute the whole, or any part of the debt. But while the law allows him to dispute the debt, it still guards against delay. An issue is to be made up immediately, and tried at the same term. While the law thus carefully guards against procrastination, it does not interfere with the defence which the party is at liberty to set up. It does not prescribe the nature of that defence, nor deprive him of any which might have been used, had the action been commenced in the ordinary way. Had the Bank of Columbia proceeded in the common course of law, the defendant could have pleaded the act of limitations, in bar of the action. If we are correct in saying, that the object of the section of the incorporating act which has been recited, was expedition, not the ademption of legal defences; we think this a mode of disputing the debt, of which he might still avail himself. There is no error in the judgment of the circuit court, and it is affirmed, with costs.

This cause came on to be heard, on a transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*675] *George Beach, Plaintiff in error, *v.* Jonathan Viles *et al.*, Defendants in error.

Assignment.

This being a suit upon a local statute, giving a particular remedy, in the nature of a foreign attachment, against garnishees, who possess goods, effects or credits of the principal debtor; the decisions which have been made on the construction of that statute, by the state court of Massachusetts, are entitled to great respect; and ought, in conformity to the uniform practice of this court, to govern its decision. p. 678.

Where, under a voluntary assignment of an insolvent debtor, the proceeds of all the property received by the assignees under the assignment, are insufficient to pay the amount of the just debts and dividends due to the assignees, the established doctrine in Massachusetts is, that the assignees cannot be holden as trustees of the debtor, to the creditor who is the plaintiff in an attachment, so as to be chargeable to him in the suit. Even if the assignment were held to be constructively fraudulent in point of law, they would be entitled to retain their own *bonâ fide* debts; for as to those, they stand upon equal grounds with any other creditors; this is understood to be the clear result of the cases decided in Massachusetts. p. 678.

Error to the Circuit Court of the United States for the district of Massachusetts. The original process in this case was founded on the statute of Massachusetts, passed 28th of February 1795, entitled "an act to enable creditors to receive their just demands out of the goods, effects and credits of their debtors, when the same cannot be attached by the ordinary process of law." In said process, it was alleged that Loud & Hunt, being indebted to George Beach, as set forth in the process, refused to pay the same, to his

pamage $4000; and in the process, it was also alleged, that Loud & Hunt had not in their own hands and possession, goods or estate to the value of $4000, but had intrusted and deposited in the hands of said defendants goods, effects or credits to the value; and the said defendants were summoned to show cause why execution to be issued on such judgment as George Beach might recover in said suit against Loud & Hunt, should not issue against their goods, effects and credits in the hands and possession of these defendants. The process was dated the 21st day of November 1826; service *was made on the 23d of the same month, and it was entered at the May term of the circuit court of the United States, in Boston, in 1827. [*676

The defendants, the supposed trustees, appeared, and severally answered under oath, as set forth in the record. From their answers it appeared, that on the 15th day of December 1825, an indenture of assignment was made, which was also set forth in the record, in which Loud & Hunt were parties of the first part; Nathan Viles, Henry Atkins and Daniel Holbrook, preferred creditors, were parties of the second part; and sundry other persons, creditors of Loud & Hunt, who might execute the indenture within six months from its date, were parties of the third part. By this indenture, Loud & Hunt assigned to the defendants certain real and personal property, effects and demands, in trust, to sell and collect the same, and after defraying all expenses, first, to pay the parties of the second part all sums due them, respectively, and all sums for which they were liable on account of Loud & Hunt, as indorsers or otherwise; second, to pay the residue to such creditors mentioned in the schedule thereto annexed, as should become parties, in proportion to their demands, by an equal rate per dollar; third, to pay over the surplus, if any, and also the dividend which would have been payable to any creditor, if he had not neglected to become a party thereto, to Loud & Hunt. There was a clause in the indenture, providing for adding to and perfecting the schedules, to carry into effect the intentions of the parties; and general power to receive and collect, and a clause accepting the property assigned in full; and each assignee was to be answerable for his own acts only.

The nominal amount or estimate of the property assigned exceeded the amount of debts and liabilities of the assignees; but by reason of losses on property then in hands of certain consignees, and bad debts, the produce thereof fell much short of it. The just claims of those creditors who became parties to the indenture, according to its terms, and before the process in this case was served, amounted to about $20,000. The parties *of the first and second part, and nearly all those of the third part, signed and sealed the indenture, on the day of its date, and all who were parties became so within the term of six months, therein prescribed. The assignees took possession of the property assigned, on the same 15th of December, and fitted and prepared the same (a large portion of which consisted of materials in hand, of manufactures in an unfinished state) for sale. They also collected the demands, as far as practicable, and realized in money from the whole personal property and effects, including the sum expended in completing and preparing for sale, the sum of $8309.28. They also advertised the real estate; but were prevented from effecting a sale by reason of certain attachments thereon. This real estate they estimated, to be worth $2000, [*677

which could not be reached by the trustee process. It also appeared from the answers, that the consideration from the said assignment was truly, as therein expressed, for sums justly due from Loud & Hunt, to the said defendants and other creditors ; and the liabilities before that time incurred by Holbrook for Loud & Hunt, to a greater amount than the whole value of the property so assigned ; that the whole proceeds of the said property and effects had actually been applied in part discharge of the said dues and liabilities, before the service of the plaintiff's process, and in pursuance of the provisions of said indenture ; excepting the sum of $805.44, in the hands of Viles & Atkins ; which last sum they held, to be appropriated according to said trust, and that no further sums would probably ever be realized therefrom. That the sums necessarily expended by the assignees, in and about the premises, amounted to $1626.57, that the assignment was made *bonâ fide*, and without any intent to defraud, delay, or hinder any of the creditors of Loud & Hunt from recovering their debts. And they further declared, that the defendant had not, at the time of the service of the plaintiff's writ upon them, any goods, effects or credits in their hands or possession belonging to Loud & Hunt, or either of them. It also appeared from said answers, that Holbrook was perfectly solvent in his own affairs, and free from debt, excepting as *the surety of Loud & Hunt, and that the assignment was expected to prevent his becoming insolvent on their account.

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The question before the circuit court was, whether the defendants, upon their said answers and disclosures, should be charged as the trustees of said Loud & Hunt, or discharged. The circuit court having intimated, that this case fell within the principle of the decisions of the supreme judicial court of Massachusetts, and particularly the case of *Andrews* v. *Ludlow*, 5 Pick. 28, the counsel for the plaintiff declined arguing the case ; and judgment was rendered, that the supposed trustees be severally discharged on their answers. The plaintiff then sued out this writ of error, to have said judgment reversed.

The case was argued by *Webster*, for the plaintiff in error ; *D. A. Simmons*, for the defendants.

Story, Justice, delivered the opinion of the court. After stating the facts, he proceeded as follows :—The present being a suit upon a local statute, giving a particular remedy in the nature of a foreign attachment against garnishees, who possess goods, effects or credits of the principal debtor, the decisions which have been made upon the construction of that statute by the state courts are entitled to great respect ; and ought, in conformity to the uniform practice of this court, to govern our own decisions. This consideration saves us from the necessity of discussing many of the questions, which have been so elaborately argued at the bar. If we were called upon to decide them upon general principles applicable to conveyances, which are assailed as being in fraud of creditors, we should have much difficulty in arriving at a conclusion upon some of the points, and should require further time for deliberation. But we are of opinion, that the case may be finally disposed of upon a single ground, which has received the sanction of the highest state court of Massachusetts. It is this :

it appears from the facts, that the proceeds of all the property, received by the assignees, under this assignment, are insufficient to pay *the amount of the just debts and demands due, *bonâ fide*, to the assignees. [*679 Under such circumstances, the established doctrine in Massachusetts is, that the assignees cannot be holden as trustees of the debtor, under this process, so as to be chargeable to the creditor, who is plaintiff in the suit. Even if the assignment were held to be constructively fraudulent, in point of law, they would be entitled to retain for their own *bonâ fide* debts ; for as to these, they stand upon equal grounds with any other creditors. This is understood to be the clear result of the cases decided in Massachusetts ; and it therefore, becomes, unnecessary to go into the more extensive inquiries presented by the arguments at the bar. Upon this ground, we are all of opinion, that the judgment of the circuit court ought to be affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and was argued by counsel : On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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TO THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

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ACTIONS.

1. By the law of Mississippi, the assignee of a *chose in action* may institute a suit in his own name; when, therefore, an executor, having proved the will of his testator, in Kentucky, had assigned a promissory note, due to the estate by a citizen of Mississippi, the suit was well brought by the assignee, without any probate of the will in that state. *Harper* v. *Butler*.....*239

ADMINISTRATORS.

1. Where administrators, acting under the provisions of an act of assemhly of the state of Ohio, were ordered by the court, vested by the law with the power to grant such order, to sell real estate, and before the sale was made, the law was repealed, the powers of the administrators to sell, terminated with the repeal of the law. *Bank of Hamilton* v. *Dudley's Lessee*.....*492
2. The lands of an intestate descend, not to the administrator, but to the heirs; they vest in him, liable to the debts of his ancestor, and subject to be sold for those debts; the administrator has no estate in the land, but a power to sell under the authority of the court of common pleas. This is not an independent power, to be exercised at discretion, when the exigency in his opinion may require it; but it is conferred by the court, in a state of things prescribed by the law; the order of the court is a pre-requisite indispensable to the very existence of the power; and if the law which authorizes the court to make the order be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but it is the exercise of a legislative power, which every legislature possesses; the mode of subjecting the property of a debtor to the demands of a creditor must always depend on the wisdom of the legislature.....*Id.*

AMENDMENT.

1. The declaration purported to count upon sixty-eight bills of the bank of the commonwealth of Kentucky, and it appeared, that one of the bills had been omitted to be described, so that the declaration made out a less sum that the writ claimed or the judgment gave; the defendants in error, plaintiffs below, moved for leave to cure the defect, by entering a *remittitur* of the amount of the bill so omitted, and damages *pro tanto:* This court think itself authorized to make a precedent in furtherance of justice, whereby a more convenient practice may be introduced, and to allow the party to enter his *remittitur;* but on payment of the costs of the writ, if error is prosecuted no further, after such amendment made. *Bank of Kentucky* v. *Ashley*.....*327

ASSUMPSIT.

1. The act incorporating the Bank of the Commonwealth of Kentucky contains a provision, by which it is enacted, that the bank shall receive money on deposit without being required to give an obligation under seal to repay it; this enactment must be construed with regard to the practice of banking, and the general understanding of mankind; and must create a liability to the depositor, by the simple act of depositing, that is, an *assumpsit* in law, implied from an act *in pais.*

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2. Upon a deposit being made in the Bank of the Commonwealth of Kentucky, the cashier gave, under his hand, a certificate that there had been deposited to the credit of the plaintiffs below, $7730.81, which is subject to their order, on presentation of this certificate; the deposit was made in the notes of the bank, and when the same were deposited, and when demand of payment was made, the notes were passing at one-half their nominal value; when the certificate was presented to the bank, the cashier offered to pay the amount in the notes of the bank, but they refused to receive payment in anything but gold or silver: The language of the certificate is expressive of a general not a specific deposit, and the act of incorporation is express, that the bank shall pay and redeem their bills in gold or silver; the transaction then was equivalent to receiving and depositing the gold or silver; if the bank did not so understand it, they might have refused to receive it; and the plaintiffs would certainly have recovered the gold and silver, to the amount upon the face of the bills.....*Id.*
3. The bank having offered to pay the amount of the certificate in their bills, they put their own construction on the same, and they cannot afterwards say, that the plaintiffs below should have accompanied the certificate with a check.....*Id.*

BANK OF THE UNITED STATES.

1 The charter of the Bank of the United States forbids the taking of a greater rate of interest than six per centum, but it does not declare a contract on which a greater interest has been taken or reserved, to be void: Such a contract is void, upon general principles; courts of justice are instituted to carry into effect the laws of a country, and they cannot become auxiliary to the violation of those laws; there can be no civil right, where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal. *Bank of the United States* v. *Owens*.....*527

BILL OF EXCEPTIONS.

1. The record contains, embodied in the bill of exceptions, the whole of the testimony and evidence offered at the trial of the cause, by each party, in support of the issue; it is very voluminous, and as no exception was taken to its competency or sufficiency, either generally or for any particular purpose, it is not properly before this court for consideration, and forms an expensive and unnecessary burden upon the record. This court has had occasion, in many cases, to express its regret on account of irregular proceedings of this nature; there was not the slightest necessity of putting any portion of the evidence in this case upon the record; since the opinion of the court, delivered to the jury, presented a general principle of law; and the application of the evidence to it was left to the jury. *Pennock* v. *Dialogue*.....*1

BILLS OF EXCHANGE.

1. Bills of exchange, payable at a given time after date, need not be presented for acceptance at all; and payment may at once be demanded, at their maturity. *Townsley* v. *Sumrall*.....*170
2. It is admitted, that in respect to foreign bills of exchange, the notarial certificate of protest is, of itself, sufficient proof of the dishonor of a bill, without any auxiliary evidence.....*Id.*
3. It is not disputed, that by the general custom of merchants in the United States, bills of exchange, drawn in one state on another state, are, if dishonored, protested by a notary; and the production of such protest is the customary document of dishonor.....*Id.*
4. If a person undertake to accept a bill, in consideration that another will purchase one already drawn, or to be thereafter drawn, as an inducement to the purchaser to take it; and the bill is purchased upon the credit of such promise, for a sufficient consideration; such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another; and having a sufficient consideration to support it, in reason and justice, as well as in law, it ought to bind him.....*Id.*
5. It can make no difference in law, whether the debt for which a bill of exchange is taken is a pre-existing debt, or money then paid for the bill; in each case, there is a substantial credit given by the party to the drawer upon the bill, and the party parts with his present rights at the instance of the promisee, whose promise is substantially a new and independent one, and not a mere guarantee of the existing promise of the drawer; under such circumstances, there is no substantial distinction, whether the bill be then in existence, or be drawn afterwards; in each case, the object of the promise is to induce the party to take the bill upon the credit of the promise.....*Id.*
6. If the holder of a bill of exchange, at the time of taking the bill, knew that the drawee had not funds in his hands belonging to the

drawer, and took the bill on the promise of the drawee to accept it, expecting to receive funds from the drawer; the promise of the drawee to accept the bill, constitutes a valid contract between the parties, notwithstanding the failure of the drawer to place funds in his hands; the acceptance of the drawee of a bill binds him, although it is known to the holder that he has no funds in his hands; it is sufficient, that the holder trusts to such acceptance..... *Id.*

7. It is well settled, that if a bill of exchange be drawn by one partner, in the name of the firm, or if a bill drawn on the firm by their usual name and style be accepted by one of the partners, all the partnership are bound; it results necessarily from the nature of the association, and the objects for which it is constituted, that each partner should possess the power to bind the whole, when acting in the name by which the partnership is known; although the consent of the other partners, to the particular contract, should not be obtained, or should be withheld. *Leroy* v. *Johnson*.....*186

8. Where a bill of exchange was drawn by A., after the dissolution of his partnership with B., and the proceeds of the bill went to pay, and did pay, the partnership debts of A. & B., which A., on the dissolution of the firm, had assumed to pay; the holder of the bill, after its dishonor, can have no claim on B., in consequence of the particular appropriation of the proceeds of the bill..... *Id.*

See PROMISSORY NOTES.

CARRIERS.

1. The law regulating the responsibility of common carriers does not apply to the case carrying intelligent beings, such as negroes; the carrier has not, and cannot have, over them the same absolute control that he has over inanimate matter; in the nature of things, and in their character, they resemble passengers, and not packages of goods; it would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods. *Boyce* v. *Anderson*.....*150

2. The law applicable to common carriers is one of great rigor; though to the extent to which it has been carried, and in the cases to which it has been applied, its necessity and its policy are admitted; yet it ought not to be carried further or applied to new cases; it has not been applied to living men, and it ought not to be.....*Id.*

3. The ancient rule of the law of carriers, that the carrier is liable only for ordinary neglect, does not apply to the conveyance of slaves..... *Id.*

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1. As the plaintiffs in the circuit court claimed under a conveyance made in pursuance of a decree of a court of competent jurisdiction, the bill ought not to have been dismissed for want of parties; the circuit court ought to have given leave to make new parties, and on their failing to bring the proper parties before the court, the dismissal should have been without prejudice. *Hunt* v. *Wickliffe*.....*201

2. The court has decided, that a suit could be maintained in equity, by the holder of an indorsed note, against a remote indorser; and upon grounds perfectly familiar to courts exercising equity jurisdiction. *Bank of the United States* v. *Weisiger*.....*331

3. It has been decided in Kentucky, that a suit at law could not be maintained in that state by the indorsee, against a remote indorser; the conclusion then results from our decisions, that he must be let into equity; for an indorsement is certainly no release to the previous indorsers; and the ultimate assignee alone is entitled to the benefit of their liability; and this we understand to be consistent with the received opinions and practice in Kentucky..... *Id.*

4. A testatrix directed, that the interest of certain funds should be applied "to the proper education" of certain persons, her nephews, "so that they may be severally fitted and accomplished in some useful trade;" and gave to each of them "who should live to finish his education, or reach the age of twenty-one years of age, one hundred pounds, to set him up in his trade;" she also gave the whole of her estates, of every description, to be equally divided among certain persons, who should be living when the interest applicable to the education of her nephews should cease to be required, they being some of the persons among whom the same was to be divided; and she directed, that so long as any one of the three nephews who should live, had not finished his education, or arrived at the age of twenty-one years, the division of the property so devised and given should be deferred, and no longer. A bill was filed, by one of the nephews of the testatrix, charging that the executors had not paid the several sums of money bequeathed to him, and praying that they might be decreed to pay the same; no other persons were made parties to the proceeding but the

executors: and after a report of the master, the cause came on to a hearing, and the circuit court dismissed the bill, for want of proper parties. The defendant, at the argument, insisted, that not only the two nephews, whose education was provided for by the testatrix, should have been made parties, but also all the residuary legatees. So far as the bill sought to obtain such a portion of the fund as was, by a fair construction of the will, applicable to the education of the nephews of the testatrix, they alone were required to be parties; and the court reversed the decree of the circuit court which dismissed the bill, for the purpose of enabling the complainant to make the other two nephews of the testatrix parties. The court did not consider it necessary to make the residuary legatees parties, in a proceeding the sole object of which was to ascertain and distribute among the nephews of the testatrix the amount to which they were entitled, for the expenses of education. The residuary legatees have, undoubtedly, an interest in reducing every demand on the estate; whatever remains, sinks into the *residuum*; and that *residuum* is diminished as well by the claims of creditors and specific legatees, as by this. In all such cases, the executors represent the residuary legatees, and guard their interests; it is a part of that duty which requires them to protect the interests of the estate. In such suits, the residuary legatees are never made parties; to require it would be an intolerable burden on those who have claims on an estate in the hands of executors. *Dandridge* v. *Washington's Executors*..*370

5. Where a bill was filed against the stockholders of a voluntary association, for the purpose of banking; and the process was returned, "served" upon some of the parties named in the bill, and as to others, who were not within the reach of the process, "not found;" the court stated, that it was not meant to say, that in cases of this nature, it is necessary to bring all the stockholders before the court, before any decree can be made. It is well known, that there are cases in which a court of equity dispenses with such proceeding, when the parties are very numerous and unknown; and the adoption of the rule would evidently impede, if not defeat the purposes of justice. *Mandeville* v. *Riggs*..... *482

6. Upon the death of some of the parties to the bill, who had been served with process, the bill ought to have been revived against their personal representatives, if they could be brought before the court; unless some good reason, such as absolute insolvency, could be assigned to justify the decision.. *Id.*

7. One of the great principles upon which courts of equity generally require all parties, who are known and within the reach of its jurisdiction, to be made parties, is to prevent future litigation and to take away multiplicity of suits; there are exceptions, it is true, to the rule, but they are founded upon special considerations..... *Id.*

8. No instances are known, where a joint liability has been asserted before a court of chancery, on which the decree has not been made against all the parties before it who did not establish some personal discharge. *Id.*

9. In a bill filed in the circuit court of Alexandria county, in the district of Columbia, against the stockholders of an association for banking purposes, the bill was dismissed as to those stockholders who were named in the bill, but were not served with process; and it was held to be error. As non-residents, the act of congress of the 3d of May 1803, allows proceedings to be had against them, by publication in the newspapers in the district..... *Id.*

10. The complainants in the circuit court were proved to be the regularly appointed committee of a voluntary society of Lutherans, in actual possession of the premises, and acting by their direction, to prevent a disturbance of that possession; under the circumstances of the case, there does not appear to be a serious objection to their right to maintain a suit for a perpetual injunction against the heirs of the donor, who sought to regain the property, and to disturb their possession. *Beatty* v. *Kurtz*..... *566

11. The only difficulty which presents itself upon the question, whether the complainants in the circuit court have shown, in themselves, sufficient authority to maintain their suit, is, that it is not evidenced by any formal vote or writing; if it were necessary to decide the case on this point, under all the circumstances, it might be fairly presumed; but this is not necessary; because this is one of those cases in which certain persons belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others, having the like interests, as part of the same society, for purposes common to all, and beneficial to all..... *Id.*

12. There is no doubt, but that under the general prayer in a bill in chancery, for general relief, other relief may be granted than that which is particularly prayed for; but such relief must be agreeable to the case made by the bill. *English* v. *Foxall*.....*595

13. A marriage-settlement provided, that the trustees, after the death of the husband, should stand possessed of a bond executed

to them by the husband, and of the sum of $37,038 to be received by them, upon trust to place out the same, when it should come into their hands, at interest, on freehold securities, or invest it, or any part of it, in the purchase of stock of the United States of North America, or bank-stock there, with the approbation of the wife; and to call in and replace the same, and re-invest the same, and the produce thereof, from time to time, upon or in such securities, or stock, with the approbation of the wife. It is not an unreasonable interpretation, to say, that the wife, who survived the husband, was to have a controlling agency, within the limitation prescribed by the contract; she has not an arbitrary and unlimited discretion; the investment is restricted to three objects; freehold securities, United States stock, or bank-stock; and the trustees are not authorized to make any other investment; the trustees are bound to make the investment in any one of the funds mentioned, which the wife might request or direct..... *Id.*

14. The husband, by his will, confirmed the marriage-settlement, and he further declared, "that if the sum of $37,038 secured to be paid to the trustees should at any time be found insufficient to raise and bring into the hands of the trustees the clear annual sum of $2222.22 the annuity secured to be paid to his wife by the settlement, then the trustees of his will shall, from time to time, transfer to themselves, as trustees of the settlement, out of the residuum of his estate, such sum or sums of money as may, from time to time, be found necessary to make up any deficiency there may happen to be between the current amount of the interest and produce of the principal sum, and the amount of the annuity; so that, in no event, less than $2222.22 shall be raised annually for his wife, or for her benefit, in the United States." The personal estate of the husband, exclusive of the sum placed in the hands of the trustees of the annuity, was so invested as to produce six per centum per annum, and the direction of the wife to keep invested in six per cent. stock of the United States the $37,038, produced a deficiency in the annuity, which she claimed to have made up from the residuary estate: the wife has a right to claim this deficiency to be so made up... *Id.*

CHARITABLE USES.

1. A lot of ground had, in the original plan of an addition to Georgetown, been marked "for the Lutheran church;" and by the German Lutherans of the place, had been used as a place of burial, from the dedication, and who had erected a school-house on it, but no church; exercising acts of protection and ownership over it, at some periods, by committees appointed by the German Lutherans, the original owner acquiescing in the same. This may be considered as a dedication of the lot to public and pious uses; and, although the German Lutherans were not incorporated, nor were there any persons who, as trustees, could hold the property, the appropriation was also valid under the bill of rights of Maryland; the bill of rights, to this extent at least, recognises the doctrines of the statute of Elizabeth for charitable uses; under which, it is well known, that such uses would be upheld, although there was no specific grantee or trustee. This might, at all times, have been enforced as a charitable and pious use, through the intervention of the government, as *parens patriæ*, by its attorney-general or other law-officer; it was originally consecrated for a religious purpose; it has become a depository of the dead; and it cannot now be resumed by the heirs of the donor. *Beatty* v. *Kurtz*..... ..... *566

COMMON LAW.

1. The common law of England is not to be taken in all respects to be that of America; our ancestors brought with them its general principles, and claimed it as their birth-right; but they brought with them and adopted only that portion which was applicable to their situation. *Van Ness* v. *Pacard*..... *137

CONDITION.

1. If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with it, or, by any act of his own, prevent the performance, the opposite party is excused from proving a strict compliance with the conditions; thus, if the precedent act is to be performed, at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it; the law will not permit him to set up the non-performance of the condition, as a bar to the responsibility which his part of the contract had imposed upon him. *Williams* v. *Bank of the United States*..... .. *96

CONSIDERATION.

1. Damage to the promisee constitutes as good a consideration as benefit to the promisor. *Townsley* v. *Sumrall*..... *170

CONSTITUTION OF THE UNITED STATES.

1. There is nothing in the constitution of the United States which forbids the legislature of a state to exercise judicial functions. *Satterlee* v. *Matthewson*.....*380
2. There is no part of the constitution of the United States which applies to a state law which divested rights vested by law in an individual, provided its effect be not to impair the obligation of a contract ..... *Id.*
3. A tax imposed by a law of any state of the United States, or under the authority of such a law, on stock issued for loans made to the United States, is unconstitutional. *Weston* v. *City Council of Charleston*..... *449
4. It is not the want of original power in an independent sovereign state to prohibit loans to a foreign government, which restrains the state legislature from direct opposition to those made by the United States; the restraint is imposed by our constitution; the American people have conferred the power of borrowing money on the government, and by making that government supreme, have shielded its action, in the exercise of that power, from the action of the local governments; the grant of the power, and the declaration of supremacy, are a declaration that no such restraining or controlling power shall be exercised..... *Id.*

CONSTITUTIONALITY OF STATE LAWS.

1. The act of the assembly of the state of Delaware, by which the construction of a dam erected by the plaintiffs was authorized, shows plainly, that this is one of those many creeks passing through a deep level marsh, adjoining the Delaware, up which the tide flows for some distance; the value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved; measures calculated to produce these objects, provided they do not come in collision with the powers of the general government, are, undoubtedly, within those which are reserved to the states. The measure authorized by this act, stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it; but this abridgment, unless it comes in conflict with the constitution, or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognisance. *Willson* v. *Black-bird Creek Marsh Co*.....*245
2. If congress had passed any act, in execution of the power to regulate commerce, the object of which was to control state legislation over these small navigable creeks, into which the tide ebbs and flows, and which abound throughout the lower country of the middle and southern states, the court would feel not much difficulty in saying, that a state law, coming in conflict with such act, would be void; but congress has passed no such act; the repugnancy of the law of Delaware is placed entirely on its repugnancy to the law to regulate commerce with foreign nations, and among the several states; a power which has not been so exercised as to affect this question. ..... *Id.*
3. S. and M. held land in Luzerne county, Pennsylvania, in common, under a Connecticut title; a division of the land was made between them, and S. became the tenant of M., of his part of the land thus set off in severalty, under a lease, to be terminated on a notice of one year; S. afterwards obtained a Pennsylvania title to the land leased to him by M., and on a trial in an ejectment for the land, brought by M. against S., the court of common pleas of Bradford county, Pennsylvania, held, that S., having held the land as tenant of M., could not set up a title against his landlord; upon a writ of error to the supreme court of Pennsylvania, in 1825, it was held, that "the relation between landlord and tenant could not exist between persons holding under a Connecticut title;" the legislature of Pennsylvania, on the 8th of April 1826, passed an act declaring that "the relation of landland and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between citizens of the Commonwealth;" the case came again before the supreme court of Pennsylvania, and the judgment of the court of common pleas of Bradford county, in favor of M., the landlord, was affirmed; that court having decided that the act of assembly of the 8th of April 1826, was a constitutional act, and did not impair the validity of any contract; S. brought a writ of error to this court, claiming that the act of the assembly of Pennsylvania, of the 8th of April 1826, was unconstitutional: *Held*, that the act was constitutional. *Satterlee* v. *Matthewson*. *380
4. In the case of Fletcher *v.* Peck, 6 Cranch 87, it was stated by the chief justice, that it might well be doubted, whether the nature of society and of government do not prescribe some limits to the legislative power; and he asks, "if any be prescribed, where are they to be found, if the property of an individual fairly and honestly acquired, may be seized without compensation?" It is nowhere intimated, in that opinion, that a state statute which divests a vested right, is repugnant to the constitution of the United States ... *Id.*

5. A tax imposed by a law of any state of the United States, or under the authority of such a law, on stock issued for loans made to the United States, is unconstitutional. *Weston* v. *City Council of Charleston*..... *449

6. It is not the want of original power in an independent sovereign state to prohibit loans to a foreign government, which restrains the state legislatures from direct opposition to those made by the United States; the restraint is imposed by our constitution; the American people have conferred the power of borrowing money on the government, and by making that government supreme, have shielded its action, in the exercise of that power, from the action of the local governments; the grant of the power and the declaration of supremacy, are a declaration that no such restraining or controlling power shall be exercised..... *Id.*

7. The lands of an intestate descend, not to the administrator, but to the heir; they vest in him, liable to the debts of his ancestor, and subject to be sold for those debts; the administrator has no estate in the land, but a power to sell, under the authority of the court of common pleas. This is not an independent power, to be exercised at discretion, when the exigency, in his opinion, may require it; but it is conferred by the court, in a state of things prescribed by the law; the order of the court is a pre-requisite, indispensable to the very existence of the power; and if the law which authorizes the court to make the order be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but it is the exercise of a legislative power, which every legislature possesses; the mode of subjecting the property of a debtor to the demands of a creditor, must always depend on the wisdom of the legislature. *Bank of Hamilton* v. *Dudley's Lessee*..... *492

8. J. J. died in New Hampshire, seised of real estate in Rhode Island, having devised the same to his daughter, an infant; his executrix proved the will in New Hampshire, and obtained a license from a probate court, in that state, to sell the real estate of the testator, for the payment of debts; she sold the real estate in Rhode Island, for that purpose, and conveyed the same by deed; giving a bond to procure a confirmation of the conveyance by the legislature of Rhode Island; the proceeds of the sale were appropriated to pay the debts of the intestate: *Held*, that an act of the legislature of Rhode Island, which confirmed the title of the purchasers, was valid. *Wilkinson* v. *Leland*..... *627

9. That government can scarcely be deemed to be free, where the rights of property are left solely dependent on the will of the legislative body, without any restraint; the fundamental maxims of a free government seem to require, that the rights of personal liberty and private property, should be held sacred; at least, no court of justice in this country would be justified in assuming, that the power to violate or disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people; the people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention..... *Id.*

CONSTRUCTION OF STATUTES.

1. Where English statutes, such, for instance, as the statute of frauds, and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by English courts of law, has been considered as silently incorporated into the acts; or has been received with all the weight of authority. *Pennock* v. *Dialogue*..... *1

2. Where the question upon the construction of the statute of a state, relative to real property, has been settled by any judicial decision in the state where the land lies; this court, upon the uniform principles adopted by it, would recognise that decision as a part of the local law. *Gardner* v. *Collins* .. *58

3. The 2d, 3d and 4th sections of the act of January 6th, 1800, entitled "an act for the relief of persons imprisoned for debts," make provision for the discharge of persons confined under execution; and the 5th section extends "the privileges and relief" of that act, to persons in confinement, against whom judgment is obtained, but no execution issued; under the provisions in favor of persons charged in execution, on the day of arrest, a notice may be served upon the person at whose suit they are confined, and at the end of thirty days, they may be discharged. By the 5th section, it is enacted, "that any person imprisoned upon process issuing from any court of the United States, except at the suit of the United States, in any civil action, against whom judgment has been or shall be recovered, shall be entitled to the privileges and relief provided by this act, after the expiration of thirty days from the time such judgment has been or shall be recovered; though the creditor should not, within that time, sue out his execution, and charge the debtor therewith." It has been argued,

that, under this section, the defendant must remain in prison thirty days after judgment, before he can sue out his notice to the plaintiff; thus requiring him to remain sixty days in confinement, in the cases which come under this section; whereas, he remains but thirty days, when confined under execution. There can be no reason for this distinction; and in favor of liberty, and with a view to consistency, the construction should be otherwise; if such were the true construction, the relief would not be the same as is extended to debtors of the other class. The day of entering judgment under the 5th section, is the day that corresponds to the day of arrest, under the previous provisions of the law; and therefore, in thirty days after the judgment, the defendant may be discharged; complying with the other requisitions of the law. *Bank of the United States* v. *Weisiger*..... *331

4. The act of the 30th of March 1802, having described what should be considered as the Indian country, at that time, as well as at any future time, when purchases of territory should be made of the Indians; the carrying of spirituous liquors into a territory so purchased, after March 1802, although the same should be at the time frequented and inhabited exclusively by Indians, would not be an offence within the meaning of the before-mentioned acts of congress, so as to subject the goods of the trader, found in company with those liquors, to seizure and forfeiture. *American Fur Company* v. *United States*..... *358

5. A legislative act is to be interpreted according to the intention of the legislature apparent upon its face; every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature. *Wilkinson* v. *Leland*..... *627

6. The legislative and judicial authority of New Hampshire were bounded by the territory of that state, and could not be rightfully exercised to pass estates lying in another state; the sale of real estate in Rhode Island, by an executrix, under a license granted by a court of probate of New Hampshire, was void; and a deed executed by her of the estate was, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein..... *Id.*

7. By the laws of Rhode Island, the probate of a will, in the proper probate court, is understood to be an indispensable preliminary to establish the right of the devisee; and then his title relates back to the death of the testator..... *Id.*

8. The act of the legislature of Maryland, passed in 1796, ch. 47, § 13, declares, "that all persons capable in law to make a valid will and testament, may grant freedom to, and effect the manumission of, any slave or slaves belonging to such persons, by his, her or their last will and testament, and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other period as may be limited in such last will and testament; provided always, that no manumission by last will and testament shall be effectual to give freedom to any slave or slaves, if the same shall be to the prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood, at the time the freedom given shall commence;" the time of freedom of the appellee in this case, commenced when he was about eleven years old: *Held*, that this manumission by will was valid. *Le Grand* v. *Darnall*..... *664

9. The court of appeals of Maryland has decided, that a devise of property, real or personal, by a master to his slave, entitles the slave to his freedom, by necessary implication; this court entertains the same opinion..... *Id.*

See DESCENT: PATENTS AND PATENT-RIGHTS: STATE LAWS.

CONTRACTS.

1. Upon a deposit being made in the Bank of the Commonwealth of Kentucky, the cashier gave, under his hand, a certificate, that there had been "deposited to the credit of W. P. & W., $7730.81, which is subject to their order, on presentation of this certificate;" the deposit was made in the notes of the bank, and when the same were deposited, and when demand of payment was made, the notes were passing at one-half their nominal value; when the certificate was presented to the bank, the cashier offered to pay the amount in the notes of the bank, but they refused to receive payment in anything but gold or silver. The language of the certificate is expressive of a general, not a specific deposit; and the act of incorporation is express, that the bank shall pay and redeem their bills in gold or silver; the transaction then was equivalent to receiving and depositing the gold or silver; if the bank did not so understand it, they might have refused to receive it; and the plaintiffs would certainly have recovered the gold and silver, to the amount upon the face of the bills. *Bank*

of the Commonwealth of Kentucky v. *Wister*..... .... *318

COURTS.

1. It is no ground of reversal, that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, where it was not requested by either party, at the trial; it is sufficient, that the court has given no erroneous directions. *Pennock* v. *Dialogue*..... *1
2. If either party considers any point presented by the evidence, omitted in the charge of the court, it is competent for such party, to require an opinion from the court, upon that point; the court cannot be presumed to do more, in ordinary cases, than to express its opinion upon questions which the parties themselves have raised on the trial..... *Id.*
3. A court cannot be required to give an instruction to the jury, as to the relation, right and credibility of the testimony adduced by the parties in a cause. *Van Ness* v. *Pacard*..... *149
4. In a controversy between two nations concerning national boundary, it is scarcely possible, that the courts of either should refuse to abide by the measures adopted by its own government; there being no common tribunal to decide between them, each determines for itself on its own rights; and if they cannot adjust their differences peaceably, the right remains with the strongest; the judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; its duty commonly is, to decide upon individual rights, according to those principles which the political departments of the nation have established; if the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. *Foster* v. *Neilson*..... *253
5. However individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed..... *Id.*
6. After the acts of sovereign power over the territory in dispute with Spain, which have been exercised by the legislature and government of the United States, asserting the American construction of the treaty, by which the government claims it; to maintain the opposite construction, in its own courts, would certainly be an anomaly in the history and practice of nations; if those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted; it is not in its own courts, that this construction is to be denied..... *Id.*
7. The court refused to reverse the decree of the circuit court of the county of Washington, although an error had been committed in proceeding under mandate from this court; as no benefit would result to the appellant from a reversal. *Campbell's Executors* v. *Pratt*..... *354
8. A district court of the United States, performing the apprropriate duty of a district court, is not sitting as a circuit court, because it possesses the power of a circuit court also. *Southwick* v. *Postmaster-General*..... *442
9. The power of the inferior court of a state to make an order, at one term, as of another, is of a character so peculiarly local, a proceeding so necessarily dependent on the judgment of the revising tribunal, that the judgment of the same is considered authority, and this court is disposed to conform to it. *Bank of Hamilton* v. *Dudley's Lessee*..... *492
10. That a court of record, whose proceedings are to be proved by the record alone, should, at a subsequent term, determine that an order was made at a previous term, of which no trace could be found on its records, and that, too, after the repeal of the law which gave authority to make such an order, is a proceeding of so much delicacy and danger, which is liable to so much abuse, that some of the court question the existence of the power..... *Id.*
11. The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law; if, in a case depending before any court, a legislative act shall conflict with the constitution, it is admitted, that the court must exercise its judgment on both, and that the constitution must control the act; the court must determine whether a repugnancy does or does not exist, and in making this determination, must construe both instruments; that its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which this court can perceive no reason..... *Id.*
12. Where the court was asked to instruct the jury upon a particular point, if they believed from the evidence certain facts, and there was not the slightest evidence from which the jury had a right to believe the existence of any such facts, the court ought not to have given such instructions, since they were calculated to mislead them, and raise a

mere speculative question. *Chirac* v. *Reinecker* *613

COURTS OF THE DISTRICT OF COLUMBIA.

1. It was assumed on the argument, by the counsel on both sides, that the circuit court of the county of Washington, in the district of Columbia, is vested with the same power in relation to intestates' estates in that county, that is possessed by a county court in Maryland, over lands lying within the county. *Thompson* v. *Tolmie*..... *157

COURTS OF THE UNITED STATES.

1. Admitting, that the legislature of Ohio can give an occupant-claimant a right to the value of his improvements, and authorize him to retain possession of the land he has improved, until he shall have received that value; and assuming that they may annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts; still, the legislature cannot change radically the mode of proceeding prescribed for the courts of the United States, or direct those courts, in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury. *Bank of Hamilton* v. *Dudley's Lessee* *492

See DISTRICT COURTS OF THE UNITED STATES.

DEBTS.

1. It is admitted, that the title of an heir, by descent, in the real estate of his ancestor, and of a devisee, of an estate unconditionally devised to him, is, upon the death of the party under whom he claims, immediately devolved upon him, and he acquires a vested estate; but this, though true in a general sense, still leaves his title incumbered with all the liens which have been created by the party in his lifetime, or by law, at his decease; it is not an unqualified, though it may be a vested interest, and it confers no title, except to what remains after every such lien is discharged. *Wilkinson* v. *Leland*.. *627
2. By the laws of Rhode Island, as well as of all the New England states, the real estate of intestates stands chargeable with the payment of their debts, upon a deficiency of assets .... *Id.*

DEPOSITIONS.

See EVIDENCE.

DESCENT.

1. The statute of descents of Rhode Island, of 1822, enacts, "that when any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend, and pass, in equal portions, to his or her kindred, in the following course;" it then provides, "if there be no father, then to the mother, brothers and sisters of such intestate, and their descendants, or such of them as there be;" and then declares, in the nature of a proviso, that "when the title to any estate of inheritance, as to which the person having such title shall die intestate, came by descent, gift or devise from the parent or other kindred of the intestate, and such intestate die without children; such estate shall go to the kin next to the intestate, of the blood of the person from whom such estate came or descended, if any there be." *Gardner* v. *Collins*..... *58
2. An estate, situated in Rhode Island, was devised by John Collins, to his daughter, Mary Collins, in fee; Mary Collins intermarried with Caleb Gardner, and upon her death, in 1806, the estate descended to her three children, John, George and Mary C. Gardner; John and George Gardner died intestate and without issue, and Mary C. Gardner, as heir to her brothers, became seised of the whole estate, and died in 1822: *Held*, that under the provisions of the law of descents of Rhode Island, two-thirds of the estate of Mary C. Gardner descended to Samuel F. Gardner, Eliza Phillips, formerly Eliza Gardner, and Mary Clarke, formerly Mary Gardner, children of Caleb Gardner by a former marriage; they being brothers and sisters of the half blood of Mary C. Gardner; it being admitted, that the remaining one-third, which Mary C. Gardner took by immediate descent from her mother, belonged to the heirs of the whole blood of John Collins..... ....*Id.*
3. The phrase "of the blood," in the statute, includes the half blood; this is the natural meaning of the word "blood," standing alone, and unexplained by any context; a half brother or sister is of the blood of the intestate, for each of them has some of the blood of a common parent in his or her veins; a person is, with the most strict propriety of language, affirmed to be of the blood of another, who has any, however small, a portion of the same blood, derived from a common ancestor. In the common law, the word "blood" is used in the same sense; whenever it is intended to express any qualification, the word whole or half blood is generally used to designate it, or the qualification is implied

from the context, or known principles of law..... *Id.*

4. A descent from a parent to a child cannot be construed to mean a descent through, and not from, a parent; so, a gift or devise from a parent, must be construed to mean a gift or devise by the act of that parent, and not by that of some other ancestor more remote, passing through the parent..... *Id.*

5. It is true, that in a sense, an estate may be said to come by descent from a remote ancestor, to a person upon whom it has devolved, through many intermediate descents; but this, if not loose language, is not that sense which is ordinarily annexed to the terms. When an estate is said to have descended from A. to B., the natural and obvious meaning of the words is, that it is an immediate descent from A. to B..... *Id.*

6. At the common law, a man might sometimes inherit, who was of the whole blood of the intestate, who could not have inherited from the first purchaser; as, in the case of a purchase of an estate by a son, who dies without issue, and his uncle inherits the same, and dies without issue; the father may inherit the same from the uncle, although he could not inherit from his own son..... *Id.*

7. By the law of descent of Maryland, a person claiming as heir must prove himself heir of the person last seised of the estate; and if an intestate leaves a brother of the whole blood who survived him and died without issue, and without having ever been actually seised of the estate, it will descend to the half blood of the person so seised. *Chirac* v. *Reinecker*..... *613

8. It is admitted, that the title of an heir by descent, in the real estate of his ancestor, and of a devisee of an estate unconditionally devised to him, is, upon the death of the party under whom he claims, immediate devolved upon him, and he acquires a vested estate; but this, though true in a general sense, still leaves his title incumbered with all the liens, which have been created by the party, in his lifetime, or by law, at his decease; it is not an unqualified, though it may be a vested, interest, and it confers no title, except to what remains after every such lien is discharged. *Wilkinson* v. *Leland*..... *627

9. By the laws of Rhode Island, as well as of all the New England states, the real estate of intestates stands chargeable with the payment of their debts, upon a deficiency of assets. *Id.*

DEVISE AND BEQUEST.

1. The testatrix directed that the interest of certain funds should be applied "to the proper educaation" of certain persons, her nephews, "so that they may be severally fitted and accomplished in some useful trade;" and gave to each of them "who should live to finish his education, or reach the age of twenty-one years of age, one hundred pounds, to set him up in his trade;" she also gave the whole of her estates, of every description, to be equally divided among certain persons, who should be living when the interest applicable to the education of her nephews should cease to be required, they being some of the persons among whom the same was to be divided; and she directed, that so long as any one of the three nephews who should live, had not finished his education, or arrived at the age of twenty-one years, the division of the property so devised and given, should be deferred, and no longer. The court do not think that in ascertaining the amount applicable to the education of the appellant, one of the learned professions may be taken as the standard, with as much propriety as the trade or art of a mechanic; the distinction between a profession and a trade is well understood; and they are seldom, if ever, confounded with each other in ordinary language; if the testatrix had contemplated, what, in the common intercourse of society, is denominated a profession; she would scarcely have used a term, which is generally received as denoting a mechanical art. But the bequest is not confined to the expense of acquiring the trade, so as to be enabled to exercise it in the common way; the testatrix intended such an education as would fit her relations to hold a distinguished place in that line of life in which she designed them to move; the sum allowed for the object ought to be liberal, such as would accomplish it, if the fund from which it was to be drawn would permit it. *Dandridge* v. *Washington's Executors*..... *370

DISTRICT COURTS OF THE UNITED STATES.

1. A district court of the United States, performing the appropriate duty of a district court, is not sitting as a circuit court, because it possesses the powers of a circuit court also. *Southwick* v. *Postmaster-General*..... *442

EJECTMENT.

1. Where A. was the real landlord of the premises in controversy in an ejectment, and employed counsel to defend the suit, but was not a party defendant on the record, the record of the recovery in the ejectment, when offered in evidence in an action of trespass

for mesne profits, against B., is not conclusive evidence of title in the plaintiffs; but it is *primâ facie* evidence thereof, and is evidence of the plaintiffs' possession; but B. may controvert the title of the plaintiffs. As to third persons, strangers to the suit, the record is evidence to show possession of the property in the plaintiffs. *Chirac* v. *Reinecker*.... ..... *613

EQUITY.

1. It is well settled, both in the courts of Kentucky and in this court, that a possession which will bar an ejectment, is also a bar in equity. *Hunt* v. *Wickliffe*..... *201

ERROR.

1. The court refused to reverse the decree of the circuit court of the county of Washington, although an error had been committed in proceeding under the mandate from this court; as no benefit would result to the appellant from a reversal. *Campbell's Executors* v. *Pratt*..... *354

EVIDENCE.

1. It is undoubtedly true, that questions respecting the admissibility of evidence are entirely distinct from those which refer to its sufficiency or effect; they arise in different stages of the trial; and cannot, with strict propriety, be propounded at the same time. *Columbian Insurance Co.* v. *Lawrence*.. *25
2. Presumptions from evidence, of the existence of particular facts, are in many cases, if not in all, mixed questions of law and fact; if the evidence be irrelevant to the fact insisted upon, or be such as cannot fairly warrant a jury in presuming it, the court is so far from being bound to instruct them, that they are at liberty to presume it, that they would err in giving such an instruction. *Bank of United States* v. *Corcoran*.. ..... *121
3. A court cannot be required to give an instruction to the jury, as to the relation, right and credibility of the testimony adduced by the parties in a cause. *Van Ness* v. *Pacard*..... *137
4. In an action originally commenced against A. and B., as partners, upon an alleged engagement by the firm, and where A., who was not found or served with process, was offered as a witness in favor of B., having been released by B., the court said: "It is to be premised, that the only ground upon which the objection can be rested, is the supposed interest of the witness in the event of the cause: since the suit having regularly abated as to him, by the return that he was 'no inhabitant,' he was no more a party to it, than he would have been, had his name been altogether omitted in the declaration; as to the objection upon the score of interest, it is sufficient to remark, that it was manifestly hostile to the party in whose favor he testified, and who offered it in evidence; since the plaintiffs' recovery against the defendant, and satisfaction from him, would be a bar to their action against the witness; and the release of A. protected him against any action which A. might bring against him for contribution or otherwise." *Le Roy* v. *Johnson*..... *186
5. Undoubtedly, the presumption is in favor of the validity of every grant issued in the forms prescribed by law; and it is incumbent on him who controverts it, to support his objections; the whole burden of proof lies on him. But if his objections depend on facts, those facts must be submitted to a jury; if opposing testimony be produced, that testimony, also, must be laid before the jury; and the court may declare the law upon the fact, but cannot declare it on the testimony. *Patterson's Lessee* v. *Jenks*..... *216
6. Whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case, in like manner as if the evidence applied personally to the principal. *American Fur Co.* v. *United States*..... *358
7. Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the other..... *Id.*
8. After the plaintiffs had proved, by a surveyor, that most of the lines and streets in "Howard's late addition to Baltimore town," had been run by him, as the same were marked in a particular plat, upon which was the lot of ground for which the ejectment was brought, they gave the plat so authenticated in evidence; this was contained in a volume in which were also other plats; the defendant then offered in evidence another plat, in the same volume, but gave no evidence to authenticate it, claiming to use the same in evidence, as it was authenticated in the same volume in which was that exhibited by the plaintiffs: It was *held*, that the whole volume was not in evidence; and if the defendant meant to use any plat in the same, it was his duty to establish it, by competent proof of its particular authenticity. *Chirac* v. *Reinecker* *613

9. Evidence to establish heirship and pedigree had been obtained under a commission issued for that purpose to France, in an action of ejectment, in which the plaintiffs had recovered the lots of ground for which the suit was instituted; in the course of that trial, a bill of exceptions was tendered by the plaintiffs, and sealed by the court, in which the evidence contained in the commission was inserted; the commission and the testimony obtained under it were afterwards lost. In an action for mesne profits, brought by the plaintiffs in the ejectment, against the landlord of the defendant in the suit, who had employed counsel to oppose the claims of the plaintiffs, but who was not a party to the suit on record; it was *held*, that the testimony, as copied into the bill of exceptions, was legal and competent evidence of pedigree.... *Id.*
10. It is well known, that in cases of pedigree, the rules of law have relaxed in respect to evidence, to an extent far beyond what has been applied to other cases; this relaxation is founded on principles of public convenience and necessity..... *Id.*
11. Where A. was the real landlord of the premises in controversy in an ejectment, and employed counsel to defend the suit, but was not a party defendant on the record, the record of the recovery in the ejectment, when offered in evidence in an action of trespass for mesne profits against B., is not conclusive evidence of title in the plaintiffs; but is *primâ facie* evidence thereof, and is evidence of the plaintiff's possession; but B. may controvert the title of the plaintiffs. As to third persons, strangers to the suit, the record is evidence to show possession of the property in the plaintiffs..... *Id.*

FIXTURES.

See WASTE.

FORFEITURE.

1. The act of the 30th of March 1802, having described what should be considered as the Indian country, at that time, as well as at any future time when purchases of territory should be made of the Indians; the carrying of spirituous liquors into a territory so purchased, after March 1802, although the same should be at the time frequented and inhabited exclusively by Indians, would not be an offence within the meaning of the before-mentioned acts of congress, so as to subject the goods of the trader, found in company with those liquors, to seizure and forfeiture. *American Fur Co.* v. *United States*..... *358

FRAUD AND FRAUDULENT CONVEYANCE.

1. The court set aside a conveyance which had been made to defeat the claims of creditors. *Venable* v. *Bank of United States*.... *107
2. In proceedings to set aside a conveyance of real estate, made in fraud of the rights of creditors, it is not necessary to make a mortgagee of the estate a party; his rights under the mortgage not being brought into question..... ..... *Id.*

GEORGIA.

1. Construction of the provisions of the treaties made by the state of Georgia with the Indians, relative to boundaries; and of the acts of the legislature of that state, relative to grants of lands within its territorial limits, and which were not within the Indian boundary line, as defined by the treaties, and as recognized by those acts. *Patterson's Lessee* v. *Jenks*..... *216
2. If the state of Georgia have construed their treaty with the Cherokee Indians, by any subsequent acts manifesting an understanding of it; this court would not hesitate to adopt that construction..... *Id.*
3. If the state of Georgia has practically settled the limits of Franklin county, such settlement ought to have been conclusive on the circuit court..... ..... *Id.*

GRANTS OF LAND.

1. In the nature of things, we perceive no reason why the grant of the land in controversy, should not be good for land which it might lawfully pass; and void as to that part of the tract, for the granting of which the office had not been open; it is every day's practice to make grants for lands which have in part been granted to others; it has never been suggested, that the whole grant is void, because a part of the land was not grantable. *Patterson's Lessee* v. *Jenks*..... *216
2. The principle, that a patent conveying lands lying partly within, and partly without, the territory retained by the Indians, was void as to so much as lay within it, and valid for the residue, was settled by this court in the case of Danforth *v.* Wear, 9 Wheat. 673; this decision was made on a patent depending on the statutes of North Carolina, which contain prohibitions at least as strong as those of Georgia..... *Id.*

INDIAN COUNTRY.

See FORFEITURE.

INJUNCTION.

1. If the complainants in the circuit court were proved to be the regularly appointed committee of a voluntary society of Lutherans, in actual possession of the premises, and acting by their direction to prevent a disturbance of that possession; under the circumstances of this case, there does not appear to be a serious objection to their right to maintain a suit for a perpetual injunction against the heirs of the donor, who sought to regain the property, and to disturb their possession. *Beatty v. Kurtz*.....*584

INSOLVENT LAW OF THE UNITED STATES.

1 The 2d, 3d and 4th sections of the act of January 6th, 1800, entitled "an act for the relief of persons imprisoned for debts," make provision for the discharge of persons confined under execution; and the fifth section extends "the privileges and relief" of that act, to persons in confinement, against whom judgment is obtained, but no execution issued; under the provisions in favor of persons charged in execution, on the day of arrest, a notice may be served upon the person at whose suit they are confined, and at the end of thirty days, they may be discharged. By the fifth section, it is enacted, "that any person imprisoned upon process issuing from any court of the United States, except at the suit of the United States, in any civil action, against whom judgment has been or shall be recovered, shall be entitled to the privileges and relief provided by this act, after the expiration of thirty days from the time such judgment has been or shall be recovered; though the creditor should not within that time sue out his execution, and charge the debtor therewith." It has been argued, that, under this section, the defendant must remain in prison thirty days after judgment, before he can sue out his notice to the plaintiff; thus requiring him to remain sixty days in confinement, in cases which come under this section, whereas, he remains but thirty days, when confined under execution; there can be no reason for this distinction; and in favor of liberty, and with a view to consistency, the construction should be otherwise; if such were the true construction, the relief would not be the same as is extented to debtors of the other class. The day of entering judgment, under the fifth section, is the day that corresponds to the day of arrest, under the previous provisions of the law; and therefore, in thirty days after the judgment, the defendant may be discharged; complying with the other requisitions of the law. *Bank of United States v. Weisiger*..... *331

2. Where the agent of the plaintiff agreed in writing to dispense with the imprisonment required by law, to entitle the defendant to be discharged under the insolvent law of the United States; and the defendant, who was in confinement, was discharged, without having been imprisoned thirty days, this was not such a proceeding as would bar the assignee of a note to recover against a subsequent assignor; the object of the imprisonment is, to give the plaintiff an opportunity to ascertain the situation of the defendant, and if he does require this, it may be waived, without prejudice to his claims on others. *Id.*

3. A discharge under the insolvent laws of the United States, is confined in its effects altogether to the particular cause; and even as to that, does not exempt the debtor's present effects, or future acquisitions, from the process of the law; nor is his person exempt from confinement for the same debt, should he be detected in a fraud upon the creditor..... *Id.*

INSURABLE INTEREST.

1. L. & P., at the time an insurance was made for them against loss by fire, were entitled to one-third of the property by deed, and to two-thirds as mortgagees; but one moiety of the whole was held under an agreement which had not been complied with, and which purported on its face to be void, if not complied with; but the other contracting party had not declared it void, nor called for a compliance with it. L. & P. had an insurable interest in the property. *Columbian Insurance Co. v. Lawrence*.....*25

2. That an equitable interest may be insured, is admitted; and we can perceive no reason which excludes an interest held under an executory contract; while the contract subsists, the person claiming under it has, undoubtedly, a substantial interest in the property; if it be destroyed, the loss, in contemplation of law, is his; if the purchase-money be paid, it is his, in fact; if he owes the purchase-money, the property is equivalent, and is still valuable to him; the embarrassment of his affairs may be such that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it; the destruction of the property is a real loss to the person in possession, who claims title under an executory contract; and the contingency, that this title may be defeated by

subsequent events, does not prevent this loss ..... *Id.*

INSURANCE.

1. In all treatises on insurances, and in all the cases in which the question has arisen, the principle is, that a misrepresentation which is material to the risk, avoids the policy. *Columbian Insurance Co.* v. *Lawrence*..*25

INSURANCE AGAINST FIRE.

1. The material inquiry is, does the offer for insurance state truly the interest of the assured in the property to be insured? The offer describes the property as belonging to Lawrence & Poindexter, and states it afterwards to be their stone mill; it contains no qualifying terms, which should lead the mind to suspect that their title was not complete and absolute; the title of the assured was subject to contingencies, and was held under contract which had become void by the non-performance of the same: this court is of opinion, that a precarious title, depending for its continuance on events which might or might not happen, is not such a title as is described in this offer of insurance; construing the words of that offer as they are fairly to be understood. *Columbian Insurance Co.* v. *Lawrence*..... *25
2. The contract for insurance against fire is one in which the underwriter generally acts on the representation of the assured; and that representation ought consequently to be fair, and to omit nothing which it is material to the underwriter to know; it may not be necessary, that the person requiring insurance should state every incumbrance on his property, which it might be required of him to state, if it was offered for sale; but fair dealing requires that he should state everything which might influence the mind of the underwriter in forming or declining the contract..... *Id.*
3. What will not constitute a waiver of the preliminary proof of loss, which the assured is bound by the policy to produce..... *Id.*
4. Construction of a policy of insurance against loss by fire..... *Id.*

JURISDICTION.

1. The 11th section of the act of 1789, must be construed in connection with, and in conformity to, the constitution of the United States; by this latter, the judicial power does not extend to private suits, in which an alien is party, unless a citizen be the adverse party; and it is indispensable, to aver the citizenship of the defendants, to show, on the record, the jurisdiction of the court. *Jackson* v *Twentyman*..... *136
2. When the proceedings of a court of competent jurisdiction are brought before another court collaterally, they are by no means subject to all the exceptions which might be taken to them, on a direct appeal; the general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears on their face, that the subject-matter was within the jurisdiction of the court, they are voidable only; the errors and irregularities of any suit are to be corrected by some direct proceeding, either before the same court, to set them aside, or in an appellate court. If there be a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn into question. *Thompson* v. *Tolmie*.. *157
3. The decision of this court in Elliott *v.* Peirsol, 1 Pet. 340, was not intended to decide anything at variance with the principles established in this case..... *Id.*
4. When the jurisdiction of the court on the subject, under whose authority lands have been sold, appears on the face of the proceedings; its errors or mistakes, if any were committed, cannot be corrected or examined, when brought up collaterally..... *Id.*
5. The value of the interest a guardian has in the minor's estate, is not the value of the estate, but that of the office of guardian; this is of no pecuniary value, except so far as it affords a compensation for labors and services; and in a controversy between persons claiming adversely as guardians, having no distinct interest of their own, it cannot be considered as amounting to a sufficient sum to authorize an appeal to this court from a circuit court of the district of Columbia. *Ritchie* v. *Mauro*..... *243
6. This court has frequently decided, that to sustain its jurisdiction in appeals and writs of error, it is not necessary to state, in terms, upon the record, that the constitution or a law of the United States was drawn in question; it is sufficient, to bring the case within the provisions of the 25th section of the judiciary act, if the record shows that the constitution or a law of the United States must have been misconstrued, or the decision could not have been made; or that the constitutionality of a state law was questioned, and the decision was in favor of the party claiming under such law. *Willson* v. *Black-bird Creek Marsh Co*..... *245
7. In an action for money had and received, for the recovery of the amount of a deposit made

in the Bank of the Commonwealth of Kentucky, acting under an act of incorporation, passed by the legislature of that state, the defendant pleaded to the jurisdiction, on the ground, that the state of Kentucky alone was the proprietor of the stock of the bank; for which reason, it was insisted, that the suit was virtually against a sovereign state: The court are of opinion, that the question is no longer open here; the case of the United States Bank *v.* Planters' Bank of Georgia, 9 Wheat. 904, was a much stronger case for the plaintiffs in error than the present; for there, the state of Georgia was not only a proprietor, but a corporator; here, the state is not a corporator, since, by the terms of the act incorporating this bank, "the president and directors" alone constitute the body corporate, the metaphysical person liable to suit; hence, by the law of the state itself, it is excluded from the character of a party, in the sense of this law, when speaking of a corporation. It may be added to the reasons which influenced the court in their opinion, in the case of the Bank of the United States *v.* Planters' Bank of Georgia, that if a state did exercise the powers in and over a bank, or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such a bank from a direct issue of bills of credit; which violation of the constitution, no doubt, the state here intended to avoid. *Bank of the Commonwealth of Kentucky* v. *Wister* *318

8. The bills of a bank were payable to an individual, or bearer, and in an action upon the bills, there was no averment of the citizenship of the person to whom the bills were payable, and they might, therefore, have been payable, in the first instance, to a party not competent to sue in the courts of the United States: This court has uniformly held, that a note payable to bearer is payable to anybody, and is not affected by the disabilities of the nominal payee..... *Id.*

9. Objections to the jurisdiction of this court have been frequently made, on the ground, that there was nothing apparent on the record, to raise the question, whether the court from which the case had been brought, had decided upon the constitutionality of a law, so that the case was within the provisions of the 25th section of the judiciary act of 1789; this has given occasion for a critical examination of the section, which has resulted in the adoption of certain principles of construction applicable to it; one of those principles is, that if the repugnancy of a statute of a state, to the constitution of the United States, was drawn into question, or if that question was applicable to the case, this court has jurisdiction of the cause; although the record should not in terms state a misconstruction of the constitution of the United States; or that the repugnancy of the statute of the state, to any part of that constitution, was drawn into question. *Satterlee* v. *Matthewson*..... *380

10. The power of this court to revise the judgments of state tribunals, depends on the 25th section of the judiciary act; that section enacts, "that a final judgment or decree in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had," where is drawn in question the validity of a statute of, or of an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity, "may be re-examined, and reversed or affirmed in the supreme court of the United States." *Weston* v. *City Council of Charleston*..... *449

11. The city council of Charleston, exercising an authority under the state of South Carolina, enacted an ordinance, by which a tax was imposed on the six and seven per cent. stock of the United States; and in the court of common pleas of the Charleston district, an application was made for a prohibition, to restrain them from levying the tax, on the ground, that the ordinance violated the constitution of the United States; the prohibition was granted, and the proceedings in the case were removed to the constitutional court, the highest court of law of the state; and in that court, it was held, that the ordinance did not violate the constitution of the United States, and a writ of error was prosecuted on this decision to this court: *Held*, that the question decided by the constitutional court, was the very question on which the revising power of this court is to be exercised..... *Id.*

12. A writ of error to this court may be prosecuted, where, by the judgment of the highest court of the state of South Carolina, a prohibition issued in a state court, to prevent the levying of a tax which was imposed by a law repugnant to the constitution of the United States, was refused by the state courts, on the ground, that the law was not so repugnant to the constitution..... *Id.*

13. The term suit is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, in which an individual pursues that remedy in a court of justice which the law affords him.. ... *Id.*

14. The words "final judgment," in the 25th section of the judiciary act, must be under-

stood, in the section under consideration, as applying to all judgments and decrees which determine the particular cause; and it is not required, that such judgments shall finally decide upon the rights which are litigated, that the same shall be within purview of the section..... *Id.*

15. A motion to dismiss a suit for want of jurisdiction, applies solely to cases where this court has no jurisdiction of the cause; and not where the circuit court has exceeded its proper jurisdiction in the particular case. *Canter* v. *American and Ocean Insurance Co*..... *554

16. By the laws of Mississippi, the assignee of a *chose in action* may institute a suit in his own name; when, therefore, an executor, having proved the will of his testator, in Kentucky, has assigned a promissory note due to the estate by a citizen of Mississippi; the suit was well brought by the assignee, without any probate of the will in that state. *Harper* v. *Butler*..... *239

17. When there is no change of the parties to a suit, during its progress, a jurisdiction depending on the condition of the parties, is governed by that condition as it was at the commencement of the suit. *Conolly* v. *Taylor*..... *556

18. If an alien should sue a citizen, and should omit to state the character of the parties in the bill, though the court could not exercise jurisdiction, while the defect in the bill remained, yet it might, as is every day's practice, be corrected at any time before the hearing, and the court would not hesitate to decree in the cause..... *Id.*

19. A suit was originally instituted by aliens, and a citizen of the United States, as complainants, against the defendants, citizens of the United States; in the progress of the cause, and before the final hearing, the name of the citizen of the United States, who was one of the plaintiffs, was stricken out, and he was made a defendant by the court: *Held*, the substantial parties, plaintiffs, those for whose benefit the decree is sought, are aliens, and the court has original jurisdiction between them and all the defendants; but they prevented the exercise of this jurisdiction, by uniting with themselves a person between whom and one of the defendants the court could not take jurisdiction; strike out his name as a complianant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed between the alien parties, and all the citizen defendants; there is no objection, founded on convenience or law, to this course..... *Id.*

KENTUCKY.

1. The law of Kentucky relative to the liabilities of indorsers on promissory notes, and the mode of enforcing the same. *Bank of United States* v. *Weisiger*..... *331

LANDLORD AND TENANT.

1. Every demise between landlord and tenant, in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies; every person, under such circumstances, is supposed to be conusant of this custom, and to contract with a tacit reference to it. *Van Ness* v. *Pacard*..... *137

LOUISIANA.

By the treaty of St. Ildefonso, made on the 1st of October 1800, Spain ceded Louisiana to France; and France, by the treaty of Paris, signed the 30th of April 1803, ceded it to the United States; under this treaty, the United States claimed the countries between the Iberville and the Perdido; Spain contended, that her cession to France comprehended only that territory which, at the time of the cession, was denominated Louisiana, consisting of the island of New Orleans, and the country which had been originally ceded to her by France, west of the Mississippi. The land claimed by the plaintiffs in error, under a grant from the crown of Spain, made after the treaty of St. Ildefonso, lies within the disputed territory; and this case presents the question, to whom did the country between the Iberville and Perdido belong, after the treaty of St. Ildefonso? Had France and Spain agreed upon the boundaries of the retroceded territory, before Louisiana was acquired by the United States, that agreement would undoubtedly have ascertained its limits; but the declarations of France, made after parting with the province, cannot be admitted as conclusive. In questions of this character, political considerations have too much influence over the conduct of nations, to permit their declarations to decide the course of an independent government, in a matter vitally interesting to itself. *Foster* v. *Neilson*..... *253

2. If a Spanish grantee had obtained possession of the land in dispute, so as to be the defendant, would a court of the United States maintain his title, under a Spanish grant, made subsequent to the acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St. Ildefonso was

right, and the American construction wrong? Such a decision would subvert those principles which govern the relations between the legislative and judicial departments, and mark the limits of each..... *Id.*

3. The sound construction of the eighth article of the treaty between the United States and Spain, of the 22d of February 1829, will not enable the court to apply its provisions to the case of the plaintiff..... ..... *Id.*
4. The article does not declare that all the grants made by his Catholic majesty, before the 23d of January 1818, shall be valid, to the same extent as if the ceded territories had remained under his dominion; it does not say, that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and it would have repealed those acts of congress which were repugnant to it; but its language is, that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature; until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject..... *Id.*

LANDS AND LAND TITLES.

1. The act of the legislature of Maryland, relative to a devise of the real estate of intestates in certain cases, in directing the commissioners when to give deeds to purchasers, has this general provision—that the commission and proceedings thereon shall be recited in the preamble of the deed. It certainly could not have been intended, that the commission, and all the proceedings, should be set out *in hæc verbâ;* if the substance of the proceedings is recited, it is sufficient. *Thompson* v. *Tolmie*..... *157
2. The law appears to be settled in the states, that courts will go far to sustain *bonâ fide* titles acquired under sales made by statutes regulating sales made by order of orphans' courts; where there has been a fair sale, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings..... *Id.*
3. An entry was made in the land-office of Kentucky of 1000 acres, in the name of "John Floyd's heirs," without naming the persons who were the heirs; upon an objection to the validity of the entry, the court said, that substituting a legal description, which cannot be misunderstood, for the more definite description by the proper names of the persons who are the heirs, was not of such subtantial importance as to vitiate the transaction. *Hunt* v. *Wickliffe*..... .....*201
4. An entry was made "so as to join the settlements on the north-east and south sides thereof, so as to run into the old military surveys which are legal;" the old military surveys formed together a parallelogram, and adjoined the lands intended to be described by the entry; it was objected, that the limitation on the entry, "so as not to run into the old surveys which are legal," rendered the whole entry so uncertain as to make it void..... .... *Id.*
5. The rules, which are settled in Kentucky, would require that this entry, had the restriction respecting the military surveys been omitted, should be surveyed equally on the north-east and south sides of the settlement, the whole land to be included by rectangular lines; the old military survey must, therefore, be so contiguous to the settlement, as to stop one or two of those lines. A subsequent locator knows where to look for them, and the testimony in the cause informs us, that he would encounter no difficulty in finding them; "we consider the last words 'which are legal,' merely as an affirmance that they are so, not as leaving it doubtful; and consequently, that they make no change in the entry."..... *Id.*
6. It is well settled, both in the courts of Kentucky and in this court, that a possession which will bar an ejectment, is also a bar in equity..... *Id.*
7. Each of the parties held in possession, distinct parts of the land in controversy; in this state of things it is well settled, that the party having the better right, is in constructive possession of all the land not occupied, in fact, by his adversary..... *Id.*
8. Undoubtedly, the presumption is in favor of the validity of every grant issued in the forms prescribed by law; and it is incumbent on him who controverts it, to support his objections; the whole burden of proof lies on him. But if these objections depend on facts, those facts must be submitted to a jury; if opposing testimony be produced, that testimony, also, must be laid before the jury; and the court may declare the law upon the fact, but cannot declare it on the testimony. *Patterson's Lessee* v. *Jenks*.....*216
9. In the nature of things, we perceive no reason why the grant of the land in controversy should be good for land which it might lawfully pass; and void as to that part of the tract, for the granting of which the office had not been open; it is every day's practice to make grants for lands which have in part been granted to others; it has never been

suggested, that the whole grant is void, because a part of the land was not grantable.... ....*Id.*

10. The principle, that a patent conveying lands lying partly within, and partly without the territory retained by the Indians, was void as to so much as lay within it, and valid for the residue, was settled by this court in the case of Danforth *v.* Wear, 9 Wheat. 673; this decision was made on a patent depending on the statutes of North Carolina, which contain prohibitions at least as strong as those of Georgia.....*Id.*

11. Under the statute of limitations of Tennessee, of 1797, a possession of seven years is a protection only when held under a grant, or under valid mesne conveyances, or a paper title, which are legally or equitably connected with a grant; and a void deed is not such a conveyance as that a possession under it will be protected by the statute of limitations. *Lessee of Powell* v. *Harman*... *241

12. The lands north-west of the river Ohio, between the rivers Scioto and little Miami, lying west of Ludlow's line, east of Roberts's line, and south of the Indian boundary, reserved by Virginia, in her deed of cession to the United States, of March 1784, for the satisfaction of the military bounties Virginia had promised, were not, prior to 1810, by any legislative acts of the government of the United States, withdrawn from appropriation under and by virtue of Virginia military land-warrants. A patent issued on the 12th of October 1812, founded upon a military land warrant, for land within the reserved lands, is valid against a claimant of the same land, holding under a sale made by the United States. *Reynolds* v. *McArthur*.....*417

13. Proceedings for the sale of the real estate of an intestate, for the payment of debts, were commenced before the repeal of the act of the legislature of Ohio, entitled "a law for the settlement of intestates' states;" the administrators, notwithstanding the repeal, went on to sell the land, and appropriate the proceeds to the discharge of the debts of the intestate: *Held*, that the sale was void. *Bank of Hamilton* v. *Dudley's Heirs*.....*492

See LOUISIANA.

MARRIAGE SETTLEMENT.

1 A marriage settlement provided, that the trustees, after the death of the husband, should stand possessed of a bond executed to them by the husband, and of the sum of $37,038 to be received by them; upon trust to place out the same when it shall come into their hands, at interest, on freehold securities, or invest it, or any part of it, in the purchase of stock of the United States of North America, or bank-stock there, with the approbation of the wife; and to call in and replace the same, and re-invest the same and the produce thereof, from time to time, upon or in such securities, or stock, with the approbation of the wife. *English* v. *Foxall.**595

2. It is not an unreasonable interpretation to say, that the wife, who survived the husband, was to have a controlling agency, within the limitation prescribed by the contract; she has not an arbitrary and unlimited discretion. The investment is restricted to three objects: freehold securities, United States stock, or bank-stock; and the trustees are not authorized to make any other investment; the trustees are bound to make the investment in any one of the funds mentioned, which the wife might request or direct.....*Id.*

3. The husband, by his will, confirmed the marriage settlement, and he further declared, "that if the sum of $37,038 secured to be paid to the trustees should at any time be found insufficient to raise and bring into the hands of the trustees the clear annual sum of $2222.22, the annuity secured to be paid to his wife by the settlement, then the trustees of his will shall, from time to time, transfer to themselves, as trustees of the settlement, out of the residuum of his estate, such sum or sums of money as may, from time to time, be found necessary to make up any deficiency there may happen to be between the current amount of the interest and produce of the principal sum, and the amount of the annuity: so that, in no event, less than $2222.22 shall be raised annually for his wife, or for her benefit in the United States."..... .....*Id.*

4. The personal estate of the husband, exclusive of the sum placed in the hands of the trustees of the annuity, was so invested as to produce six per centum per annum; and the direction of the wife to keep invested in six per cent. stock of the United States, the $37,038, produced a deficiency in the annuity, which she claimed to have made up from the residuary estate: the wife has a right to claim this deficiency to be so made up... *Id.*

PARTIES.

1. When there is no change of the parties to a suit, during its progress, a jurisdiction depending on the condition of the parties is governed by that condition as it was at the commencement of the suit. *Conolly* v. *Taylor*.....*556

PARTNER AND PARTNERSHIP.

1. Third persons are not bound to inquire whether the partner with whom they are contracting is acting on the partnership account, or for his individual advantage; the interest of the partner in the joint-stock of the concern, and his consequent authority to use the partnership name, raises a presumption that the contract was made for joint account; which is sufficient to bind the firm, unless to the contrary be shown; and that the person with whom the partner deals had notice, or reason to believe that the former was acting on his separate account. *Le Roy* v. *Johnson*..... *186
2. Where in the articles of partnership no name of the firm was mentioned as agreed upon, and the concern went into operation under the articles, the books being kept, and the bills and accounts relating to their transactions being made out at their warehouse, in the name of "Hoffman & Johnson;" it cannot be questioned, but that a name thus assumed, recognized and publicly used, became the legitimate name and style of the firm; not less so, than if it had been adopted by the articles of partnership..... *Id.*
3. Where a bill of exchange was drawn by A. after the dissolution of his partnership with B., and the proceeds of the bill went to pay, and did pay, the partnership debts of A. & B., which A. on the dissolution of the firm had assumed to pay; the holder of the bill, after its dishonor, can have no claim on B. in consequence of the particular appropriation of the proceeds of the bill..... *Id.*
4. It is admitted, that if one of partners contracted with a third person, in the name of the firm, after the dissolution, but that fact not made public, or known by such third person, the law considers the contract as being made with the firm, and on their credit; but if the partner deal with another, in his individual name, and upon his sole responsibility, without even an allusion to the partnership, it was unimportant to that other, to know that the partnership was dissolved, since he was dealing not with the firm, and upon their credit, but with the individual with whom he was acting, upon his own credit..... *Id.*

PATENTS AND PATENT RIGHTS.

1. It has not, and indeed, it cannot be denied, that an inventor may abandon his invention, and surrender or dedicate it to the public; this inchoate right, thus gone, cannot afterwards be resumed at his pleasure; for when gifts are once made to the public in this way, they become absolute. The question which generally arises on trials is a question of fact, rather than of law; whether the acts or acquiescence of the party furnish, in the given case, satisfactory proof of an abandonment, or dedication of the invention to the public. *Pennock* v. *Dialogue*.... *1
2. It is obvious, that many of the provisions of our patent act are derived from the principles and practice which have prevailed in the construction of the law of England in relation to patents..... *Id.*
3. Where English statutes, such, for instance, as the statute of frauds, and the statute of limitations, have been adopted into our own legislation; the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts; or has been received with all the weight of authority; this is not the case with the English statute of monopolies, which contains an exception, on which the grants of patents for inventions have issued in that country; the language of that clause in the statute is not identical with the patent law of the United States; but the construction of it adopted by the English courts, and the principles and practice which have long regulated the grants of their patents, as they must have been known, and are tacitly referred to in some of the provisions of our own statute, afford materials to illustrate it..... *Id.*
4. The true meaning of the words of the patent law, "not known or used before the application;" is, not known or used by the public, before the application..... *Id.*
5. If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should, for a long period of years, retain the monopoly, and make and sell his invention publicly; and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure; and then, and then only, when the danger of competition should force him to procure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what should be derived under it, during his fourteen years; it would materially retard the progress of science and the useful arts; and give a premium to those who should be least prompt to communicate their discoveries. *Id.*
6. If an invention is used by the public, with the consent of the inventor, at the time of his application for a patent; how can the court say that his case is nevertheless such as the act was intended to protect? If such a public use is not a use within the meaning of the statute; how can the court extract the case from its operation, and support a patent,

when the suggestions of the patentee were not true; and the conditions, on which alone the grant was authorized, do not exist?.. *Id.*

7. The true construction of the patent law is, that the first inventor cannot acquire a good title to a patent, if he suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application for a patent; this voluntary act or acquiescence in the public sale or use, is an abandonment of his right; or rather, creates a disability to comply with the terms and conditions of the law; on which alone the secretary of state is authorized to grant him a patent..... *Id.*

POSSESSION OF LANDS.

1. Each of the parties held in possession distinct parts of the land in controversy: in this state of things, it is well settled, that the party having the better right is in constructive possession of all the land not occupied, in fact, by his adversary. *Hunt* v. *Wicklife*..... *201

PRACTICE.

1. When the appellee had died after the commencement of the term, and the court, not knowing his decease, had decided upon the case, after argument, the court ordered the decree to be entered as of the first day of the term. *Bank of United States* v. *Weisiger*..... *481
2. Where an appeal from the circuit court to this court was prayed by a number of the defendants, and one only executed the proper appeal-bond, the objection to the proceeding ought to have been taken by way of preliminary motion to dismiss the appeal for irregularity, on account of the failure to give the proper appeal-bond. *Mandeville* v. *Riggs*..... *482
3. The declaration purported to count upon sixty-eight bills of the bank of the Commonwealth of Kentucky, and it appeared, that one of the bills had been omitted to be described, so that the declaration made out a less sum than the writ claimed or the judgment gave; the defendants in error, plaintiffs below, moved for leave to cure the defect by entering a *remitter* of the amount of the bill so omitted, and damages *pro tanto:* this court thinks itself authorized to make a precedent in furtherance of justice, whereby a more convenient practice may be introduced, and to allow the party to enter his *remitter;* but on payment of the costs of the writ, if error is prosecuted no further after such amendment made. *Bank of the Commonwealth of Kentucky* v. *Ashley*..... *327

See BILLS OF EXCEPTION: RE-ARGUMENT.

PROMISSORY NOTE.

1. The notary-public, after a note became due, called at the house of the indorser, who resided in the city of Cincinnati, which he found shut up, and the door locked; and on inquiry of the nearest resident, he was informed that the indorser and family had left town on a visit; whether for a day, week or month, he did not know, nor did he inquire; he made use of no further diligence to ascertain where the indorser had gone, or whether he had left any person in town to attend to his business; he left a notice at the house of a person adjoining, with a request to hand it to the indorser, when he should return: *Held*, that this was sufficient diligence on the part of the holders of the note, to charge the indorser. *Williams* v. *Bank of United States*..... *96
2. The general rule of law applicable to this subject, has long been settled; that to enable the holder of a bill of exchange or promissory note, to charge the indorser, it is incumbent on him to prove, that timely notice of the dishonor of the bill, or of the non-payment of the note, was given to the indorser; or if this could not be done, he must excuse the omission, by showing that due diligence had been used to give such notice..... *Id.*
3. If the parties reside in the same city or town, the indorser must be personally notified of the dishonor of the bill or note, either verbally, or in writing; or a written notice must be left at his dwelling-house or place of business; either mode is sufficient, but one or other must be observed, unless it is prevented by the act of the party entitled to the notice..... *Id.*
4. The holder of a bill or promissory note, in order to entitle himself to call upon the drawer or indorser, must give notice of its dishonor to the party whom he means to charge; but if, when the notice should be given, the party entitled to it should be absent from the state, and has left no known agent to receive; if he abscond, or has no place of residence, which reasonable diligence used by the holder can enable him to discover, the law dispenses with the necessity of giving regular notice..... *Id.*
5. Where the parties reside in the same city or town, the notice should be given at the dwelling-house, or place of business, and the duty of the holder does not require him to give the notice at any other place..... *Id.*

6. C., the indorser of the note, at the time it fell due, lived in a house in Georgetown, except the lower front room, which was occupied separately, as a store, by one of his sons; there was a separate entrance to the dwelling part of the house through an alley or passage, apart from the store, which led to the upper rooms, and back buildings and yard of the house; the son of C., who occupied the store, had a dwelling-house separate from the store; C. was, at that time, postmaster of Georgetown, and kept the post-office in another part of the town, where he usually transacted his private business as well as that of his office; C. had no concern in his son's store, but he was frequently about the door; until he took charge of the post-office, which was a year before the note fell due, written commmunications and notices for him were sometimes left at the store, and were carried by another of his sons, unless when he forgot it, to him; after C. took possession of the post-office, if notices had been left at the store for C., the bearer of them would have been directed to take them to the post-office; or they would have been delivered to him by his son at the post-office, if recollected, or if they had been seen when left at the store; the notary stated, that he believed the notice of non-payment of the note was left at the store, because he thought that he had frequently notices to give to the defendant, and was in the habit of leaving them at the store, and he never had been in the dwelling-house, or in the passage or alley: *Held*, that this notice was not sufficient, of non-payment of the note, to charge C. with a liability to pay the note. *Bank of United States* v. *Corcoran*..... *121

7. If a notice of the non-payment of a note, although left at an improper place, was nevertheless, in point of fact, received in due time by the indorser, and so proved, or could, from the evidence in the cause, be properly presumed by the jury; it is sufficient, in point of law, to charge the indorser..... *Id.*

8. The law in Kentucky is settled, as it is in Virginia, and in this court, that upon Virginia contracts by indorsement of promissory notes, every reasonable effort must be made to recover of the maker by suit, before the assignee can have recourse against the assignor or indorser. *Bank of United States* v. *Weisiger*..... *331

9. It is upon the question, what constitutes such diligence, that all the difficulties arise, in suits upon these contracts; and certainly, this court cannot be called upon to carry the obligations imposed upon assignees on this point, further than the state courts have already extended them..... *Id.*

10. What will be considered a sufficient compliance with the requisitions of the laws of Kentucky, imposing diligence in the prosecution of a suit against the maker of a note, by the indorsee, in order to charge a prior indorser..... *Id.*

11. The discharge of an insolvent, under the statutes, is the most satisfactory evidence of insolvency; after such discharge, it is not required, that process of execution shall be issued against the party, in order to conform to the injunction of diligence..... *Id.*

12. The evidence in the case was, that the day when the note became due, the bank being the holder thereof, and it being payable there, after the usual banking-hours were over, it was delivered to a notary, by the officers of the bank, they informing him at the time, that there were no funds there for the payment of the note: this was a sufficient proof of due demand of payment. *Bank of United States* v. *Carneal* *543

13. When a note is payable at a bank, it is not necessary to make any personal demand upon the maker elsewhere; it is his duty to be at the bank, within the usual hours of business, to pay the same, and if he omits so to do, and a demand is there made of payment, by the holder, within those hours, and it is refused or neglected to be made, the holder is entitled to maintain his action for such dishonor..... *Id.*

14. It is difficult to lay down any universal rule as to what is due diligence in respect to notice to indorsers; many cases must be decided upon their own particular circumstances, however desirable it may be, when practicable, to lay down a general rule.. *Id*

15. When notice is sent by the mail, it is sufficient, to direct it to the town where the party resides, if it be a post-town; if not, then to the post-office or post-town nearest to his residence, if known; but the rule, as to the nearest post-office, is not of universal application; for if the party be in the habit of receiving his letters at a more distant post-office, or through a more circuitous route, and the fact be known to the person sending notice, notice sent by the latter mode will be good. And where the party is in the habit of receiving his letters at various post-offices, to suit his own convenience or business, it may be sufficient to send it to either..... *Id.*

16. A suggestion was made at the bar, that the letter to the indorser, stating the demand and dishonor of the note, is not sufficient, unless the party sending it also informs the indorser, that he is looked to for payment; but where such notice is sent by the holder, or by his order, it necessarily implies such a responsibility over..... *Id.*

17. Bills of exchange drawn in one state of the Union, on persons living in another state, partake of the character of foreign bills, and ought to be so treated in the courts of the United States. *Buckner* v. *Finley*.... *586

RE-ARGUMENT.

1. The court refused to hear a re-argument upon a point decided in the case of Fullerton *v.* Bank of United States, 1 Pet. 612, that the act of the legislature of Ohio, relative to proceedings against parties to promissory notes, had been well adopted as a rule of practice in the courts of the United States for the state of Ohio. *Williams* v. *Bank of United States*..... *96

SLAVES.

1. The act of the legislature of Maryland, passed in 1796, ch. 47, § 13, declares "that all persons capable in law to make a valid will and testament, may grant freedom to, and effect the manumission of, any slave or slaves belonging to such person or persons, by his, her or their last will and testament, and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other period as may be limited in such last will and testament; provided always, that no manumission by last will and testament shall be effectual to give freedom to any slave or slaves, if the same shall be to the prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood, at the time the freedom given shall commence;" the time of freedom of the appellee in this case, commenced when he was about eleven years old: *Held*, that his manumission by will was valid. *Le Grand* v. *Darnall*..... *664

2 The court of appeals of Maryland has decided, that a devise of property, real or personal, by a master to his slave, entitles the slave to his freedom, by necessary implication; this court entertains the same opinion..... *Id.*

SPAIN.

See Louisiana: Treaties.

STATE LAWS.

1. Where the question upon the construction of the statute of a state relative to real property has been settled by any judicial decision in the state where the land lies, this court, upon the uniform principles adopted by it, would recognise that decision as a part of the local law. *Gardner* v. *Collins*....*58

2. Construction of the law of descents of Rhode Island..... *Id.*

3. The act of the legislature of Maryland, relative to a devise of the real estate of intestates in certain cases, in directing the commissioners when to give deeds to purchasers, has this general provision—that the commission and proceedings thereon shall be recited in the preamble of the deed: it certainly could not have been intended, that the commission, and all the proceedings, should be set out *in hæc verbâ;* if the substance of the proceedings is recited, it is sufficient. *Thompson* v. *Tolmie*.....*157

4. The law appears to be settled in the states, that courts will go far to sustain *bonâ fide* titles acquired under sales made by statutes regulating sales made by order of orphans' courts; where there has been a fair sale, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings..... *Id.*

5. The law of Kentucky authorizes their courts of chancery to make decrees against absent defendants, on the publication of an order for two months successively, in some paper authorized to make the publication, and on fixing it up at certain public places, prescribed by the act; this publication is considered as a constructive service of the process. The supreme court of Kentucky has decided, that the publication must be continued for two calendar months. *Hunt* v. *Wickliffe*...*201

6. Construction of the provisions of the treaties with the Indians, made by the state of Georgia, relative to boundaries; and of the acts of the legislature of that state, relative to grants of land within its territorial limits, and which were not within the Indian boundary line, as defined by the treaties and as recognised by those acts. *Patterson's Lessee* v. *Jenks*.....*216

7. If the state of Georgia have construed their treaty with the Cherokee Indians, by any subsequent acts, manifesting an understanding of it, this court would not hesitate to adopt that construction..... *Id.*

8. If the state of Georgia has practically settled the limits of Franklin county, such settlement ought to have been conclusive on the circuit court..... *Id.*

9. Under the statute of limitations of Tennessee of 1797, a possession of seven years is a protection, only when held under a grant, or under valid mesne conveyances, or a paper title, which are legally or equitably connected with a grant; a void deed is not such a conveyance as that a possession under it will

be protected by the statute of limitations. *Lessee of Powell* v. *Harman*.....*241

10. This court has frequently decided, that to sustain its jurisdiction in appeals and writs of error, it is not necessary to state, in terms, upon the record, that the constitution, or a law of the United States, was drawn in question; it is sufficient to bring the case within the provisions of the 25th section of the judiciary act, if the record show that the constitution, or a law of the United States, must have been misconstrued, or the decision could not have been made; or that the constitutionality of a state law was questioned, and the decision was in favor of the party claiming under such law. *Willson* v. *Blackbird Creek Marsh Co*.....*245

1 The act of the assembly of the state of Delaware, by which the construction of the dam erected by the plaintiffs was authorized, shows plainly that this is one of those many creeks, passing through a deep level marsh, adjoining the Delaware, up which the tide flows for some distance; the value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved; measures calculated to produce these objects, provided they do not come in collision with the powers of the general government, are, undoubtedly, within those which are reserved to the states. But the measure authorized by this act, stops a navigable creek and must be supposed to abridge the rights of those who have been accustomed to use it; but this abridgment, unless it comes in conflict with the constitution, or a law of the United States, is an affair between the government of Delaware and its citizens; of which this court can take no cognisance.....*Id.*

12. S. and M. held land in Luzerne county, Pennsylvania, in common, under a Connecticut title; a division of the land was made between them, and S. became the tenant of M., of his part of the land thus set off in severalty, under a lease, to be terminated on a notice of one year; S. afterwards obtained a Pennsylvania title to the land leased to him by M., and on a trial in an ejectment for the land, brought by M. against S., the court of common pleas of Bradford county, Pennsylvania, held, that S., having held the land as tenant of M., could not set up a title against his landlord; upon a writ of error to the supreme court of Pennsylvania, in 1825, it was held, that "the relation between landlord and tenant could not exist between persons holding under a Connecticut title." The legislature of Pennsylvania, on the 8th of April 1826, passed an act declaring that "the relation of landlord and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between citizens of the commonwealth;" the case came again before the supreme court of Pennsylvania, and the judgment of the court of common pleas of Bradford county, in favor of M., the landlord, was affirmed; that court having decided, that the act of assembly of the 8th of April 1826, was a constitutional act, and did not impair the validity of any contract; S. brought a writ of error to this court, claiming that the act of the assembly of Pennsylvania of the 8th of April 1826, was unconstitutional: *Held*, that the act was constitutional. *Satterlee* v. *Matthewson*.....*380

13. Objections to the jurisdiction of this court have been frequently made, on the ground that there was nothing apparent on the record to raise the question whether the court from which the case had been brought, had decided upon the constitutionality of a law, so that the case was within the provisions of the 25th section of the judiciary act of 1789; this has given occasion for a critical examination of the section, which has resulted in the adoption of certain principles of construction applicable to it. One of those principles is, that if the repugnancy of a statute of a state, to the constitution of the United States, was drawn into question, or if that question was applicable to the case, this court has jurisdiction of the cause; although the record should not, in terms, state a misconstruction of the constitution of the United States; or that the repugnancy of the statute of the state, to any part of that constitution, was drawn into question.....*Id.*

14. There is nothing in the constitution of the United States, which forbids the legislature of a state to exercise judicial functions...*Id.*

15. There is no part of the constitution of the United States, which applies to a state law which divested rights vested by law in an individual, provided its effect be not to impair the obligation of a contract.....*Id.*

16. In the case of Fletcher *v.* Peck, 6 Cranch 87, it was stated by the chief justice, that it might well be doubted, whether the nature of society and of government, do not prescribe some limits to the legislative power; and he asks, "if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" It is nowhere intimated in that opinion, that a state statute which divests a vested right, is repugnant to the constitution of the United States.....*Id.*

17. This court can perceive no sufficient grounds for declaring, that the legislature of Ohio might not repeal the law of that state by

which the court of common pleas was authorized to direct, in a summary way, the sale of the lands of an intestate; "jurisdiction of all probate and testamentary matters" may be completely exercised, without possessing the power to order the sale of the lands of an intestate; such jurisdiction does not appear to be identical with that power, nor to comprehend it. *Bank of Hamilton* v. *Dudley's Lessee*..... *492

18. The occupant claimant law of Ohio, which declares, that an occupying claimant shall not be turned out of possession, until he shall be paid for lasting and valuable improvements made by him, and directs the court, in a suit at law, to appoint commissioners to value the same, is repugnant to the seventh amendment of the constitution of the United States, which declares, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved;" the compensation for improvements is a suit at common law, and must be submitted to a jury..... *Id.*

19. Admitting, that the legislature of Ohio can give an occupant claimant a right to the value of his improvements, and authorize him to retain possession of the land he has improved, until he shall have received that value; and assuming, that they may annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts; still, the legislature cannot change radically the mode of proceeding prescribed for the courts of the United States, nor direct these courts, in a trial at common law, to appoint commissioners for the decisions of questions which a court of common law must submit to a jury ..... *Id.*

20. The inability of the courts of the United States to proceed, in suits at common law, in the mode prescribed by the occupant law of Ohio, does not deprive the occupant of the benefit intended him; the modes of proceeding which belong to courts of chancery, are adapted to the execution of the law; and to the equity side of the court he may apply for relief; sitting in chancery, it can appoint commissioners to estimate improvements, as well as rents and profits, and can enjoin the execution of the judgment at law, until its decree shall be complied with. If any part of the act be unconstitutional, the provisions of that part may be disregarded; while full effect will be given to such as are not repugnant to the constitution of the state, or the ordinance of 1787; the question whether any of its provisions be of this description, will properly arise, in the suit brought to carry them into effect..... ..... *Id.*

21. The act of the legislature of Maryland, passed in 1796, ch. 47, § 13, declares "that all persons capable in law to make a valid will and testament, may grant freedom to, and effect the manumission of any slave or slaves, belonging to such person or persons, by his, her or their last will and testament, and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other period as may be limited in such last will and testament; provided always, that no manumission by last will and testament shall be effectual to give freedom to any slave or slaves, if the same shall be to the prejudice of creditors, nor unless the said slave or slaves, shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood, at the time the freedom given shall commence;" the time of freedom, of the appellee, in this case, commenced when he was about eleven years old: *Held*, that this manumission by will was valid. *Le Grand* v. *Darnall*..... *664

22. The court of appeals of Maryland has decided, that a devise of property, real or personal, by a master to his slave, entitles the slave to his freedom, by necessary implication: this court entertains the same opinion..... *Id.*

23. This being a suit upon a local statute, giving a particular remedy, in the nature of a foreign attachment, against garnishees, who possess goods, effects or credits of the principal debtor; the decisions which have been made on the construction of that statute, by the state court of Massachusetts, are entitled to great respect; and ought, in conformity to the uniform practice of this court, to govern its decisions. *Beach* v. *Viles*..... *675

12. Where, under a voluntary assignment of an insolvent debtor, the proceeds of all the property received by the assignees, under the assignment, are insufficient to pay the amount of the just debts and dividends due to the assignees; the established doctrine in Massachusetts is, that the assignees cannot be holden as trustees of the debtor, to the creditor who is the plaintiff in an attachment, so as to be chargeable to him in the suit; even if the assignment were held to be constructively fraudulent, in point of law, they would be entitled to retain their own *bonâ fide* debts; for, as to those, they stand upon equal grounds with any other creditors; this is understood to be the clear result of the cases decided in Massachusetts..... *Id.*

25. The act of the legislature of Maryland, of 1793, incorporating the Bank of Columbia, one of the sections of which gives to the bank a summary proceeding against debtors to the bank, did not intend to interfere with

any legal defence against the claim of the bank the party might have; it does not prescribe the nature of that defence nor deprive him of any which might have been used, had the action been commenced in the usual way. *Bank of Columbia* v. *Sweeney*.....*671

26. J. J. died in New Hampshire, seised of real estate in Rhode Island, having devised the same to his daughter, an infant; his executrix proved the will in New Hampshire, and obtained a license from a probate court, in that state, to sell the real estate of the testator for the payment of debts; she sold the real estate in Rhode Island for that purpose, and conveyed the same by deed; giving a bond to procure a confirmation of the conveyance by the legislature of Rhode Island; the proceeds of the sale were appropriated to pay the debts of the intestate: *Held*, that an act of the legislature of Rhode Island, which confirmed the title of the purchasers, was valid. The legislature and judicial authority of New Hampshire were bounded by the territory of that state, and could not be rightfully exercised, to pass estates lying in another state; the sale of real estate in Rhode Island, by an executrix, under a license granted by a court of probate of New Hampshire, was void; and a deed executed by her of the estate was, *proprio vigore*, inoperative to pass any title of the testator, to any lands described therein. *Wilkinson* v. *Leland*.....*627

27. By the laws of Rhode Island, the probate of a will, in the proper probate court, is understood to be an indispensable preliminary to establish the right of the devisee, and then, his title relates back to the death of the testator..... *Id.*

STATUTE OF FRAUDS.

1. In cases not absolutely closed by authority, this court has always expressed a strong inclination not to extend the operation of the statute of frauds, so as to embrace original and distinct promises, made by different persons, at the same time, upon the same general consideration. *Townsley* v. *Sumrall*...*170

2. If A. says to B., pay so much money to C., and I will repay it to you, it is an original independent promise; and if the money be paid upon the faith of it, it has been always deemed an obligatory contract, even though it be by parol; because there is an original consideration moving between the immediate parties to the contract..... *Id.*

SUPREME COURT OF THE UNITED STATES.

1 The city council of Charleston, exercising an authority under the state of South Carolina, enacted an ordinance, by which a tax was imposed on the six and seven per cent. stock of the United States; and in the court of common pleas of the Charleston district, an application was made for a prohibition, to restrain them from levying the tax, on the ground, that the ordinance violated the constitution of the United States; the prohibition was granted, and the proceedings in the case were removed to the constitutional court, the highest court of law of the state; and in that court, it was held, that the ordinance did not violate the constitution of the United States, and a writ of error was prosecuted on this decision to this court: *Held*, that the question decided by the constitutional court, was the very question on which the revising power of this court is to be exercised. *Weston* v. *City Council of Charleston*.....*449

2. The power of this court to revise the judgments of state tribunals, depends on the 25th section of the judiciary act; that section enacts, "that a final judgment or decree, in any suit, in the highest court of law or equity of a state, in which a decision in the suit could be had," where is drawn in question the validity of a statute of, or of an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity, "may be re-examined, and reversed or affirmed, in the supreme court of the United States."..... *Id.*

3. A writ of error to this court may be prosecuted, where, by the judgment of the highest court of the state of South Carolina, a prohibition, issued in a state court, to prevent the levying of a tax which was imposed by a law repugnant to the constitution of the United States, was refused, on the ground that the law was not so repugnant to the constitution..... *Id.*

4. The term "suit" is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, in which an individual pursues that remedy in a court of justice, which the law affords him..... *Id.*

5. The words "final judgment," in the 25th section of the judiciary act, must be understood, in the section under consideration, as applying to all judgments and decrees which determine the particular cause; and it is not required, that such judgments shall finally decide upon the rights which are litigated, that the same shall be within purview of the section..... *Id.*

6. The judicial department of every government is the rightful expositor of its laws, and emphatically, of its supreme law; if, in a

case depending before any court, a legislative act shall conflict with the constitution, it is admitted, that the court must exercise its judgment on both, and that the constitution must control the act; the court must determine, whether a repugnancy does or does not exist, and in making this determination, must construe both instruments. That its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which this court can perceive no reason. *Bank of Humilton* v. *Dudley's Lessee*.....*492

TENNESSEE.

1. Construction of the statute of limitations of Tennessee, relative to possession of lands. *Lessee of Powell* v. *Harman*.....*241

TREATIES.

1. A treaty is, in its nature, a contract between two nations, not a legislative act; it does not generally effect, of itself, the object to be accomplished, especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. *Foster* v. *Neilson*.....*253
2. In the United States, a different principle is established; our constitution declares a treaty to be the law of the land; it is, consequently, to be regarded in courts of justice, as equivalent to an act of the legislature, whenever it operates, of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the courts..... *Id*

See LOUISIANA.

UNITED STATES.

1. For all national purposes embraced by the federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws; in all other respects, the states are necessarily foreign and independent of each other. *Buckner* v. *Finley*.....*586

USURY.

1. The branch bank of the United States, at Lexington, Kentucky, discounted a promissory note, reserving interest thereon, at the rate of six per centum per annum, it being agreed that the owner of the note should receive the proceeds of the discount, in notes of the Bank of Kentucky, at their nominal value, although the same were, at the time, of no greater current value than fifty-four per cent. of the said nominal value: *Held*, that the contract was usurious and void; and that the bank could not recover of any of the parties to the discounted note. *Bank of United States* v. *Owens*.....*527
2. A fraud upon a statute, is a violation of the statute..... *Id.*
3. A profit made, or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume, where the treaty is for a loan, and the capital is to be returned, at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specific rate of interest; according to this principle, the lender in this case has taken forty-six per cent., for three years, or at the rate of about fifteen per cent. per annum above his prescribed interest; this is contrary to the provisions of the charter of the Bank of the United States, and against law..... *Id.*
4. Reserving interest as discount, is the same as taking the same; since it cannot be permitted by law, to stipulate for the receipt or reservation of that which it is not permitted to receive; in those instances in which courts are called upon to inflict penalties upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for there, the actual receipt is generally necessary to consummate the offence; but where the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule, that it is unlawful to contract to do, that which it is unlawful to do. ..... *Id.*
5. The charter of the Bank of the United States forbids the taking of a greater rate of interest than six per centum; but it does not declare a contract on which a greater interest has been taken or reserved, to be void. Such a contract is void, upon general principles; courts of justice are instituted to carry into effect the laws of a country, and they cannot become auxiliary to the violation of those laws; there can be no civil right where there can be no legal remedy; and there can be no legal remedy, for that which is itself illegal. *Id.*

WASTE.

1. Action on the case against the defendant for waste, committed by him while tenant of the plaintiff, the owner of the reversionary interest, by pulling down and removing from

the demised premises, a dwelling-house erected thereon, and attached to the freehold; the question raised in the case was, what fixtures erected by the tenant, during his term, are removable by him. The general rule of the common law undoubtedly is, that whatever is once annexed to the freehold becomes part of it, and cannot be afterwards removed, except by him who is entitled to the inheritance; this rule, however, never was inflexible, and without exceptions. It was construed most strictly between executor and heir, in favor of the latter; and more liberally, between tenant for life and in tail, and remainder-man or reversioner, in favor of the former; and tenant, in favor of the tenant. A more extensive exception to the rule has been of fixtures erected for the purposes of trade; fixtures which were erected to carry on trade and manufactures, were, from an early period of the law, allowed to be removed by the tenant, during his term; and were deemed personalty for many other purposes. *Van Ness* v. *Pacard*..... ..... *137

2. It might deserve consideration, whether, if the rule of the common law of England which prohibits the removal of fixtures erected by the tenant for agricultural purposes, were not previously adopted in a state, by some authoritative practice or adjudication, it ought to be assumed by this court, as a part of the jurisprudence of such state, upon the mere footing of its existence in the common law..... *Id.*

3. The question whether fixtures erected for the purposes of trade, are or are not removable by the tenant, does not depend upon the form or size of the building; whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney; the sole question is, whether it is designed for the purposes of trade or not..... *Id.*

4. If the house were built principally for a dwelling-house for the family, independently or carrying on a trade, then, it would doubtless be deemed a fixture, falling under the general rule, and irremovable; but if the residence of the family were merely an accessary for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then, it is within the exception..... *Id.*

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