REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

JANUARY TERM 1830.

By RICHARD PETERS,

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

VOL. IV.

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EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS

Hon. JOHN MARSHALL, Chief Justice.

" WILLIAM JOHNSON,
" GABRIEL DUVALL,
" JOSEPH STORY,
" SMITH THOMPSON,
" JOHN MCLEAN,
" HENRY BALDWIN,

} Associate Justices.

JOHN MCPHERSON BERRIEN, Esq., Attorney-General.

TENCH RINGGOLD, Marshal.

WILLIAM THOMAS CARROLL, Clerk.

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OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

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OF THE

CASES CITED IN THIS VOLUME.

The references are to the STAR *pages.

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1830.

JAMES CARVER, Plaintiff in error, *v.* JAMES JACKSON, on the demise of JOHN JACOB ASTOR, THEODOSIUS FOWLER, CADWALLADER D. COLDEN, CORNELIUS J. BOGET, HENRY GAGE MORRIS, MARIA MORRIS, THOMAS HINKS and JOHN HINKS, Defendants in error.

Bills of exception.—Execution of deed.—Estoppel.—Marriage-settlement. Executory limitations.—Forfeited estates.—Compensation for improvements.

The practice of bringing the whole of the charge of the court, delivered to the jury in the court below, for review before this court, is unauthorized, and extremely inconvenient both to the inferior and to the appellate court; with the charge of the court to the jury upon mere matters of fact, and with its commentaries upon the weight of evidence, this court has nothing to do; observations of that nature are understood to be addressed to the jury, merely for their consideration as the ultimate judges of the matters of fact; and are entitled to no more weight or importance than the jury, in the exercise of their own judgment, choose to give them; they neither are, nor are understood to be, binding on them, as the true and conclusive exposition of the evidence. If, in summing up the evidence to the jury, the court should misstate the law, that would justly furnish a ground for an exception; but the exception should be strictly confined to that misstatement; and by being made known at the moment, would often enable the court to correct an erroneous expression, so as to explain or qualify it in such manner as to make it wholly unexceptionable, or perfectly distinct. p. 80.

The plaintiff claimed title under a marriage-settlement, purporting to be executed *the 13th of January 1758, by an indenture of release, between Mary Philipse, of the first part, [*2
Roger Morris, of the second part, and Joanna Philipse and Beverly Robinson, of the third part; whereby, in consideration of a marriage intended to be solemnized between Roger Morris and Mary Philipse, &c., R. M. and M. P. granted, &c., to J. P. and B. R., "in their actual possession now being, by virtue of a bargain and sale to them thereof made, for one whole year, by indenture bearing date the day next before the date of these presents, and by force of the statute for transferring uses into possession, and to their heirs, all those," &c., upon certain trusts therein mentioned. This indenture, signed and sealed by the parties, and attested by the subscribing witnesses to the sealing and delivery thereof, with a certificate of William Livingston, one of the witnesses, and the execution thereof before a judge of the supreme court of the state of New York, dated the 5th of April 1787, and of the recording thereof in the secretary's office of New York, was offered in evidence by the plaintiff, and objected to, on the ground, that the certificate of the execution was not legal and competent evidence, and

did not entitle the plaintiff to read the deed, without proof of its execution; a witness was sworn, who proved the handwriting of William Livingston, and of the other subscribing witness, both of whom were dead; the certificate of the judge of the supreme court of New York stated, that William Livingston had sworn before him, that he saw the parties to the deed, "sign and seal the indenture, and deliver it as their, and each of their, voluntary acts and deeds," &c. According to the laws of New York, there was sufficient *primâ facie* evidence of the due execution of the indenture; not merely of the signing and sealing, but of the delivery, to justify the court in admitting the deed to be read to the jury; and in the absence of all controlling evidence, the jury would have been bound to find that the deed was duly executed. p. 82.

The plaintiff in the ejectment derived title under the deed of marriage-settlement of the 15th of January 1758, executed by Mary Philipse, who afterwards intermarried with Roger Morris, and by Roger Morris and certain trustees named in the same; the premises, before the execution of the deed of marriage-settlement, were the property of Mary Philipse, in fee-simple. The defendant claimed title to the same premises, under a sale made thereof, as the property of Roger Morris and wife, by certain commissioners acting under the authority of an act of the legislature of New York, passed the 22d of October 1779, by which the premises were directed to be sold, as the property of Roger Morris and wife, as forfeited—Roger Morris and wife having been declared to be convicted and attainted of adhering to the enemies of the United States. Not only is the recital of the lease, in the deed of marriage-settlement, evidence between the original parties to the same, of the existence of the lease; but between the parties to this case, the recital is conclusive evidence of the same, and superseded the necessity of introducing any other evidence to establish it. p. 83.

The recital of the lease, in the deed of release, in the present case, was conclusive evidence upon all persons claiming under the parties, in privity of estate, as those in this case claimed; and, independently of authority, the court would have arrived at the same conclusion upon principle.[1] p. 83.

As to the law of estoppels. p. 84.

Leases, like other deeds and grants, may be presumed, from long possession, which cannot otherwise be explained; and under such circumstances, a recital in an old deed, of the fact of such
*3] a lease having been executed, is certainly *presumptive proof, or stronger, in favor of such possession under title, than the naked presumption arising from a mere unexplained possession. p. 84.

The uses declared in a deed of marriage-settlement were: to and for the use of "Joanna Philipse and Beverly Robinson (the releasees) and their heirs, until the solemnization of the said intended marriage; and from and immediately after the solemnization of the said intended marriage, then to the use and behoof of the said Mary Philipse and Roger Morris, and the survivor of them, for and during the time of their natural lives, without impeachment of waste; and from and after the determination of that estate, then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her or their heirs and assigns for ever; but in case the said Roger Morris and Mary Philipse shall have no child or children begotten between them, or that such child or children shall happen to die during the lifetime of the said Roger and Mary, and the said Mary should survive the said Roger, without issue, then to the use and behoof of her, the said Mary Philipse, and her heirs and assigns for ever; and in case the said Roger should survive the said Mary Philipse, without any issue by her, or that such issue is then dead, without leaving issue, then, after the decease of the said Roger Morris, to the only use and behoof of such person or persons, and in such manner and form, as the said Mary Philipse shall, at any time during the said intended marriage, devise the same, by her last will and testament, &c. The marriage took effect, children were born; all before the attainder of their parents in 1779; Mary Morris survived her husband, and died in 1825, leaving her children surviving her. This is a clear remainder in fee to the children of Roger Morris and wife; which ceased to be contingent, on the birth of the first child, and opened to let in after-born children. p. 90.

It is perfectly consistent with this limitation, that the estate in fee might be defeasible, and determinable, upon a subsequent contingency; and upon the happening of such contingency, might pass, by way of shifting executory use, to other persons in fee, thus making a fee upon a fee. p. 90.

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[1] A recital does not operate as an estoppel, in favor of one who would not be bound by it. Jewell *v.* Harrington, 19 Wend. 471; Borst *v.* Corey, 16 Barb. 136.

Carver v. Astor.

The general rule of law, founded on public policy, is, that limitations of this nature shall be construed to be vested when, and as soon as, they may vest;[1] the present limitation, in its terms, purports to be contingent only until the birth of a child, and may then vest; the estate of the children was contingent only until their birth, and when the confiscation act of New York passed, they being all born, it was a vested remainder in them and their heirs, and not liable to be defeated by any transfer or destruction of the life-estate. p. 92.

The act of the legislature of New York, of May 1st, 1786, gave to the purchasers of forfeited estates the like remedy, in case of eviction, for obtaining compensation for the value of their improvements, as is directed in the act of the 12th of May 1784; the latter act declares, that the person or persons having obtained judgment against such purchasers, shall not have any writ of possession, nor obtain possession of such lands, &c., until he shall have paid to the purchaser of such lands, or person holding title under him, the value of all improvements made thereon, after the passing of the act: *Held*, that claims of compensation for improvements made under the authority of these acts of the legislature of New York, are inconsistent with the provisions of the treaty of peace with Great Britain of 1783, and should be rejected. p. 101.

That in all cases a party is bound by natural justice to pay for improvements on land, made against his will, or without his consent, is a proposition which the court are not prepared to admit.[2] p. 101.

*Error to the Circuit Court for the Southern District of New York. In the circuit court for the southern district of New York, an [*4 action of ejectment was instituted by the defendant in error, for the recovery of a tract of land, in the town of Carmel, in the county of Putnam, in the state of New York. The plaintiff claimed title, on the demise of John Jacob Astor and others, named in the case. The action was tried by a jury, at October term 1829, in the circuit court, in the city of New York, and a verdict and judgment rendered for the plaintiff in the same; a bill of exceptions was tendered by the defendant in the circuit court, who prosecuted this writ of error.

After judgment was rendered for the plaintiff in the circuit court, he prayed the court to order a writ of possession, to cause him to have possession of the premises; and thereupon, James Carver suggested to the court, that Roger Morris and Mary Morris, his wife, under whom the plaintiff in ejectment claimed, were, for fifteen years and upwards, next before the 22d of October 1779, in possession of a large tract of land in the then county of Dutchess, in the state of New York, including the premises. That on the 22d of October 1779, the legislature of the state of New York, by "an act for the forfeiture and sale of the estate of persons who have adhered to the enemies of the state, &c.," declared Roger Morris and his wife to be convicted and attainted of adhering to the enemy; and all their estate, real and personal, severally and respectively, in possession, reversion or remainder, was forfeited and vested in the people of the state. That commissioners appointed under this act, on the 16th of November 1782, sold, disposed of, and conveyed the land in question in this suit, to Timothy Carver, his heirs and assigns, for the consideration of 71*l*. That by an act of the legislature of the 12th of May 1784, and an act of the 1st of May 1786, it was, among other things, provided, that where judgment, in a due course of law,

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[1] Poor *v.* Consadine, 6 Wall. 458; Lantz *v.* Trusler, 37 Penn. St. 482.

[2] This case was re-affirmed in Crane *v.* Morris, 6 Pet. 598, an ejectment on the same title, the court saying, that upon a deliberate review, they were entirely satisfied with the opinion and judgment pronounced in Carver *v.* Astor, which was, indeed, most thoroughly and anxiously considered.

should be obtained for any lands sold by the commissioners of forfeitures, against any person who derived title thereto under the people of the state,
*5] or the commissioners, *the person who obtained judgment should not have a writ of possession, or obtain possession of the land, until he or she should have paid to the person in possession under said title, the value of all improvements made thereon, to be estimated as provided in the acts. That he, the said Timothy Carver, purchased the property held by him, in the full confidence that he obtained a perfect indefeasible title to the land in fee-simple, entered forthwith into possession of the same, made great, valuable and permanent improvements on the land, which are now in value upwards of $2000, by which the lands are enhanced in value to that sum and upwards. That Timothy Carver afterwards conveyed the premises to James Carver, the defendant in ejectment, who also made other valuable improvements on the land, before the commencement of this suit, of the value of $2000 and upwards. That this action had been commenced and prosecuted, and a recovery had been had on a ground of title, reciting the same; that the act of the legislature of New York, passed the 22d of October 1779, for the forfeiture of estates, &c., did not take from the plaintiff in the suit the title to the premises, after the death of Roger Morris and wife, both of whom were deceased at the time of the institution of this suit. So that the plaintiffs were the owners of the land in fee, and entitled to recover the possession of the same. And the defendant insisted, that, under the provisions of the several acts of the legislature of New York, he ought to be paid the value of the improvements made on the lands; that no writ of possession should issue, until the same was paid; and he prayed the court to stay the plaintiff from the writ, or from having possession of the lands, until the value should be paid; and that commissioners might be appointed to ascertain the said value.

The plaintiff did not deny the facts alleged by the defendant, but he denied the right of the defendant to be paid for the improvements, and insisted on his right at law to a writ of possession, and to the possession of the land, without paying the value of the improvements. The court held, that the matters suggested by the defendant, and admitted by the plaintiff,
*6] were not sufficient to bar or stay the plaintiff from *having his writ of possession, or possession of the land, without paying the whole or any part of the value of the improvements estimated or valued in any way whatever; and that the plaintiff should have a writ of possession to cause him to have possession of the lands.

The bill of exceptions set forth the whole proceedings on the trial of the cause; and that an agreement had been entered into by the parties to it, that the plaintiff was not entitled to the recovery of the property, unless it should satisfactorily appear in the suit, in addition to whatever else might be necessary to authorize a recovery therein, that the whole title, both in law or equity, which might or could have been vested in the children and heirs of Roger Morris and Mary his wife, of, in or to the premises or lands in question in the suit, had been, as between the grantors and grantees, legally transferred to John Jacob Astor, one of the lessors of the plaintiff, his heirs and assigns; nor unless a proper deed of conveyance in fee-simple from John Jacob Astor and all persons claiming under him, to the people of the state of New York, would be valid and effectual to release, transfer and extinguish

all the right, title and interest, which was, or might have been, vested in the children and heirs of Roger Morris and wife.

The plaintiff in the ejectment gave in evidence a patent from William III. to Adolphe Philipse, dated 17th June 1692, for a large tract of land, including the premises, and proved the descent of the same to Frederick Philipse; and that Mary Philipse, who afterwards intermarried with Roger Morris, was a devisee in tail, with other children, of Frederick Philipse, and by subsequent proceedings in partition, and by a common recovery, Mary Philipse became seised in fee-simple of one equal undivided part of the land granted by the patent; and that afterwards, on the 7th of February 1754, a deed of partition, reciting the patent and the title of the heirs, was executed between the children and devisees and heirs of Frederick Philipse, by which the portions severally belonging to them were set apart and divided to each in severalty, one portion being allotted to Mary Philipse; the land in controversy being included in the land surveyed *and held under [*7
the patent and deed of partition. The part allotted to Mary Philipse [
in the partition, was No. 5.

The plaintiff then offered to read in evidence a deed of marriage-settlement, dated 13th of January 1758, intended to convey all the land in No. 5, between Mary Philipse, of the first part, Roger Morris, of the second part, Joanna Philipse and Beverly Robinson, of the third part; on the back of which deed was indorsed a certificate in the following terms:

"Be it remembered, that on the 1st day of April 1787, personally came and appeared before me, John Sloss Hobart, one of the justices of the supreme court of the state of New York, William Livingston, Esq., governor of the state of New Jersey, one of the subscribing witnesses to the within written indenture, who being by me duly sworn, did testify and declare, that he was present, at or about the day of the date of the within indenture, and did see the within-named Joanna Philipse, Beverly Robinson, Roger Morris and Mary Philipse, sign and seal the same indenture, and deliver it as their, and each of their, voluntary acts and deeds, for the uses and purposes therein mentioned; and I having carefully inspected the same, and finding no material erasures or interlineations therein, other than those noted to have been made before the execution thereof, do allow the same to be recorded. John Sloss Hobart."

Upon the back of the deed was also indorsed a certificate of the recording thereof, in the following words: "Recorded in the secretary's office of the state of New York, in deed book commencing 25th November 1774, page 550. Examined by me this 11th of April 1787.

Robert Harpur, D. Secretary."

To which said evidence, so offered, the counsel for the defendant objected, upon the ground, that the certificate was not legal and competent evidence to be given to the jury, and did not entitle the plaintiff to read the deed in evidence, without proof of its execution; and that the certificate was not sufficient, inasmuch as it did not state that William Livingston testified or swore that he was a subscribing witness to the deed. The parts of the deed of 13th January 1758, material to the case, were the following:

"This indenture, made the 13th day of January, in the *thirty- [*8
first year of the reign of our sovereign lord, George II., by the grace of God, of Great Britain, France and Ireland, King, defender of the faith,

&c., and in the year of our Lord, 1758, between Mary Philipse, of the first part, Major Roger Morris, of the second part, and Joanna Philipse and Beverly Robinson, of the third part, witnesseth, that in consideration of a marriage intended to be had and solemnized between the said Roger Morris and Mary Philipse, and the settlement hereafter made by the said Roger Morris on the said Mary Philipse, and for and in consideration of the sum of five shillings, current money of the province of New York, by the said Joanna Philipse and Beverly Robinson to her, the said Mary Philipse, at or before the ensealing and delivery of these presents, well and truly paid, the receipt whereof is hereby acknowledged, and for divers other good causes and considerations her thereunto moving, she, the said Mary Philipse, hath granted, bargained, sold, released and confirmed, and by these presents doth grant, bargain, sell, release and confirm, unto the said Joanna Philipse and Beverly Robinson (in their actual possession now being, by virtue of a bargain and sale to them thereof made, for one whole year, by indenture bearing date the day next before the day of the date of these presents, and by force of the statute for transferring of uses into possession), and to their heirs, all those several lots or parcels of land, &c.," describing the property, in which was included the land in controversy in this suit.

"To have and to hold all and singular the several lots of land, &c., and all and singular other the lands, tenements, hereditaments and real estate whatsoever of her the said Mary Philipse, &c., unto the said Joanna Philipse and Beverly Robinson, and their heirs, to and for the several uses, intents and purposes hereinafter declared, expressed, limited and appointed, and to and for no other use, intent and purpose whatsoever; that is to say, to and for the use and behoof of them the said Joanna Philipse and Beverly Robinson, and their heirs, until the solemnization of the intended marriage, and to the use and behoof of the said Mary Philipse and Roger Morris, and the survivor of them, for and *during the term of their natural lives, without impeachment of waste, and from and after the determination of that estate, then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her or their heirs and assigns for ever; but in case the said Roger Morris and Mary Philipse shall have no child or children begotten between them, or that such child or children shall happen to die, during the lifetime of the said Roger and Mary, and the said Mary should survive the said Roger, without issue, then to the use and behoof of her, the said Mary Philipse, and her heirs and assigns for ever; and in case the said Roger Morris should survive the said Mary Philipse, without any issue by her, or that such issue is then dead, without leaving issue, then, after the decease of the said Roger Morris, to the only use and behoof of such person or persons, and in such manner and form, as she, the said Mary Philipse, shall, at any time during the said intended marriage, devise the same, by her last will and testament; which last will and testament, for that purpose, it is hereby agreed by all the parties to these presents, that it shall be lawful for her, at any time during the said marriage, to make, publish and declare, the said marriage, or anything herein contained, to the contrary thereof in anywise notwithstanding; provided, nevertheless, and it is the true intent and meaning of the parties to these presents, that it shall and may be lawful to and for the said Roger Morris and Mary Philipse, jointly, at any time or times during the said marriage,

*9]

to sell and dispose of any part of the said several lots or parcels of land, or of any other her lands, tenements, dereditaments and real estate whatsoever, to the value of three thousand pounds, current money of the province of New York ; and in case the said sum of three thousand pounds be not raised by such sale or sales, during their joint lives, and they have issue between them, that then it shall be lawful for the survivor of them to raise the said sum, by the sale of any part of the said lands, or such deficiency thereof as shall not then have been already raised thereout, so as to make up the said full sum of three thousand pounds, anything herein before contained to the contrary thereof in anywise notwithstanding."

*The court overruled the objection, and allowed the deed to be read in evidence, and the counsel for the defendant excepted to the same. [*10

Evidence was then given, by the testimony of Mr. Hoffman, to prove the death of William Livingston and Sarah Williams, who were witnesses to the deed, and that the names of those persons were their proper handwriting. That Mary Philipse and Roger Morris intermarried, and had four children, all born before October 1779 ; also the death of some of the children ; the intermarriage of others; that Joanna Philipse was the mother of Mary Morris and Susanna Robinson, wife of Beverly Robinson ; that Beverly Robinson died between 1790 and 1795 ; that Roger Morris died in 1794, and his wife Mary Morris died in 1825. Evidence was also given to show that Roger Morris was in possession of the premises from 1771 to 1774.

The plaintiff then gave in evidence a conveyance by lease and release of the premises, *inter alia*, by the heirs and legal representatives of Roger Morris and wife, to John Jacob Astor. The conveyance by the commissioners of forfeited estates to Timothy Carver, of the land, was then given in evidence by the plaintiffs, and by Timothy Carver and wife to the defendant.

Mr. Barclay proved, that Roger Morris and his family left this country for England, just before the evacuation of the city of New York by the British troops, in 1782 or 1783, and that neither of them had since returned to the United States. The plaintiff here rested his case.

And thereupon, the counsel of the defendant objected and insisted, that (independent of any other questions that might arise upon the plaintiff's case) unless the deed, commonly called a marriage-settlement deed, which had been given in evidence, was accompanied or preceded by a lease, the plaintiff could not recover in this action ; that without such lease, the deed could only operate as a deed of bargain and sale, and the statute of uses would only execute the first use to the bargainees, Joanna Philipse and Beverly Robinson, who took the legal estate in the land; and that the children of *the said Roger Morris and his wife took only trust or equitable interests, and not the legal estate in the lands ; and that the plaintiff could not recover, because such lease had not been produced, nor its absence accounted for, if one existed ; and of this opinion was the court. [*11

The counsel for the plaintiff then offered to give evidence to the court, to prove the loss of the said lease, to lay the foundation for secondary evidence of its contents, by showing that diligent search for such lease had been made in various places, without being able to find the same ; to which evidence the counsel for the defendant objected, on the ground, that such

evidence did not go to prove the loss or destruction of the lease, but to show that none ever existed ; and that before the plaintiff could give such, or any other, evidence of the loss of the lease, he must prove that a lease did once exist.

The counsel for the plaintiff then offered to give evidence to show that diligent efforts had been made in England, and in the United States, to find the lease, without success ; which was objected to by the defendant, on the ground, that such evidence did not go to prove the loss or destruction of the lease, but to show that none ever existed ; and that before such evidence was given, it must be proved, that a lease did once exist. The court overruled this objection, considering the recital in the release *primâ facie* evidence for that purpose, and the plaintiff gave the evidence. To this decision, in overruling the objections and admitting the evidence, the counsel for the defendant excepted.

Testimony was then offered and admitted, to prove that it was the almost universal practice not to record the lease, when the conveyance was by way of lease and release. This evidence was given by the testimony of persons who had examined the offices of record, and not by that of those who kept the records. The counsel for the defendant objected to this evidence, alleging that the facts asserted could only be proved by the persons who had the custody of the records ; but this objection was overruled, and the same was excepted to.

*12] Here the plaintiff again rested the proofs as to the loss of *the lease ; and offered to give secondary evidence to the jury of its previous existence and contents. The counsel for the defendant objected, and insisted, that the plaintiff had not sufficiently proved the loss of the lease, and was not entitled to go into secondary evidence of its previous existence and contents. But the court overruled the objections ; and was of opinion, that the plaintiff had, from the evidence, satisfied the court as to the loss and non-production of the lease, and was entitled to give secondary evidence of its contents ; to which opinion and decision, the counsel for the defendant also excepted.

The counsel for the plaintiff, for the purpose of proving to the jury the existence and contents of the lease, offered to read in evidence to the court and jury, the recital contained in the said release or marriage-settlement deed, of a lease or bargain and sale for a year ; to which evidence, so offered as aforesaid, the counsel for the defendant objected, on the ground, that the said recital was not evidence for those purposes against the defendant. But the court overruled the objection, and permitted the recital to be read in evidence to the jury, to prove the existence and contents of the lease ; to which opinion and decision, the counsel for the defendant also excepted.

The plaintiff then offered, and gave in evidence, by the testimony of Mr. Benson and Mr. Troup, that William Livingston, who had witnessed the deed of release, was an eminent lawyer in the city of New York, where the deed was executed, and that it was the practice at that time to employ lawyers to draw deeds ; that it was usual to recite the lease in the deed of release ; that it was a frequent practice in New York, to convey lands by lease and release, until within four years of the revolution. Evidence was also offered and admitted, by the books of record, to show what was the

usual form and contents of a lease. To all this testimony, the counsel for the defendant excepted.

The printed journal of the house of assembly of New York, for the year 1787, was then admitted in evidence, under an exception by the counsel for the defendant. It *showed, that on the 16th of February 1787, a petition had been presented by Joanna Morris, on behalf of herself, [*13 her brothers and sisters, children of Roger Morris and Mary his wife, relative to the estate forfeited to the people of the state of New York by the attainder of their parents, and a report thereon to the legislature; and here the plaintiff rested his case.

The defendant gave evidence to prove that Timothy Carver, and himself under him, had been in possession of the premises, since the close of the revolutionary war, claiming the same in fee. He also produced and read in evidence, conveyances by way of lease and release, executed by Roger Morris and wife, in 1765, 1771, 1773, and other deeds and leases for parts of the lot No. 5, in which no mention was made of the marriage-settlement, and in which the property was described as held under the patent to Adolphe Philipse, and in which Roger Morris and wife covenanted, "that they had good right and full power and lawful authority to release and convey the same in fee." The defendant also gave in evidence the exemplification of a patent to Beverly Robinson, Roger Morris and Philip Philipse, dated the 27th of March 1761, in which was recited the surrender of part of the great tract granted to Adolphe Philipse on the 17th of June 1696, the descent of the whole of the said tract to the children of Frederick Philipse; no mention being made in the recitals of the marriage-settlement, and by which patent, two tracts of land, as a compensation for part of the land held under the original patent, which was supposed to lie within the Connecticut line, was granted.

It was proved, by the evidence of Mr. Watts, that he had in his possession the marriage-settlement deed which had been read in evidence, at and immediately before the time of its proof before Judge Hobart in 1787; that the witness wrote the body of the certificate of proof indorsed on the back; that the whole of the said certificate was written by the witness, except the name of Judge Hobart, written at the bottom, which was written by the said judge; that he believed he wrote the certificate in the presence of the judge, at the time the proof was made, which was at the house of said judge, in the city of New York; Governor Livingston *was then staying at Judge Hobart's house on a visit. On being shown the said [*14 original certificate, the witness said, that a blank was originally left in the body of the said certificate, for the name of the judge or officer before whom the said proof was to be made, and from that circumstance, he had no doubt, that the said certificate, was written, before he knew what officer would take the said proof, and not in the presence of the judge; that the witness received the said deed, early in the said year 1787, in an inclosure from the said Roger Morris, who was then in London, England.

The plaintiff then gave in evidence, the defendant's counsel excepting thereto, the act of the legislature of the state of New York, passed April 16th, 1827, entitled "an act to extinguish the claim of John Jacob Astor and others, and to quiet the possession of certain lands in the counties of Putnam and Dutchess;" the act passed April 19th, 1828, entitled "an act

to revive and amend an act entitled 'an act to extinguish the claim of John Jacob Astor and others, and to quiet the possession of certain lands in the counties of Putnam and Dutchess.'" Evidence was also given, the defendant's counsel excepting thereto, to show that this suit was defended, for the state of New York, by the attorney-general of the state.

The counsel for the defendant then gave in evidence an exemplification of the proceedings of the council of safety of New York, on the 16th of July 1776, in which it was resolved unanimously, that all persons abiding within the state of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the state; and that all persons passing through, visiting or making a temporary stay in the said state, being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same time, allegiance thereto; that all persons, members of, or owing allegiance to, this state as before described, who shall levy war against the said state, within the same, or be adherent to the king of Great Britain, or others the enemies of said state, and being thereof convicted, shall suffer the pains and penalties of death.

*15] *The counsel for the defendant also read in evidence an act of the legislature of the state of New York, entitled "an act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this state, and for declaring the sovereignty of the people of this state, in respect to all property within the same," passed the 22d of October 1779; it being admitted by the counsel for both parties, that Roger Morris, Mary Morris, the wife of Roger Morris, and Beverly Robinson, mentioned in the first section of the act, are and were the same persons by those names therein before mentioned; Beverly Robinson being the person by that name who was one of the parties to the marriage-settlement deed: Also an act, entitled "an act for the speedy sale of the confiscated and forfeited estates within this state, and for other purposes therein mentioned," passed the 12th of May 1784: Also, "an act further to amend an act entitled 'an act for the speedy sale of the confiscated and forfeited estates within this state, and for other purposes therein mentioned," passed the 1st of May 1786: Also, "an act limiting the period of bringing claims and prosecutions against forfeited estates," passed the 28th of March 1797: Also, "an act for the limitation of criminal prosecutions, and of actions and suits at law," passed the 26th of February 1788; and "an act for the limitation of criminal prosecutions at law," passed the 8th of April 1801.

The counsel for the plaintiff then made and submitted to the court in writing, the following points upon which they relied:

1. Mary Philipse, in January 1758, was seised in fee-simple.

2. By the deed of settlement, a contingent remainder was limited to the children of that marriage, which vested as soon as they were born, and no act of Morris or his wife, done after the execution of that deed, can impair the estate of the children.

*16] *3. The recital of the lease in the release, is an estoppel against the defendant, as to the fact so recited, on the ground of privity of estate.

4. If the recital be not a technical estoppel, then it is an admission of a fact, in solemn form, by the parties to that deed, and is evidence of the fact

recited, from which the jury are bound to believe the fact, unless it be disproved.

5. The attainder and sale under it operated as a valid conveyance of all the estate of the attainted persons, at the date of the attainder, and no more. The purchasers under this state acquired a title in these lands for the lives of Morris and his wife, and of the survivor of them, and in judgment of law, must be considered as standing in the same relation to the children of that marriage, as the original tenants for life, whose estates were confiscated.

6. As the purchasers under the state were tenants for life, and the children of Morris and his wife, or their assignees, are seised in remainder of the fee, it results from that relation, that the possession of the purchasers could not be adverse to the title of the remainder-men. The persons entitled to the remainder have five years from the death of Mrs. Morris to commence their suits for the land; and the sale by the remainder-men to Mr. Astor, during the existence of the life-estate, is in accordance with the rules of the common law, and in violation of no statute.

7. The principles of natural law, as well as the treaties of the 3d of September 1783, and 19th of November 1794, between the United States and Great Britain, confirm and protect the estate so acquired by Mr. Astor.

And the counsel for the defendant submitted in writing to the court the following points, on which they relied:

1. That the plaintiff cannot recover in this action, unless a lease preceded or accompanied the release which has been read in the case.

2. That the plaintiff, not having offered any evidence of the actual execution or contents of any particular paper, as such lease, cannot recover, on the ground that a lease was executed and is lost.

*3. That the testimony of Egbert Benson, Robert Troup and the other witnesses, as to the custom or practice of conveying by lease and release; the professional character of William Livingston, and his connection with the Philipse family; although it might, under certain circumstances, be evidence to lay the foundation for a general presumption, according to the rules of law respecting presumptions of deeds and grants, that a proper lease or other writing, necessary to support the conveyance, had been executed; is not competent to prove, either the actual execution, existence in fact, or contents of the alleged lost lease. [*17

4. That no legal presumption of a deed or lease, such as is necessary to enable the plaintiff to support this action, can fairly arise in this case; because the facts and circumstances of the case are not such as could not, according to the ordinary course of affairs, occur, without supposing such a deed or lease to have existed; but are perfectly consistent with the non-existence of such lease.

5. That no possession having been proved in this case, more consistent with the title of the plaintiff than with that of the defendant, any deed or lease, necessary to support the plaintiff's action, must be proved, and cannot be presumed.

6. That the recitals in the deed of release do not bind the defendant by way of estoppel; because he is a stranger to the deed, and claims nothing under it.

7. That inasmuch as the defendant is not only a stranger to the deed of release, and claims nothing under it, but as also it appears, that the defend-

ant's immediate grantor entered into possession of the premises as early as the year 1783, under a claim of title adverse to that supposed to be created by the said deed or release, and he, and the defendant, after and under him, have continued so in possession, under such adverse claim of title, to the present time; the recitals in said deed of release are not evidence against the defendant.

8. Supposing the lease and release to have been duly executed, then the remainder, limited to the children of Roger Morris and Mary his wife, was a contingent, and not a *vested remainder, at the time of the attainder and banishment of Roger Morris and Mary his wife, in 1779. *18]

9. By the attainder and banishment of Roger Morris and Mary his wife, in 1779, they became civilly dead, and their estate in the lands determined, before the time when the contingent remainder to the children could vest; and thus the contingent remainder to the children was destroyed, for the want of a particular estate to support it.

10. By the attainder and banishment of Beverly Robinson, the surviving trustee, in 1779, and the forfeiture of all his estate to the people of the state of New York, all seisin, possibility of entry, or *scintilla juris* in Beverly Robinson, to serve the contingent uses when they arose, was divested; and inasmuch as the state cannot be seised to uses, there was no seisin out of which the uses in remainder could be served, when the contingency upon which they were to arise or vest happened; and the state took the estate discharged of all the subsequent limitations in remainder.

11. In consequence of the attainder and banishment of Beverly Robinson, the surviving trustee, and Roger Morris and Mary his wife, in 1779, and the forfeiture of all their, and each of their, estate in the land, to the people of the state of New York, the children of Roger Morris and Mary his wife, never had any legal seisin in the land.

12. In consequence of the act of attainder, and the conveyance made by the people of the state of New York to Timothy Carver, with warranty, the estate of the children of Roger Morris and Mary his wife, in the lands in question in this suit, was defeated and destroyed.

13. Roger Morris and Mary his wife, under the marriage-settlement deed, had an interest in the land, and might convey in fee to the amount of 3000*l.* in value. They did convey to the amount of 1195*l.* in value, and the residue of that interest was forfeited to, and vested in the people of New York; and the power was well executed, by the conveyance of the commissioners of forfeitures to Timothy Carver, the defendant's grantor.

14. The whole title, both in law and equity, which may *or can be vested in the children and heirs of Roger Morris and Mary his wife, of, in and to the lands and premises in question, has not been, as between the grantors and grantee, legally transferred to the said John Jacob Astor, his heirs and assigns. *19]

15. A proper deed of conveyance in fee-simple from the said John Jacob Astor, and all persons claiming under him, to the people of the state of New York, would not be valid and effectual to release, transfer and extinguish all right, title and interest which now is, or may have been, vested in the children and heirs of Roger Morris and Mary his wife.

16. The plaintiff's action is barred under the act of limiting the period of bringing claims and prosecutions against forfeited estates.

17. The plaintiff's action is barred, under the general limitation act of 1788 ; also under the general limitation act of 1801.

Upon which the court expressed the following opinion and instructions. to be given to the jury on the defendant's points ; under the modifications stated in the same.

1. The court gave the instruction as prayed.

2. It having been satisfactorily proved to the court, that the lease was lost, its execution and contents may be proved by secondary evidence.

3. That the testimony of Egbert Benson, Robert Troup and other witnesses, as to the custom and practice of conveying by lease or release ; the professional character of William Livingston, and his connection with the Philipse family, coupled with the recital in the release ; were admissible in this case to go to the jury, for them to determine whether a proper lease, necessary to support the conveyance of release, so as to pass the legal estate, had been executed.

4. That the jury might in this case presume, if the evidence satisfied them of the fact, that such lease was duly executed, if, in their opinion, the possession was held by Roger Morris and his wife, under this marriage-settlement deed, embracing both the lease and release. And that it was for them to decide, from the evidence, whether *possession was held under the marriage-settlement, or under the title of Mary Philipse, anterior to the marriage-settlement. [*20

5. The instruction on this point is embraced in the answer to the fourth.

6. That the recital in the release does not bind the defendant, by way of estoppel ; but is admissible evidence to the jury, connected with the other circumstances, for them to determine whether a proper lease was made and executed.

7. The instruction on this point is included in the answer to the sixth.

8. The remainder limited to the children of Roger Morris and Mary his wife, was a vested remainder, at the time of the attainder and banishment of Roger Morris and Mary his wife, in the year 1779, and did not thereafter require any particular estate to support it ; but if a particular estate was necessary, there was one sufficient in this case for that purpose.

9 and 10. The answer to these points is included in the answer to the eighth.

11. The attainder and banishment of Beverly Robinson, Roger Morris and Mary his wife, in the year 1779, and the forfeiture of all their estate in the land, to the people of the state of New York, and the conveyance to Timothy Carver of the lands in question, did not take away the right which the children of Roger and Mary Morris had under the marriage-settlement deed.

12. The answer to this point is included in the answer to the eleventh.

13. Admitting that the power reserved to Morris and his wife to sell a part of the lands included in the marriage-settlement deed became forfeited to the state, so far as it had not been executed, the sale to Timothy Carver could not, under the evidence in this case, be considered an execution of that power.

14. The whole title, both in law and equity, which may or can have

vested in the children and heirs of Roger Morris and Mary his wife, of, in or to the lands and premises in question, has been, as between the grantors and grantee, *legally transferred to John Jacob Astor, his heirs and *21] assigns, according to the true intent and meaning of the acts of the legislature of the state of New York, which have been produced and read upon the trial.

15. A proper deed of conveyance, in fee-simple, from John Jacob Astor, and all persons claiming under him, to the people of the state of New York, would be valid and effectual, to release, transfer and extinguish all right, title and interest which now is, or may have been, vested in the children and heirs of said Roger Morris and Mary his wife, according to the true intent and meaning of the acts of the legislature referred to in the next preceding instruction.

16 and 17. The plaintiff's action is not barred by any statute of limitations in this state.

The court then charged the jury. After stating the plaintiff's title under the patent to Adolphe Philipse in 1697, and that it was not denied by the defendant, but that Mary Philipse, in 1754, became seised, in severalty, in fee-simple of the premises in question, the court proceeded to say :

"At this point, the dispute commences. On the part of the plaintiff, it is contended, that the marriage-settlement deed which has been produced and submitted to you, bearing date in the year 1758, was duly executed and delivered, on or about the time it bears date ; the legal operation of which was to vest in Roger Morris and his wife Mary a life-estate, with a contingent remainder to their children, which became vested in them on their birth, and that their right and title has been duly vested in Mr. Astor, by the deed bearing date in the year 1809. On the part of the defendant, it is contended, that Mary Philipse never parted with her title in the premises, by the marriage-settlement deed, set up on the other side, or that if she did, it was revested in her or her husband, and continued in them, or one of them, until they were attainted in the year 1779, by an act of the legislature of this state ; and that the title to the land in question thereby became vested in the people of this state, from whom the defendant derives title. Unless, therefore, the plaintiff can establish this marriage settlement-deed, so as to vest a legal *estate in the children of Roger Morris and Mary his wife, he *22] cannot recover in this action. It will be proper for you, in examining and weighing the facts and circumstances of this case, to bear in mind, that the children of Morris and wife could not assert in a court of law their right in this land, until the death of Mrs. Morris, in the year 1825, and since 1825, there has been no want of diligence in prosecuting and asserting the claim. In the year 1809, Mr. Astor purchased and acquired all the interest of the children of Morris and wife ; and you are to consider him as now standing in their place.

"The first question then is, was the marriage-settlement duly executed ? In the first place, the plaintiff has produced the ordinary and usual evidence of the execution of the deed ; has shown that Governor Livingston was the subscribing witness, and that in 1787, he went before Judge Hobart, and made the usual and ordinary proof of the execution of the deed—such as was sufficient to entitle the deed to be recorded : the handwriting of the witnesses, who are dead, has also been proved. Upon this proof, the *primâ*

facie presumption of law is, that the deed was executed in all due form, to give it force and validity; and in the absence of all other evidence, the jury would be justified, if not conclusively bound to say, that everything was properly done, including a delivery. But whether delivered or not, is a question of fact for the jury. Delivery is absolutely essential; a deed, signed, but not delivered, will not operate to convey land. But no particular form was necessary; if the grantee comes into the possession of the deed in any way which may be presumed to be with the assent of the grantor, that is enough, and is a good delivery in law; and if found in the hands of the grantee, years afterwards, a delivery may fairly be presumed, and it will operate from, and relate back to the time of its date, in the absence of all proof to the contrary. If a deed be delivered to an agent, or thrown on a table, with the intent that the grantee should have it, that is sufficient, although no words are used. Such proof as has been given in this case, would be sufficient for a jury to presume a *delivery, even in the case of a modern deed, and is much [*23
stronger in relation to one of ancient date. In this case, what else could be proved? Would it be reasonable to require anything beyond what the plaintiff has proved? The witnesses are dead; their handwriting has been proved, and a proper foundation is thus laid for presuming that everything was done to give effect and validity to the deed. Such being the case, the burden of proof is thrown on the other side, to rebut the presumption of a delivery, warranted from these circumstances. Much stress has been laid upon the fact, that the certificate of proof by Governor Livingston, not only states, that the witness saw the parties sign and seal, but that he saw them deliver the deed. In stating a delivery, the certificate is a little out of the ordinary form; and it is not important, and adds little or nothing to the evidence of a due and full execution of the deed, that the word deliver was inserted. This insulated fact is not of much importance, for without that word, the legal effect of the proof would be the same; proof of the due execution, for the purposes expressed in the deed, includes a delivery.

"What, then, is the evidence to bring the fact of delivery into doubt? I separate now between the release and the lease; these are two distinct questions, and I shall consider the question relative to the lease hereafter. The argument of the defendant is, that the deed was not delivered, and did not go into effect. Then, what is the reasonable presumption to be drawn from the facts he has proved? keeping in mind that this is evidence, by the defendant, to disprove the presumption of law from the facts proved, that the deed was duly delivered. It has been said on the part of the defendant, that the deed was probably kept for some time, and that the design to have a marriage-settlement was finally abandoned. If you believe, from the proof made by Governor Livingston, that the deed went into the hands of the parties, then there was a good delivery, because a deed cannot be delivered to the party as an escrow. Then, is there any evidence to call the delivery into question? Where is the evidence to induce the belief that the deed was executed *with any understanding, that it was not to [*24
have immediate effect, or that it was delivered to a third person as an escrow, or that the parties did not intend it as an absolute delivery? You have a right to say so, if there is evidence to support it; but if there is nothing to induce such a belief, then you are to say that it was duly delivered. It has been said, that this was a dormant deed, never intended by

the parties to operate; that it had slept, until after the attainder, and until the year 1787. There is weight in this, or rather there would be weight in it, if the parties interest had slept on their rights. But who has slept? Morris and his wife, Beverly Robinson and Joanna Philipse, the trustees: they are the persons that have slept, and not the children. This does not justify so strong an inference against the children, as if they had slept upon their right. Is it fair, in such a case, to draw any inference against the children?

"It has been said, that there were three copies of this instrument; it is somewhat uncertain, how many copies there were, or where they went. But suppose, there were three copies, where would they probably go? Undoubtedly, to the parties in interest. Mary Philipse would have one, and Roger Morris another, and the trustees the third. Mary Philipse, in a certain event, contemplated in the marriage-settlement, would again become seised in fee. She, therefore, had an interest in having one copy; for although she had parted with the fee, she took back a life-estate, with the possibility of an ultimate fee in the land revesting in her. Roger Morris also had an interest under the deed, and it is, therefore, reasonable to presume, that he had one copy of the deed. The third copy would have gone to the trustees, Beverly Robinson nnd Joanna Philipse. But where did this one come from? All you have on this subject is, that Mr. Watts received it from Morris, in 1787, to have it acknowledged. This one, for the purpose of passing the title, is as good as though all three were produced.

"It has also been urged, that this deed was not recorded until 1787. Is there anything in that fact that should operate against the children? They
*25] were minors for the greater *part of the time down to the year 1787, when it was recorded. It has also been urged as a controlling fact, that Morris was here at the close of the war, and did not have the deed recorded, before going to England. It appears from the testimony of Colonel Barclay, that Morris and his family left New York for England, before the evacuation of the city by the British army, which was on the 25th of November 1783. It is well known, as a matter of history, that the British were in possession of the city of New York through all the war. Is there anything then in the fact that it was not recorded, from which an inference can be drawn against the deed? Where were the officers before whom Morris could at this time have had the deed proved? No law has been shown, giving any such power, nor do I know of any such law. Then, is there any just ground for a charge of negligence, even against Morris himself? After 1783, there were officers here before whom the deed might have been acknowledged or proved. Is there anything in omitting to have it recorded after that time? There was only three or four years delay; and are there not circumstances reasonably to account for that, and show why it was recorded in 1787? In February preceding the time of proof and recording, the children made an application to the legislature, asserting and setting forth their claim. They were told by the report of the committee, which was adopted by the house, if you have a right, as you say you have, go to the courts of law, where you will have redress. This was a very proper answer. The report did not, however, as has been urged, contain any admission of their title; nor did the committee give any opinion upon the validity of the claim; and if they had, we cannot regard it. But all they

or the house said; was, that if what you allege be true, you have a remedy in the courts of law. This was calculated to awaken their attention and to induce them to prove and record their deed, as a precautionary measure.

"It has been said, that this was no more than the ordinary transaction of proving a deed, and that in the case of an old *deed, the witness finding his name to the deed, swears from that circumstance, rather than from any particular recollection that he saw it executed. But in this case, was there not something special and particular preceding the proof of this deed? something calculated to awaken attention—and ought it to be considered no more than the ordinary transaction of proving an old deed? Governor Livingston, the witness who proved the deed, as has been proved to you, was a man of high character, an eminent lawyer, and a distiguished whig. It is fair to presume also, that he knew what had been done just before in the legislature. It is not reasonable then to believe, that his attention was particularly called to the transaction, and that he referred back to the time of the execution of the deed, and that he would not have proved it, if he had not a recollection of what then took place? It is reasonable to presume, his attention being awakened, that he refreshed his recollection of the original transaction. It was proved at Judge Hobart's house. Mr. Watts drew the certificate. But can you presume, that the witness would swear, and the judge would certify, without having read it? It is reasonable to presume, that Judge Hobart, as well as the witness, knew what had taken place in the legislature in this city, a short time before. This certificate is a little out of the ordinary form; it states the execution to have been at or about the day of its date; they may have thought it necessary to show that the deed was not got up to overreach the attainder. Is there anything in the circumstances of this proof to induce the belief of unfairness? [*26

"It is also said, that Morris and his wife have done acts inconsistent with the deed. In weighing the force and effect of these acts, you must bear in mind, the time when the interest vested in the children under this deed; for after that interest vested, none but themselves could divest it. It is said, there is doubt as to the time when the marriage took place; but it was probably between 1757 and 1761; for in the latter year, Mary Morris executed a deed as the wife of Roger Morris. I am inclined to think the law is, that after the marriage, the parties to the deed could not disannul the *deed. But certainly not after the birth, and during the life, of the children of that marriage. [*27

"We now come to the act that are said to be inconsistent with the deed. Those acts are of three distinct kinds or classes. 1. Those for settling the exterior lines of the patent. 2. The deeds to Hill and Merrit. 3. The leases for the lives of other persons.

"In estimating the weight of the first class, it will be proper for you to bear in mind, the situation of the patent to Adolphe Philipse. It was bounded north by the Kip (or Van Cortland & Co.) patent and the Beekman patent, and on the east by Connecticut. The first class of instruments produced by the defendant relate to the Connecticut line, the Beekman patent, and the Kip (or Van Cortland) patent. The first deed is that of January 18th, 1758: this relates to the boundary of the Beekman patent. You will see from this deed, and its recital, what the parties intended. It recites an agreement in 1754, to settle the lines of the two patents. You

are not necessarily to take this as having been executed after the marriage-settlement deed: delivery is what gives validity to a deed. Certainly, Mary Philipse was not married at the time the deed was made; for if she had been, she would have signed it as Mary Morris. If she was not married, and had not executed the marriage-settlement deed, she was seised in fee of the land, and had the absolute control over it. Again, it does not appear how much of the Philipse patent was conveyed by this deed; and it was made in pursuance of an agreement, in 1754, to settle the boundary.

"The next is the patent to Philipse, Robinson and Morris, growing out of the settlement of the Connecticut line. The government settled the line between New York and Connecticut, making it a straight line, instead of one parallel to the Hudson river, according to the patent; and this patent was given to Morris and others, for the lands lying on the west side of that line. And the patent recites, that Morris and his wife had released to the king the land taken from the Philipse patent by the new line. This was an act to settle boundaries. Again, it is to be observed, that Robinson and *Morris were both married; and yet the patent was not given to their wives, but to the husbands. The interest Morris had in the land, was a life-estate under the settlement deed, the same as it would have been without it. Without that deed, he had a life-estate as tenant by the curtesy, Morris, instead of taking this patent to his wife or children, or in trust for them, took it to himself. He might, however, be considered as taking the land in trust for his children. But this alleged inconsistency of Morris is just as great without as with the settlement deed.

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"The next is the deed to Verplank, in relation to the Kip or Rumbout patent. It does not appear, that this deed conveyed any of the Philipse patent. But suppose it did, it does not necessarily follow, that it was intended to assert any right in hostility to the marriage-settlement deed. Is it not a fair and reasonable presumption, these children being infants, that the parents meant this as a settlement of difficulties about boundary, for the benefit of the children, and not that they intended to act in hostility to the deed? It was the act of parents, and not of strangers. The intention with which all these acts were done, is important; as they are introduced to show that Morris and his wife have acted inconsistently with their right under the marriage-settlement deed.

"We are next to consider the deeds to Hill and Merritt. Are these hostile to the settlement deed? If there had been no power to sell any part of the land, they would have been strongly inconsistent with the settlement deed. But that deed contains a power expressly giving them the right to sell in fee, to the value of 3000*l.* They have only sold to the amount of 1195*l.*, and so are within the power. But it has been said, that these deeds do not recite the power—that was not necessary: the purchasers in these (Hill and Merritt) deeds would require as valid a title as if the power had been recited. These deeds are, therefore, not inconsistent with the settlement deed.

"The next thing to be considered is the three life leases. Were these such acts of hostility as to induce the belief that *the settlement deed was not delivered? It has been argued on the part of the plaintiff, that the word dispose, in the power, would authorize these leases as well as sales in fee. This I think is not the true construction of the power: looking

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at the latter part of the power, it is evident, that by the words sell and dispose of, they only contemplated sales, and not leasing for life or lives. And so, in strictness of law, they had no power to make these leases for lives. But if they had no such power, still the question returns, how is that to affect the rights of the children ; and did they intend it in hostility to those rights? It could not affect their interest in the land. The question is not what was the legal effect of these acts, but how did Morris intend them? Did he actually mean to act in hostility to the deed ? That is the question. You are not to construe it an act of hostility, unless it was so intended by Morris. It was a new country ; clearing and improving the lands was for the benefit of the children ; and if Morris so intended these leases, they are not hostile to the deed. These are all the circumstances relied upon as being inconsistent with the settlement deed ; and they are questions for you. I do not wish to interfere with your duties. It is for you to say, whether the deed was duly executed and delivered.

"The next question for your consideration is, whether there was a lease as well as a release. In the judgment of the court, a lease was necessary to convey a legal estate to the children, and through them to Mr. Astor. Without a lease, this deed would only have operated as a bargain and sale, and the statute (for reasons that I need not stop to explain) would not have executed the ulterior uses. So, a lease is indispensable to the plaintiff's title. Then, the question is, are you satisfied that a lease was executed? This, perhaps, is the stress of the case. On this subject, questions of law are intermingled with the facts. The plaintiff says, that the recital in the release is conclusive evidence of the lease ; such evidence as cannot be disputed. If so, then it would operate as a technical estoppel, and Carver's mouth would be shut, and he would not be permitted to dispute the *existence of the lease, whether there was one in point of fact or not. But it is [*30 not enough to make it an estoppel, that the defendant claims under the same party ; he must claim under or through the same deed, or through the same title. Here, neither the defendant nor the state claim through this deed ; They claim in hostility to it ; they say there never was such a deed ; they claim the interest that was in Mary Philipse in 1754. This recital is not, therefore, to be considered a technical estoppel.

"The question, then, is, whether the recital can operate in any other way? The court has before decided, in your hearing, that this recital is evidence for the jury ; and it is for you to say, what weight and importance it ought to have. The defendant has excepted to the decision of the court that this is evidence ; and if the court should have mistaken the law, the defendant will have his redress. You are, therefore, to take this recital as evidence legally and properly admitted ; and if legal evidence, it is evidence for some purpose. It would be absurd for the court, after deciding that it is legal evidence, to tell you not to consider it, or that it is entitled to no weight or importance. You must, therefore, regard this recital as evidence.

"The recital being evidence, the question is for you to decide, what is its weight and importance? In recent transactions, where the party can have other evidence of the fact, recitals are of little weight. But in ancient transactions, they are of more weight and consequence. There may be no witness to prove the fact. And the force and importance of a recital may be greater or smaller, according to the facts and circumstances of each par-

ticular case. Here, the lease is lost, and it cannot, therefore, be shown who were the witnesses to it, nor, with certainty, what it contained. The witnesses to the release are dead, and the plaintiff could not, therefore, be called upon to produce them. In the proof of ancient transactions, the rules of evidence must be relaxed in some measure, to meet the necessity of cases. Where witnesses cannot be had, we have to resort to other proof. These
*31] will have greater weight in some cases than in others. *If the case is stripped of any fact or circumstance to induce a suspicion of fraud, then a recital will have greater weight.

"From the release, it is reasonable to presume, that the parties intended to convey a legal estate. This deed, if not drawn by Governor Livingston, was most likely drawn under his advice and direction, and is it not fair to presume, that he drew the proper deeds to carry into effect the intentions of the parties? If he acted fairly, he would have done so; and is it not a fair presumption, that he drew such an instrument as was customary at that day, and deemed necessary to convey the legal estate? It is proved, that the lease and release was the ordinary mode of conveyance. Judge Benson says, that was the uniform practice; and Colonel Troup says the same. This is an additional circumstance, to induce the belief that a lease was executed, and it is for you to determine, whether the circumstances are sufficient to satisfy you, that what was usual and in accordance with the ordinary course of business, was done in this case.

"But it is objected, that the lease is not produced. The plaintiff has, in the opinion of the court, accounted for this, by proving it lost. It has been shown not to have been the general practice to record the leases with the releases; very few appear ever to have been so recorded in proportion to the releases, and those produced in court, on the part of the defendant, have never been recorded. It has been said, that the lease had performed its office, the moment the release was executed, and was no longer of any moment. This is not correct; but if the parties were under that impression, it will in some measure account for their not keeping it with greater care. If you are satisfied, from the evidence, that there was a lease duly executed, then the plaintiff has a right to recover, unless some act has since been done, changing the rights of the parties.

"The defendant's counsel have urged, that this is not a case for pre-
*32] sumptions in favor of the existence of a lease; that *presumptions can only be resorted to, when the possession accords with the fact to be presumed. There may be some question on this point. I have examined all the cases cited, but I find none that come precisely to this case. So far as I understand the cases, presumptions cannot be resorted to, in hostility to the possession. The mere fact of a naked possession proves but little. Courts, therefore, admit evidence of the declarations of parties in possession of land, to show how they hold. In this case, the possession may be considered equivocal. Morris and wife would have been entitled to the possession, whether there was or was not such a deed; and presuming a lease, would not necessarily be presuming a fact in hostility to the possession. If you are, therefore, satisfied, that Morris and wife were in possession, holding under the deed of marriage-settlement, presumptions may be indulged in favor of the existence of the lease. But if you consider them holding the

possession, in hostility to the marriage-settlement, it is not a case for presuming a lease.

"A lease and release are considered but one instrument, though in two parts. The absence of the lease is not the loss of an entire link in a chain of title, but it is a defect of a part of one instrument. Suppose, a deed purporting to pass a fee, produced without a seal, and from the lapse of time or other cause, there is no appearance of its ever having had a seal? Then the party must show that it had been sealed, for otherwise it would not pass the fee. By what kind of evidence could this fact be established? Would it not be proper to look at the conclusion and attestation of the deed—Signed, sealed, &c.? Would it not also be proper evidence, to show it was drawn by a man who knew that a seal was necessary to pass the estate, and other circumstantial evidence, and for the jury, from evidence of this description, to presume and find that the instrument was duly sealed, to supply the defect and infirmity of the deed?

"If you are satisfied, the lease, as well as release, was executed and delivered, a legal estate has been shown in the *heirs of Roger and Mary Morris, and the plaintiff will be entitled to recover, unless that title has been revested in Roger and Mary Morris, or one of them. [*33

"It is said, that the title has been revested in Mrs. Morris, by some conveyance, since the settlement deed. This you may presume, if, in your opinion, the evidence will warrant such presumption. But no redelivery, cancelling, or the like, would have that effect; there must have been a reconveyance. This must also have been made, before the marriage, or, at the utmost length, before the birth of a child; therefore, you can only look to circumstances arising before the marriage, or before the birth of a child; unless you should be of opinion, that the acts of Roger Morris and his wife, which have been given in evidence, were in hostility to this marriage-settlement deed. The children may have reconveyed, since they came of age. But the circumstances do not weigh very strongly against them, before 1825, when they were first in a condition to assert their rights. There cannot be any very strong grounds for supposing the children ever reconveyed; but if there is anything to satisfy you there was a reconveyance, you will say so; and it will defeat the plaintiff's right to recover. But in my judgment, the result will depend principally upon the question, whether a lease and release were duly executed and delivered, so as to pass the legal estate.

"The deed of the state only passed such right to the defendant's father as the state had; and if the marriage-settlement deed has been established, that was nothing more than the life-estate of Morris and wife. It is not necessarily to be inferred, from any of the acts read, that the state intended to take any greater interest than such as the persons attainted had. They sold what the commissioners of forfeitures judged had been forfeited; they did not examine into the state of the title, but only exercised their judgment upon such information as they had. It was for that reason, that the state conveyed with warranty. The state cannot be presumed to have intended to conclude the rights of third persons who were not attainted. If, therefore, you *shall find that marriage-settlement deed, consisting of a lease and release, was duly executed and delivered, on or about the time it purports to bear date, the children of Roger and Mary Morris acquired under it a contingent remainder, which became vested on their birth; [*34

and the plaintiff will be entitled to recover, unless that interest was destroyed or put an end to by some subsequent reconveyance, of which you will judge and determine."

Upon this charge, and on the opinion, the court left the case to the jury. A verdict and judgment were rendered for the plaintiff; and the defendant prosecuted this writ of error.

The case was argued by *Bronson*, Attorney-General of New York, and *Webster*, for the plaintiff in error; and by *Ogden* and *Wirt*, for the defendant.

For the *plaintiff* in error, the following points were made:

I. No estate ever vested in the children of Morris and wife under the settlement deed. 1. The remainder limited to the children by that deed, was a contingent remainder, and could not vest in the lifetime of their parents. 2. By the attainder and banishment of Morris and wife in 1779, they became civilly dead, and their estate in the land determined; and the contingent remainder to the children failed, for the want of a particular estate to support it. 3. If the attainder and forfeiture worked no more than an assignment of the particular (or life) estate; then the conveyance by the state of New York, in 1782, to Timothy Carver, with warranty, was equivalent to a feoffment by the tenant for life, and destroyed the contingent remainder depending on that life-estate. 4. By the attainder of Beverly Robinson, the surviving trustee, in 1779, and the forfeiture of all his estate to the people of the state of New York, all seisin in the trustee to serve the contingent uses to the children was divested. The state cannot be seised to a use; and so there was no seisin to serve the contingent uses to the children, when the *event upon which they were to vest happened: and the state took the land discharged of the subsequent limitations in remainder.

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II. Under the settlement deed (without a lease), the children could not take legal, but only trust or equitable interests in the land.

III. The judges erred in admitting evidence to prove the loss, before it had been shown that a lease ever existed.

IV. The plaintiff did not prove the loss, nor did he sufficiently account for the non-production of the lease, and was not entitled to give secondary evidence of its contents. 1. The release states it was executed in three parts—there must also have been three parts to the lease—and the plaintiff should have accounted for all the parts, before being permitted to give secondary evidence of the contents. 2. Most of the evidence of searches for the lease, was of a loose and unsatisfactory character; depending, as to its sufficiency, upon mere hearsay evidence. 3. No sufficient search was proved among the papers of Mary Morris, formerly Mary Philipse. 4. No search was shown to have been made among the papers of Joanna Philipse, the mother of Mary Morris, and one of the trustees. 5. No search was proved in the office of the secretary of state, where the release was recorded. Nor was any proved in the clerk's office of the counties of Dutchess and Putnam, where the land is situated. 6. A search, by a third person, among the papers of the children and heirs of Roger Morris and his wife, who were lessors of the plaintiff, was not sufficient. Those lessors were competent witnesses upon the question of loss, and should have been

sworn, or examined on commission. 7. The other lessors of the plaintiff, Messrs. Colden, Fowler and Bogert, should have been sworn, as well as Mr. Astor, to prove that they had not got the lease. 8. It should have been shown, where the release came from, when it came into the hands of the plaintiff, or Mr. Astor, and that the lease was not in that place.

*V. The recital in the release does not bind the defendant by way of estoppel, nor is it evidence against him. [*36

VI. This is not a case where a lease or other conveyance can be presumed.

VII. The plaintiff was not entitled to recover, without proving the actual execution of a lease.

VIII. Evidence of what were the contents of a lease, in a particular case, between other parties, was not competent evidence to prove what were the contents of the lease in this case.

IX. If a lease of some kind was executed, the plaintiff was not entitled to recover, on proving it lost, without also proving what were its contents.

X. The judge admitted evidence, which was not pertinent, and which may have misled the jury. 1. A common practice to convey land by lease and release was not competent evidence, to prove that a lease was executed in this case, or what were its contents. 2. The professional character of Governor Livingston was not competent evidence to prove either a lease or its contents. 3. Proof that it was not usual to record leases, was not competent evidence to prove the loss of a lease in this case. 4. Proof of what was the usual recital of a lease in a deed of release, was not competent evidence for any purpose. 5. The journal of the assembly was not legal or competent evidence against tht defendant. 6. The acts of the legislature of the state of New York, relative to the claim of Mr. Astor, were not competent evidence against the defendant. 7. Proof that this suit was defended by the state of New York, was not competent evidence against the defendant.

XI. The judge misdirected the jury, on the question of a delivery of the settlement deed.

XII. The judge misdirected the jury, as to the grounds upon which they might find there was a lease as well as a release.

*XIII. The judge should have instructed the jury, that this was a proper case for presuming a conveyance. [*37

XIV. Roger Morris and Mary his wife, under the marriage-settlement deed, had an interest in the land, and might convey in fee, to the amount of 3000*l.* in value. They did convey to the amount of 1195*l.* in value, and the residue of that interest was forfeited to and vested in the people of the state of New York; and the power was well executed, by the conveyance of the commissioners of forfeitures to Timothy Carver, the defendant's grantor.

XV. The whole title, both in law and equity, which may or can have vested in the children and heirs of Roger Morris and Mary his wife, of, in and to the lands and premises in question, has not been, as between the grantors and grantee, legally transferred to the said John Jacob Astor, his heirs and assigns.

XVI. A proper deed of conveyance in fee-simple, from the said John Jacob Astor, and all persons claiming under him, to the people of the state of New York, would not be valid and effectual, to release, transfer and extinguish all right, title and interest which now is, or may have been

vested in the children and heirs of the said Roger Morris and Mary his wife.

XVII. The plaintiff's action is barred, under the act limiting the period of bringing claims and prosecutions against forfeited estates.

XVIII. The plaintiff's action is barred, under the general limitation act of 1788; and also under the general limitation act of 1801.

XIX. The plaintiff was bound to pay for the permanent improvements upon the land, by which its value had been increased.

Bronson, for the plaintiff in error, contended, that on the true construction of the deed of settlement, no estate vested in the children of Roger Morris and wife. Morris and wife took, upon their marriage, an estate in the land, for the term of their natural lives, and the life of the *sur-
*38] vivor, with a contingent remainder in fee to the children, which could not vest in the lifetime of their parents. The uses in the deed, were: 1. To the trustees, until the marriage. 2. To Morris and wife for life. 3. From and after the determination of the life-estate, to such children as might be born of the marriage. 4. But if they should have no child or children, or such child or children should happen to die in the lifetime of their parents, then either to Mrs. Morris, or to such persons as she should devise the same. Thus, the remainder was contingent and did not vest during the life of the parents; and it afterwards failed, for the want of a particular estate to support it, the life-estate of Roger Morris and wife having been forfeited. It was the obvious meaning of the deed, that the residue of the estate should go to the children, if they survived the mother; and if not, to her, as either event should take place. It was thus a remainder limited to two persons, or classes of persons, depending on survivorship; and until the happening of the event, it could not become a vested estate in either. This was the effect of the limitation over, and such a limitation is good at common law. There may be two concurrent remainders or contemporary fees, called alternate remainders; the latter to take effect in case the first shall fail. *Luddington* v. *Kime*, 1 Ld. Raym. 203; s. c. 1 Salk. 224; 1 Preston on Estates 488, 493. The case before the court is more properly one fee—one remainder; and is like the ordinary case of a remainder limited to the survivor of two or more persons.

In answer to the allegation, that the children, on their birth, took vested remainders in fee, and that the limitations over, in case of the death of the children, could only have taken effect by way of shifting use; it is urged, that although by conveyances deriving their operation from the statute of uses, estates may be limited differently from the limitations by conveyances at common law, yet the difference between a remainder and a shifting use is, that a remainder must be limited to take effect in possession upon the regular determination of the estate which precedes it; but a shifting use *does not take effect upon the regular determination of the preceding
*39] estate, but in derogation or abridgment of that estate. 1 Preston on Estates 117, 92, 93; Cruise's Dig. Rem. ch. 5, §§ 19, 36. Springing and shifting uses, and executory devises, are only admitted in cases of necessity, and it is well settled, that where a limitation can take effect as a remainder, with a sufficient freehold estate to support it, it shall not be construed as a springing or shifting use, or as an executory devise. *Luddington* v. *Kime*,

before cited. *Doe* v. *Holmes*, 3 Wils. 243 ; *Goodtitle* v. *Billington*, 2 Doug. 725, 753 ; Fearne on Ex. Dev. 5.

The principles of these cases fully apply to this case. There was no difficulty in giving effect to the limitation to Mrs. Morris, or her devisee, as a remainder, construing the deed as giving the residue of the estate to the one or the other, according to survivorship. Thus, no estate could vest in the children, during the lifetime of their parents. They had no certain or fixed right of future enjoyment. The case is, therefore, within the fourth class of cases, as they are arranged by Mr. Fearne ; the person, though *in esse*, was not ascertained. Fearne on Contingent Rem. 2, 3, 5, 9 ; *Biggot* v. *Smyth*, Cro. Car. 102 ; Co. Lit. 378 *a* ; Cruise's Dig. Rem. ch. 1, § 8 ; Bac. Abr. Rem. and Rev. D. ; 1 Preston on Est. 77 ; *Leonard Lovie's Case*, 10 Co. 85, 86 ; 3 Co. 20 ; 1 Plowd. 20 ; *Smith* v. *Belay*, Cro. Eliz. 630. It is not the event which is to determine the preceding estate, but that which is to give effect to the remainder, which distinguishes a contingent from a vested remainder. 1 Preston on Est. 67, 70, 71. If the remainder to the children was vested in interest, it might be aliened or devised, and on their death, it would descend to their heirs ; and the limitation to the mother, and her devisee might have been defeated, notwithstanding the death of the children before their parents. It is, therefore, evident, that the remainder was contingent, until the question of survivorship was determined. 1 Preston on Est. 64 ; Cruise's Dig. Rem. ch. 1, § 9 ; *Doe* v. *Provoost*, 4 Johns. 61 ; *Denn* v. *Bagshaw*, 6 T. R. 512.

*There are some cases upon wills, where the courts, to carry into effect the intention of the testator, have held a contingent disposition of the estate to be a condition subsequent, to divest the estate, and not a condition precedent. 4 Bos. & Pul. 313 ; 14 East 601 ; 1 Maule & Selw. 327 ; 2 Johns. Cas. 314. But in these cases, the estates in remainder were so limited as to take effect in possession, upon the regular determination of the preceding estate ; or where it was necessary to effect the intention of the testator so to construe the limitation. The cases of *Doe* v. *Martin*, 4 T. R. 39 ; *Earl of Sussex* v. *Temple*, 1 Ld. Raym. 311 ; *Matthews* v. *Temple*, Comb. 467, do not interfere with the principles contended for on the part of the plaintiff in error. [*40

II. The contingent remainder to the children failed, upon several grounds :

1. By the attainder and banishment, by which Morris and wife became civilly dead, and their estate determined ; there being, from that event, no particular estate to support it. Banishment for life works the civil death of the party. Co. Litt. 133 ; 1 Bl. Com. 132, 133 ; 4 Johns. Ch. 218 ; 6 Ibid. 118. The remainder must vest in interest, during the continuance of the particular estate, or the moment of its determination, or it is gone for ever. Fearne on Cont. Rem. 307, 326, 389 ; Cruise's Dig. Rem. ch. 6, §§ 35, 36 ; 2 Saund. 386 ; *Thompson* v. *Leach*, 1 Ld. Raym. 316 ; *Lloyd* v. *Brooking*, 1 Vent. 188 ; 2 Salk. 576. In the cases of *Corbet* v. *Tichborn*, 2 Salk. 576, and *Linch* v. *Coote*, Ibid. 469, where it was held, that by attainder for treason of the tenant for life, the crown takes no other than the interest of the tenant ; there was, in the first case, a still subsisting life-estate to sustain the remainder ; and in the second case, the remainder was actually vested. In *Borland* v. *Dean*, 4 Mason 174, it was held, that the confiscation of the estate of the tenant for life did not defeat the remainder. But this was on

the ground that it was a vested, and not a contingent, estate, at the time of the confiscation.

*41] 2. If the attainder and forfeiture worked no more than *an assignment of the particular and life-estate, then the conveyance by the state, in 1782, to Timothy Carver, with warranty, was equivalent to a feoffment by the tenant for life, and destroyed the contigent remainder depending on that estate. Fearne on Cont. Rem. 316, 318 ; Cruise Dig. Rem. ch. 6, §§ 1, 7 ; 2 Saund. 386. It is true, that a bargain and sale by tenant for life, will not destroy a contingent remainder, as it passes no greater interest than the person has. But the statute of New York, under which the commissioners acted, is part of the alienation, as well as the deed, and the statute gives the deed of the commissioners all the effect of a feoffment with livery at common law.

3. By the attainder of Beverly Robinson, the surviving trustee, in 1779, and the forfeiture of all his estate to the people of the state of New York, all seisin in the trustee, to serve the contingent uses to the children, was divested ; and thus, the remainder to the children of Roger Morris and wife was destroyed. The state cannot be seised to a use ; and so there was no seisin to serve the contingent remainder to the children, and the state took the land discharged of the subsequent limitations. It is necessary to the execution of a use, that some person should be seised to the use. Gilbert on Uses and Trusts 125 ; *Chudleigh's Case,* 1 Co. 132 ; 1 Saund. on Uses and Trusts 117, 181 ; 7 Cruise's Dig. Uses, ch. 3, § 78 ; Ibid. Rem. ch. 5, § 9. The king cannot be seised to a use, but by prerogative holds the lands discharged of the use ; and the people of the state of New York have succeeded to all the rights and prerogatives of the former sovereign. Cruise's Dig. Use, ch. 2, § 37 ; Ibid. ch. 3, §§ 9, 10 ; Vin. Abr. Uses, C ; Gilbert on Uses and Trusts 5, 6 ; *People* v. *Herkimer*, 4 Cow. 345 ; *People* v. *Gilbert*, 18 Johns. 227.

The counsel then proceeded to argue, that there should have been a lease, in order to sustain a marriage-settlement. That the loss of the lease was not proved. But the court having decided that the recital of the

*42] lease in the deed of *the 13th January 1758, was evidence between these parties, of the original existence of the lease, the argument upon these points is omitted.

It was further argued, that the recital in the lease does not bind the plaintiff in error, by way of estoppel, nor is it evidence against him. The circuit court held, that the recital was not an estoppel, but that it was evidence against the defendant in that court, of the existence of the lease. It was not such evidence. The defendant did not claim under or through the deed, but claimed adversely to it, and deduced his title from the patent to Adolphe Philipse, in 1697. The plaintiff then set up a deed of seventy years' standing, wholly disconnected with the defendant's claim of title ; save that it was executed by one of the persons through whom the title had passed. It is denied, that it could be evidence against any one but the party who made it, and, possibly, his heirs and personal representatives, or others standing in his place. It is not denied, that the deed, without the lease, is good and valid, and divests the title of Mary Philipse, as effectually as if a lease had been made ; but without a lease, the legal title is not placed where the plaintiffs below require it.

It is important to consider, that there never has been a holding under this deed. Morris and wife were entitled to the possession of the estate, without the deed, and it is necessary to look beyond the deed, to ascertain under what title they hold. There is no evidence, which shows that the deed was ever referred to by them as valid or subsisting; but by a series of acts, altogether unequivocal and adverse to the deed, they exercised full ownership over the property, by granting it in fee, or on leases for life—acts inconsistent with the deed.

The doctrine, that the recital is evidence against the defendant, goes the whole length of determining, that an admission, made by any person through whom a title has passed, binds every one to whom the title may come; and that a deed, to which a party is a stranger, and under which there *has been no holding, not only binds him, by way of divesting [*43
the title of his grantor, but that he is also bound by any admission it may contain. The king is not bound by estoppels. Vin. Abr. Estoppel, U, 2. Nor are the governments of the states of the United States bound by them. *Elmendorf* v. *Carmichael*, 2 Litt. 481. The old doctrine was, that a recital did not bind any one, not even the party to the reciting deed. Vin. Abr. Estop. M. pl. 5; 7 Co. Litt. 352 *b*. But it is admitted, that a different rule now prevails, and that recitals are for the most part evidence against the party to the deed, his heirs, and those standing strictly in the character of representatives; and against persons claiming through or under the deed. *Denn* v. *Cornell*, 3 Johns. Cas. 174; Willes 9; *Willoughby* v. *Brook*, Cro. Eliz. 756; Com. Dig. Testmoigne, B. 5. But in 2 Stark. on Evid. 30, it is said, "a recital is not evidence against a stranger to a second deed;" and a man is a stranger to a deed, when he does not claim under it, although he may claim under the same grantor. The cases relied upon to support the position of the defendant in error do not warrant the conclusion claimed from them. *Ford* v. *Lord Grey*, 1 Salk. 285; 6 Mod. 44. In these cases, the claims were under the grantor, in and under or through the reciting deed. It is believed, that no case can be found, where the point has been adjudged, that a recital was evidence against one claiming under the party to the reciting deed, but not through it, unless where there has been a possession, not to be accounted for, but on the truth of the recited fact. In such a case, it may be evidence against a stranger. Norris's Peake's Ev. 164. Estoppels by verdict, admissions on record, &c., bind all privies. 1 Phil. Evid. 245. Because they operate on the interest in the land, and divest the title. 1 Salk. 276. But a recital is mere matter of admission, which does not operate on the title to land, nor affect it in the hands of a grantee of the person making the admission. Even the heir is not always bound by that which would estop his ancestor. **Goodtitle* v. *Morse*, 3 T. R. 365; *Kercheval* v. *Triplett*, 1 A. K. Marsh. [*44
7, 494.

The judge admitted evidence which was not pertinent, and which may have misled the jury. 1. A common practice to convey land by lease and release, was not competent evidence, to prove that a lease was executed in this case, or what were its contents. 2. The professional character of Governor Livingston was not competent evidence, to prove either a lease or its contents. 3. Proof that it was not usual to record leases, was not competent evidence to proof the loss of a lease in this case. 4. Proof of what was the usual

recital of a lease, in a deed of release, was not competent evidence for any purpose. 5. The journal of the assembly was not legal or competent evidence against the defendant. 6. The acts of the legislature of the state of New York, relative to the claim of Mr. Astor, were not competent evidence against the defendant. 7. Proof that this suit was defended by the state of New York was not competent evidence against the defendant. It may be said, that this evidence was unimportant; it is for that very reason that we complain of its admission. And unless the plaintiff can show, that it was legal evidence between these parties, and upon the questions to be tried, the judgment must be reversed; for it is impossible to say, that the jury did not found their verdict upon it.

For what legitimate purpose, were the acts of the legislature concerning the claim of Mr. Astor given in evidence? If to excite the sympathy, or operate upon the prejudices of the jury, it was an improper and illegal purpose. We attempted to defend James Carver, and against him the plaintiff was to establish his right. If the acts in question contained any admission in favor of the plaintiff's title, will it be contended, that the legislature could destroy or admit away the vested rights of James Carver? But those acts denied the title of Mr. Astor, and referred him to the courts of law to establish it by proof; and he was to do that, against the tenants upon the land, not against the state. *Again, those acts proposed a compromise to Mr. Astor, but there was no evidence, that he had ever accepted those terms of compromise. And how did it tend to establish the title of Mr. Astor, or anything concerning it; to show that this suit was defended by the state of New York? If not legal evidence, a reversal of this judgment is asked. If Mr. Astor has a title to this land, he must prove it by legal and pertinent evidence.

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The judge of the circuit court misdirected the jury, on the question of the delivery of the settlement deed. The force of this objection can only be seen by referring particularly to the case of the plaintiff below. The evidence offered was the affidavit of Mr. Livingston, of the execution of the deed, and that of Mr. Hoffman, of the handwriting of the subscribing witnesses, both of whom were proved to be dead. The affidavit of Mr. Livingston was made, not from a recollection of the execution, but from his name having been subscribed as a witness. This was *primâ facie* proof to put the instrument on record, and amounted only to presumptive evidence of a delivery of the deed. When a subscribing witness is called to prove the execution of a deed, two distinct facts are to be established. 1. The sealing or execution. 2. The delivery. 1 Stark. Evid. 331, 333, 334; 2 Ibid. 473, 475, 477; *Jackson* v. *Phipps*, 12 Johns. 418. Where the witness is dead, proof of the handwriting furnishes presumptive evidence of sealing and delivery, if there has been possession under it, or the deed comes from the grantee. But in the absence of possession, or where the deed was never in the hands of the grantee, the presumption is very slight. Such proof of a deed as will entitle it to be recorded, is certainly no stronger than an acknowledgment by the party, that he executed it as his act and deed, for the uses and purposes therein mentioned, and in neither case, is the evidence conclusive, but only *primâ facie* or presumptive, and such as may be rebutted. *Jackson* v. *Dunlop*, 1 Johns. Cas. 114; *Maynard* v. *Maynard*, 10 Mass. 456; *Gardner* v. *Collins*, 3 Mason 398. These cases sufficiently establish, that the proof or

acknowledgment, and *the recording of a deed, furnish only *primâ facie* evidence of delivery.

But upon the whole case, it is thought, that any evidence of a presumption, that there was an actual delivery of the deed, so that it became an operative and valid conveyance, was entirely destroyed by the facts of the case. The deed was prepared, in contemplation of marriage, and necessarily was not to be delivered, until the moment of the marriage ceremony. This must have been the case ; as by its terms, if the marriage did not occur, the estate would be held by the trustees. The marriage did not take place immediately, for Mary Philipse, on the 18th of January 1758, executed a deed for a part of the land, in her own name. She appears to have been married, before the 5th of March 1761. It is probable, the deed was thrown aside, increased confidence in Morris having made it of no importance ; and that it was only brought forward afterwards, for the purpose for which it is now set up. It was not recorded until 1787, although all the other title papers of the family were put on record. The recitals in the deeds given after it, state all the circumstances of the title under Adolphe Philipse, but no deed recites this, nor in any manner refers to it. There was no evidence that the deed had been seen, after its execution, in the hands of the trustees ; or seen at all, until 1787, when it was produced by the grantor. Upon such facts, it is difficult to believe, that it was, at any time before the revolution, a subsisting conveyance.

Other important facts were proved. The deeds, before the war, given by Morris and wife, grant and convey a fee-simple in the parts of the land contained in the settlement, and do not mention a life-estate. In settling the line with Connecticut, the surrender to the crown does not mention the trust deed ; the parties style themselves owners and proprietors, and the grant of land, in consideration of the surrender, is to Roger Morris, and not subject to the pretended settlement. Beverly Robinson, a trustee under the deed of 1758, should have protected the trust, but he was a party to the compromise with the crown, under which five thousand acres were acquired in his own right by Roger Morris.

*The misdirection of the court was, in telling the jury that the evidence by which the delivery was brought into doubt, was of no [*47 legal effect or importance. There was one error which pervaded every part of the charge in this particular. While the question was, whether there was any deed, duly perfected by delivery, under which the children had rights ; the judge assumed that fact, and made it the basis of destroying the legal effect of that evidence, given to disprove it. That this was a dormant deed, which had slept for twenty-nine years, went very strongly to impeach its validity ; and the judge said, "there is weight in this, or rather there would be weight in it, if the parties in interest had slept on their rights." He then says, "the children have not slept," and asks, "is it fair, in such a case, to draw any inference against the children?" This assumes the very fact in controversy, that there was a deed ; and therefore, that it was improper to draw any inference against the children, from the acts or omissions of others.

He also contended, that the court misdirected the jury upon the omission to record the deed, and on the acts and conveyances of Morris and wife in disregard of the deed of 1758. Several of the deeds are disposed of by the

court, by saying they were to settle boundaries; but they asserted a right to the lands in fee, and for what purpose they were made, was of no moment. In relation to the leases, the judge said, that Morris and wife, "in strictness of law," had no power to make them; but he adds, "how is that to affect the rights of the children?" This was equivalent to saying the children had rights; the very question in the cause.

Upon the whole, it is evident, that the court left nothing to the jury, on the question of delivery. He also said, that in his charge, he had laid before the jury all the circumstances relative to the question of delivery; but he had omitted to state, that this deed came out of the hands of the grantor; and some other facts important to the cause.

The judge should have instructed the jury, that this was a proper case for presuming a re-conveyance. *The judge told the jury, that they might presume a re-conveyance, if they thought the evidence would warrant the presumption; but he also said, that in his judgment, the case depended principally upon other grounds. It was, in fact, saying, that it was not a proper case for presuming a re-conveyance. The presumption of such a conveyance was in accordance with the actual holding of the property from 1758 to the day of the trial; and all the parties connected with the title have acted, at all times, as though such were the fact. In New York (and the local law governs in this case), the rule concerning presumptions of conveyances is in favor of the claims of the plaintiff in error here. 2 Wend. 36; *Ham* v. *Schuyler*, 4 Johns. Ch. 1. So too, in England, a re-conveyance of the legal estate was presumed, after a great lapse of time, though the possession was not originally adverse, but under a trust. And this case received the sanction of this court in *Provost* v. *Gratz*, 6 Wheat. 481.

*48]

Roger Morris and Mary his wife, under the marriage-settlement deed, had an interest in the land, and might convey, in fee, to the amount of 3000*l.* in value. They did convey to the amount of 1195*l.* in value, and the residue of that interest was forfeited to and vested in the people of the state of New York; and the power was well executed by the conveyance of the commissioners of forfeitures to Timothy Carver, the defendant's grantor.

In relation to the deeds to Hill and Merritt, the judge held, that they were a good execution of the power in the settlement deed; but on this part of the case he held, admitting that the unexecuted portion of the power passed to the state by the forfeiture, yet that the conveyance to Timothy Carver by the state was not a good execution of the power. If Morris and wife could execute the power, without reciting or professing to act under it, why could not the state do the same, after they acquired the title? If the power is to be regarded as an exception out of the grant, then Morris and wife had an interest or estate in the *land, and they might convey, without reciting the power. And it is equally clear, that the residue of that interest or estate, not aliened, passed by the forfeiture; and so the defendant acquired a good title, by the deed from the commissioners. We think this power received different constructions upon different questions; and that either the Hill and Merritt deeds were inconsistent with the settlement deed; or that the defendant acquired a good title under the commissioners' deed.

*49]

The whole title, both in law and equity, which may or can have vested

in the children and heirs of Roger Morris and Mary his wife, of, in and to the lands and premises in question, has not been, as between the grantors and grantee, legally transferred to the said John Jacob Astor, his heirs and assigns. A proper deed of conveyance in fee-simple, from the said John Jacob Astor, and all persons claiming under him, to the people of the state of New York, would not be valid and affectual, to release, transfer and extinguish, all right, title and interst, which now is, or may have been vested in the children and heirs of the said Roger Morris and Mary his wife. These questions arise upon the admissions made by the parties before the jury, and which appear upon the record.

If the remainder to the children was contingent, and not to vest until the death of both their parents, then it is quite clear, that it could not be aliened, until the question of survivorship was determined. But if the court should hold that the remainder to the children was vested, subject to be divested by way of a shifting of the use, on the event of their dying before their mother; then we contend, that they could not alien to a stranger, although they might release to a person having an interest in the land. And if the conveyance would bind the party to it, by way of estoppel, still it would not bind their heirs. *Goodtitle* v. *Morse*, 3 T. R. 365; *Kercheval* v. *Triplett*, 1 A. K. Marsh. 494; 1 Preston on Est. 75, 76; Viner's Abr. Release, G.; *Lampet's Case*, 10 Co. 46; *Hoe's Case*, 5 Ibid. 71; Com. *Dig. Grant, D; Assignment, C, 3; *Davis* v. *Hayden*, 9 Mass. 514, 519. [*50

The plaintiff was bound to pay for the improvements upon the land, by which its value had been increased. The substance of the provisions of the acts of the legislature of New York is, that the purchaser of any forfeited estate, in case of eviction, should be paid the value, at the time of the eviction, of the improvements he had made on the land; not for his labor or expenditures, but the amount by which that labor and those expenditures, should have increased the value of the land. The party who recovered his land would only pay the difference between the value of the land at the time of the recovery, and what it would be worth at the time of the recovery, without the labor and expenditures of the party evicted. This provision is both just and equitable.

It is contended, that these provisions of the laws of New York are in conflict with the treaty with England, in 1783. The acts are general in their terms and in their operation; they have no relation to the character or country of the person who should recover lands which had been sold or confiscated; they operate on all. A partial legislation, prejudicial to British subjects, was the thing it was the object of the British government to provide against. Did the British government intend to ask, or ours to give, privileges and immunities, or exemptions to British subjects, that were not accorded to our own citizens? The legislature might perhaps have adopted such violent measures in relation to confiscated estates, which would have been unjust to our own citizens and to British subjects; and against such acts, the treaty was intended to guard. But it cannot be supposed, that the provision of the treaty was to extend to interfere with regulations founded upon the principles of national justice. What were "the just rights" of persons having an interest in confiscated lands? Not a right to the future labor of others, by which the value of the lands should be enchanced. In 1783, no British subject had a "just right" to the increased *value [*51

which James Carver should give to the lands, after the year 1786, when the law was passed.

Ogden, for the defendant in error.—In 1754, Mary Philipse was seised in fee of a part of what was then called "Philipse Upper Manor," of which the premises in dispute in this suit are a portion. Mary Philipse is, therefore, the source from which both parties derive title. The plaintiff in the court below must show that he has a good title under Mary Philipse. He claims under a deed of marriage-settlement executed by Mary Philipse, in consideration of her intended marriage with Roger Morris. Was this deed executed and delivered by Mary Philipse? This is a pure question of fact, to be decided by a jury. The jury have found the fact; their verdict is conclusive, unless the judge of the circuit court has misdirected the jury on the law.

If the misdirection of the judge was as to facts, it may have furnished ground for a new trial in the court below, but not for a reversal of the judgment here. 1 Serg. & Rawle 333, 336. If no illegal evidence was admitted, the judgment is conclusive.

The proof of the execution of the deed, and of its delivery, was made by the deposition of Mr. Livingston, in 1787, and by proof of the handwriting of the witnesses who are dead. This is the ordinary proof on such matters; all the other proof was brought forward by the defendant, all of which was given to the jury. This evidence was not illegal. If all the circumstances of this case are to be reviewed by this court, what are they? The proof of the deed had been made by Mr. Livingston, after it had been before the legislature, and the claims of those under whom the plaintiff claims had become the subjects of inquiry.

It is objected, that the deed was never heard of, before the revolutionary war, and that it had never been produced, until the interests of the parties required its production. Had the parties who now exhibit the claim on the defendant, considered it as an inoperative instrument, they would have destroyed it, and have claimed from the crown a compensation for the land, as a part of the loss sustained by the war. But if *any conclusions *52] can be drawn from these facts, they were properly for the jury. As to the fact, whether the deed had been seen before the war; it may have existed, and yet not appear to this court, as the case is before this court on a bill of exceptions.

As to the deed not having been recorded at the time of its execution, there was no law in force, requiring that it should be put on record. There is no strength in the argument, that as the other muniments of title were on record, the fact that this deed is not found on record, authorizes the belief, that it never existed as a valid conveyance. A patent is always recorded, before it issues. The deed to lead to uses, in the proceedings to bar the entail, was a part of the common recovery. The deed of partition, which operated on lands twenty miles square, divided among three children, must have been recorded for the satisfaction of purchasers. But the settlement deed affected only the parties to it, and its recording was not called for.

Nor is it evidence, that no such deed was in force, that, in the conveyances made by Roger Morris and wife, after its execution, this deed was not mentioned. This was of no consequence in transferring property to strangers.

But if these facts are of any value, they were proper for the jury in determining on the question of delivery, or on the presumption of a conveyance. In the marriage settlement, a power to convey lands to the amount of 3000*l.* was reserved, and conveyances of 1195*l.* were made. This power was properly executed, without reciting that it was derived from the settlement deed. As to the presumption of a re-conveyance, it is argued, that a possession of seventy years was inconsistent with the marriage deed. But this was not the fact. In the year 1787, the deed was proved before Judge Hobart, and was then recorded; and the claims of the children of Roger and Mary Morris were soon after presented to the legislature of New York. It is a universal principle of law, that if possession be consistent with a deed, it shall be presumed to be under it. In this case, the acts of Roger Morris and *wife in the sale of the land, in granting leases, were of this character, and should be so considered. [*53

It is contended by the counsel for the plaintiff in error, that the recital of the lease in the settlement deed does not bind him, because he does not hold under that deed; and does not bind the state of New York, his grantor, because of its sovereign character. In answer to the first, it may be said, that if the plaintiff is not bound by the recitals, yet they were evidence which went properly to the jury, and their verdict has affirmed them. To the second, it is submitted, that although the king is not bound by recitals in his own deed, he is bound by those in deeds under which he claims. Matthews 201. What was the legal operation of the deed? It was the conveyance of the estate to trustees, for the use of Roger Morris and wife for life, remainder to their children, and if no children, a contingent remainder over to Mary Morris and her devisees. The remainder to the children was at first contingent, which vested at the birth of each child, and opened to let in those who were born afterwards. Cruise, Rem. ch. 5, p. 346, 264, 336, ch. 4, § 15, ch. 5, § 11, p. 350.

It is said, that the remainders were destroyed by the operation of the acts of attainder or forfeiture, and the conveyance by the state of New York. That these were equivalent to a feoffment, and destroyed the particular estate, and consequently, the remainders. But the conveyance of the state, with warranty, was not equal to a feoffment. There was no livery of seisin, and the operation of conveyances which pass the whole estate is confined to those with livery of seisin. Nor was the attainder and banishment of Morris and wife a civil death; the treaty of peace repealed the banishment, and thus restored them to civil existence. The estate depended, by the terms of its grant, on the natural death of the grantors. And the law is, that if a particular estate is determined, the remainder-man might enter, but he is not compelled to do so. 2 Ves. Sen. 482; 7 East 32. The act of attainder *intended to forfeit only the interest of Roger Morris and wife; its terms extend no further, and such only could be its operation. The offence charged against them was not treason, and no forfeiture was effected, but according to the words of the law. 2 Johns. 248. A condition or possibility was not forfeited. 4 Mason 174. The act did not intend to terminate the estate of Roger Morris and wife, but to transfer it to the state of New York, and to continue it afterwards. Thus, for all purposes of sustaining the remainders, it did continue, and their estate, being limited to their lives, is now fully determined by their death; and [*54

their children, under whom the plaintiff below claimed, were fully entitled to the land.

As to the claim to be paid for the improvements, the treaty of 1782 confirmed all unforfeited estates, and protected them from state legislation. The rights of those interested in lands were then vested, and could not be impaired. In 1782, the land held by the plaintiff in error was conveyed to him, and the acts of the legislature of New York, under which he claims to be paid for his improvements, were passed in 1784 and 1786. He did not buy the land, on the faith of these acts; and he has no claim to their legal provisions, or to any equities under them.

Wirt, also for the defendant in error, said, this case arises under the attainder and confiscation act of the state of New York. The confiscation having fallen on the estate of Roger Morris and Mary his wife, under which the property was sold, and the remainder in the children of Morris and wife having been, as is contended by the defendants in error, protected by the treaty of peace, was sold to John Jacob Astor, and is now claimed under that purchase. As the state of New York had sold the estate, under the confiscating law, claiming the fee-simple to be forfeited, it considered itself responsible to the purchasers, should their grantees be ousted, after the life-estate acknowledged to have been in Morris and wife should terminate. Under these circumstances, Mr. Astor thought it advisable to present his
*55] claim to the legislature of New York, and *certain acts were passed, by force of which, should the title be established, by competent and designated judicial proceedings, to be in him, the state of New York has offered to pay him $450,000, on his executing a full and complete conveyance of the estate, both in law and equity; which sum is to be reduced to $250,000, if it shall be determined, that he shall be liable to pay for the improvements made on the confiscated property, since the sale by the state. The acts provide, that as a test of the real merits of Mr. Astor's title, five suits in ejectment shall be prosecuted to judgment, and the decision of three actions out of the five shall be conclusive on all parties. Under these acts, the trial in question has been had, not under the general law of ejectment which prevails in the state, but under the special provisions made for the case, and deraigning the general rules of evidence in some particulars. On this trial, the verdict and judgment were in favor of Mr. Astor; and the defendant has brought the case here by writ of error, upon which writ, no questions are open for consideration, but errors in law committed on the trial. Whether the jury decided properly on the evidence, is no question for this court. Such suggestions could only have been properly made on a motion for a new trial, or if the case were here on a demurrer to evidence.

The errors alleged to have been committed on the trial, may be divided into four classes: 1. Errors in the admission and rejection of evidence. 2. Errors in the construction of the deed of marriage-settlement, and the operation of the act of attainder and confiscation. 3. Errors in the charge to the jury. 4. Errors in awarding the writ of possession, without requiring the plaintiff to pay for the improvements.

1. Errors in the admission and rejection of evidence. This was a prolific head of exceptions, and in order to estimate them correctly, the court must advert to the precise point of the controversy at which they arose, and

the situation of the parties to the suit. *In 1758, the marriage-settlement, the purport of which has been frequently stated in argument, was executed between Roger Morris, Mary Philipse, and the trustees, Beverly Robinson and Joanna Philipse, the mother of Mary Philipse. The contingent remainder limited by the deed to the children in fee, became vested on their births; and all their children having been born before the year 1779, the condition of the property, at that time, was, that Morris and wife held an estate for life in it, with a remainder in fee to their children, which remainder continued in them until 1809, when they sold the same to Mr. Astor.

The defendant claims under the act of attainder and confiscation of New York, passed on the 22d of October 1779. The estate forfeited by that act was all that which Roger and Mary Morris had on the day of its passage. This we say was a life-estate merely, as it regards the premises in this suit; leaving the remainder in fee in the children untouched. How is this act to be construed? As a forfeiture for treason? If so, the forfeiture would have relation only to the time of the offence, for avoiding all subsequent alienations of land. 2 Hawk. ch. 49, § 30. But the courts of New York have expressly decided it is not to be considered as imposing a forfeiture for treason; that the act was a specified offense, and not treason; and that the extent of the forfeiture is to be sought for only in the act itself. This court has held, that state decisions on state laws are binding here; the forfeiture is not, therefore, of the estate of Mary Morris, as it came to her from her father, but as it was subject to all her conveyances of all or any part of it, and to any dispositions she may have made of it, up to the time of the enactment of the law.

If, then, the deed of 1758, under which we claim, was really executed, being a prior alienation, the title of the state and of her grantees is barred. Thus, both plaintiff and defendant claim under Mary Philipse, they are both privies to her and to her estate. The plaintiff below is a privy by deed, the defendant a privy by law. *Could the state, on the trial of the cause, have been considered as a stranger? They claim the estate of Morris and wife. They took the estate they held in October 1779, and they were consequently bound by all their prior alienations. The state are not indeed privies in blood, nor in deed, by voluntary alienation; but they are privies in law, like the lord by escheat or forfeiture. They belong to the class of those, who come in by act of law, or "in the *post*," as Lord Coke terms it. Coke Lit. 352 *a*. And thus, being privies in law, they are bound by the same rules of evidence, and by the same estoppels, as privies in blood, or privies in deed. [*57

Mr. Wirt then went into a particular examination of the decision of the court below on the admission of the deed of release in evidence. He contended, that on the proof of the deed by Mr. Livingston, and on the evidence of Mr. Hoffman and Mr. Benson of the handwriting of the subscribing witnesses, they being dead, it was competent evidence. 1 Stark. Evid. 333, 340, 341. The defendant, he argued, did not question the sealing of the deed, but he did question its delivery, and he offered circumstances as evidence to lead to the presumption, that the deed, although solemnly prepared, had never been delivered. All these circumstances were admitted in

evidence by the plaintiff below, without objection; none were excluded by the court; and the defendant had the full benefit of them. They bore on a question of fact, the delivery of the deed; and their effect belonged to the jury exclusively, who had found that the deed was delivered. These circumstances, and the effect of the testimony, do not belong to the argument here. All that is to be inquired into is, whether the judge committed an error in law on this subject. No such error existed; none will be found in the charge. The instructions of the court to the jury left to them the decision of the value and weight of the evidence.

He contended: 1. That the recital of the deed was not only some evidence of the existence of the lease, but that in this case, it was an actual estoppel against the state of *New York to deny its existence. 2. That if it *58] was not an estoppel, it was unquestionably evidence to the extent to which it was admitted.

If it was an estoppel, all questions which arise upon the exclusion of the auxiliary proof are superseded; for it could not prejudice the defendant, to have let in such proof to establish a fact which he was already estopped to deny. It is assumed as a proposition, that the recital of a lease in a deed of release is evidence, not only against the releasor, but against all who claim under him by subsequent title, whether they reduce their title through the deed or not. That such a recital is not only evidence, but is an estoppel which binds the releasor, and all who take the estate in his right by subsequent title derived from him; and it is only against strangers in estate and blood, having no privity with the one who has made the recital, that the existence and loss of the recited instrument is required to be proved *aliunde*. The distinction that the recital binds those only who claim the estate through the deed, cannot be sound; because it is admitted, that such a recital binds the heir, who does not claim through the deed, but through a line of descents, or of descents and devises, blended, without the necessity of calling to his aid any collateral deed made by any of his ancestors; and yet he is bound, not only by the deeds of his ancestors, but by all their recitals. Why is he bound? Because he takes the property under the ancestor, precisely as the ancestor held it, claiming it in right of his ancestor; and is, therefore, bound by every admission under seal which would bind that ancestor. This is precisely the case with the state of New York. She took the estate under the same principles, and bound by the same admissions, not as a privy in blood, but by privity of law; which it will be shown is the same in effect according to the doctrine of estoppels. The state of New York is not an alienee for a valuable consideration, she stands in a situation resembling rather that of the heir, than that of such an alienee. The estate of the ancestor descends on the heir by the general law of the land; this estate vests in the state under a particular law. *In both instances, it vests in the same *59] character, and in the same right; in the precise situation in which it was held by the person last seised.

The authorities maintain the principles and the positions here assumed. Gilbert's Evid. by Lofft, 101; 1 Phil. Evid. 355; 1 Saund. on Plead. & Evid. 42; Peake 164; 1 Stark. 369; 6 Mod. 44; 1 Salk. 285; 2 Lev. 108, 242; Vaugh. 74; 4 Binn. 231; *Penrose* v. *Griffith*, 6 Ibid. 416. The principles settled by those cases are, that recitals bind the party, and all who claim under him by subsequent conveyances, but not those who

claim under him by conveyance prior to the reciting deed. The operation of the recitals is not confined to those who claim under the specific deed of recital, but extends to all who claim by subsequent title.

Now, the plaintiff in error is just in this predicament, for he claims under the same grantor, by title derived subsequently to the date of the reciting deed. He claims under those who themselves claim under that deed; he claims the very interest which the deed moulds and limits, and therefore, may be said to claim under the deed.

But while none of the cases which have been cited recognise this distinction, there are others which seem to put an end to it entirely. *Marchioness of Annandale* v. *Harris*, 2 P. Wms. 432; *Denn ex dem. Colden* v. *Cornell*, 3 Johns. Cas. 174. We are told by Lord COKE (Co. Litt. 352), that recitals are reciprocal. Such too is the law of New York. *Lansing* v. *Montgomery*, 2 Johns. 382. And therefore, since the state can estop the heir by such a recital, the state shall herself be estopped by a similar recital. Suppose, that the deed of release had settled the estate on Roger Morris in fee, and that the act of attainder and forfeiture had fallen on his person alone? Can there be a doubt, that the purchaser under the state would have defended himself under the lease, and the wife and children would have been estopped from denying its existence. The decision in *Denn* v. *Cornell* establishes this. 3 Johns. Cas. 174.

But if the release is not an estoppel, the judge in the *court below did not err; for he did not admit it as an estoppel, but only as some [*60 evidence of the existence of the lease. Was he wrong in this? The cases which have been cited to prove it an estoppel, do at least establish that it is evidence; that is, some evidence against the parties, and all who claim under them. Matthews on Presumptive Proof 201. See also *Garwood* v. *Dennis*, 4 Binn. 314; 3 Preston on Estates 28–31. If the court were not to regard the recital as some evidence that a lease had been executed, what was to be done with the release which had been proved, and was regularly in evidence. Could they regard it as a simple bargain and sale, vesting the whole legal estate in the trustees, and leaving equitable estates only in Roger Morris and wife, and in their children? The instrument disavowed that character for itself. It declared itself to be a deed, founded on a lease, and its design to be, to transfer the uses into possession, under the statute of uses. The instrument being in the cause, could not be got out of it, and the recital is part of it. The court were to give its legal character to the instrument, and on the truth of the recital, its legal character depended: was not the recital enough to justify the court in saying, it appears there was a lease; you must produce the lease or account for its non-production? If the court could have said this, it is enough to justify the opinion which was expressed; for such was simply the effect of the opinion which was expressed.

Upon the alleged errors in the legal construction of the deed of marriage-settlement, and the operation of the act of confiscation and attainder, Mr. Wirt observed, that the first point in which error is stated to have existed, was, in holding, that under the marriage-settlement, there was a vested remainder in the children, on the 22d of October 1779, the date of the act of confiscation. The children were all born before 1779, and the remainder vested on their birth. The question is, as to the legal effect of the limita-

tion to the children? The construction of the circuit court, which we support, is: 1. That the remainder in fee limited to the children was contin-
*61] gent until the birth of the first child. *2. That on the birth of the first child, the whole remainder vested in fee. 3. That on the birth of the second child, the remainder vested in the first, opened to receive him, and so on, until all the children were born, when it became a vested remainder in the whole. On the other side, the position is, that the remainder did not vest on the birth of the children; but continued to be a contingent remainder, until it should be seen, whether the children would survive the mother; because the enjoyment of the estate depended on that contingency, for if the mother should survive, she took the remainder.

We apprehend, that the counsel for the plaintiffs has not sufficiently adverted to the distinction between the contingency on which a remainder is to vest in interest, and that on which it is to vest in possession. Vested remainders are still contingent as to the enjoyment, during the continuance of the particular estate; and by the death of a remainder-man for life, before the determination of the particular estate, the vested remainder is gone for ever; it is divested on this event, and goes over to the ulterior remainder-man. During the life of the remainder-man, however, it continued to be a vested remainder; for it was vested in interest, however uncertain the enjoyment. The distinction between a vested and a contingent remainder does not depend on the contingency on which it is to vest in possession, but on that on which it is to vest in interest. The question, and the only question is this—is the remainder-man *in esse*, and capable of taking, if the life-estate should determine? If he be, the remainder is at once a vested remainder, though it may be uncertain whether it will ever vest in enjoyment. Fearne 215, 216. Now, the children of Roger Morris and wife were *in esse*, before the year 1779, and were capable of taking in possession, if the possession had become vacant by the death of the tenant for life. They had, therefore, a vested estate.

As to the objection, that they were not capable of taking the possession, during the life of their parents. This is confounding the capability to take
*62] the possession, with the right *to take it. In any vested remainder, the capacity to take the possession arises before the right to take it. That capacity exists as soon as there is a person *in esse* who meets the description of the remainder-man, and nothing is interposed between him and the possession, except the particular estate, while the right to take it is yet in suspense, until the determination of the particular estate. And as soon as a remainder-man is presented, who meets the description of the limitation, and between whom and the possession nothing stands but the particular estate, the remainder vests in interest, though it may chance never to come into possession; for many are the vested remainders which have passed away, without having vested in possession. On the 1st of October 1779, there was a life-estate in the parents; there were children of the marriage, remainder-men, all *in esse*, and nothing interposed between them and the possession except the particular estate; and had that particular estate ended on the 1st of October 1779, they had capacity to take, and most certainly would have taken. These principles are fully sustained in Fearne on Remainders 215, 216, and the cases cited by the counsel for the plaintiff in error do not impugn them.

The question depends on the very terms in which the remainder is limited. The remainder limited over has nothing to do with the vesting of the first remainder, though it may have something to do with the enjoyment of the estate. In this case, the limitation is not to such of the children as may be living at the death of their parents. Such a limitation might have altered the rights of the parties ; as it would have remained uncertain, until the death of the parents, who would be, and whether there would ever be a remainder-man. It is not, however, a life-estate which is given to the children, but an estate in fee-simple. Now, upon the construction given on the other side, which considers the lives of the children as running against the life of the mother, both contingent until her death, and the survivor to take the estate—suppose the children to have died before the mother, leaving children ; was it the intention of the settlement that they should be disinherited? *By no construction, can this be made an estate-tail by [*63 implication ; but if it could, it would not vary or affect the vesting of the estate, subject to their dying without issue in the life of the mother. The authorities to show that an estate is not prevented from vesting in interest, though the possession may be subject to be defeated by future contingencies, are *Doe* v. *Perryn*, 3 T. R. 484 ; 4 Ibid. 39 ; 4 Bos. & Pul. 313 ; 1 Maule & Selw. 321; 6 Price 41.

It has been said, for the plaintiff in error, that these were concurrent, contingent remainders, and that both were contingent, until the survivor who was to enjoy the estate was ascertained. This is the same position in effect with that to which an answer has been given. They are not concurrent, but successive remainders ; the first remainder is to the children, and failing the vesting of that, the limitation to the mother would survive and vest. Courts never consider remainders concurrent contingencies, except from absolute necessity. Fearne 377. But if they were concurrent, they remained so only until the birth of a child of the marriage, and then the remainder fully vested in such child. *Luddington* v. *Kime*, 1 Ld. Raym. 203.

The next supposed error is in the construction of the acts of attainder and confication ; and on the assumption that this is a vested remainder, it is not understood to be contended, that the act of confiscation would affect it.

Errors in the charge to the jury. No important errors in law in the charge have been insisted on, but such as have already been the subject of comment. The residue of the objections are, that the judge in summing up the facts, put the evidence to the jury too favorably for the plaintiff below, and did not put it sufficiently strong for the defendant. Are the judge's remarks upon the evidence errors in law? There is no case which supports such a position; on the contrary, it is expressly laid down, that they are not such errors. 1 Serg. & Rawle 333. Resting upon this authority, the charge may be left to its own vindication, not doubting that that vindication will be ample and sufficient for it.

*As to the question of improvements. The case is this. There [*64 are remainders in fee protected by the treaty 1783 ; and the state of New York has seized and sold the life-estate, declaring, by acts subsequent to the treaty, that with respect to all improvements made by the tenant for life, the remainder-man shall not have his estate, until he shall have paid for those improvements. 1. Is this consistent with the nature of the estate? 2. Are these acts compatible with the treaty?

As to the first inquiry, Roger Morris and wife were tenants for life, the remainder in fee belonging to their children. The relative rights of the parties were fixed by the deed of marriage-settlement. Under this deed, could Morris and his wife charge the remainder-man in fee, with any improvements they should put on the land? Suppose, after having improved the lands, by their last will and testament, they had directed that the remaindermen should not enter, until they paid for the improvements? Would such a will have operated against their children? Suppose, they had sold their estate for life, stipulating that the purchasers, before the property should be taken from them, after their decease, by the remaindermen, should be paid for all buildings and improvements made on the land. Would such a covenant have operated on the children? Under the deed of settlement, no power thus to charge the fee was reserved. When, therefore, the state of New York took the estate of Morris and wife, they held it as it had been held, and they succeeded to them as tenants for life, with no other powers over the estate than they had. Unless this was so, they took a greater estate than was held by them.

But the act of confiscation disclaims this. It purports to take the estate of Morris and wife only, and as they held it on the 22d of October 1779. The act does not purport or profess to disturb or impair any estate, except the estates of persons named in it. The state of New York could not, by mere right of succession to the state of Morris and wife, impose this burden *on the remainder-men, and impair their rights. It would be a most unjust and palpable violation of the rights of property, a usurpation of power, altogether unwarranted by the nature of the estate which they had taken under the law. Nor does the power thus to charge the estate of the remainder-men result from their general power of legislation. It was not a general act, which declared that all remainder-men should pay for improvements. It was confined to estates confiscated by the act of 1779. It was, in effect, a declaration by the tenant for life, that the remainder-man should not have his estate, until he paid him for his improvements. It thus became an individual action, and was not a legislative action.

*65]

But if it was a legislative action, its effect was, an enlargement of the confiscation act of 1779. It was a new confiscation, *pro tanto*, imposed on these remainder-men. Who is to receive the value of these improvements? The acts of the state of New York show they are to be paid for by them; the value is to be deducted from the sum payable to Mr. Astor, and thus the amount is to go into the fisc of the state. This is a confiscation of the estates of children, for the offence of their fathers.

2. Let us turn to the treaty of 1783, and consider the question under that treaty. The court will perceive, that the act of 1784 has nothing to do with this case. That was prospective, and the sale to Carver was made in 1782. It is the act of May 1786, which alone can affect this case; and by the suggestion, it appears, that the claim is for improvements made since that act. Such a claim is in direct opposition to the fifth article of the treaty of peace. The terms of the article are: "and it is agreed, that all persons who have any interest in confiscated lands, either by will, marriage-settlement, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights." Persons claiming an interest in lands by marriage-settlement, are one of the classes put by the treaty; and their "just rights" are the rights

they had when the treaty was made. These rights were fixed, at the time of the treaty, by *the marriage-settlement, and they were to enter on their estates, on the death of the tenants for life, without any responsibility for the improvements placed upon them during the tenancy. [*66

But here is a law of New York, passed three years after the treaty, which declares that they shall not enter on their estates, without paying the full value of those improvements. Is not this an "impediment" raised by this law to the prosecution of their just rights, and consequently, a violation of the treaty? It is said to be no impediment to the prosecution of their just rights, because it is just, that they should pay for the improvements. This resolves itself into a question of law; which is, whether the remainder-man in fee cannot justly take possession of the estate, when his title to the possession commences, without paying for improvements put on the land by the holder of the intermediate estate. This is no question to a legal mind.

In relation to the equitable view of the question: this is not the case of a party who, having a right to the present possession, has stood by, and seen valuable improvements put upon the estate, without disclosing his title, for the children had no title to the possession, until the death of their mother. Nor is there anything in the argument, that these improvements were made in ignorance of the title. Where is the law which requires that a party thus situated shall disclose his title? It may also be urged, that the acts of the legislature of New York bear upon their face, evidence of a general knowledge that there were outstanding titles, which might lead to the eviction of their purchasers; and that they are, on their face, levelled against the very titles which stand protected by the treaty.

Webster, for the plaintiff in error.—The first inquiry in the case was, as to the manner in which the verdict was obtained. Was it regularly proved, that any conveyance was ever completed, by which Mary Morris parted with her fee in the land, and which was existing as a *valid conveyance, in October 1779? We say it was not; because, we say, the judge misdirected the jury on the evidence bearing upon that. We say, a judge may commit errors, which this court may correct; either, 1. In admitting evidence which ought not to have been admitted. 2. In rejecting what ought to have been admitted. 3. By misstating the effect, not the weight of evidence. 4. By misleading the jury by a wrong statement to them of what the evidence really is. [*67

The first two propositions no one will deny. *Taylor* v. *Riggs*, 1 Pet. 591, 596; *Chirac* v. *Reinecker*, 2 Ibid. 625; *Dunlop* v. *Patterson*, 5 Cow. 243. The weight of evidence is for the jury. If a judge happens to say, that he thinks A. more credible than B., it is a remark on evidence. If he says, that it strikes him as not proved that a bond was given, it is the same; not so, if he speaks of the tendency or effect of evidence. If he says, this evidence, if believed, tends to establish the party's right, when it does not; or that it does not, when it does; then it is error; because, it is a remark not on evidence, but on the law of evidence. So, if he misstates the thing to be proved, or the object for which it is intended, or its legal bearing, this is error. With these general principles in view, we mean to examine the judge's ruling on the trial in the circuit court.

1. As to the evidence of the question of the lease. Nothing was proved

but by the testimony of Governor Livingston and Mr. Hoffman. This was all merely formal. Governor Livingston's oath was in the very words of the attestation, and not more; it was written for him beforehand, and in the formal words of attesting an instrument. He was an old man, swearing to a transaction then thirty years old; and there was no proof, no circumstance of which he had any recollection, but from seeing his signature. There was no more in this than in all other certificates of attestation; they usually certify delivery, before any actual delivery is made, and this was the fact in one of the conveyances by Mr. Astor in this case. The deed was doubtless
*68] executed at the house of Mrs. *Philipse. All this is no more than proving his own handwriting in 1787; and this would have answered the same purpose. All that was proved in this case was merely formal; it is just what would have been done, if the parties had intended only to have a deed prepared, to be delivered or not, as they should afterwards decide, as an escrow. It is certain, he did not see any actual delivery of the deed; and while nothing is imputed to Governor Livingston, his testimony goes no further than has been stated.

There was no other proof of the existence of this paper, until it was proved in April 1787. It is not traced to the hands of the grantees. No one ever saw it; it was not shown to the legislature. Perhaps, on this evidence, and its effects, the judge did not misdirect the jury. This, though perhaps *primâ facie* proof, was the slightest of all proof. No actual delivery shown—no possession of the deed by the grantees. Now, suppose a marriage had not taken place, and the trustees had set up this deed; it would have been said at once, that the presumption of delivery was overruled. Anything else that carries an equal presumption destroys the *primâ facie* proof. It is, of all cases, the one in which subsequent events might intercept the delivery of the deed. We were not called upon to disprove delivery; it was enough for us, to bring the fact of delivery into doubt, everything else, without delivery, was nothing. The judge in this matter was right.

Now, what did we offer against this evidence. 1. The deed was never recorded or proved: this was not required by law, but it was usual, especially, with this family; all their deeds were recorded; the first patent, the deed to lead to uses, the deed of partition; and the will was proved in chancery. The settlement deed, of all others, was a proper deed to be recorded; it was to provide for unborn children, and the practice of the family was not to be changed. The trustees would, in accordance with their duty, prove and record this deed, to preserve the rights of the children. More especially,
*69] why was not this deed proved and recorded *in 1783? Forfeitures were then all over; the children were born, and, perhaps, of men's estate. Only one part was found, and that had been carried beyond seas. Would prudent men have so acted? The treaty had then established the children's rights.

Now, we say, that this part of the case was not accurately stated to the jury. The judge asks, if these circumstances should operate against the children? we say, they should; and we think here is a plain misdirection in point of law. We say, that all the evidence relied upon by us, drawn from the conduct of the immediate parties to the supposed deed, is evidence against the children. The judge says, these facts should not operate against the children; we contend, that they should and must; and this is a direct

question of law, not a mere remark on evidence. Again, the judge excuses Morris from recording the deed, because he says, there were at that time no offices for recording deeds. But this could only be from 1775 to 1783. Our argument is, that if the deed had ever been delivered, it would have been recorded before 1775. Is the form of this argument fairly stated? Is it legally stated? Then again, as to not recording in 1783; the judge asks, are there not circumstances to account for this delay of three or four years? This is equivalent to saying that there are such circumstances.

2. The sleeping of this settlement from 1758 to 1787, twenty-nine years, is relied upon, to prove that it never had a legal existence. No witness ever saw it. It was not heard of by any of the family. It is recited in none the conveyances. These are material facts. In the history of this title, each deed recites the previous deed, down to that now under examination; below it, they recite not through it, but over it; or as if it were not in existence. There is an absolute absence of every possible fact looking to or recognising the existence of this deed, for thirty years. Now, is not this, of itself, evidence of weight and importance, to rebut the presumption of delivery? How does the judge answer this? He says, there would *have been weight in this, if the children had slept thus long: we say, it is just as strong against them, for the purpose for which we use it, as against Morris and wife, and the trustees. "The children slept upon their rights:" the very question is, whether the children had any rights. It is not whether they shall be barred, but whether they ever had any estate. Now, this is clear matter of law. "Is it fair to draw any inference in such a case, against the children?" That is, the jury understood the judge to say; the law will warrant no such inference. We say it will. [*70

3. The manner of holding the property, and acts inconsistent with the title under the deed, disprove its existence. Here is a whole series of acts, extending over many years, by the very persons who were parties to the supposed settlement, and absolutely irreconcilable to the idea of its real subsistence. These were the conveyances executed by Roger Morris and wife, in which the settlement was not mentioned, and conveyances made in direct disaffirmance of it. The charge of the judge upon these matters was altogether erroneous. The deeds thus executed, and the agreements, indicate a holding of the property in fee-simple, not a holding under the settlement. And the judge says, that they are within the limitation of the power reserved in the settlement deed, and not inconsistent with it. Is this so? By the settlement deed, Morris and wife had estates for life only; in the deeds, they expressly covenant they are seised in fee. Now, the consistency or inconsistency of these deeds, is a question of law, though the effect of the inconsistency is a question for the jury. The judge has said, that in point of law, they are consistent deeds, that there is no inconsistency between the covenants in the deed and the title under the settlement. Is this correct? If the judge had said, that this form of executing the powers, might have been used through mistake; that the deeds might have been inartificially drawn; and that the jury might consider these circumstances; it had been well enough. But he withdraws the whole matter at once from *the consideration of the jury, by directing them, as matter of law, that there is no inconsistency. Can this be sustained? As to the life leases, they were not given under the power reserved in the settlement deed, nor in execution of [*71

the power. They are totally inconsistent with it, and the evidence shows a system of leasing the lands. How does the judge dispose of these? It was a question of intention, as we say; and the judge asks, how do these facts affect the rights of the children? This is equivalent to saying, they do not affect the rights of the children at all, in point of law. This is a legal direction on the effect of evidence. Is it right? Might not these acts affect the children?

Again, the judge says, did Morris intend these acts in hostility to the children? that is not the true question. The question is, whether these acts go to show that there were no rights in the children. The truth is, the judge proceeded altogether on the supposition, that there had been an original acknowledged right in the children, and that we were attempting to bar that right by adverse possession. We say, these acts prove, or tend to prove, that there was no subsisting settlement, and that not only the weight but the bearing and effect of this evidence was misstated to the jury. We contend, that everything from 1758 to the revolution, bearing either way, bears against the settlement deed, as a subsisting deed, and for the original title; everything giving indications either way, indicates a holding under the original title; that in thirty years there was no act to the contrary. We do not say, these circumstances are conclusive as matter of law, but we say, they are cogent as matter of evidence; and we say, the judge substantially withdrew the consideration of them from the jury. On the other important fact that the deed came, in 1787, from the hands of the grantor, the judge said nothing. He omitted to notice the circumstance, although he stated that he had mentioned all the circumstances of the case.

Then the case is: 1. That the deed, thirty years after its date, is still found in the hands of the grantor, not proved, *acknowledged or recorded. 2. That no other part of the indenture is produced, lease or release, though search has been made for it. 3. That no one ever saw the deed from its date until 1787. 4. That no one act was done in thirty years, recognising the existence of the deed for thirty years. 5. That subsequent conveyances, deducing the whole title, and reciting every other conveyance in the chain, make no mention of any such settlement deed. 6. That there is a series of acts, deeds, conveyances and compacts, beginning within five days of the date of the supposed settlement, and coming down to the revolution, by parties to the supposed deed, wholly inconsistent with any idea of its subsistence. Now, we admit, that a jury may set up the settlement deed against all this evidence; provided no direction be given them, after the evidence is put in, and provided no improper direction be given. We do not ask the court to decide on the weight of evidence. But we say, if the judge misstates the object of the evidence offered, if he misdirects as to its tendency and effects, if he states incorrectly the views in which it is evidence; then the jury has been prevented from passing intelligently on the matter. We say, the directions of the judge on these facts were not according to the law of the case.

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It is also contended, that the acts of the legislature of New York were not evidence in the cause. The effect of their introduction was to change the parties before the jury. They were not general laws of the land; and they were important testimony. For the admission of such evidence, a court will reverse a judgment. 3 Cow. 621; 16 Johns. 89; 5 Cow. 243.

As to the recital of the lease, in the deed of release; how far does it bind the plaintiff in error, and the state of New York, under which he claims? It is admitted, that recitals estop the party to the deed, himself and his heirs, because the heir is bound by the covenants of his ancestor. They also affect every person claiming under the instrument, unless it was offered as presumptive evidence of a grant, in order to support a possession which *could not be accounted for, but on the supposition of such grant. These principles are fully sustained by the elementary [*73 writers, and by the cases in 1 Salk. 285, 286; *Ford* v. *Grey*, 6 Mod. 44; 4 Binn. 355; Norris's Peake 164; Archbold's Plead. 380; Saund. on Plead. & Evid.; Preston on Estates 43; Phil. Evid. 410; 1 Salk. 276. There is no case in which a recital has been held to bind a person who comes in, *in invitum*. The alienee may be protected by covenants. But suppose, a creditor who has the land in execution; he takes it bound by everything his debtor has done, not by everything his debtor has said. It operates by way of admission. Under what circumstances, is one man bound by the admission of another? Suppose, an admission under hand and seal, that the property is held fraudulently. This will not bind the alienee without notice. In the case in 1 Salk. 285, *Ford* v. *Grey*, what is meant by "those claiming under him?" Is it the persons who claim under the same conveyance, or merely by subsequent deed? The court had just decided, that admissions in an answer in chancery bind the party, but not his alienee. If the court designed these words in their extended sense, they would have suggested the distinction between an answer and a deed.

The state of New York is a stranger to the deed of Morris and wife, and the recital should not, upon sound principles of law, have been admitted to prove the existence of the lease. But the circuit court admitted the recital, to prove the existence of the lease, and also its contents. Upon the cases decided in Pennsylvania, in 4 Binn. 614, and another, the possession was equivocal, and secondary evidence was called in aid. Those decisions turned on the special circumstances of the case. The case in 17 Ves. 134, was a case in which the lease was to be proved. Counsel were employed to examine the papers, before the conveyance. The chancellor admitted the release, because the possession could not be accounted for on any other ground. If possession is equivocal, the exigency under which this case would apply has not arisen.

In Buller's Nisi Prius 254, it is said, "when possession *has gone along with the deed many years, the original of which is lost or [*74 destroyed, a copy or abstract may be given in evidence." In Matthews, the doctrine is fully set forth, 188–90. And in the authorities cited, it is distinctly stated, that the recital of a lease, in the release, is evidence in those cases where auxiliary proof is admitted, to make out the presumption of a conveyance to support a possession. Now, if the possession is equivocal, *ex natura rerum*, the presumption can never arise. *Ricard* v. *Williams*, 7 Wheat. 59.

In the case before the court, the possession, so far as the acts of the parties to the alleged settlement deed are to give it a character, has been shown to be adverse to the terms and purposes of that deed, and not at any time such as could have existed, had the deed been considered operative and in force. When, therefore, the parties did not, by their gifts, give to the deed

any influence, ought it to operate on those who were entirely strangers to it, and who rely on the acts and proceedings of the parties to the deed, to prove it had not a valid existence. This is to give it effect and power over the rights of strangers, when these were never permitted by the parties to prevail as to themselves

Upon the title acquired by the children of Roger Morris, under the deed of settlement, Mr. Webster argued: The question upon this title is now for the first time to be discussed. The construction which this court will give to that deed may be in favor of Mr. Astor, and carry the rule as to contingent remainders to the extent claimed by his counsel; but there has been no case referred to which sustains the doctrine. In all the definitions and general doctrines of remainders, the counsel for both parties agree. A remainder is "a remnant of an estate, expectant on a particular estate, created together with it, at one time." A contingent remainder is a "remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed, until after the determination of the preceding estate." These contingent remainders are classified under four divisions—and the fourth class is, where
*75] the contingency *consists in the person not being ascertained, or not in being, at the time the limitation was made. The remainder now in question is of this class. Unquestionably, when created, it was contingent, because it was uncertain who would take. The example put by Fearne illustrates our case, as is contended. "If an estate be limited to two for life, remainder to the survivors in fee; the remainder is contingent, for it is uncertain who will be the survivor." Fearne on Rem. 9. And this case cannot range with the principles claimed for the defendant in error.

Now, it being clear, that this remainder being, at the time of its creation, contingent, because the persons to take were not ascertained; the question is, did it vest, on the birth of a child of Roger Morris and wife, or remain contingent, until the determination of the particular estate? We maintain the latter proposition. Our view of the question is this. The deed created an estate for life in Morris and wife, with a remainder (not remainders) with an alternative aspect; or, in other words, to be disposed of, or go in one or other of the two ways, according to the events. We think the case precisely the same, as if the words had been "an estate to Morris and wife for life, and to the children of the marriage in fee, if the parents should die, leaving children; otherwise, to the right heirs of Mary Morris. It has been argued, that the object in giving a fee to the children was a high and leading one—that this was the first purpose, and all others were secondary. But the deed will bear no such construction.

It must be observed, that the estate to be secured was the estate of Mary Morris. The object of the settlement was not to divest it, but to keep it in her control, and in the line of descent of her own right heirs. In only two events, is it to be divested from her own right heirs. 1. If she have children living, it is to go to them, who, though her heirs, would take as purchasers. 2. The right to dispose of the estate by will, in case of her dying without issue, and give away the estate to whom she pleased. If she neither left
*76] children, nor made a will, the estate *would go to her own right heirs. In no event, was it to be divested from her right heirs, to the heirs of Morris, unless she should desire to have it so; and thus the true

object of the settlement was no more than to point out two events, in either of which the transmission of the estate to her right heirs should be intercepted. To use popular language, the estate is not vested in the children by the deed; it is to be settled on them, if there should be children surviving the parents. The estate is to move from the line of legal transmission, before it can be vested in the children as purchasers, and the removal is to take place, on the happening of the contingency; this contingency, we say, is nothing other than the living of the children at their parents' death, or their surviving their mother.

Suppose, the grant had been from a stranger to Morris and wife for life; and after their death, to their children, if living; or otherwise, to the right heirs of the wife. Would not this have been a clear case of survivorship? It is stronger, in this case, where Mary Philipse is the grantor, and proposes not to dispossess herself, nor her own right heirs; except in the happening of certain conditions and contingencies. Now, we say, that there is no intent or purpose manifested by this deed, which is not capable of being carried into full effect, according to its nature and import, as a regular remainder. It comes, as has been said, within the regular definition of a remainder; and of a contingent remainder of the fourth class. Preston on Estates, 119, 92, 93, 71, cited, to show that it is a contingent remainder in Mr. Fearne's fourth class.

It is not pretended, that the limitation could not take effect as a remainder. For the rule of law is universal and unbending. "If a limitation can take effect as a remainder, it shall not be construed to take effect under the doctrine of shifting uses." 2 Cruise 350. The doctrine of shifting uses is analogous to that of executory devises. "If there be a freehold to support the remainder, it shall not be construed an executory devise." *Doe* v. *Holmes*, 3 Wils. 243; *Luddington* v. *Kime*, *1 Ld. Raym. 303; 2 Cruise 283; 2 Doug. 757. In 1 Doug. 225, Lord Mansfield [*77 says, "it is perfectly clear and settled, that when an estate can take effect as a remainder, it shall not be construed to be an executory devise or shifting use." This principle precisely meets the case of the plaintiff in error. The same point is settled, 3 T. R. 485; 2 Cruise 285.

The counsel for the defendant in error insist, that this is a vested remainder, at the birth of the first child of Morris and wife; and that we do not attend to the distinction between remainders vesting in interest and vesting in enjoyment. We have endeavored to pay a due regard to this distrinction. A remainder vests in interest, whenever the person is ascertained, and is *in esse*, and has a fixed right of future enjoyment. In the authority cited by the counsel, Fearne 215, the remainder is absolutely limited to a person *in esse*. Now, in the case before the court, it was not absolutely settled, that the children would take; it could not, on the view we have taken of the deed of settlement, be absolutely ascertained, until the parent's death. It is said, here is a person *in esse*, ascertained, and capable to take, if the particular estate falls; and it is, therefore, a vested remainder. But the fallacy of this position is in this. He is capable of taking, that is, he is the person who may take, but he is not capable of taking, because he is not in a condition to take. Mrs. Morris had just as much capacity to take as the children. But who shall take, is not ascertained. No one has a fixed and absolute right, nor can this be the case, until the death of Mrs. Morris.

The facts of the case fully exemplify the application of these principles. Mrs. Morris was married, had children, and had a brother who would be her heir-at-law, should she die leaving no children. Now, if she should have survived her children, her brother would take her estate. Is this not a case of mere survivorship. Preston 7; Cro. Eliz. 630; *Denn* v. *Bagshaw*, 6 T. R. 512; 4 Johns. 61. We say, that as this remainder was capable of taking effect as a regular remainder, it cannot take effect by way of shifting use. The law is fixed upon this point; there is no *principle which *78] would induce the court to give it a construction to operate as a shifting use.

The operation of such a view of the case will show that it cannot be adopted. A son is born: we say, the estate cannot be vested, because it is not ascertained that he will have it. If it does vest, it may defeat the whole purpose of the settlement. The counsel for the defendants in error say, it shall vest; and if events make it necessary, we will divest it, by the doctrine of shiftng uses. What will be the consequences of such a principle? On the birth of a son, the remainder vests; he dies, within a few hours after his birth—where is the estate then? It cannot go back to its original situation—once vested, it is no longer a contingent remainder. It has gone to his paternal uncle, out of the family. Suppose, another child born, how can it go back? It never can by shifting use; for there can be no conveyance by shifting use, which conveyance is not provided in the deed. There is no provision in the deed, that if the estate has been once vested in the right heirs of the children, it shall afterwards be divested. When the estate has once gone to the right heirs of the children, it is irrevocable—the whole force of the deed is spent. Besides, the result would be, that to preserve the fee, to keep it safe, it should be transmitted to the Morris family, and be subject to forfeiture.

If the remainder was contingent, it fell on the attainder and banishment of Roger Morris and wife. This is the clear doctrine of law. *Barland's Case* was like it. That was pronounced an escheat, and there was no attainder, no banishment. If a *scintilla* of the estate was left in the trustees, that passed by the act of attainder and banishment also.

Upon the claim of the plaintiff in error to be paid for his improvements, he argued, that it was questionable whether the terms of the treaty were intended to apply to such a case. This action is not brought to prosecute an interest in lands, by debt or marriage-settlement; but for the mere lands themselves, to which an absolute title is created by a marriage-settlement. The interest meant by the treaty was a lien on lands, not the lands themselves. This is apparent from *an examination of the terms of the *79] treaty. Marriage-settlements are coupled with debts; and an interest in lands by debt can only be a lien; and an interest in lands by marriage-settlement, when found in this connection, can only mean a charge on land by settlement deed. It is to be observed, that the treaty provides for any interest in land, whether by debt, marriage-settlement or otherwise. Now, if this means a claim to the land itself, these things would follow:

1. Suppose, the children had been put into the act of attainder, they could have pleaded the treaty, because they had an interest in the land; that is, a title to the land itself, under the marriage-settlement. This was their "just right," and the confiscation act would have been an impediment.

2. Morris and wife might have sued in their lifetime, for they had an interest in the land under a marriage-settlement. 3. The comprehensive term "or otherwise," would have let in everybody named in the act. This would have repealed all the confiscation acts at once; which the treaty did not do. It only recommended their repeal. There is nothing to operate against the statute but the treaty.

He contended, that the treaty did not apply to this case. Its application could not interfere with the rights of those who had improved the property and added to its value; so that when it was recovered, the party who recovered obtained more than his title originally gave him. The treaty protects the just rights of those who are included in its provisions; but the party who has recovered the land cannot say, he has a just right to the improvements made on the land—not made by an intruder, but by a purchaser of a title which was good during the life of Morris and wife. The laws of New York relative to this subject, would be in force against her own citizens; and it could not have been intended, that British subjects should have rights and privileges greater than our own citizens. The law interposes no impediment to the recovery of the property the grantee of the children of Morris and wife are really entitled to; it allows them to recover the land, in the situation it was at the time of the *settlement, and as it was, if Morris and wife had died a natural, instead of a civil death, in 1779. [*80

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the southern district of New York, in a case where the plaintiff in error was the original defendant. The action is ejectment, brought upon several demises; and among others, upon the demise of John Jacob Astor. The cause was tried upon the general issue, and a verdict rendered for the original plaintiff, upon which judgment was entered in his favor; and the present writ of error is brought to revise that judgment.

Both parties claim under Mary Philipse, who, it is admitted, was seised of the premises in fee, in January 1758. Some of the counts in the declaration are founded upon demises made by the children of Mary Philipse, by her marriage with Roger Morris; and one of whom is upon the demise of John Jacob Astor, who claims as a grantee of the children.

Various exceptions were taken by the original defendant, at the trial, to the ruling of the court upon matters of evidence, as well as upon certain other points of law growing out of the titles set up by the parties. The charge of the court in summing up the case to the jury, is also spread, *in extenso*, upon the record; and a general exception was taken to each and every part of the same, on behalf of the original defendant. And upon all these exceptions the case is now before us.

We take this occasion to express our decided disapprobation of the practice (which seems of late to have gained ground) of bringing the charge of the court below, at length, before this court for review. It is an unauthorized practice, and extremely inconvenient, both to the inferior and to the appellate court. With the charge of the court to the jury, upon mere matters of fact, and with its commentaries upon the weight of evidence, this court has nothing to do. Observations of that nature are understood to be addressed to the jury, merely for their consideration, as the ultimate judges

of matters of fact; and are entitled to no more weight or importance, than the jury, in the exercise of their own *judgment, choose to give them. *81] They neither are, nor are they understood to be, binding upon them, as the true and conclusive exposition of the evidence.(a) If, indeed, in the summing up, the court should misstate the law, that would justly furnish a ground for an exception. But the exception should be strictly confined to that misstatement; and by being made known, at the moment, would often enable the court to correct an erroneous expression, or to explain or qualify it, in such a manner as to make it wholly unexceptionable, or perfectly distinct. We trust, therefore, that this court will hereafter be spared the necessity of examing the general bearing of such charges. It will, in the present case, be our duty, hereafter, to consider, whether the objections raised against the present charge can be supported in point of law.

The original plaintiff claimed title, at the trial, under a marriage-settlement, purporting to be made and executed on the 13th of January 1758, by an indenture of release, between Mary Philipse, of the first part, Roger Morris, of the second part, and Joanna Philipse and Beverly Robinson, of the third part; whereby, in consideration of a marriage intended to be solemnized between Roger Morris and Mary Philipse, &c., she, Mary Philipse, granted, released, &c., unto Joanna Philipse and Beverly Robinson, "in their actual possession now being, by virtue of a bargain and sale to them thereof made, for one whole year, by indenture bearing date the day next before the date of these presents, and by force of the statute for transferring uses into possession, and to their heirs, all those several lots or parcels of land, &c.," upon certain trusts and uses in the same indenture mentioned. This indenture, signed and sealed by the parties, with the usual attestation of the subscribing witnesses (William Livingston and Sarah Williams) to the sealing and delivery thereof, with a certificate of the proof of the due execution thereof by William Livingston (one of the subscribing witnesses), before Judge Hobart, of the supreme court of New York, on the 5th of April 1787, and *a certificate of the recording thereof in the *82] secretary's office of the state of New York, was offered in evidence at the trial, by the plaintiff, and was objected to by the defendant, upon the ground, that the certificate of the execution was not legal and competent evidence, and did not entitle the plaintiff to read the deed in evidence, without proof of its execution. The judge who presided at the trial, overruled the objection, and admitted the deed in evidence. This constitutes the first exception of the defendant. A witness was then sworn, who testified, that the signatures of William Livingston and Sarah Williams to the deed were in their proper handwriting, and that they were both dead. The deed was then read in evidence. The certificate of the probate of the deed before Judge Hobart is in the usual form practised in that state, excepting only that it states with somewhat more particularity than is usual, that William Livingston, one of the subscribing witnesses, &c., being duly sworn, did testify and declare, "that he was present, at or about the day of the date of the said indenture, and did see the within-named Joanna Philipse, Beverly Robinson, Roger Morris and Mary Philipse, sign and seal the same indenture, and deliver it as their and each of their voluntary acts and deeds," &c.

(a) See Evans v. Eaton, 7 Wheat. 356, 426.

We are of the opinion, that under these circumstances, and according to the laws of New York, there was sufficient *primâ facie* evidence of the due execution of the indenture (by which we mean not merely the signing and sealing, but the delivery also), to justify the court in admitting it to be read to the jury; and that in the absence of all controlling evidence, the jury would have been bound to find, that it was duly executed. We understand such to be the uniform construction of the laws of New York, in all cases where the execution of any deed has been so proved, and has been subsequently recorded. The oath of a subscribing witness, before the proper magistrate, and the subsequent registration, are deemed sufficient, *primâ facie*, to establish its delivery as a deed. The objection was not, indeed, seriously pressed at the argument.

The next exceptions of the defendant grew out of the *non-production of the lease recited in the deed of marriage-settlement, and [*83
of the insufficiency of the evidence to establish either its original existence, or its subsequent loss. We do not think it necessary to go into a particular examination of the various exceptions on this head, or of the actual posture, under which they were presented to the court, or of the manner in which they were ruled by the court. Whichever way many of the points may be decided, our opinion proceeds upon a ground, which supersedes them, and destroys all their influence upon the cause. We are of opinion, not only that the recital of the lease in the deed of marriage-settlement was evidence between these parties, of the original existence of the lease, but that it was conclusive evidence between these parties of that original existence; and superseded the necessity of introducing any other evidence to establish it. The reasons, upon which this opinion is founded, will now be briefly expounded. To what extent, and between what parties the recital of a lease, in a deed of release (for we need not go into the consideration of recitals generally), is evidence, is a matter not laid down with much accuracy or precision in some of the elementary treaties on the subject of evidence. It is laid down generally, that a recital of one deed in another, binds the parties and those who claim under them. Technically speaking, it operates as an estoppel, and binds parties and privies; privies in blood, privies in estate, and privies in law. But it does not bind mere strangers, or those who claim by title paramount the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties, by title anterior to the date of the reciting deed. Such is the general rule. But there are cases, in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease, in a deed of release, and in a suit against a stranger, the title under the release comes in question, there, the recital of the lease, in such release, is not *per se* evidence of the existence of the lease. But if the existence and loss of the lease be established by other evidence, there the recital is admissible as secondary *proof, in the absence of more perfect evidence, to establish the con- [*84
tents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself, under such circumstances, materially fortify the presumption from lapse of time and length of possession, of the original existence of the lease. Leases, like other deeds and grants, may be presumed from long possession, which cannot otherwise be explained; and

under such circumstances, a recital of the fact of such a lease, in an old deed, is certainly far stronger presumptive proof in favor of such possession under title, than the naked presumption arising from a mere unexplained possession.[1]

Such is the general result of the doctrine to be found in the best elementary writers on the subject of evidence (See 1 Phil. on Evid. ch. 8, § 2, p. 411 ; 1 Stark. Evid. part 2, § 123, page 301, § 156, page 369 ; Com. Dig. Estoppel, B, C ; Evidence B, 5 ; Matthews on Presump. 195, 206, 269 ; Co. Litt. 352 ; *Mayor of Carlisle* v. *Blamire*, 8 East 487). Peake on Evidence (p. 165) seems, indeed, to have entertained a different opinion ; and to have thought, even as between the parties, the recital was admissible as secondary evidence only, upon proof that the lease was lost. But in this opinion he is not supported by any modern authority ; and it is very questionable, if he has not been misled by confounding the different operations of recitals as evidence between strangers and between parties. It may not, however, be unimportant to examine a few of the authorities in support of the doctrine on which we rely. The cases of the *Marchioness of Anandale* v. *Harris*, 2 P. Wms. 432, and *Shelley* v. *Wright*, Willes 9, are sufficiently direct as to the operation of recitals by way of estoppel between the parties. In *Ford* v. *Gray*, 1 Salk. 285, one of the points ruled was, "that a recital of a lease in a deed of release, is good evidence of such lease, against the releasor and those who claim under him ; but as to others, it is not, without proving that there was such a deed, and it was lost and destroyed." The same case is reported in 6 Mod. 44, where it is said, that it was ruled, "that *the recital of a lease, in a deed of release, is good evidence against the releasor, and those that claim under him." It is then stated, that "a fine was produced, but no deed declaring the uses, but a deed was offered in evidence, which did recite a deed of limitation of the uses, and the question was, whether that (recital) was evidence ; and the court said, that the bare recital was not evidence ; but that if it could be proved that such a deed had been, and lost, it would do, if it were recited in another." This was doubtless the same point asserted in the latter clause of the report in Salkeld ; and thus explained, is is perfectly consistent with the statement in Salkeld, and must be referred to a case, where the recital was offered as evidence against a stranger. In any other point of view, it would be inconsistent with the preceding propositions, as well as with the cases in 2 P. Wms. and Willes.

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In *Trevivan* v. *Lawrance*, 1 Salk. 276, the court held, that the parties, and all claiming under them, were estopped from asserting that a judgment sued against the party, as of Trinity term, was not of that term, but of another term ; that very point having arisen and been decided against the party upon a *scire facias* on the judgment. But the court there held (what is very material to the present purpose), that "if a man makes a lease by indenture, of D., in which he hath nothing, and afterwards purchases D. in fee, and afterwards bargains and sells it to A. and his heirs, A. shall be bound by this estoppel ; and that where an estoppel works on the interest of the lands, it runs with the land, into whose hands soever the lands come ; and an ejectment is maintainable upon the mere estoppel." This decision is

[1] Deery *v.* Cray, 5 Wall. 795.

important in several respects. In the first place, it shows, that an estoppel may arise by implication, from a grant, that the party hath an estate in the land, which he may convey, and he shall be estopped to deny it. (See also *Fairtitle* v. *Gilbert*, 2 T. R. 171; *Helps* v. *Hereford*, 2 B. & Ald. 242; *Rees* v. *Lloyd*, Wightwick 123.) In the next place, it shows, that such estoppel binds all persons claiming the same land, not only under the same deed, but under any subsequent conveyance from the same party; that *is to say, it binds not merely privies in blood, but privies in estate, as subsequent grantees and alienees. In the next place, it shows, [*86 that an estoppel, which (as the phrase is) works on the interest of the land, runs with it, into whose ever hands the land comes. Now, this last consideration comes emphatically home to the present case. The recital of the lease, in the present release, works on the interest in the land; the lease gave an interest in the land, and the admission of it in the release, enabled the latter to operate in the manner which the parties intended. The estoppel, therefore, worked on the interest in the land, not by implication merely, but directly by the admission of the parties. That admission was a muniment of the title, and, as an estoppel, travelled with the title, into whose ever hands it might afterwards come.

The same doctrine is recognised by Lord Chief Baron Comyn in his Digest, Estoppel, B, & E, 10. In the latter place (E, 10), he puts the case more strongly; for he asserts, that the estoppel binds, even though all the facts are found in a special verdict. "But," says he (and he relies on his own authority), "where an estoppel binds the estate, and converts it to an interest, the court will adjudge accordingly; as, if A. leases lands to B. for six years, in which he has nothing, and then purchases a lease of the same land for twenty-one years, and afterwards leases to C. for ten years, and all this is found by verdict; the court wil adjudge the lease to B. good, though it be so only by conclusion." A doctrine similar in principle was asserted in this court, in *Terrett* v. *Taylor*, 9 Cranch 52. The distinction then, which was urged at the bar, that an estoppel of this sort binds those claiming under the same deed, but not those claiming by a subsequent deed, under the same party, is not well founded. All privies in estate by subsequent deed are bound in the same manner as privies in blood; and so indeed is the doctrine in Comyn's Digest, Estoppel B, and in Co. Litt. 352 *a*.

We may now pass to a short review of some of the American cases on this subject. *Denn* v. *Cornell*, 3 Johns. Cas. 174, is strongly in point. There, Lieutenant Colden, in 1775, made his will, and in it recited, that he had *conveyed to his son David, his lands in the township of Flushing, [*87 and he then devised his other estate to his sons and daughters, &c. Afterwards, David's estate was confiscated under the act of attainder, and the defendant in ejectment claimed under that confiscation, and deduced his title from the state. No deed of the Flushing estate (the land in controversy) was proved from the father; and the heir-at-law sought to recover on that ground. But the court held, that the recital in the will, that the testator had conveyed the estate to David, was an estoppel of the heir to deny that fact, and bound the estate. In this case, the estoppel was set up by the tenant claiming under the state, as an estoppel running with the land. If the state or its grantee might set up the estoppel, in favor of their title; then, as estoppels are reciprocal, and bind both parties, it might have been

set up against the state or its grantee. It has been said at the bar, that the state is not bound by estoppel, by any recital in a deed. That may be so, where the recital is in its own grants or patents, for they are deemed to be made upon suggestion of the grantee.(*a*) But where the state claims title under the deed, or other solemn acts of third persons, it takes it *cum onere*, and subject to all the estoppels running with the title and estate, in the same way as other privies in estate.

In *Penrose* v. *Griffith*, 4 Binn. 231, it was held, that recitals in a patent of the commonwealth were evidence against it, but not against persons claiming by title paramount from the commonwealth. The court there said, that the rule of law is, that a deed containing a recital of another deed, is evidence of the recited deed, against the grantor, and all persons claiming by title derived from him, subsequently. The reason of the rule is, that the recital amounts to the confession of the party; and that confession is evidence against himself, and those who stand in his place. But such confession can be no evidence against strangers. The same doctrine was acted upon and confirmed by the same court, in *Garwood* v. *Dennis*, 4 Binn. 314.

*88] In *that case, the court further held, that a recital in another deed was evidence against strangers, where the deed was ancient, and the possession was consistent with the deed. That case also had the peculiarity belonging to the present, that the possession was of a middle nature, that is, it might not have been held solely in consequence of the deed, for the party had another title; but there never was any possession against it. There was a double title, and the question was, to which the possession might be attributable. The court thought, that a suitable foundation of the original existence and loss of the recited deed being laid in the evidence, the recital in the deed was good corroborative evidence, even against strangers. And other authorities certainly warrant this decision. (*b*)

We think, then, that upon authority, the recital of the lease in the deed of release, in the present case, was conclusive evidence upon all persons claiming under the parties, in privity of estate, as the present defendant in ejectment did claim; and, independently of authority, we should have arrived at the same result upon principle; for the recital constitutes a part of the title, and establishes a possession under the lease, necessary to give the release its intended operation. It works upon the interest in the land, and creates an estoppel, which runs with the land against all persons in privity under the releasors. It is as much a muniment of the title, as any covenant therein running with the land. This view of the matter dispenses with the necessity of examining all the other exceptions as to the nature and sufficiency of the proof of the original existence and loss of the lease, and of the secondary evidence to supply its place.

*89] The next question is, supposing the marriage-settlement duly executed, what estate passed by it to Morris and his wife, and their children? The uses declared in the deed are in *the following terms: "to and

(*a*) But see Commonwealth *v.* Pejebscut Proprietors, 10 Mass. 155.

(*b*) See, in addition to the foregoing authorities, Bull. N. P. 254; Gilb. Evid. 100, 101; Bean *v.* Parker, 17 Mass. 591; Wilkinson *v.* Scott, 17 Ibid. 244; Braintree *v.* Hingham, Ibid. 432; Kite's Heirs *v.* Shrader, 3 Litt. 447; 2 Thomas' Co. Litt. 582, note.

for the use and behoof of them, the said Joanna Philipse and Beverly Robinson (the releasees), and their heirs, until the solemnization of the said intended marriage; and from and immediately after the solemnization of the said intended marriage, then to the use and behoof of the said Mary Philipse and Roger Morris, and the survivor of them, for and during the term of their natural lives, without impeachment of waste; and from and after the determination of that estate, then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her or their heirs and assigns for ever. But in case the said Roger Morris and Mary Philipse shall have no child or children begotten between them, or that such child or children shall happen to die during the lifetime of the said Roger and Mary, and the said Mary should survive the said Roger, without issue, then to the use and behoof of her the said Mary Philipse, and her heirs and assigns for ever. And in case the said Roger should survive the said Mary Philipse, without any issue by her, or that such issue is then dead, without leaving issue, then, after the decease of the said Roger Morris, to the only use and behoof of such person or persons, and in such manner and form, as the said Mary Philipse shall, at any time during the said intended marriage, devise the same, by her last will and testament," &c. There are other clauses not material to be mentioned.

The marriage took effect; children were born, and indeed, all the children were born before the attainder in 1779. Mary Morris survived her husband, and died in 1825, leaving her children, the lessors of the plaintiff, surviving her. The conveyance taking effect by the statute of uses, upon a deed operating by way of transmutation of possession, no difficulty arises in giving full effect, by way of springing or shifting or executory uses, to all the limitations, in whatever manner they may be construed. The counsel for the original defendant contend, that the parents take a life-estate, and that there is a remainder, upon a contingency, with a double aspect. That the remainder to the children is upon the contingency of their surviving their parents; and in case of their *non-survivorship, there is an alternative remainder to the mother, which would take effect in lieu of the other. That, consequently, the remainder to the children was a contingent remainder, during the life of their parents; and as such, it was destroyed by the proceedings and sale under the act of attainder and banishment of 1779. The circuit court was of a different opinion; and held, that the remainder to the children was contingent, until the birth of a child, and then vested in such child, and opened to let in after born children; and that there being a vested remainder in the children, at the time of the act of 1779, it stands unaffected by that act. [*90

We are all of opinion, that the opinion of the circuit court upon the construction of the settlement deed was correct. It is the natural interpretation of the words of the limitations, in the order in which they stand in the declaration of the uses. The estate is declared to be to the parents, during their natural lives, and then to the use and behoof of such child or children as may be procreated between them, and to his, her and their heirs and assigns for ever. If we stop here, there cannot be a possible doubt of the meaning of the provision. There is a clear remainder in fee to the children, which ceased to be contingent upon the birth of the first, and opened to let in the after-born children (see *Doe* v. *Perryn*, 3 T. R. 484; *Doe* v. *Martin*,

7 Ibid. 83 ; *Bromfield* v. *Crowder*, 4 Bos. & Pul. 313 ; *Doe* v. *Provoost*, 4 Johns. 61). It is perfectly consistent with this limitation, that the estate in fee might be defeasible, and determinable, upon a subsequent contingency ; and upon the happening of such contingency, might pass by way of shifting executory use (as it might in case of a devise by way of executory devise), to other persons in fee, thus mounting a fee upon a fee. The existence then of such executory limitation over, by way of use, would not change the nature of the preceding limitation, and make it contingent, any more than it would in the case of an executory devise. The contingency would attach, not to the preceding limitation, but to the executory use over.

*91] Let us now consider, what is the effect of the succeeding *clause in the settlement deed, and see, if it be capable, consistently with the apparent intention of the parties, of operating as an alternative remainder, under the double aspect of the contingency, as contended for by the original defendant. The clause is, " but in case the said Roger Morris and Mary shall have no such child or children begotten between them, or that such child or children shall happen to die, during the lifetime of the said Roger and Mary, and the said Mary should survive the said Roger, without issue, then, &c." Now, it is important to observe, that this clause does not attach any contingency to the preceding limitation to the children, but merely states the contingency upon which the estate over is to depend. It does not state, that the children shall not take, unless they survive the parents ; but that the mother shall take, in case she survives her husband, without issue. She then, and not the children, is to take, in case of the contingency of her survivorship. It is applied to her, and not to them. Besides, upon the construction contended for at the bar, if all the children should die, during the lifetime of the parents, leaving any issue, such issue could not take ; and yet a primary intention was to provide for the issue of the marriage. Nor in such a case, could the mother take the estate over ; for that, by the terms of the settlement, could take effect, only in case she survived her husband, without issue. The subsequent clause demonstrates this still more fully ; for her power to dispose of the estate by will, in case her husband survives her, is confined to such survivorship, if " such issue is then dead, without leaving issue."

Another difficulty in the construction contended for is, that the children must survive both the parents, and that if they should survive the mother and not the father, in that event, they could not take ; yet the settlement plainly looks to the event of the death of the mother, without issue, as that alone on which the estate over is to have effect. It is also the manifest intention of the settlement, that if there be any issue, or the issue of any issue, such issue shall take the estate ; which can only be, by construing the prior limitation in the manner in which it is construed by this court. The general rule of law, founded on public policy, is, that limitations of this

*92] *nature shall be construed to be vested, when, and as soon as they may. The present limitation, in its terms, purports to be contingent, only until the birth of a child, and may then vest. So that, whether we consult the language of the settlement, the order of its provisions, the apparent intention of the parties, or the general rule of law, they all lead to the same results ; that the estate to the children was contingent, only until their birth ; and that when the act of 1779 passed, they being

all then born, it was a vested remainder in them and their heirs, and not liable to be defeated by any transfer or destruction of the life-estate.

This view of the settlement deed renders it wholly unnecessary to enter upon any minute consideration of the nature and operation of the attainder act of 1779; since it is clear, that that act, whether it worked a transfer or a destruction of the life-estate of the parents (and in our opinion, the former was its true operation), did not displace the vested remainder of the children, but left it to take effect, upon the regular determination of the life-estate.

In respect to another point raised at the argument, that the power reserved to Roger Morris and his wife, under the marriage settlement, to dispose of the land to the amount of 3000*l.*, so far as it remained unexecuted by them, was, by the attainder act of 1779, transferred to the state, and might be executed by the state; we are of opinion, that it is not well founded. In the first place, we consider this to be a power, personal in the parents, and to be exercised in their discretion, and not in its own nature transferrible. Even under the statutes of treason, in England, powers and conditions, personal to the parties, did not, by an attainder, pass to the crown. 1 Hale's P. C. 240, 242, 244–46; *Jackson* v. *Catlin*, 2 Johns. 248; Sugd. on Powers 174, 176. And it has been settled in New York, that the offence stated in the act, was not, strictly speaking, treason, but *sui generis*, as the terms of the act stated it. *Jackson* v. *Catlin*, 2 Johns. 248. In the next place, the act purports to vest in the state, by forfeiture, the "estates" only of the offenders; and being a *penal act, it is to be construed strictly. A power to dispose of land in the seisin of a third person, [*93 is, in no just sense, an estate in the land itself. In the next place, the deed of the commissioners authorized by the act, purports generally to convey all the estate, right, title and interest of the offenders, in the property conveyed, and does not purport to be any execution of a limited nature and object. In every view, the doctrine contended for is untenable.

Passing over, for the present, some minor exceptions, we may now advance to the consideration of the objections urged against the charge of the court; and these objections, so far as they have not been already disposed of, by the questions growing out of the proofs applicable to the lease, are to the direction of the court upon the point, whether there was or was not a due delivery of the marriage-settlement deed. If that deed was duly delivered, then, no acts done, after the marriage, by the parents, however inconsistent with that deed, could affect the legal validity of the rights of the children, once acquired and vested in them under it. But the point pressed at the trial was, whether it was ever executed and delivered at all, so as to have become an operative conveyance; or whether there was a mere nominal execution by the parties; and whether it was laid aside and abandoned as a conveyance, before the marriage, and never become complete by delivery. There was, at the trial, what the law deemed sufficient *primâ facie* evidence of the delivery of the deed. But certain omissions, as well as certain acts, of the parents, were relied on to rebut this evidence, and to establish the conclusion, that there had been, in point of fact, no such delivery. With the value of these acts and circumstances, as matters of presumption for the consideration of the jury, by way of rebutter of the *primâ facie* evidence, this court has nothing to do; and does not intend to express any opinion thereon. But so far as they bore upon the fact of delivery, they

applied with the same force in relation to the children, as they did in relation to the parents; that is, so far as they were presumptive of the non-delivery of the deed, they furnished the same presumption against the children, that they would against the parents. They were open to explanation and observation, and had just as much weight in *the one case as in the other. They were not acts or omissions which bound the children, supposing them to have any vested interest; but circumstances of presumption, to be weighed, so far as they went, to establish, that no interest ever vested in them, by reason of the non-delivery of the deed of settlement. Whatever might be the inconsistency of these acts with the provisions of that deed, that inconsistency was no otherwise important, than as it might furnish a presumption against the existence of the deed as an operative conveyance. It is in reference to these considerations, that the argument at the bar has insisted upon objections to the charge of the judge at the trial; and in examining the charge on this head, difficulties have occurred to the court itself.

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The circumstances principally relied upon were, the dormancy of the settlement deed from 1758 to 1779; the omission to record it until 1787; and the supposed inconsistency of certain deeds executed by the parents, between 1758 and 1773, with the title under that settlement.

In respect to the dormancy of the deed, the charge is as follows: "It has been said, that this is a dormant deed, never intended by the parties to operate; that it had slept until after the attainder, and until the year 1787. There is weight in this; or rather, there would be weight in it, if the parties in interest had slept on their rights. But who has slept? Morris and wife, Beverly Robinson and Joanna Philipse, the trustees. They are the persons that have slept, and not the children. This does not justify so strong an inference against the children, as if they had slept upon their rights. Is it fair in such a case to draw any inference against the children?" To two of the judges, this appears to amount to a direction, that in point of law, the dormancy of the deed, during this period, not having been the act of the children, does not furnish the same presumption of the non-delivery against them, as it would against the parents; and that to give the presumption from this circumstance full effect, it ought to appear, that the children had slept on their rights; that is, had acquiesced in such dormancy of the title. To those *judges, this direction seems erroneous, because the presumption is the same, whether the children acquiesced or not.

*95]

In respect of the non-recording of the deed, the charge proceeds to state. "It has also been urged, that this deed was not recorded until 1787. Is there anything in this fact, that should operate against the children? They were minors for the greater part of the time, down to the year 1787, when it was recorded, &c." It seems to the same judges, that the same distinction as to the effect of the presumption, in the case of the parents and that of the children, pervades this, as it does the former statement.

As to the inconsistency relied on, the introductory part of the charge is as follows: "It is also said, that Morris and his wife have done acts inconsistent with the deed. In weighing the force and effect of these acts, you must bear in mind, the time when the interest vested in the children under this deed; for after that interest vested, none but themselves could divest it," &c. It is certainly true, that after the interests was once vested

in the children, no act, however inconsistent with the deed, done by the parents, could affect that interest. But the point of view, under which the argument was addressed to the court, was, that such inconsistency furnished ground for a presumption of a non-delivery of the deed; and in this point of view, it seems to the same judges, that this part of the charge relies too much upon a distinction between the parents and children, as to the effect of the presumption. In another part of the charge, the judge very properly puts all these acts of supposed inconsistency upon the true ground: what was the interest of the parties in these acts? and whether they were done in hostility to the deed, supposing it inoperative, or as acts of parents acting beyond the deed, for what they might deem beneficial to their children, and for the interest of all concerned in the estate?

To the other judges, however, these objections do not appear to be well founded, when taken in connection with the general scope and object of the remarks of the judge, in his charge upon this branch of the case. The purpose, for which these omissions and acts of alleged inconsistency in Morris were offered, had been explicitly stated. The jury had been *told, [*96
that they were relied upon to rebut the evidence of delivery of the deed, which had been offered on the part of the plaintiff below. Before entering upon any comments on this evidence, and to prepare the minds of the jury for the due application of the remarks, the judge observed, "What, then, is the evidence, to bring the fact of delivery into doubt? What is the reasonable presumption to be drawn from the facts proved? keeping in mind, that this is evidence on the part of the defendant, to disprove the presumption of law, from the facts proved, that the deed was duly delivered." The jury were, therefore, fully apprised of the bearing of these circumstances, and the purpose for which they were offered. And they could not but have understood that it was submitted to them, to judge of the weight to which they were entitled, otherwise, the evidence would have been excluded as inconsistent; and the jury must have understood, that they did weigh to some extent against the children; for when speaking of the objection, that the deed had lain dormant for a number of years, the jury were told, that this circumstance did not justify so strong an inference against the children, as if they had slept upon their rights; thereby admitting, that it was open to an inference against them, but not so strong as if they had been of age, and the life-estate of their parents ended, and they, during that delay, had been in a situation to assert their rights. And should it be admitted, that the judge erred in the suggestion, it would amount to no more than an intimation of his opinion upon the weight of evidence. The same remark will apply to every part of the charge, when the rights of the children are spoken of, in contradistinction to those of their parents. They refer to the delivery of the deed. Thus, with respect to the delay in recording the deed, the judge puts the question to the jury in this form: "Is there anything in the fact, that it was not recorded, from which an inference can be drawn against the deed?" Pointing the attention of the jury to the fact of delivery, and not to any controlling distinction between the interest of the children and their parents, the bearing of the remarks of the judge with respect to the various deeds executed by Morris and his wife, *and which are alleged to have been inconsistent with the marriage- [*97
settlement, could not have misled the jury. It is true, they were

told, that in weighing the force and effect of those acts, they must bear in mind the time when the interest vested in the children under the deed. This remark must have been understood by the jury, as subject to their finding with respect to the delivery of the deed; and not as expressing an opinion, that the interest of the children vested at the date of the deed. For, if that had been understood as the opinion of the judge, the evidence, as before observed, would have been inadmissible, and the jury would have been told, that it could have no bearing upon the case. Instead of which, it had been before explained to them, that the object of this evidence was, to disprove the delivery of the marriage-settlement deed, and not to divest any interest that had become vested in the children. And in the conclusion of this part of the charge, the judge tells the jury, "These are all the circumstances relied upon as being inconsistent with the settlement deed, and these are questions for you. I do not wish to interfere with your duties. It is for you to say, whether the deed was duly executed and delivered."

The jury had been told, in a previous part of the charge, that delivery of the deed was essential, in order to pass the title, and that this was a fact for them to decide; and it was, in conclusion, left to them, in as broad a manner as could be done. The whole scope of the charge on this point, left the evidence open for the full consideration of the jury, and the remarks of the judge are no more than a mere comment on the weight of evidence, and as such were adressed to the judgment of the jury, and not binding upon them. If a decided opinion had been expressed by the judge upon the weight of evidence, it is not pretended, that it would be matter of error, to be corrected here. But the charge does not even go thus far; and it is believed by a majority of the court, that it is not justly exposed to the criticisms which have been applied to it.

In respect to that part of the charge which comments upon the various *98] deeds made by the parents, which were *relied upon as inconsistent with the settlement deed, no objection has occured to any member of the court, except as to the comments on the deeds to Hill and Merritt, and the life leases to other persons. In respect to the deeds to Hill and Merritt, one judge is of opinion, that the statement, "that these deeds are not inconsistent with the settlement deed," is incorrect in point of law, because those deeds contained a convenant of seisin; and under the settlement deed, although Morris and wife had a right to convey the land, they were not in the actual seisin of it, and therefore, such a convenant was inconsistent with the settlement deed. But the other judges are of opinion, that this part of the charge is correct, because Morris and wife had, under the settlement deed, a power to convey in fee, lands to a much greater amount; that it was not necessary to recite in their deeds of sale their power to sell; and that the covenant of seisin, being a usual muniment of title, and not changing in the slightest degree the perfection of the title actually conveyed, did not, in point of law, whether their was a seisin or not, create any repuguancy between those deeds and the settlement deed. If the parties had, in those deeds, recited the settlement deed and the power to convey, and had then conveyed, with the same convenants, the deeds could not have been deemed, in point of law, inconsistent with the power under the settlement deed; but would have been deemed a good execution of the power, and the covenants a mere additional security for the title.

The same judge is also of opinion, that the life leases, which were given in evidence, not having been made in pursuance of the power in the marriage-settlement deed, are, by their terms and effect, so inconsistent with it, as to authorize the jury to find against its delivery on this ground alone; and that the circuit court erred in charging the jury, that the effect and operation of these leases was not a subject for their inquiry, and that their bearing on the cause depended on the intention of Morris. To the other judges, however, the charge in this particular is deemed unexceptionable. The judge decided, that these life leases were unauthorized by the power; and the *question was, what influence they ought to have upon the point of non-delivery of the settlement deed, they not deriving any validity or force under it. Were they acts of ownership over the property, which could not be explained, consistently with the existence of the settlement deed? or were they acts which, though unauthorized, might fairly be presumed to be done, without any intention to disclaim the legal title under that deed? In estimating this presumption, it is to be considered, that these were the acts of parents, and not of strangers? That it does not necessarily follow, because parents do unauthorized acts in relation to the estates of their children, they intend those acts as hostile or adverse to the rights of their children. Parents may, from a sincere desire to promote the interest of their children, and to increase the value of their estates, make leases for the clearing and cultivation of their estates, which they know to be unauthorized by law, but which, at the same time, they feel an entire confidence will be confirmed by their children. The very relation in which parents stand to their children, excuses, if it does not justify such acts. It will be rare, indeed, if parents may not confidently trust their acts, done *bonâ fide* for the benefit of their children, will, from affection, from interest, from filial reverence, or from a respect to public opinion, be confirmed by them. The acts of parents, therefore, exeeding their legal authority, admit of a very different interpretation from those of mere strangers. The question in all such cases is, what were the intentions and objects of the parents? Did they act upon rights, which they deemed exclusively vested in themselves? or did they act with a reference to the known interests vested in their children? It appears to the majority of the judges, that the circumstance of the life leases was properly put to the jury, as a question of intention; and that the jury were left at full liberty to deduce the proper conclusion from it. [*99

The next point is, as to the improvements claimed by the tenant in ejectment under the act of New York of the 1st of May 1786. That act declares, "that in all cases of purchases made of any forfeited estates, in pursuance of any of the laws directing the sale of forfeited estates, in which any *purchaser of such estates shall be evicted by due course of law, in the manner mentioned, &c., such purchaser shall have like remedy for obtaining a compensation for the value of the improvements by him or her made on such estate, so by him or her purchased, and from which he or she shall be so evicted, as is directed in and by the first clause in the" act of the 12th of May 1784. The latter act declares, that the person or persons having obtained judgment, shall not have any writ of possession, or obtain possession of such lands, &c., until he, she or they shall have paid to the person or persons possessing title thereto, derived from or under the people of the state, the value of all improvements made thereon, after the passing [*100

of the act. Neither the act of 1784 nor of 1786, purports to give a universal remedy for improvements, in cases of eviction by title paramount; but is confined to cases of confiscated estates, where the title comes by sale from the state. However operative it may be as to citizens of the state (on which it is unnecessary to give any opinion), the question before us is, whether such improvements can be claimed in this case, consistently with the treaty of peace of 1783?

By the fifth article of that treaty, it is agreed, "That all persons who have any interest in confiscated lands, either by debts, marriage-settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights." By the sixth article, it is agreed, that, "there shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in the war; and that no person shall on that account suffer any future loss or damage, either in his person, liberty or property." We think, that the true effect of these provisions is, to guaranty to the party, all the rights and interests which he then had in confiscated and other lands, in the full force and vigor which they then possessed. He was to meet with no impediment to the assertion of his just rights; and no future confiscations were to be made of his interest in any land. His just rights were, at that time, to have the estate, whenever it should fall into possession, free of all incumbrances or *liens for improvements created by the tenants for life, or by purchasers under the state. To deny him possession, or a writ of possession, until he should pay for all such improvements, was an impediment to his just rights, and a confiscation, *pro tanto*, of his estate in the lands. The argument at the bar supposes, that there is a natural equity to receive payment for all improvements made upon land. In certain cases, there may be an equitable claim; but that in all cases, a party is bound, by natural justice, to pay for improvements made against his will, or without his consent, is a proposition which we are not prepared to admit. We adhere to the doctrine laid down on this subject in *Green* v. *Biddle*, 8 Wheat. 1. We are of opinion, that the claim for improvements in this case is inconsistent with the treaty of peace, and ought to be rejected.

*101]

A number of objections, of a minor nature, are spread upon the record; such as exceptions to the admission of evidence to prove the common practice to convey lands by way of lease and release, and the admission of the journals of the legislature; to the admission of the act of compromise between the state and John Jacob Astor; to the sufficiency of the title of Astor under the deed of the children of Morris and wife, to extinguish their title, &c. To all these we think it unnecessary to make any further answer, than that they have not escaped the attention of the court; and that the court perceive no valid objection to the ruling of the circuit court respecting them. Upon the whole, it is the opinion of this court, that the judgment of the circuit court be and the same is hereby affirmed, with costs.

Judgment affirmed.

Ex parte Martha Bradstreet: In the Matter of James Jackson, *ex dem.* Martha Bradstreet, *v.* Daniel Thomas.

Bill of exceptions.

A rule had been granted on the district judge of the northern district of New York, to show cause why he did not sign a bill of exceptions in a case tried before him: The court said, that on the day of the return of the rule, the district judge has a right to show cause; whether the person who obtained the rule moved or not, he had a right to have the rule disposed of.

On the trial of a cause in the district court of the United States for the northern district of New York, exceptions were taken to opinions of the court delivered in the course of the trial; and some time after the trial was over, a bill of exceptions was tendered to the district judge, which he refused to sign, objecting to some of the matters stated in the same, and at the same time, altering the bill then tendered, so as to conform to his recollection of the facts of the case, and inserting in the bill all that he deemed proper to be contained in the same; which bill of exceptions, thus altered, was signed by the judge. On the motion of the party who had tendered the bill of exceptions, a rule was granted on the district judge, to show cause why he did not sign the bill of exceptions as first tendered to him; to this rule, the judge returned his reasons for refusing to sign the bill, so tendered, and stating, that he had signed such a bill of exceptions as he considered correct.

This is not a case in which the judge has refused to sign a bill of exceptions; the judge has signed such a bill as he thinks correct; the object of the rule is to oblige the judge to sign a particular bill of exceptions which has been offered to him; the court granted the rule to show cause; and the judge has shown cause, by saying he has done all that can be required from him, and that the bill offered is not such a bill as he can sign; the court cannot order him to sign such a bill.[1]

A return by the district judge to a rule to show cause, need not be sworn to by him. p. 103.

The law requires that a bill of exceptions should be tendered at the trial; if a party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it; a practice to sign it after the term, must be understood to be matter of consent between the parties; unless the judge has made an express order in the term, allowing such a period to prepare it.[2]

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[1] In Ex parte Crane, 5 Pet. 190, it was determined, that a *mandamus* will lie, to compel the signing of a bill of exceptions. The same point was ruled in New York, in People *v.* Judges of Westchester, 2 Johns. Cas. 118; People *v.* Judges of Washington, 1 Caines 511; Sikes *v.* Ransom, 6 Johns. 279; Delavan *v.* Boardman, 5 Wend. 132. But not to settle it in a particular manner. Ex parte Tweed, 1 Hun 252. So, a *mandamus* will lie to the judges of the common pleas, commanding them to amend a bill of exceptions, according to the truth of the case; but a return *quod non ita est*, will be sufficient. Sikes *v.* Ransom, *ut supra.* See People *v.* Baker, 35 Barb. 105. In Pennsylvania, however, the writ of *mandamus* will not lie. In Drexel *v.* Man, 5 W. & S. 397, Chief Justice Gibson said, "It is strange that the writ of *mandamus* should be supposed to give remedy in a case like the present. It is true, that it does so in New York, as appears by The People *v.* The Judges of Washington county, 2 Caines 97, the secret of which is, that the matter is regulated by a particular statute of the state. I have seen no case, English or American, which indicates that it may be used for the purpose, as a prerogative writ." (But see Ex parte Crane, 5 Pet. 190.) "In England, it certainly may not; for we are told by Lord Coke (2 Inst. 426), that the proper remedy is a writ specially framed on the statute of West. II.; and, accordingly, we find a form for it in the Register, p. 182, setting forth the circumstances of the case, and commanding the judges, if they be true, to affix their seals to the bill. If they return, that they are untrue, the superior court proceeds no further, but leaves the complainant to his action for a false return, in which their truth is tried according to the course of the common law. Such a remedy certainly resembles an alternative *mandamus;* still, it is not a prerogative writ, but specific, grounded in a statute." Such a writ was issued on Conrow *v.* Schloss, 55 Penn. St. 28, where it was also determined, that if the judge confess the exception, he will be compelled to sign the bill, without regard to the materiality of the exception. The judge's return to the writ, however, is conclusive, and cannot be contravened. Haines *v.* Commonwealth, 99 Penn. St. 410.

[2] Brown *v.* Clarke, 4 How. 4; Phelps *v.*

Ex parte Bradstreet.

At January term 1829, on motion of Mr. *Key*, and on affidavit filed, the court granted a rule on the Honorable Alfred Conklin, district judge of the Northern District of New York, to show cause why he did not sign a certain
*103] bill of exceptions tendered to him on the part of the plaintiff, in *the case of James Jackson *ex dem.* Martha Bradstreet *v.* Daniel Thomas ; which cause had been tried before him, and a verdict given for the defendant. The rule was made returnable on the second Monday in January of this term. The same rule was obtained in the case of Jackson *ex dem.* Martha Bradstreet *v.* Joseph Kirkland.

To this rule the district judge, on the 10th of December 1829, returned, with the bills of exceptions which had accompanied the copy of the rule as served upon him, his reasons for refusing to comply with the demand of the plaintiff.

On the 27th day of February, the return-day of the rule having passed, *Storrs*, after notice to Mrs. Bradstreet, moved to take up the return of Judge Conklin. He said, that many important titles depended upon the decision of the cases in which the rules had been granted, and one of these cases was upon the calendar of this court. The return has been made, and the district judge has obeyed the mandate of this court. The application is also submitted at the instance of the district judge, who is not willing to stand before the court without a decisive inquiry into his proceedings.

Key objected to the court taking up the case, on the application of any one but Mrs. Bradstreet. It was for her to call it up, during the term, and to determine at what time; it will depend on the result of the case on the calendar, what course she will pursue.

Marshall, Ch. J.—The district judge of the northern district of New York has been called upon by a rule of this court to show cause ; and on the day of the return of the rule, he has a right to show cause, whether the person who obtained the rule moves or not. There is no question but that Judge Conklin has a right to have the rule disposed of.

The case went off until the following motion-day, by agreement. Afterwards, Mr. *Storrs* said, the return to the rule had been made by Judge Conklin in his official capacity ; he had not sworn to it ; but if this shall be required by the court, it will be done.

*104] *Marshall, Ch. J.—The judge need not swear to the return of the reasons why he refused to sign the bill of exceptions.

The return set forth, that at the time of the trial of the cause mentioned in the rule, no bill of exceptions was tendered, nor were any exceptions reduced to writing, except by himself, in the minutes which he kept of the trial ; unless, which was probable, the counsel also noted them in their minutes. Several weeks after the trial, the amended bill of exceptions, accompanied by a paper containing numerous amendments proposed by the counsel for the defendant, was delivered to him for correction ; and he

Mayer, 15 Id. 160; Dredge *v.* Forsyth, 2 Black 563 ; Kellogg *v.* Forsyth, Id. 571. The judge is not bound to seal a bill of exceptions, unless presented to him for settlement, within the time prescribed by the rules of court. Haines *v.* Commonwealth, 99 Penn. St. 410. And see Greenway *v.* Gaither, Taney Dec. 227.

thereupon proceeded, with due deliberation, and with the aid of his notes of the trial, to correct and settle the same, in conformity, as nearly as possible, with the truth of the case. No counsel appeared for either party, and no application was made for some time, for the bill of exceptions, by the counsel in the cause. In an amended return, the district judge stated, that some correspondence had taken place with Mrs. Bradstreet, in relation to alterations proposed to be made in the bill of exceptions; and in an interview with her, nothing was said by her, which was understood as an intimation of her intention or wish to be heard further upon the subject.

The return then proceeded to state, that in the bill of exceptions, as proposed by Mrs. Bradstreet, many alterations had been made in terms and language, of little importance, and matters were introduced as having occurred on the trial, which did not occur, circumstances are misstated, and opinions are imputed to him which he did not express; and thus many parts of the amendments proposed by the plaintiff were untrue; and that, therefore, the same were not signed by him. The particulars to which these representations referred were stated in the return.

The return, after stating that in reference to an instrument of writing produced in the cause, in the bill of exceptions as signed by the judge, a brief description of the instrument was inserted, instead of the whole, *in extenso*, which had been done in conformity with the established rules of practice, requiring only so much of the evidence offered upon the trial *as is sufficient fully and fairly to present every question of law [*105 embraced in the exception, proceeded—

"In conclusion, I have only to add the expression of my conviction, that although this rule of law has by no means been rigidly applied in abridging this bill, it has, in no instance, been departed from, to the prejudice of the plaintiff. If, however, on a particular examination of the bill and amendments (without which, I may be permitted to remark, it is impossible to form a just conclusion), your honorable court should, in regard to the documentary evidence, entertain a different opinion, I shall most cheerfully obey its mandate to correct the supposed error."

Storrs, on a motion to discharge the rule, stated, that this court would never require a judge to sign a bill of exceptions which he considers incorrect. The court will adopt another course, and will leave it to the judge to re-examine the bill, and to do what he shall consider proper. The bill of exceptions was not made out and offered to the judge at the trial, which is the practice in New York, nor was it presented to him until a long time afterwards; and it was then corrected according to his notes. The true course would be, to refer the matter back to the judge; and let him appoint a time, on notice to both parties, to appear before him, and revise the bill of exceptions. This the judge is perfectly willing to do.

Mr. Storrs stated, that he was the counsel for the parties in interest in the case, and he was desirous to see that their interests should not suffer. He also wished to present the case on the part of Judge Conklin, and ask the attention of the court to it.

Key, in opposition to the motion, contended: 1. That this court would consider the bills of exceptions as duly tendered, inasmuch as the judge, though he states that they were not tendered during the term, does not

allege that they were out of time ; and if, by the general practice of the court, or by consent, they were written during the trial, and presented afterwards, which is not denied, they ought to be considered in time. 6 Johns. 279 ; 2 Tidd 788. That this had been agreed to, he inferred *from the *106] return made by the district judge, and from the affirmance of facts in the affidavit, not denied in the return. 2. This court will now look at the bills of exception and the return ; and whatever parts of the bills have been objected to, and the objections justified by the return, they will order to be certified ; and such facts as have been objected to, and the objections not sustained by the return, the judge will also be called on to certify. 2 Ld. Raym. 1008. Unless this is done, the remedy by *mandamus* is nugatory. It was unimportant as to the manner in which the omissions should be required to be certified. This might be done in any mode most respectful to the judge.

The intimation of the counsel for the district judge, that the bills of exception may be settled by a hearing before the judge, on notice, would probably remove all the difficulties in the case, if the rule should now be discharged.

Marshall, Ch. J., delivered the opinion of the court.—The court is unanimously of opinion, that the rule ought not to be granted. This is not a case in which the judge has refused to sign a bill of exceptions. The judge has signed such a bill as he thinks correct. If the court had granted a rule upon the district judge to sign a bill of exceptions, the judge could have returned that he had performed that duty. But the object of the rule is, to oblige the judge to sign a particular bill of exceptions, which had been offered to him. The court granted the rule to show cause ; and the judge has shown cause, by saying he has done all that can be required from him ; and that the bill offered to him is not such a bill as he can sign. Nothing can be more manifest, than that the court cannot order him to sign such a bill of exceptions. The person who offers a bill of exceptions ought to present such a one as the judge can sign. The course to be pursued is, either to endeavor to draw up a bill, by agreement, which the judge can *sign ; or to prepare a bill to which there will be no objection, and *107] present to the judge.

The court will observe, that there is something in this proceeding which they cannot, and which they ought not to sanction. A bill of exceptions is handed to the judge, several weeks after the trial of the cause, and he is asked to correct it from memory. The law requires that a bill of exceptions should be tendered at the trial. But the usual practice is, to request the judge to note down in writing the exceptions, and afterwards, during the session of the court, to hand him the bill of exceptions, and submit it to his correction from his notes. If he is to resort to his memory, it should be handed to him immediately, or in a reasonable time after the trial. It would be dangerous, to allow a bill of exceptions, of matters dependent on memory, at a distant period, when he may not accurately recollect them ; and the judge ought not to allow it. If the party intends to take a bill of exceptions, he should give notice to the judge at the trial ; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to sign it after the term, must be under-

stood to be a matter of consent between the parties, unless the judge has made an express order in the term, allowing such a period to prepare it.

It is ordered by the court, that the *mandamus* as prayed for be and the same is hereby refused; and that the rule heretofore granted in this cause be and the same is hereby discharged.

Rule discharged.

Ex parte JOHN L. TILLINGHAST, Esquire. [*108

Attorneys.

That a counsellor practising in the highest court of the state of New York, in which he resides had been stricken from the roll of counsellors of the district court of the United States for the northern district of New York, by the order of the judge of that court, for a contempt, does not authorize this court to refuse his admission as a counsellor of this court.

This court does not consider the circumstances upon which the order of the district judge was given within its cognisance; or that it is authorized to punish for a contempt, which may have been committed in the district court of the northern district of New York.

Hoffman moved the Court for the admission of John L. Tillinghast, as a counsellor of this court. He stated, that he was a counsellor of court of chancery of the state of New York and of the supreme court of that state, and was, at this time, in the full exercise and enjoyment of the rights and privileges of a counsellor of those courts. He exhibited the certificates, in due form, of the time of the admission of Mr. Tillinghast, to practice in the courts, and that he is now a practitioner of the same. He was enabled to say, from knowing the opinions of three of the judges of the supreme court of New York, that Mr. Tillinghast was respected, and had their confidence.

It was understood, that the rule of this court was, to admit persons who practised in the highest courts of the several states, and Mr. Tillinghast was therefore completely within the rule. It would be disingenuous, not to refer to a circumstance which had occurred in relation to Mr. Tillinghast, in the district court of the United States for the northern district of New York. In that court, he had been stricken off the roll of counsellors of the court, by order of the district judge.

If the causes of that proceeding are now to be inquired into, under the relations which existed between him and Judge Conklin, and the respect he entertained for him, Mr. Hoffman said, he should not interfere. But this court will not look into this circumstance; and the mere fact of an *individual having been stricken off the roll, would not in itself induce the court to refuse his admission here. This might occur at the [*109 request of the individual, or it might be the effect of his acceptance of an office which disqualified him to practice; as that of marshal. Upon this fact alone, the court will not reject this application.

But if the court will go into an examination of the circumstances of the case, Mr. Tillinghast is fully prepared, and willing to proceed; in which he will have the aid of other counsel. He is desirous that this court would hear the facts and decide upon them, and he expects to be able, in the investigation, fully to vindicate himself from all reproach.

It is understood, that on a former occasion, when a *mandamus* was applied for to the district judge, to restore the applicant to the roll of coun-

sellors, this court would not go into an examination of the facts of the case, and they may not now be disposed to do it.[1] It might also be objected to it, that it would be *ex parte*, and will give to Judge Conklin no opportunity to be heard on the matter.

The certificates of the admission of Mr. Tillinghast to practice in the highest courts of New York, and of his now being a counsellor of those courts, were then filed by Mr. Hoffman.

Marshall, Ch. J.—The court has had under its consideration the application of Mr. Tillinghast for admission to this bar. The court finds that he comes within the rules established by this court. The circumstance of his having been stricken off the roll of counsellors of the district court of the northern district of New York, by the order of the judge of that court, for a contempt, is one which the court do not mean to say was not done for sufficient cause, or that it is not one of a serious character; but this court does not consider itself authorized to punish here for contempts which may have been committed in that court. When, on a former occasion, a *mandamus* was applied for to restore Mr. Tillinghast to the roll of counsellors of the
*110] district *court, this court refused to interfere with the matter; not considering the same within their cognisance. The rules of this court having been in every respect complied with, Mr. Tillinghast must be admitted a counsellor of this court.

On consideration of the motion made by Mr. *Hoffman*, it is ordered by the court, that John L. Tillinghast, Esq., of the state of New York, be admitted as an attorney and counsellor of this court, and he was sworn accordingly.

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*111] Boyce & Henry, Plaintiffs in error, *v.* Timothy Edwards, Defendant in error.

Bills of exchange.—Promise to accept.—Interest.—Lex loci contractûs.

Action on two bills of exchange drawn by Hutchinson, on B. & H., in favor of E., which the drawees, B. & H., refused to accept, and with the amount of which bills, E. sought to charge the defendants as acceptors, by virtue of an alleged promise, before the bills were drawn.

The rule on this subject is laid down with great precision by this court, in the case of Coolidge *v.* Payson, 2 Wheat. 75, after much consideration, and a careful review of the authorities; that a letter written, within a reasonable time, before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill in the credit of the letter, a virtual acceptance, binding on the person who makes the promise.[2] p. 121.

Whenever the holder of a bill seeks to charge the drawee as acceptor, upon some occasional or implied undertaking, he must bring himself within the spirit of the rule laid down in Coolidge *v.* Payson. p. 121.

The rule laid down in Coolidge *v.* Payson requires the authority to be pointed at the specific bill or bills to which it is intended to be applied, in order that the party who takes the bill upon the credit of such authority may not be mistaken in its application. p. 121.

The distinction between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept, seems not to have been attended to; but the evidence necessary to support the one or the other, is materially different. To maintain the former, the promise must be applied to the particular bill alleged in the declaration to have been accepted; in the latter,

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[1] The *mandamus* was refused, on the ground of want of jurisdiction. See 19 How. 13.

[2] See notes to Coolidge *v.* Payson, 2 Wheat. 66.

the evidence may be of a more general character; and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of the promise. p. 122.

Courts have latterly learned very much against extending the doctrine of implied acceptances, so as to sustain an action upon a bill; for all practical purposes, in commercial transactions in bills of exchange, such collateral acceptances are extremely inconvenient, and injurious to the credit of bills; and this has led judges frequenntly to express their dissatisfaction that the rule has been carried so far as it has; and their regret that any other act, than a written acceptance on the bill, had ever been deemed an acceptance. p. 122.

As it respects the rights and the remedy of the immediate parties to the promise to accept, and all others who may take bills upon the credit of such promise, they are equally secure and equally attainable, by an action for the breach of the promise to accept, as they would be by an action on the bill itself. p. 123.

The contract to accept the bills, if made at all, was made in Charleston, South Carolina; the bills were drawn in Georgia, on B. & H., in Charleston, and with a view to the state of South Carolina for the execution of the contract: the interest is to be charged at the rate of interest in South Carolina.[1] p. 123.

*Error to the Circuit Court of South Carolina. An action of *assumpsit* was brought in the circuit court of South Carolina, by [*112 Timothy Edwards, a citizen of the state of Georgia, against Boyce & Henry, merchants of Charleston, upon two bills of exchange, drawn by Adam Hutchinson, at Augusta, Georgia, on the plaintiffs in error, dated the 27th of February 1827, payable sixty days after sight, amounting together to $4431. The bills were duly protested for non-acceptance and non-payment.

The plaintiff in the circuit court gave in evidence a letter from Boyce, Johnson & Henry, dated at Charleston, Marth 9th, 1825.

"Mr. Edwards:—Mr. Adam Hutchinson, of Augusta, is authorized to draw on us for the amount of any lots of cotton he may buy and ship to us, as soon after as opportunity will offer; such drafts will be duly honored."

He also gave in evidence the following notice, signed by Kerr Boyce and George Henry, which was published in the Charleston newspaper, on the 28th of March 1825.

"The copartnership heretofore existing under the firm of Boyce, Johnson & Henry, is this day dissolved, by the death of Mr. Samuel Johnson, Jr. The business will be conducted in future by the subscribers, under the firm of Boyce & Henry, who improve this opportunity of returning thanks to their friends for their liberal patronage, and hope by assiduity and attention to merit a continuance of their support."

The plaintiff also gave in evidence a letter from Boyce & Henry to Adam Hutchinson, dated September 14th, 1826, which contained these words. "But in the meantime, if you can, buy cotton on good terms, you are at liberty to draw as before." Also a letter from the same to the same, dated the 16th of September 1826, advising him of the sale of a large parcel of cotton, and saying, "we wrote you last mail, with authority to draw on us as usual, if you could buy to make here at eight to nine cents." Also another letter from the same to Adam Hutchinson *of January 4th, 1827. "Your [*113 favor of the 1st instant is received. You have entirely mistaken us, as to our losing confidence in you; our idea is this, we are unable to keep so large a sum beyond our control, as the amount which is now standing on our books. For instance, should any accident happen to you, where would be

[1] S. P. United States Bank *v.* Daniel, 12 Pet. 33; Andrews *v.* Pond, 13 Id. 65; Bank of Illinois *v.* Brady, 3 McLean 268.

the money to pay your drafts which are now on us and are accepted? Should you die, the cotton or money would, of course, be held by whoever manages your estate. But to come to the point; we feel every disposition to give you every facility in our power; you are, therefore, at liberty to draw on us, when you send the bill of lading. We do not put you on the footing of other customers, for we do not allow them to draw for more than three-fourths, in any instance. You may draw for the amount," &c. Also a letter of February 17th 1827, acknowledging the receipt of the bill of lading for 158 bales of cotton, and stating as follows, "your bills have been presented which you gave to Timothy Edwards, which we would have accepted, had we heard from you concerning the first bill," &c.

The plaintiff then gave in evidence a letter from Adam Huchinson of February 7th 1827, to Boyce & Henry, saying, "the cotton by the Edgefield, you will please have re-weighed and put into store, as I do not wish it sold, until the draft drawn against it becomes due. I am shipping by the Commerce 119 bales cotton; it cost $3320," &c. Also a letter of the 9th February 1827, from Adam Hutchinson to Boyce & Henry: "After writing you by last mail, I bought 39 bales of cotton more, and shipped it per the Commerce, &c.: the 39 bales cost here $1111, &c. I yesterday drew upon you two drafts for $2331, and for $2100, at sixty days, in favor of Mr. T. Edwards, which please honor."

*114] The defendants in the circuit court objected to the *reading in evidence the letters from Boyce, Johnson & Henry, to Timothy Edwards, in March 1827; also to the letters from Boyce & Henry; and from Adam Hutchinson to Boyce & Henry; but the objections were overruled by the court.

The court stated to the jury, that the letter of Boyce, Johnson & Henry of the 9th March 1825, in connection with other evidence in the cause, was sufficient to charge the defendants in the circuit court, as acceptors. The court relied principally on the fact, that Boyce & Henry, on the 12th April 1825, a few days after they had announced the dissolution of the copartnership of Boyce, Johnson & Henry, had credited themselves in the account-current which accompanied the bill of exceptions, with the sum of $1313.58, due by Adam Hutchinson to the late firm; thus identifying the firms, and continuing the responsibility under the letter of guaranty to the plaintiff, dated 9th March 1825. The court also relied upon the continued acceptance and payment, by the defendants, of numerous bills, between the date of that letter and 15th February 1827, previous to which day, viz., on the 12th February 1827, they refused to accept the bills in question.

The court also charged the jury, that unless, from all the circumstances, the jury should believe that the plaintiff knew of the letter from Boyce & Henry, of the 4th of January 1827, addressed to A. Hutchinson, and that he took the bills of 8th February 1827, upon the faith of that letter, it would not legally bind them to accept the said bills; but that it was entirely a question for the jury, whether the plaintiff had dealt with Hutchinson on the faith of that letter; and moreover, whether he had or not, was immaterial, because the previous letter, the notice, the accounts rendered, and the numerous bills drawn and accepted, were ample authority for the plaintiff to take the bills in question. The court also instructed the jury, that the true question was, whether the plaintiff had dealt with Hutchinson on his

credit, or on the credit of Boyce & Henry. That the terms of the letter of the 4th of January having been complied with, the defendants were bound, in good faith, to accept the drafts of the *8th of February; that the money raised by the sale of the 158 bales of cotton must be regarded [*115 as the money of Edwards and not of Hutchinson; that it was not material, whether the letter was written before or after the bill was drawn; for in either case it was, according to law, an acceptance.

A verdict and judgment were entered for the plaintiff in the circuit court, allowing the plaintiff interest according to the laws of Georgia; and the defendants, having moved for a new trial, which was refused, brought this writ of error.

They contended, that the charge of the court was erroneous; and that the verdict of the jury was contrary to law. 1. Because the letter of credit from Boyce, Johnson & Henry to Timothy Edwards, in favor of Adam Hutchinson, in March 1825, was inadmissible as evidence against Boyce & Henry; and at all events, it gave no authority to Hutchinson to draw on Boyce & Henry. 2. Because the other circumstances relied upon by the court to identify the firms of Boyce, Johnson & Henry, and Boyce & Henry, so as to extend the obligations of the said letters from the former to the latter, were wholly insufficient for that purpose, or for making the defendants liable on other grounds. 3. Because the letters of Boyce & Henry to Adam Hutchinson, and from Hutchinson to Boyce & Henry, were inadmissible as evidence in this case; and even if they were not, they could create no right or obligation, as between Edwards and Boyce & Henry, particularly, as no proof was adduced, to show that these letters were known to Edwards, when he took the drafts. 4. Because the accounts-current between Boyce & Henry and Hutchinson, produced by the plaintiff, showed that, at the time the drafts were drawn, Hutchinson was indebted to the defendants nearly $10,000, and the proceeds of the 158 bales of cotton were rightly applied to that balance. 5. Because Georgia interest ought not to have been allowed. 6. Because the charge of the judge, and the finding of the *jury, were erroneous in the foregoing particulars, and in several others. [*116

McDuffie, for the plaintiffs in error, stated, that the practice in South Carolina was to move the court for a new trial, and on its refusal, to take a writ of error.

The question of this case depends upon the law of acceptance, the plaintiffs in error asserting that they were not bound to accept or pay the bills of exchange, which are the subjects of this suit. The first point to be maintained by the plaintiffs in error is, that the letter of Boyce, Johnson & Henry ought not to have been admitted, to prove a claim on the firm of Boyce & Henry, as the firms were different and distinct. The death of Johnson dissolved the partnership, and terminated their obligations. A promise to one firm cannot be transferred and made available to another. 4 Taunt. 693. There are good reasons why this responsibility should not be asserted. The death of Johnson gave a new position to the parties; and the partnership of Boyce & Henry was liable only for its own engagements. According to the principles which have been established in this court, even the firm of Boyce, Johnson & Henry would not have been bound to accept these bills. Was

the stipulation in the letter to be everlasting? This court has said, that a letter of credit shall not be binding on any one, beyond a reasonable time. The charge on the books of the plaintiffs was a mode of keeping the accounts, but this does not prove that the firms were identical. Their continued acceptances are relied upon; they do not prove the obligation to accept bills which they refused.

Is the letter of Boyce, Johnson & Henry, if it bound the new firm, available to prove a contract with Timothy Edwards, who never saw the letter? The law upon this matter is settled definitely. A verbal promise to accept a bill, before it is drawn, is not binding; this is sustained by all the authorities. 1 East 106; 4 Ibid. 74; 4 Cowp. 393. In *Coolidge* v. *Payson*, in this court, 2 Wheat. 66, the court *lay down the principles which regulate this subject. The bill must be taken with a knowlege of the promise to accept, and upon the credit of that promise. The plaintiff below did not know of the contract in this case, if any existed. In England, the judges have endeavored to limit the liability to accept bills to be drawn. Holt 181; Chitty on Bills 219, note. Such bills are injurious to the safety of commerce; they create a floating and an uncertain capital. Before the plaintiffs in error should have been held liable, it should have been proved that Edwards saw the letter.

*117]

As to the allowance of interest, according to the law of Georgia, the contract to accept and pay, if any was made, was entered into in Charleston. The bills, although drawn in Georgia, were to be paid in Carolina; and there the letters were written on which the plaintiff in the circuit court relied to establish the liability of the defendants. It was, therefore, exclusively a contract in Carolina, and the law of that state was the law of the contract as to interest.

Berrien, for the defendant in error, argued, that the letter of Boyce Johnson & Henry, of the 9th March 1825, taken in connection with the advertisement of the 29th of that month, and the continued course of business carried on between the parties, up to 1827, when the bills in the suit were drawn—bound the plaintiffs in error to accept the bills drawn by Adam Hutchinson. The objection to the admission of the letter of the 9th March 1825, is, that it was not the act of the parties to this suit; but this was the precise question between the plaintiff and the defendants in the circuit court. It was, therefore, a question of the effect of that letter on the rights of the plaintiff, and no other. It was proper to submit to the jury, who would draw their conclusion of its operation and of its application, from all the circumstances. Independently of that letter, the mere course of trade between the parties, from March 1825, to February 1827, created an implied obligation on the part of Boyce & Henry to accept the bills drawn by Hutchinson in the course of that trade, until notice of the revocation of his authority to draw bills. If the letter of the 4th of January is considered as a revocation *of the general power to Hutchinson, still the terms of that letter seem to have been complied with, and the obligation of Boyce & Henry, under that letter, was complete.

*118]

The principles upon which the defendant in error rests, have been established in *Coolidge* v. *Payson*, 2 Wheat. 66. A person who takes a bill

on the credit of a promise to accept it, if drawn in a reasonable time, has a right to recover; the promise is a virtual acceptance. The right of Hutchinson to draw was known to Edwards. The general notice given by Boyce & Henry, on the 28th March 1825, that they had succeeded to the business of the former firm, was an assumption of the obligations of that firm; and in proof of this, they accepted bills drawn on the firm of Boyce, Johnson & Henry, after the advertisement. In their accounts with Hutchinson, he is charged with the balance due to Boyce, Johnson & Henry. Afterwards, thirty-one bills drawn by Adam Hutchinson in the same course of business were accepted and paid, amounting to $67,865. These acts were a ratification on their part of the authority given on the 9th March 1825.

As regards Edwards, Hutchinson may be considered as the agent of the plaintiffs in error, purchasing on their account, and on their guarantee. The letter of the 27th of January 1827, would then only affect the defendant, if he had notice of it; and if he had, as the terms of that letter were complied with, they were bound to accept the bills. If the terms were not conformed to, this should have been proved in the court below, by the plaintiffs in error. The letter of the 4th January 1827, was a distinct and substantive agreement to accept on certain terms, which were complied with on the part of the drawer; and if Edwards took the bill, on the faith of that letter, the plaintiffs were bound. This question was properly left to the jury by the court.

Thompson, Justice, delivered the opinion of the court.—This was an action of assumpsit, brought in the circuit court of the United States for the district of South Carolina, *upon two bills of exchange, drawn by Adam Hutchinson, in favor of Timothy Edwards, the plaintiff in the court below, upon Boyce & Edwards, the defendants, both bearing date on the 7th February 1827; the one for $2100, and the other for $2331, payable sixty days after sight. The cause was tried before the district judge; and in the course of the trial, several exceptions were taken on the part of the defendants below to the admission of evidence, and the ruling of the court upon questions of law; all which are embraced in the charge to the jury, to which a general bill of exceptions was taken; and the cause comes here upon a writ of error. [*119

The bills of exchange were duly presented for acceptance, and on refusal, were protested for non-acceptance and non-payment; but the plaintiff sought to charge the defendants as acceptors, by virtue of an alleged promise to accept, before the bills were drawn. And whether such liability was established by the evidence, is the main question in the cause. The evidence principally relied upon for this purpose consisted of two letters, the first as follows:

"Charleston, March 9, 1825.

Mr. Edwards:

Dear Sir:—Mr. Adam Hutchinson, of Augusta, is authorized to draw on us for the amount of any lots of cotton which he may buy and ship to us, as soon after as opportunity will offer; such drafts shall be duly honored by, yours respectfully,

Boyce, Johnson & Henry."

Johnson soon after died ; and on the 28th of the same month of March, the defendants published a notice in the Charleston newspapers, announcing a dissolution of the partnership, by the death of Johnson, and that the business would be conducted in future under the firm of Boyce & Henry. The other letter is from the defendants, of the date of the 4th January 1827, addressed to Adam Hutchinson, in which they say, "You are at liberty to draw on us, when you send the bill of lading. We do not put you on the *120] footing of other customers, for we do not allow them to draw for more *than three-fourths in any instance. You may draw for the amount," &c.

The defendants' counsel had objected to the admission of the first letter from Boyce, Johnson & Henry ; and contended, that this did not bind Boyce & Henry to accept bills drawn on them, after the dissolution of the partnership was known, and desired the court so to instruct the jury. But the court stated to the jury, that the said letter, in connection with the other evidence in the cause, was sufficient to charge the defendants as acceptors. The other evidence referred to by the court, as would appear from other parts of the charge, was the letter of the 4th January 1827 ; the notice of the dissolution of the partnership ; the accounts rendered by the defendants ; and the numerous bills, drawn and accepted by them, all which had been given in evidence in the course of the trial.

According to the view which we take of the instruction given by the court below at the trial, that the defendants, upon the evidence, were liable as acceptors, it becomes very unimportant to decide whether the letter of Boyce, Johnson & Henry should have been admitted or not. For we think, in point of law, there was a misdirection in this respect ; even if the letter was properly admitted. We should incline, however, to the opinion, that this letter, at the time when it was offered and objected to, and standing alone, would not be admissible evidence against the defendants. It was dated nearly two years before the bills in question were drawn, and was from a different firm. It was evidence between other and different parties. A contract alleged to have been made by Boyce & Henry, could not be supported by evidence that the contract was made by Boyce, Johnson & Henry. It might be admissible, connected with other evidence, showing that the authority had been renewed and continued by the new firm ; and in support of an action on a promise to accept bills drawn on the new firm. But that was not the purpose for which it was received in evidence, or the effect given to it by the court in the part of the charge now under consideration. *121] It was declared to be sufficient, in *connection with the other evidence, to charge the defendants as acceptors. And in this we think the court erred. Had the letter been written by the defendants themselves, it would not have been sufficient to charge them as acceptors.

The rule on this subject is laid down with great precision by this court, in the case of *Coolidge* v. *Payson*, 2 Wheat. 75, after much consideration, and a careful review of the authorities : "that a letter written within a reasonable time, before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it ; is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." This case was decided in the year 1817. The same question again came under considera-

tion, in the year 1828, in the case of *Schimmelpennich* v. *Bayard*, 1 Pet. 284, and received the particular attention of the court, and the same rule laid down and sanctioned; and this rule we believe to be in perfect accordance with the doctrine that prevails both in the English and American courts on this subject. At all events, we consider it no longer an open question in this court; and whenever the holder of a bill seeks to charge the drawee as acceptor, upon some collateral or implied undertaking, he must bring himself within the spirit of the rule laid down in *Coolidge* v. *Payson;* and we think the present case is not brought within that rule.

With respect to the letter of the 9th March 1825; in addition to the objection already mentioned, that it is not an authority to draw, emanating from the drawees of these bills; it bears date nearly two years before the bills were drawn; and what is conclusive against its being considered an acceptance is, that it has no reference whatever to these particular bills, but is a general authority to draw, at any time, and to any amount, upon lots of cotton shipped to them. This does not describe any particular bills in terms not to be mistaken. The rule laid down in *Coolidge* v. *Payson* requires the authority to be pointed at the specific bill or bills to which *it is intended to be applied; in order that the party who takes the bill upon the credit of such authority, may not be mistaken in its [*122 application.

And this leading objection lies also against the letter of the 4th of January 1827. It is a general authority to Hutchinson to draw, upon sending to the defendants the bills of lading for the cotton. This is a limitation upon the authority contained in the former letter, even supposing it to have been adopted by the new firm; and must be considered, *pro tanto*, a revocation of it. Hutchinson is only authorized to draw, upon sending the bills of lading to the defendants. And although it may fairly be collected from the evidence, that that was done in the present case, it does not remove the great objection, that it is a general authority, and does not point to any particular bills, and describe them in terms not to be mistaken, as required by the rule in *Coolidge* v. *Payson*. The other circumstances relied on by the court to charge the defendants as acceptors, are still more vague and indefinite, and can have no such effect. The court, therefore, erred, in directing the jury, that the evidence was sufficient to charge the defendants as acceptors, and the judgment must be reversed.

The distinction between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept, seems not to have been adverted to. But the evidence necessary to support the one or the other, is materially different. To maintain the former, as has been already shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of the promise. Courts have latterly leaned very much against extending the doctrine of implied acceptances, so as to sustain an action upon the bill. For all practical purposes, in commercial transactions in bills of exchange, such collateral acceptances are extremely inconvenient, and injurious to the credit of the bills; and this has led judges frequently to *express their dissatisfaction, that the rule had been carried as far as it has; and their regret that any other [*123

act, than a written acceptance on the bill, had ever been deemed an acceptance. As it respects the rights and the remedy of the immediate parties to the promise to accept, and all others who may take bills upon the credit of such promise; they are equally secure, and equally attainable, by an action for the breach of the promise to accept, as they could be by an action on the bill itself.

In the case now before the court, the evidence is very strong, if not conclusive, to sustain an action upon a count properly framed upon the breach of the promise to accept. The bills in question appear to have been drawn for the exact amount of the costs of the cotton shipped at the very time they were drawn. And if the bills of lading accompanied the advice of the drafts, the transaction came within the authority of the letter of the 4th of January 1827; and if satisfactorily shown, that the bills were taken upon the credit of such promise, and corroborated by the other circumstances given in evidence, it will be difficult for the defendants to resist a recovery for the amount of the bills.

With respect to the question of interest, we think, that if the plaintiff shall recover at all, he will only be entitled to South Carolina interest. The contract of the defendants, if any was made, upon which they are responsible, was made in South Carolina. The bills were to be paid there; and although they were drawn in Georgia, they were drawn, so far as respects the defendants, with a view to the state of South Carolina for the execution of the contract. The judgment of the circuit court must be reversed; and the cause sent back, with directions to issue a *venire de novo*.

Judgment reversed.

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*124] * UNITED STATES, Appellants, *v.* JOHN MORRISON and others, Appellees.

Lien of judgment in Virginia.

There is no statute in Virginia which expressly makes a judgment a lien upon the lands of the debtor; as in England, the lien is the consequence of a right to take out an *elegit*. During the existence of this, the lien is universally acknowledged; different opinions seem, at different times, to have been entertained, of the effect of any suspension of this right.

Soon after this case was decided in the circuit court for the district of East Virginia, a case was decided in the court of appeals of the state, in which this question on the execution law of the state of Virginia was elaborately argued, and deliberately decided; that decision is, that the right to take out an *elegit* is not suspended, by suing on a writ of *fieri facias*, and consequently, that the lien of the judgment continues, pending the proceedings on that writ.[1] This court, according to its uniform course, adopts the construction of the act which is made by the highest court of the state.

APPEAL from the Circuit Court for the district of East Virginia. In the circuit court, the United States filed a bill, the object of which was, to make certain real property, assigned, on the 22d of October 1823, by John Morrison to Robert G. Ward, subject to a judgment obtained in their favor in the western district of Virginia, in October 1819. The assignment made by

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[1] Scriba *v.* Deanes, 1 Brock. 166; United States Bank *v.* Winston, 2 Id. 252; Shrew *v.* Jones, 2 McLean 78; Morsell *v.* National Bank, 91 U. S. 360.

Morrison to Ward was general, of all his property, in trust for the payment of his debts to sundry persons. The deed of trust referred to certain previous deeds of trust which Morrison had executed, conveying a large portion of the same property to secure particular debts. The previous deeds were all executed subsequently to the rendition of the judgment in favor of the United States, in October 1819; viz., on the 14th of February 1823, the 21st of February 1823, and the 9th of March 1823. Divers creditors of Morrison had issued their executions of *fieri facias* against the property of John Morrison; which had been duly levied upon the same, before the execution of the general assignment of October 1823.

On the day the judgment was obtained by the United States, in 1819, a part of the same was enjoined, and an *execution was issued for the remainder, which was levied on the property of Morrison [*125 and Roberts, and a forthcoming bond was given by John Morrison, Roberts and their sureties; and the debt not being paid, an execution was awarded against Morrison, Roberts and one of the sureties, and issued in April 1822. While it was in the hands of the marshal, and before it was levied, the agent of the treasury, at the instance of the defendants, instructed the marshal to forbear levying it, on condition of the defendants paying the costs; and the costs being paid, the marshal did not make a levy, and made a return, within the year 1822, that all further proceedings were suspended, in pursuance of the said instructions. A second *fieri facias* was issued, on the 5th of February 1825, on which the marshal returned "no effects found, not conveyed by deed of trust."

In the bills filed by the United States, they asserted their claim to the payment of their judgment against Morrison, in preference to all the other creditors, out of the property assigned to Ward; this claim extending over the property conveyed in the deeds executed prior to the assignment, and also to the proceeds of other real property levied on by executions issued by creditors. The claim was asserted upon two distinct grounds. 1. Upon the 65th section of the act of congress of 1799, ch. 128, which declares, that in all cases of insolvency, or where any estate in the hands of executors administrators and assignees shall be insufficient to pay all the debts due from the deceased, the debt due to the United States, &c., shall be first satisfied, &c. 2. Upon the ground, that their judgment against Morrison gave them a lien upon the land, which, under the facts of the case, they alleged was a subsisting one, to overreach the liens created by the deeds executed by Morrison.

The circuit court were of opinion, that the deed of October 1823, was a general assignment, and that the United States were entitled to priority out of the subject contained in that deed; that nothing was to be considered as effectually conveyed by that deed, which had been embraced by the previous deeds, or levied upon by executions previous to that deed; that the United States had no claim, either by virtue *of their statutory priority or [*126 judgment, to the property contained in the previous deeds, and levied upon by the previous executions, except to any surplus, which might remain: and proceeded to decree in favor of the United States for the value of all the property in the deed of October 1823, not embraced by the previous deeds and executions, there being no surplus; and dismissed their bill, so far as it asserted a claim to charge the property conveyed by said prior deeds, or

covered by the executions. From so much of the decree as dismissed their bill to the extent stated, the United States appealed to this court.

For the United States, *Berrien*, Attorney-General, contended, that the judgment of the United States against Morrison was, at the time of executing the several deeds, a good, subsisting and prior lien; and that they are entitled to have the proceeds of the sales of the real estate of Morrison first applied in satisfaction of the judgment. The general rule is understood to be, that in settling the priorities of incumbrances, judgments are regarded as such, from the time of rendering them; and that in England, and those states whose laws are similar, with a view to such an object, no inquiry is made to ascertain whether an *elegit* had issued, or the election to issue it had been entered on the roll, within the year and a day. It is confidently believed, that no such case can been found. And it is understood, that the circuit court concurred in the principle; but rested its decision on two grounds. 1. That the *elegit* would not overreach the title of an incumbrancer or purchaser, unless at the time that the conveyance was made to the incumbrancer or purchaser, the judgment-creditor could sue out an *elegit*. 2. That after a partial levy of a *fieri facias*, an *elegit* could not be sued out, until another *fieri facias* was sued out, and a return of *nulla bona* had thereon.

This conclusion was deduced from the construction given by the court to the Virginia statute of executions. This is, therefore, emphatically a case *127] which calls into exercise the *principles so often, and in so many various forms asserted by this court, of a determination to conform its decisions to that of the state courts in their local laws. 1 Wheat. 279; 2 Ibid. 317; 6 Ibid. 316; 10 Ibid. 153, &c. With this view of the subject, there has been obtained a statement of a case almost contemporaneously decided in the court of appeals of the state of Virginia, after an elaborate argument. It is the case of *Fox* v. *Rootes et al.*, not yet reported; but a statement of which, having been communicated to the counsel of the appellee, is now submitted. This case disposes definitively of the first point ruled in the circuit court; for the court of appeals have therein decided, that a judgment-creditor is entitled to priority over a subsequent incumbrancer, though his judgment had been rendered many years before, and no execution had ever issued on it, and, of course, no execution could issue, until revived by *scire facias*.

It is unnecessary, on this branch of the subject, to make any other remark than that, if in the construction of the laws of Virginia, this court conforms its decision to that of the court of appeals of Virginia, the case is decisive of the present controversy; unless the objection suggested by the counsel of the appellees, that it has not been reported, should weigh with the court. Should this be important, the court will retain the cause, until an authentic copy of the decision can be obtained. The case of *Coleman* v. *Cocke*, 6 Rand. 618, is relied upon, as in itself sufficient to sustain the claim of the United States. The counsel for the appellee supposes it does not overrule the case of *Eppes* v. *Randolph*, 2 Call 125, to which he has referred; nor conflict with the decision of the circuit court in this case. It is true, that it is said by the court, in *Coleman* v. *Cocke*, that the cases of *Eppes* v. *Randolph* and the *United States* v. *Morrison*, do not touch the case of *Coleman* v. *Cocke*, on the question of jurisdiction, nor on its merits; but they immediately state

it to have been "the uniform course of the English court of chancery, to consider a judgment, with a capacity to acquire the right to sue out an *elegit* by *scire facias* or otherwise, as a lien, &c.; and in *the very front of [*128
the decision in *Eppes* v. *Randolph*, they proceed to decide, that the plaintiffs in that case had an existing capacity to sue out *elegits* upon their decrees, "without any preliminary proceeding whatever;" while in direct conflict with the decision of the circuit court in this case, they affirm, that a party having taken out a *fieri facias*, which had been levied and returned in part satisfied, may sue out an *elegit*, without a second *fieri facias*, and the return of *nulla bona*.

The circuit court proceeded on the principle, that at the time of the execution of the deeds of trust, in February and March 1823, the United States had no existing capacity to sue out an *elegit*; while the court of appeals have decided, that such capacity existed, without any preliminary proceeding whatever, and that this capacity subsisted, notwithstanding the partial levy of a *fieri facias*, and without suing out a second writ, and procuring a return of *nulla bona*. On the principles settled by the court of appeals in the case of *Coleman* v. *Cocke*, the United States had unquestionably a capacity to sue out an *elegit*, at the time of the execution of the deeds of trust, in February and March 1823. The case of *Tyler* v. *Rice*, furnished by the counsel of the appellee, is a decision in an inferior court. The time allowed by law for taking out the *elegit* had expired; but in the case at bar, the year and day had not expired, when the deeds were executed.

The United States cannot be in a worse situation by the issuing and partial levy of the *fieri facias*, than they would have been, had no execution whatever issued on that judgment, up to the time when the deeds of trust were made; since the court of appeals have decided, that the partial levy of the *fieri facias* did not impair their right to sue out an *elegit*, and that it was competent to them to do so, without any preliminary step whatever. It follows, that as the year and day had not elapsed, when the deeds of trust were executed, the United States had, at that time, the capacity to sue out an *elegit*, and are, consequently, entitled to the benefit of the lien arising from their judgment.

In a case depending exclusively on the construction given *by the [*129
courts of Virginia to a statute of that state, it is not deemed necessary to extend further remarks.

Barbour, for the appellees, relied on the following points: 1. That the three deeds created specific and perfected liens on the property therein conveyed, and that the levy of the several executions created the like liens on the property on which they were levied; which could not be displaced by any statutory priority of the United States, since that priority is not, of itself, equivalent to a lien. *Conard* v. *Atlantic Insurance Company*, 1 Pet. 386.

2. That the judgment of the United States, though it might have created a lien which would have been available, if an *elegit* had been issued within the year, or an election entered on the record within that time, to charge the goods and half the land, yet neither of these having been done, it gave the United States no lien as against purchasers or incumbrancers. *Eppes* v. *Randolph*, 2 Call 125, 85; 1 Pet. 386.

3. Although a *fieri facias* was issued within the year, yet three years having elapsed after it was issued, within which time the liens of the appellees were created, and before the next execution issued, that could not properly issue without a *scire facias*, the effect of which would be prospective only—and the first *fieri facias* having been suspended by order of the agent of the treasury, the United States lost, by this interference and indulgence, any benefit they might have derived for having issued the execution. He said, it was conceded, that if a debtor to the United States made a general assignment of his estate, as in the case before the court, they would be entitled to a preference over all the other creditors; whatever might be the dignity of their debts, unless those creditors have some specific lien upon his property. But when that specific lien existed, he contended, the claim of the United States to a priority of payment cannot be sustained.

It must be admitted, that where any *bonâ fide* and absolute conveyance is made, the property passes, so as to defeat the priority. It has been sup-
*130] posed that the case of **Thelusson* v. *Smith*, 2 Wheat. 396, had decided, that such would not be the effect of an absolute conveyance or prior lien. But this court, in *Conard* v. *Atlantic Insurance Company*, 1 Pet. 386, have said, that the case of *Thelusson* v. *Smith* has been greatly misunderstood at the bar; and they affirm the law to be as has been now stated. They say, "if, before the right of preference has accrued to the United States, the debtor has made a *bonâ fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt; or if his property has been seized under a *fieri facias*, the property is divested out of the debtor, and cannot be made liable to the United States. The court refer to the *United States* v. *Fisher*, 2 Cranch 358, and the *United States* v. *Hooe*, 3 Ibid. 73, for the same principles. From these authorities, it is asserted, that the United States have no right to priority of payment, by force of the statute, over any creditors having specific and perfected liens. If this principle be true, there is at once an end of the question in this case, in the first aspect of it; because some of the appellees have that specific lien, by virtue of deeds of trust duly executed, and others, by executions actually levied on Morrison's property, before the execution of the assignment in October 1823; and therefore, although the claim of the United States to priority is established by that deed, yet the specific liens have intercepted anything from passing into the hands of the assignee to be derived from the property subject to these liens, unless there should be a surplus after their discharge.

But, if they can claim no priority by force of the statute, then the inquiry is, can they claim the same by virtue of their judgment merely? It will at once occur to the court, that the judgment, as such, under no circumstances, could create any lien on the personal property of Morrison, and only on half his lands; so that this aspect of the question has reference only to a supposed lien upon one-half of the land. It is conceded, that the judgment created a lien on the land; which, had it been consummated in
*131] proper time, and *in a proper mode, would have been available against the claims of the appellees. The nature of the interest of a judgment-creditor in the land of his debtor is very distinctly stated by the court in the case of *Conard* v. *Atlantic Insurance Company*, 1 Pet. 443. From this authority, it fully appears, that, as it respects other persons, the judg-

ment gives no available lien, unless it is consummated by a levy on the land, and by following up the steps of the law.

Let us now see, what are those steps, in Virginia, which are essentially necessary to this consummation? In that state, the only execution which can issue against the land is the writ of *elegit*, by virtue of which one moiety is extended. In 2 Call 125, and especially in 186, 187, it is distinctly said by the court of appeals, what a judgment-creditor must do, in order to preserve his lien. He must either issue his *elegit* within the year, or enter on the roll, as in England, or in the record-book here, that he elects to charge the goods and half of the land, which would be equal to issuing the *elegit*. If he does neither, he may, on motion, be allowed to enter the election *nunc pro tunc*; but in the latter case, if there has been an intervening purchaser, the motion will be denied on the principle of relation. A *scire facias* may indeed be issued to revive the judgment, but that will operate prospectively, not so as to avoid mesne alienations here. Now, let us try the case before the court by the standard here laid down.

The judgment was obtained in April 1822, and not only was no *elegit* issued within the year, but none has ever been issued; nor has there ever been an entry on the record-book, of an election to charge the goods and half the land. Here, then, is an entire absence of both the requisites, the one or the other of which is declared to be a *sine qua non* to the preservation of the lien created by the judgment. It is true, that all the deeds in favor of the other creditors of Morrison were executed, and all the executions were levied, within the year after the rendition of the judgment; and if, therefore, the *elegit* had been issued, or the election *had been entered, within the year, it would have had relation back to the date of the judgment, and have overreached the subsequent liens of the deeds and executions. But neither of these things having been done, we have the authority of the court of appeals for saying, that the lien created by this judgment overreached nothing. [*132

The doctrine of this case is supported as well by principle as authority. Let us examine the origin of a lien attributed to a judgment. At common law, a judgment did not bind the lands. The lien is the creature of this court, derived by construction from the statute of Edward, which gives to the creditor the election to take half the lands; the court holding purchasers to constructive notice of the judgment. But it is a rule of law, that after twelve months and a day, the judgment shall be presumed to be satisfied; so that when that time is suffered to elapse, the party is put to his *scire facias* to remove the presumption, before he can issue his execution. 3 Bl. Com. 41. The purchaser, then, acting on the presumption produced by the *laches* of the creditor, it surely is more reasonable, that the creditor whose negligence produced a loss should bear it, than the purchaser to whom it is not imputable.

The common-law principle is supported by the Virginia statute, which, in terms, authorizes the creditor to issue execution within the year. In confirmation of this reasoning, he cited Gilbert on Executions 12; 2 Call 142. If, in a real action, where the land itself is recovered, and the demandant suffers the year to elapse, without execution, the purchaser is protected; the reason is much stronger, where money only is recovered, and other executions may issue than those which affect the land.

The reason of the doctrine in the case of *Eppes* v. *Randolph*, requiring either the actual issuing of an *elegit* within the year, or the entry on the record-book of an election to do so, is rendered manifest, by seeing the beneficial results which flow from it. The purchaser by these means has fair notice given to him of the intention of the judgment-creditor to consummate his lien. This notice is ample to put him *on his guard, and is, to every
*133] essential purpose, equivalent to the notice which is given by the recording of a prior deed. This case, with the reasoning on which it is founded, would seem to be conclusive against the second ground assumed by the United States—the claim to a priority by virtue of their judgment.

But it is supposed, that the case of *Coleman* v. *Cocke*, 6 Rand. 618, is in conflict with the case of *Eppes* v. *Randolph*. The court in that case decided, that after a *fieri facias* levied and returned in part, an *elegit* may be issued, without pursuing the *fieri facias* to a return of *nihil;* and that a creditor thus situated is competent to maintain a suit in chancery, for the purpose of vacating fraudulent conveyances. They do not, however, decide anything on the subject of lien, as between a judgment-creditor and a *bonâ fide* purchaser; on the contrary, they refer to the case of *Eppes* v. *Randolph*, and the decision in this case; and distinguish them from that, by saying, that these cases proceed upon their respective merits, and not upon the question of jurisdiction; and whether right or wrong, do not touch the case under consideration.

As to the case of *Fox* v. *Rootes et al.*, in which it is said, the whole of the principals claimed by the appellants have been settled in their favor; it may be observed, that the case is not reported, and that we have no statement of the facts of the case, so as to enable the court to judge of their bearing and application; and the point decided may be differently understood from what it would be and ought to be. The case seems to have been decided before *Coleman* v. *Cocke*, and it is, therefore, obvious, that it cannot apply to that case; as, if it had, that case would have superseded the necessity of most of the discussion in the case of *Coleman* v. *Cocke*. In the case of *Fox* v. *Rootes*, the cases of *Coleman* v. *Cocke*, and *Eppes* v. *Randolph*, were referred to, and not overruled, but distinguished from them. Such a decision as is supposed, would be against the justice of the case; against the settled rules in *Eppes* v. *Randolph*, and against the opinion of this court in *Conard* v. *Atlantic Insurance Company*, 1 Pet. 443. *Great injus-
*134] tice would be done to innocent purchasers, by holding their purchases to be overreached by a lien, after a year against their presumption. So too, it would have the effect of making estates malienable for twenty years; for no man would be safe in laying out money on land. A *scire facias* is required by the statute, where no execution has been issued.

If the lien did not, *per se*, overreach the judgment, then it cannot be sustained, that this effect was produced by the execution of that judgment. The *fieri facias* issued in 1822 was suspended until 1825. Another *fieri facias* was issued, which was returned *nulla bona*. It has been shown, that an execution must, in the first instance, issue within a year and a day, or none can issue without a *scire facias*. Upon principle, then, it would seem to follow, that after one execution issued within the year, and more than a year elapsed before a second, in like manner, there must be a *scire facias;* and so it is decided, that even after a renewal by a *scire facias*, if no execu-

tion is issued within a year, there must be another *scire facias*. Tidd's Pract. 1008. But executions may be continued down regularly by intermediate continuances, and then another might issue after a year. 1 Str. 109 ; 2 Wils. 82 ; 6 Bac. Abr. 107. The next step was, to allow the party to enter the continuances at any time, and this, although a legal fiction, was well enough between the parties to the suit ; but this fiction of law is always applied to promote justice ; and accordingly, the court say, in *Eppes* v. *Randolph*, that whilst a motion may be made to enter an election of an *elegit*, *nunc pro tunc*, it will not be allowed so as to affect intermediate purchasers. Tidd 1003–4.

Again, the first execution was suspended in its operation, before the levy, by order of the treasury ; and the greater portion of the liens were created before the second issued. This seems to bring the case within the principle of the cases in 1 Wils. 44 ; 2 Johns. 418 ; 3 Cow. 272 ; that wherever a plaintiff in a first execution grants indulgence to the defendant, by a delay of execution or sale, the property becomes liable to a second execution. Now, if an execution actually levied loses its lien by this *indulgence, surely one, never levied, in consequence of an agreement for indulgence, cannot have the effect of continuing a lien, and that too upon real estate, which in its nature applies only to personal estate. [*135

The decision, in the first case, proceeds on the ground, that the judgment-creditor shall not, by indulgence to the defendant, save his property from other creditors ; so, he ought not to be allowed to grant that indulgence, by a delay which deceives purchasers, and indeed, involves them in loss. He ought not to be allowed to retain a more general lien produced by judgment, when he extends to the defendant an indulgence ; which, in case of a specific lien produced by the actual levy of the *fieri facias*, would be sufficient to divest it, and subject the property to other executions.

Afterwards, on a subsequent day of the term, Barbour stated, that he had received a transcript of a decree made by the chancellor of the Richmond district, affirming the principle of *Eppes* v. *Randolph*, which was made in March 1828. He also asked the attention of the court to the dates in *Coleman* v. *Cocke*, 6 Rand. 619 ; from which, he said, it appeared, that on the 19th of February 1819, the original decree was made, upon which an execution issued, on which a part only of the money decreed being made ; the bill was filed February 1820, and, of course, therefore, within the year. The question, as to the effect of the lapse of more than a year, did not, therefore, arise ; and the court say, in p. 630 of the report, that at the time when the bill was filed, the plaintiffs had an existing capacity to sue out *elegits* upon their decrees, which might well be, consistently with the case of *Eppes* v. *Randolph*, the year not having then elapsed.

Marshall, Ch. J., delivered the opinion of the court.—The single question in this case is, whether the United States, or certain other creditors of the defendant, John Morrison, have the prior lien on lands of the said Morrison which have been conveyed to those creditors. In October 1819, the United States obtained a judgment against John Morrison, in the district court of Virginia, on *which a *fieri facias* issued. The goods taken in execution were restored to the debtor, according to the law of Virginia, and a bond taken, with a condition to have them forthcom- [*136

ing on the day and place of sale. This bond being forfeited, an execution was awarded thereon by the judgment of the district court, on the 2d of April 1822. A *fieri facias* was issued on the second judgment, the return on which was, that the costs were made, and all further proceedings suspeneed by order of the agent of the treasury department. The conveyances under which the defendants claim were dated in February and March 1823. The United States contend, that the judgment of April 1822, created a lien on these lands which overreaches these conveyances.

There is no statute in Virginia which, in express terms, makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an *elegit*. During the existence of this right, the lien is universally acknowledged. Different opinions seem at different times to have been entertained of the effect of any suspension of the right. The statute concerning executions enacts, that "all persons who have recovered, or shall hereafter recover, any debt, damages or costs, in any court of record, may, at their election, prosecute writs of *fieri facias*, *elegit* and *capias ad satisfaciendum*, within the year, for taking the goods, lands and body of the debtor." The third section provides, that when any writ of execution shall issue, and the party at whose suit the same is issued shall afterwards desire to take out another writ of execution, at his own proper costs and charges, the clerk may issue the same, if the first be not returned and executed; and where, upon a *capias ad satisfaciendum*, the sheriff shall return that the defendant is not found, the clerk may issue a *fieri facias*, and he shall return that the party hath no goods, or that only part of the debt is levied, in such case, it shall be lawful to issue a *capias ad satisfaciendum* on the same judgment; and where part of a debt shall be levied upon an *elegit*, a new *elegit* shall issue for the residue; and where *nihil* shall be returned upon any writ of *elegit*, a *capias ad satisfaciendum* or *fieri facias* may issue, and so *vice versâ*.

*137] *By the construction put by the circuit court on this section, the party who had sued out a *fieri facias* could not resort to an *elegit*, until the remedy on the *fieri facias* was shown by the return to be exhausted. The United States had sued out a *fieri facias* on the judgment of April 1822, and the remedy on that writ was not exhausted in February and March 1823, when the deeds of trust under which the defendants claim were executed. In the opinion of that court, the United States could not, at the date of those deeds, have sued out an *elegit*. As the lien is the mere consequence of the right to take out an *elegit*, that court was of opinion, that it did not overreach a conveyance made when this right was suspended.

A case was soon afterwards decided in the court of appeals, in which this question on the execution law of the state was elaborately argued and deliberately decided. That decision is, that the right to take out an *elegit* is not suspended, by suing out a writ of *fieri facias*, and consequently, that the lien of the judgment continues, pending the proceedings on that writ. This court, according to its uniform course, adopts that construction of the act which is made by the highest court of the state. The decree, therefore, is to be reversed and annulled, and the cause remanded to the circuit court, that its decree may be reformed, as is required by this opinion.

This cause came on to be heard, on the transcript of the record from the

circuit court of the United States for the fifth circuit, and district of East Virginia, and was argued by counsel: On consideration whereof, this court is of opinion, that the claim of the United States to the lands conveyed by the deeds of February and March 1823, under the lien created by their judgment of April 1822, ought to have been sustained, and that so much of the decree of the said circuit court as dismisses the original and amended bill of the plaintiffs, so far as it claims to charge the property conveyed by the deed of trust of the 14th of February, in the year 1823, from John Morrison to James A. Lane and William Ward, and by the deed of the 21st of February, in *the year 1823, from John Morrison to James W. Ford, and by the deed of the 9th of March, in the year 1823, from [*138 the said Morrison to Inman Horner, is erroneous, and ought to be reversed. This court doth, therefore, reverse the said decree, as to so much thereof, and doth remand the cause to the court of the United States for the fifth circuit and district of Virginia, with directions to reform the said decree so far as it is hereby declared to be erroneous, and to affirm the lien of the United States on the lands in the said deed mentioned. All which is ordered and decreed accordingly.

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* Columbian Insurance Company of Alexandria, Plaintiffs in Error, *v.* Ashby & Stribling, Defendants. [*139

Marine insurance.—Abandonment.

Action on a policy of insurance on the brig Hope, from Alexandria to Barbadoes and back to the United States. On the outward voyage, the Hope put into Hampton Roads for a harbor, during an approaching storm, and was driven on shore above high-water mark; a survey was held, and she was recommended to be sold for the benefit of all concerned; the assured abandoned, and there was no pretence but that the injury which the vessel had sustained justified the abandonment. The question in the case was, whether, by the acts of the assured, the abandonment had not been revoked?

There can be no doubt, but that the revocation of an abandonment, before acceptance by the underwriters, may be inferred from the conduct of the assured, if his acts and interference with the use and management of the subject be such as satisfactorily to show that he intended to act as owner, and not for the benefit of the underwriters; but this is always a question of intention, to be collected from the circumstances of the case, and belongs to the jury, as a matter of fact, and is not to be decided by the court, as matter of law. p. 143.

In the case of the Chesapeake Insurance Company *v.* Stark, 6 Cranch 272, this court lays down the general rule, that if an abandonment be legally made, it puts the underwriter completely in the place of the assured, and the agent of the latter becomes the agent of the former; and that the acts of the agent interfering with the subject insured will not affect the abandonment; but the court takes a distinction between the acts of an agent and the acts of the assured; that in the latter case, any acts of ownership by the owner himself might be construed into a relinquishment of the abandonment, which had not been accepted.

But the court, in that case, did not say, and we think did not mean to be considered as intimating, that every such act of ownership must, necessarily, and under all possible circumstances, be construed into a relinquishment of an abandonment; the practical operation of so broad a rule would be extremely injurious.[1] p. 144.

Error to the Circuit Court of the district of Columbia, and county of Alexandria. This was an action on the case brought by Ashby & Stribling against the Columbian Insurance Company of Alexandria, on a policy of

[1] See Walden *v.* Phœnix Ins. Co., 5 Johns. 310; Curcier *v.* Philadelphia Ins. Co., 5 S. & R. 113.

insurance on the brig Hope, on a voyage from Alexandria, to and at Barbadoes and back to the United States; the vessel valued at $3000, and the sum insured being $1000. The loss was stated to be, "that while the vessel was proceeding on her voyage, and before her arrival at Barbadoes, she
*140] was, *by storm and peril of the sea, sunk and wholly lost to the plaintiffs, and did not arrive at Barbadoes." The declaration also averred, that the plaintiffs did, in due time and form, abandon the vessel to the defendants.

The facts of the case are fully stated in the opinion of the court; and the only question before the court was, whether, on the evidence laid before the jury, it was competent for the jury to infer, and they ought to infer, that Stribling, one of the assured, for himself and his partner, Ashby, had revoked the abandonment made, as stated, to the insurance company.

Jones, for the plaintiffs in error, contended, that the conduct of Mr. Stribling was a revocation of the abandonment. The persons on board a vessel which may be wrecked, are the agents of the assured and the owners; but this does not exclude the insurers from interfering, and if they think proper, from taking charge of the property; and if the party assured comes in and resists the authority of the insurers, he resumes the title to the property, and the assurers are discharged. *Chesapeake Insurance Company* v. *Stark*, 6 Cranch 268.

In this case, the agent of the insurance company was at the place where the vessel was wrecked, and was ready to do everything for the safety of the property, and to get it off. This was prevented by the sale made by the directions of the assured, and against the wish of their agent. If the owner or master of a vessel does act wholly inconsistent with the rights of the assured, it is a waiver of the abandonment. 2 Marsh. Ins. 614, and cases there cited.

E. F. Lee and *Swann*, for the defendants in error, denied that after the abandonment was made, the insurance company acted in relation to the property assured. The agent of the company left Alexandria, before the abandonment was received by the company; and no authority was transmitted to him at Norfolk, after the same. All his acts were, therefore, without warrant from the company. In his letter offering to advance money to
*141] get off the *vessel, the liability of the insurance company for the loss was expressly reserved. He did not order the sale of the vessel to be stopped for the plaintiffs in error. This court, on examining the evidence, will say, it was not such as the jury should have considered sufficient to show that the abandonment was withdrawn or revoked. The whole of the conduct of Mr. Stribling was, in the situation in which he stood, perfectly proper; and the evidence of the auctioneer shows that to have been the case, and that after the sale had commenced, he did no more than express an opinion. Philips on Ins. 407; 5 Serg. & Rawle 506.

Jones, in reply, contended, that the sending of the agent of the insurers to Norfolk, was evidence of authority, and that the reservation in the letter addressed by him to the auctioneer, was only to operate, if the vessel should be saved, and be put in a situation to proceed on the voyage insured.

Columbian Insurance Co. v. Ashby.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up on a writ of error to the circuit court of the district of Columbia for the county of Alexandria. It is an action upon a policy of insurance, bearing date the 28th of May 1825, on the brig Hope, on a voyage from Alexandria to Barbadoes, and back to a port in the United States. The vessel is valued at $3000, and the sum insured is $1000. The loss, as alleged in the declaration, is, that the vessel, whilst proceeding on her voyage, and before her arrival at Barbadoes, was, by storm and peril of the seas, sunk and wholly lost to the plaintiffs. The whole evidence is spread out upon the record; and upon which the defendant's counsel prayed the court to instruct the jury, that it was competent for them to infer, and that they ought to infer, from the evidence, that the plaintiffs had revoked the abandonment which they had made to the defendants; which instruction the court refused to give, and a bill of exceptions was duly taken to such refusal. And whether the court erred in refusing to give the instruction prayed, is the only question in the case.

*From the evidence, it appears, that Captain Brown, the master of the vessel, put into Hampton Roads, for the purpose of making a [*142
harbor and securing his vessel from an approaching storm, which, from the appearance of the weather, threatened to be very severe. And on the 5th of June, by the violence of the storm, the brig was driven on shore, above high-water mark, near Crany Island. On the next day, a survey was held upon her, and the surveyors, after examining her situation, and the injury she had received, recommended her to be sold for the benefit of all concerned. And on the 14th of June, Stribling, one of the owners, being at Norfolk, sent a letter of abandonment to the defendants, which was received by them, on the 17th of June. There was no pretence but that the injury which the vessel had sustained justified the abandonment. But the question was, whether such abandonment had not been revoked; and the circumstances relied upon to show such revocation were, that James Sanderson, the secretary of the Columbian Insurance Company, arrived at Norfolk, on the evening of the 16th of June, being before the letter of abandonment was received by the defendants, and on the same evening, offered to Stribling, one of the plaintiffs, to supply the money necessary to get the vessel off. And two days afterwards, he made the same offer to James D. Thorborn, the agent of the plaintiffs; stating that he had come to Norfolk, at the request of the defendants, and to take such measures as he might think advisable for their interest, and to give every aid to the owners of the brig: and he forbade Thorborn and Stribling from proceeding in the sale, which was then about to take place, according to an advertisement which had been previously published in the Norfolk papers. But Stribling, on consultation with Thorborn, directed the sale to be continued. The refusal of Stribling to accept the offer of Sanderson to supply the money necessary to get the vessel off, and proceeding in the sale, after being forbidden by Sanderson, are the acts alleged to have constituted a revocation of the abandonment.

The instruction prayed for to the jury ought not, in its full extent, to have been given, unless the evidence was such as *in judgment of law [*143
amounted to a revocation of the abandonment. If the court had only been requested to instruct the jury, that they might, from the evidence, infer

a revocation, the prayer would not have been so objectionable. But a positive direction, that they ought to infer such revocation, would have been going beyond what could have been required of the court, under the evidence in the cause. There can be no doubt, but that the revocation of an abandonment, before acceptance by the underwriters, may be inferred from the conduct of the assured; if his acts and interference with the use and management of the subject insured be such as satisfactorily to show that he intended to act as owner, and not for the benefit of the underwriters. But this is always a question of intention, to be collected from the circumstances of the case, and belongs to the jury as matter of fact; and is not to be decided by the court as matter of law. We do not, however, in the present case, see any evidence which would have fairly warranted the jury in finding that the abandonment had been revoked. The injury was such as to occasion almost an actual total loss of the vessel; and there could have been no possible inducement for the assured to revoke the abandonment. There is no evidence to justify the conclusion, that Stribling was acting for his own benefit, and not for that of the underwriters. The assured, by operation of law, became, after the abondonment, the agent of the underwriters, and was bound to use his utmost endeavors to rescue from destruction as much of the property as he could, so as to lighten the burden which was to fall on the underwriters. The assured had received no information from the underwriters, whether they accepted or refused the abandonment. Nor did Sanderson, who professed to act as their agent, communicate any information to Stribling on that subject; and it would seem, from the testimony of Thorborn, that the conduct of Sanderson was calculated to cast some suspicion upon his motives. He says, "he then thought, and still thinks, the course pursued by him must have been designed to perplex and embarrass the persons who were engaged in the management of the affairs of the vessel; since his letter was not delivered, until the sale had *commenced, and no *144] authority was shown by him from the defendants, to make arrangements for getting the vessel off, or to defray the expense that had already been incurred on her account." Although Stribling knew Sanderson, as secretary of the Columbian Insurance Company, he could not thereby know that he was clothed with authority to bind the company by whatever arrangement he should make. His authority as secretary did not clothe him with any such power. It is true, Stribling did not demand of him to show his authority from the company, and this might be considered as open to the conclusion that such authority was admitted; but all this was matter for the consideration of the jury, and the court could not assume that he was or was not authorized to bind the underwriters.

In the case of the *Chesapeake Insurance Company* v. *Stark*, 6 Cranch 272, this court lays down the general rule, that if an abandonment be legally made, it puts the underwriter completely in the place of the assured, and the agent of the latter becomes the agent of the former; and that the acts of the agent, interfering with the subject insured, will not affect the abandonment. But the court takes a distinction between the acts of an agent, and the acts of the assured; that in the latter case, any acts of ownership, by the owner himself, might be construed into a relinquishment of an abandonment, which had not been accepted. The court in that case did not say, and we think did not mean to be understood as intimating, that every such

act of ownership must necessarily, and under all possible circumstances, be construed into a relinquishment of an abandonment. The practical operation of so broad a rule would be extremely injurious; it would deter owners from interfering at all for the preservation of the subject insured, and leave it to perish, for fear of prejudicing their rights under the abandonment. All such acts must be judged of from the circumstances of each case. The *quo animo* is the criterion by which they are to be tested.

If, in this case, Stribling, the owner, had become the purchaser of the brig, and had got her off and fitted her up, it *would have afforded very strong, if not conclusive, evidence of a relinquishment of the abandonment. But such was not the fact; and whatever he did, appears to have been done in good faith, and with a view to the preservation of the property. But this case is very distinguishable from that of the *Chesapeake Insurance Company* v. *Stark*. There, the underwriters had refused to accept the abandonment, and the court applied the rule to that case. In such a case, the assured is at liberty to revoke the abandonment. But here, the owner did not know whether the underwriters would refuse or accept the abandonment. No answer had been received to the letter of abandonment, and the assured was left in uncertainty as to his right of revocation. We think, therefore, that there was no act of ownership exercised by Stribling, which the law would pronounce a revocation of the abandonment, or which called upon the court below to instruct the jury, that they ought to infer a revocation from any such acts. [*145

The other circumstance relied upon is, that Sanderson, who professed to act as the agent of the underwriters, offered to supply the money necessary to get the vessel off, and put her in a situation to pursue the voyage. What effect this offer would have had upon the right of the assured to abandon, until the experiment to get off the vessel had been tried, provided such offer had been unconditional, and made before the abandonment, either by the underwriters themselves, or by an agent fully authorized for that purpose, is a question upon which we give no opinion; the case does not require it. The authorities on this point do not appear to be in perfect harmony. 6 Mass. 484; 5 Serg. & Rawle 509; 3 Mason 27; 2 T. R. 407; 2 W. C. C. 347. The present case, however, is not accompanied with these circumstances. The abandonment here had actually been made, before the offer to pay the expenses of getting off the vessel; and no answer from the underwriters had been received, nor did Sanderson undertake to decide that question for them. Although he professed to act as the agent of the underwriters, he showed no authority for that purpose, and *one of the witnesses swears, that he thought the course pursued by him was designed to perplex the proceedings in relation to the vessel; and his letter to Thorborn, making the offer of the money, has this condition: "I reserve to the company all right of defence, in case they should not be liable for any part of the expenses attending the business." [*146

Under such circumstances, it is very clear, the assured could not be required to waive an abandonment, which, from anything that he knew, might, at that time, have been accepted; in a case, too, where there was a clear and undeniable right to abandon. The court below did not, therefore, err in refusing to instruct the jury, that they ought to infer from the evi-

dence, that the abandonment had been revoked. The judgment must be affirmed.

This cause came on to be heard, on the transcript of the record from the district 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 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, and damages at the rate of six per centum per annum.

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*147] *Samuel D. Harris, Marshal of the United States, for the District of Massachusetts, Plaintiff in error, *v.* James De Wolf, Jr., Defendant in error.

Effect of assignment.

The plaintiff in replevin, James De Wolf, claimed the merchandise under an assignment executed by George De Wolf and John Smith to him, in consideration of a large sum of money due by them to James De Wolf, and in consideration of advances to be made to them by him; the assignment transferred four vessels and their cargoes, three of which vessels were then at sea, and one in New York, ready to sail, the property of the assignors; the assignment was to be void on the payment to James De Wolf of the money due to him; and if it should not be paid, the assignee to enforce the pledge by process and arrest, in all countries or places whatsoever, and to sell the same for the payment of the amount due by them, the assignors, to George De Wolf; the merchandise for which this action of replevin was instituted, was part of the return-cargo of one of the vessels. The defendant, Harris, pleaded that the merchandise was not the property of the plaintiff, but of George De Wolf and John Smith, and justified the taking of the goods of the plaintiff, as marshal of the district of Massachusetts, by virtue of a writ of attachment sued out in the district court of the United States for the district of Massachusetts, in which suit, judgment was obtained against George De Wolf. On the trial, the plaintiff in the replevin proved the assignment, that large sums of money were due to him by George De Wolf and John Smith, that the goods were part of the property assigned, that he had used all proper means to take possession of the goods, but was prevented by the attachment issued by the United States; the defendant proved, that the goods were imported into the United States by De Wolf & Smith, and that at the time of the importation, they were indebted to the United States for duties which were due and unpaid, to an amount exceeding the value of the merchandise attached, and that the Octavia, one of the vessels assigned, with a cargo on board, ready for sea, was at New York at the time of the assignment; which ship was not delivered to James De Wolf, the assignee, nor were the bills of lading assigned, the cargoes on board the vessels being consigned to the masters for sales and returns.

In the case of Conard *v.* Atlantic Insurance Co., 1 Pet. 306, it was decided, that the non-delivery of a vessel assigned to secure or pay a *bonâ fide* debt, did not make the assignment absolutely void: this court is well satisfied with that opinion.

The deed of assignment conveyed to the assignee a right to the proceeds of the outward-bound cargoes on board the vessels assigned to James De Wolf.

The failure of George De Wolf to deliver to the assignee the copies of the bills of lading which were in his possession, did not leave the property subject to the attachment of creditors, who had no notice of the deed. It was held, in the case of Conard *v.* Atlantic Insurance Co., that such a transfer gives the assignee a right to take and hold those proceeds, against any person but the consignee of the cargo, or purchaser from the consignee, without notice.

*148] That the consignees of the merchandise were indebted to the United States on *duty bonds remaining due and unpaid at the time of the importation, did not, under the 62d section of the act of March 2d, 1799, make the merchandise, as to the United States, the property of the consignees, notwithstanding the assignment; and make the attachment of the United States for the debt due to them, sufficient to bar the action of replevin brought by the assignee. De Wolf *v.* Harris, 4 Mason 515, affirmed.

Harris v. De Wolf.

ERROR to the Circuit Court of Massachusetts. In the circuit court, the defendant in error instituted an action of replevin, to recover a quantity of merchandise claimed by him under a special assignment executed to him by George De Wolf and John Smith, to secure debts *bonâ fide* due to him, and which merchandise had been seized by Samuel D. Harris, the defendant in the suit, as marshal of the United States, under executions issued at the suit of the United States against George De Wolf and John Smith, on judgments obtained against them for duties. The marshal claimed to hold the merchandise as subject to the executions; and the cause was tried in the circuit court, in December 1827, and a verdict, under the charge of the court, was given for the plaintiff. At the trial, the defendant prayed the court to give certain instructions to the jury, which the court refused to give; to which refusal the defendant excepted, and prosecuted this writ of error. These instructions appear in the opinion of the court. The case was submitted to the court, without argument, by the counsel.

MARSHALL, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment of the court of the United States for the first circuit and district of Massachusetts, in an action of replevin, claiming the restitution of twenty-three cases of silks which had been attached at the suit of the United States, against George De Wolf. The property was claimed by the plaintiff in replevin, under a deed dated on the 19th of November 1822, executed by George De Wolf and John Smith, in which they acknowledged themselves to be severally indebted to the said James *De Wolf, in large sums of money, and agreed, in consideration thereof, and in [*149 consideration of other advances to be made by the said James De Wolf, to convey, and did convey, to the said James De Wolf, the ship Octavia, then lying in the port of New York, nearly ready for sea, and the three brigs Quill, Arab and Friendship, then actually at sea, their tackle, &c., and the proceeds and investments of their cargoes, &c., which said vessels and cargoes were the property of the said George De Wolf and John Smith. To this conveyance, a condition was annexed, that it should be void, on the payment to James De Wolf of the money which should be due to him; on the failure to pay which, it should be lawful for the said James De Wolf, at any time or times, to enforce the pledge by process, and arrest of the premises, or any part thereof, in all courts or places whatsoever, and cause the same to be sold, and the proceeds to be applied in satisfaction of the moneys which might then be due from them, or either of them. The silks were part of the return-cargo of one of these vessels.

The defendant pleaded, that the said silks were not the property of the plaintiff, but of George De Wolf and Smith; and justified the taking thereof, as marshal of the district, by virtue of a writ of attachment sued out of the court of the United States for the said district, in which suit the United States obtained judgment against the said George De Wolf.

At the trial, the plaintiff proved his deed of assignment; that the silks were part of the proceeds of the cargoes of the ship Octavia and brig Arab; that he had used all proper means to take possession of them; and that they were attached by the defendant, as marshal, by virtue of process sued out by the United States. He also proved debts against George De Wolf and

John Smith, severally, on account of his advances for them, which were intended to be secured by the deed of assignment, to a very large amount.

The defendant proved, that the said silks were imported into the United States, consigned to George De Wolf and John Smith, and that at the time of the importation of said silks, said George De Wolf and John Smith were indebted to the United States in bonds given by them, respectively, for *duties which were then due and unpaid, to an amount much exceeding the value of the silks replevied. The defendant also proved, that at the time the deed of assignment was executed, the ship Octavia lay at New York, with her cargo on board, nearly ready for sea; but that possession was not delivered, nor were the bills of lading indorsed or delivered to the plaintiff. The cargoes were consigned to the several masters for sales and returns.

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Many other circumstances were given by the plaintiff in evidence, to show the fairness of the deed of assignment; which were met, on the part of the defendant, by other circumstances, on which he relied, to show that, in point of law, it was fraudulent. These do not affect the opinions given by the circuit court, to which exceptions were taken; and therefore, are not recited.

After the testimony was closed, the defendant's counsel moved the court, to instruct the jury, that the deed of assignment was fraudulent as to creditors, and void. This instruction the court refused to give; but left it to the jury to determine, upon all the evidence of the case, whether the said deed was executed with an intent to defraud or delay the creditors of the said George De Wolf and John Smith, and if so executed, then the same was fraudulent, and void as to such creditors.

As the whole question of fraud was submitted to the jury, it is incumbent on the plaintiff in error, if he would support this exception, to show some defect in the deed itself, which makes it absolutely void as to creditors, whatever may be the fairness of intent with which it was executed. He relies on the fact, that possession of the Octavia was not delivered, as making the deed of assignment absolutely void. This question was decided, upon full consideration, in the case of *Conard* v. *Atlantic Insurance Company*, 1 Pet. 386, and this court is well satisfied with that opinion.

The counsel for the defendant also prayed the court to instruct the jury, that although the deed of assignment might be valid, it could not transfer a right to the proceeds of the outward-bound cargoes; which instruction the court refused to give. *This question also is decided in the case of *Conard* v. *Atlantic Insurance Company*.

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The counsel for the plaintiff also moved the court to instruct the jury, that the failure of George De Wolf and John Smith to deliver to James De Wolf the copies of the bills of lading which were in their possession, severally, when the bills of lading were executed, leaves the property subject to the attachment of creditors who had no notice of the deed. This instruction the court refused to give. In the case of *Conard* v. *Atlantic Insurance Company*, the court determined, that a deed of assignment, such as was executed in this case, was capable of transferring the right to the proceeds of the outward cargo, as between the parties; of consequence, such transfer gives the assignee a right to take those proceeds and hold them against any person but the consignee of the cargo, or person who is a purchaser from the

consignee, without notice. These principles were settled in the case which have been already cited.

The counsel also moved the court to instruct the jury, that if the consignees of the said silks were, at the time, indebted to the United States, on duty bonds remaining due and unpaid, then, that by virtue of the 62d section of the act for the collection of duties, passed the 2d of March 1799, the said goods were, as to the United States, the goods of the said consignees, notwithstanding the said deed, and in the legal custody of the said collector; and that the attachment in favor of the United States was good and sufficient to bar the action. This instruction was refused. This question was considered and determined in the case of *Harris* v. *Dennie*, decided at this term. (3 Pet. 292.)

The questions raised in this cause have all been decided in this court as they were decided by the circuit court. There is no error in the opinions, to which exceptions have been taken; and the judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

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*John Beaty, Plaintiff in error, *v.* The Lessee of A. Knowler and others, Defendant in error. [*152

Tax-sales.—Public statute.—Powers of corporation.

The defendant claimed the land in controversy under a tax-sale, which was made by a company incorporated by the legislature of Connecticut, in 1796, called "The proprietors of the half million of acres of land lying south of lake Erie," and incorporated by an act of the legislature of Ohio, passed on the 15th of April 1803, by the name of "The proprietors of the half million of acres of land lying south of lake Erie, called the sufferers' land." In 1806, the legislature of Ohio imposed a land-tax, and authorized the sale of the lands in the state for unpaid taxes giving minors the right to redeem within one year after the determination of their minority, this act was in force in 1808. In 1808, the directors of the company incorporated by the legislatures of Connecticut and Ohio, assessed two cents per acre on the lands of the company, for the payment of the tax laid by the state of Ohio, and authorized the sale of those lands on which the assessments were not paid; the lands purchased by the defendant were the property of minors, at the time of the sale, they having been sold to pay the said assessments, under the authority of the directors of the company: *Held*, that the sale of the land, under which the defendant claimed, was void.

The provisions in the act of incorporation of Ohio, that it should be considered a public act, must be regarded in courts, and its enactments noticed, without being specially pleaded, as would be necessary, if the act were private. p. 167.

That a corporation is strictly limited to the exercise of those powers which are specially conferred on it, will not be denied; the exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation. p. 168.

From a careful inspection of the whole act, it clearly appears, that the incorporation of the company was designed to enable the proprietors to accomplish specific objects, and that no more power was given than was considered necessary to attain those objects. p. 171.

The words, "all necessary expenses of the company," cannot be so construed to enlarge the power to tax, which is given for specific purposes; a tax by the state is not a necessary expense of the company, within the meaning of the act; such an expense can only result from the action of the company in the exercise of its corporate powers. p. 171.

The provision in the tenth section, "that the directors shall have power to do whatever shall appear to them to be necessary and proper to be done for the well ordering of the interests of the proprietors, not contrary to the laws of the state," was not intended to give unlimited power, but the exercise of a discretion within the scope of the authority conferred. p. 171.

Knowler *v.* Beaty, 1 McLean 41, affirmed.

Beaty v. Knowler.

Error to the Circuit Court of Ohio. This was an ejectment for lands in the state of Ohio; and on the trial in the circuit court, the defendant excepted to the charge of the court, and prosecuted this writ of error.

*153] *The facts are fully stated in the opinion of the court.

The case was argued by *J. C. Wright*, for the plaintiff; and by *Vinton*, for the defendant.

Wright contended, that the court below erred in their instruction to the jury: 1. In instructing the jury, that the directors of the company incorporated by the legislature of Connecticut, in the year 1796, designated as the "the Proprietors of the half million of acres of lands laying on the south of lake Erie," and by a law of Ohio passed the 15th of April 1830, had no legal authority to assess the tax on the land, for the non-payment of which it was sold. 2. That the proprietors of the land included in the provisions of the acts, who were minors, were not bound by the assessment of the tax, and the sale of the land.

He said, the only questions which arose on the case are these; nothing else was excepted to on the trial. Those instructions involve the construction of certain laws of Connecticut, and of the state of Ohio; which, in general, have received no interpretation from the courts in those states. The correctness of the instructions will depend on the law of Ohio; that of Connecticut having been introduced, to show the history of transaction out of which this controversy has arisen. But as the company was organized under the law of Ohio, and in a manner entirely different from that of the law of Connecticut, and the tax was laid according to its provisions, that is to be put out of the question.

1. It was objected to the validity of the assessment of the tax, that the charter does not authorize the directors to assess a tax, to pay that levied by the legislature of Ohio. It is conceded at once, that the power is not given in express terms, but is fully included in the several powers to assess a tax. Act of the 15th April 1803, § 2. The plain and obvious reading of this grant of power is, "to defray all necessary expenses of the said company in purchasing and extinguishing the Indian claims of title, surveying, locating,

*154] making partition of the land; and to defray *all other necessary expenses of said company, power is given," &c. Two descriptions of powers are confided to the directors by this provision; the first relates to expenses necessary for specified objects; and the second is equally plenary to all purposes—"to defray the necessary expenses of the said company." This power is also included in the tenth section of the act, "to do whatever shall to them appear necessary and proper for the well-ordering and interest of the company, not contrary to the laws of the state."

If the directors, in the exercise of their discretion, thought the money to be raised by this assessment was proper to defray necessary expenses, or useful for the well-ordering of the company, they had full power to lay the tax. It would be difficult to employ words to convey a more unlimited discretion to the directors; and their view in laying the tax is clearly developed in the vote. "Voted unanimously, that a tax of two cents on the pound be assessed, to defray the expenses of a tax laid by the legislature of Ohio, &c.,

and all other necessary expenses for the good of the proprietors of the said land."

2. If the directors had power to assess the tax, then, were the infant lessors bound by the assessment? It will hardly be contended, that minors cannot, in any event, be clothed with powers as corporators; that is indisputable. The resolve of the state of Connecticut released and quit-claimed, to eighteen hundred individuals named in the act, the half million of acres " and to their legal representatives, where dead, and to their heirs and assigns for ever." Swan's Ohio Land Laws, 81–100. The ancestor of the lessors of the plaintiff was then alive, and one of the persons named in the resolve. He took an estate in fee, as a tenant in common with all the others. In 1792, Connecticut constituted these grantees a corporation, and gave them, their heirs and assigns, succession as corporators; and provided, that the expenses and taxes should only be a charge on the land. The ancestor of the plaintiff's lessors, with the other grantees, organized the corporation under this act, and partook of all the powers it conferred. By his death, in 1800, *the interest he held in the land devolved upon his heirs, subject to the corporation; and by the very terms of the charter, they [*155 took his place as corporators, representing together, in the corporation, the interest their parent had represented alone. These heirs were owners and proprietors of their ancestor's share in the lands, when Ohio incorporated them with all "the owners and proprietors." This suit was brought in 1825, when all the heirs were probably of age, as the tax was laid in 1808.

Under the law, the lands were divided, and 2400 acres were set apart for the interest of Douglass, the ancestor of the lessors of the plaintiff. This division, the lessors recognise and ratify. They bring suit for a part of the allotment assigned to them in the division; and not for an undivided sixth of the 2400 acres, part of the 500,000 acres. They avail themselves of the act of incorporation, and yet claim they are not corporators, nor bound by the acts of the directors under it.

The adult, as well as the minor heirs, have all gone on as corporators. No dissent was ever expressed; but, on contrary, all, as one, represent the share. If these minors are not bound by the acts of the corporation, all remains as at the death of their ancestors, in 1808; and the partition must be gone into anew; and the separate allotment, under which forest has disappeared, and the wilderness has been made to blossom as the rose, is all to be done away, and the lands thrown into common. Everything in the country will thus be thrown into confusion. Would this be just to the cotenants? and yet it is the inevitable result of the principles given in the instructions to the jury.

Vinton, for the defendant in error, contended: 1. That the lessors of the defendant in error were not parties to, nor bound by said acts of incorporation. 2. That the directors under the Ohio act of incorporation had no power to assess a tax, to pay a state tax of that state. 3. That the tax was void for uncertainty, it being assessed in part for undefined purposes. *4. That the sale being conducted contrary to the manner prescribed by the laws of Ohio, was void. 5. The sale was void, because the [*156 collector omitted to give the notice required by said act of incorporation, of the time when the tax would become due.

It has been holden by this court, that a grant to a private corporation is a contract; and consequently, to bind the corporators, their assent, express or implied, must be had. *Dartmouth College* v. *Woodward*, 4 Wheat. 657, 659, 682; *Ellis* v. *Marshall*, 2 Mass. 275, 279. It therefore becomes necessary to inquire, if this is a private corporation? and if so, whether the defendants in error had, by their assent, express or implied, made themselves parties to it? In 4 Wheat. 668–9, public corporations are defined "to be such only as are founded by the government, for public purposes, where the whole interests belong also to the government." This definition will test the character of the corporation in question. The entire interest of this corporation consisted of private property, and the purpose of the act was, the regulation of that property for the benefit of the proprietors. The government of Ohio had no interest in the corporation; nor did it seek to attain any purpose of its own, by the act of incorporation. The declared objects of the act were, to enable the proprietors of the sufferers' lands, "to extinguish the Indian title; to survey them into townships or otherwise, and make partition of them among themselves." These are all private purposes, intended for their own emolument and advantage. The corporation is, therefore, in its nature, a private corporation.

Here, an inquiry arises, as to the effect of the last section of the act of incorporation, which declares that act to be a public act. A similar enactment has been introduced into the bank-charters of that state, which no one ever imagined to be public corporations on that account. The evident intention of this declaration is, not to change the nature of the corporation, but to relieve the corporators from the inconvenience of special pleading, and making proof of their corporate existence, according to the usages of the common law. To this extent the provision is politic and *reasonable; but to go beyond that, and give it the effect of making the corporation a public corporation, in the sense of the definition laid down, would be unreasonable, and according to the principles settled by this court in the *Dartmouth College Case*, not in the power of the legislature of Ohio. 4 Wheat. 671–2.

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This brings us to the question of assent. No express assent by the defendants in error to this act of incorporation is pretended. An implied assent is relied upon. Jonathan Douglass, the ancestor of the defendants in error, died in 1800. The act of incorporation, by the legislature of Ohio, was passed in 1803; and in 1808, the land in controversy was sold to pay a tax assessed under that act. At the time of the sale, four of the defendants in error were minors; and consequently, not able in law to contract or assent to become corporators. Assent, in such a case, is not one of the exceptions to the legal disabilities of infants. Lapse of time is relied upon to raise a presumption of assent; the common law fixes the period at which the presumption arises, at the end of twenty years; which had not elapsed, when this suit was instituted. The counsel for the plaintiff in error has argued, that the present claimants took the estate of their ancestor as he left it; and has, on this ground, endeavored to make out the power of the legislature of Ohio to bind them by its act; because the legislature of Connecticut had, in 1796, incorporated the proprietors of these lands, to enable them to effect similar objects.

There is no proof, that Jonathan Douglass ever gave his assent to the

Connecticut act, and if he did, it has no connection with the present case. The affairs of the Connecticut corporation were conducted by a board differently organized, and called by a different name from the board of directors which assessed the tax under which the land in controversy was sold; the proceedings now called in question were had under the act of Ohio. Douglass died in 1800, and it could not be one of the conditions on which his heirs inherited his estate, that they should become parties to an act of incorporation that the state of Ohio, which then had *no being as a [*158
state, might pass three years after his death. Nor does it follow, that, because the ancestor, or his heirs, were parties to one corporation, therefore, they were bound to become parties to a new and distinct corporation, created by another and independent authority. It has been urged upon the court, that if this doctrine prevail, it will overturn a great amount of property; but that no more proves the fact of assent, than if it would only overturn a small amount. It has been further contended, that the suit now pending is predicated from the partition made by the directors under the Ohio act of incorporation, and consequently, affirms their proceedings, and estops the defendants in error from denying the fact of their assent. No principle of law is better settled, than that one tenant in common may bring an ejectment against his companion, to be let into possession. Every such tenant has a right to the common enjoyment of the whole and every part of the premises; and against all strangers, he has an exclusive right of possession to the whole and every part thereof. From this principle, it follows, as a necessary consequence, that he has a right to his possessory action against such stranger, for the whole or any part of the premises. The suit, then, against the plaintiff in error, as a trespasser upon a specific part of this grant of the land, is no admission by the defendants of a partition; and consequently, is no affirmance of the partition, if any was made by the directors; which the record does not show.

2. The second point denies the authority of the directors to assess the tax in question. In the case of *Head* v. *Providence Insurance Company*, 2 Cranch 167, the court say, that "a corporation may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner that act authorizes;" and in 4 Wheat. 636, this court define a corporation in these words, "it is the mere creature of the law, and possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." Its powers are, therefore, to be construed strictly. *To determine the question of the power [*159
of the directors to assess the tax, it is necessary to look into the incorporating act, and to examine it in all its parts.

It is not pretended, that the act confers an express grant of power to assess the tax. The inquiry then arises, was the power incidental to the existence of the corporation? A formal and specific enumeration of the purposes for which the corporation was created, is set out in the preamable, and also in the second section of the act. They are, "to extinguish the Indian title to the grant of a half million acres of land, to survey and locate the same into townships or otherwise, and to make partition among the proprietors." To effect these objects, and to defray all other necessary expenses of said company, power was given to the directors, to levy taxes.

Was the tax assessed by the state of Ohio, a company charge or expense? The tax of the state was a lien upon the estate of each tenant in common, which his companion was no more bound to pay, than he would be to discharge the lien of a judgment at law, or a mortgage, of his co-tenant. The 23d section of the act of Ohio assessing the state tax, is conclusive of this point. It enacts, that when any tract of land charged with tax, is owned by two or more persons, the collector shall receive from any person tendering the same, his or her proportion of the tax due thereon. Under this provision of the act, any one of the proprietors might, by paying his proportion of the tax, discharge the lien of the state upon his estate. And his interest could no more be affected by the sale of the right of his companion for non-payment, than if that right were conveyed away by the companion himself, or sold to pay a judgment at law. The tax of the state, then, was not a company charge; nor was the payment of it by the company, in any way necesssry or incidental to the existence of the corporation.

Again, was the aid of the corporation necessary to enable the state to collect its tax? The power of the state to collect its own taxes, by its own agents, cannot be denied. If, therefore, we find the state did create its own
*160] agents *for the collection of this tax, and put into their hands all the necessary means to discharge this duty, every presumption in favor of collecting it by the agents of the corporation is excluded. On looking into the tax law of Ohio, we find the tax covered all the lands in the state, the company's lands included; that agents were appointed to collect all the tax, without any exception; for this purpose, the state was divided into collection districts, one of which embraced the land in controversy. The aid of the company, therefore, was not necessary to a perfect execution of the law of Ohio; and the means provided by the legislature for its execution, excludes the idea, that it relied upon this corporation for any such assistance as it thought proper to volunteer.

But it has been insisted, that the tenth section of the act of incorporation confers upon the directors the power to assess a tax to pay a tax of the state. It empowers them, in general terms, to do whatever to them shall appear necessary and proper to be done for the well-ordering and interest of the proprietors, not contrary to the laws of Ohio. This section contains no specific and substantive grant of power. It ought, therefore, to be construed to be a general grant of the means necessary and proper for the execution of the specified purposes of the act of incorporation. So understood, it does not in fact enlarge the powers of the corporation, and seems to have been introduced into the act from abundant caution.

3. Before the examination of the remaining points, it may be proper to notice an objection that has been urged by the opposing counsel. It is insisted, that we are not at liberty to present either of these points to the court; because they do not form part of the opinion of the court below, to which exceptions were taken at the trial. The objection is predicated from the supposition, that the writ of error was sued out to reverse the opinion of the court, instead of the judgment itself. The writ covers the whole record; and if it shall appear from an inspection of it, that there is no error in the judgment, it cannot be reversed, whatever may be the errors in the
161*] opinion of the court. The record sets out the proof of the title of the plaintiffs *below; it is a perfect title. The title of the defend-

ant below, as proved by him, is also spread upon the record. If that title is defective, it cannot avail him against the perfect title of his opponents. We are, therefore, at liberty to examine that title, as it appears on the record.

The third objection, then, is, that the tax was void, being assessed in part for undefined purposes. The objects of the tax are declared in the resolution of assessment to be, "to defray the expenses of a tax laid by the state of Ohio, and other necessary expenses for the good of the proprietors of the said land." The taking power of the corporation is limited to certain purposes specified in the incorporating act, which would doubtless include the means necessary and proper for the full attainment of those purposes. It must be exercised within those limits; and in such a manner, that it can be known with certainty whether they have been exceeded. If otherwise, its assumptions of power could neither be detected nor controlled. For example, let it be conceded, that the corporation had no power to assess a tax to pay a tax of the state; is it not apparent, that a tax for that purpose might be assessed under the vague terms "for the good of the proprietors!" The undefined portion of the tax must, therefore, be void. The tax is one entire and indivisible thing; and if void for part, it must be for the whole. It cannot be ascertained, how much of the land in controversy, if any part of the tax was authorized, was sold to pay the valid, and how much the invalid portion of the tax.

4. The sale was contrary to the laws of Ohio. By the tenth section of the act of incorporation, the directors were restrained from doing those things that were contrary to the laws of the state. The collectors of the state tax were required to reside in their collection districts, to give bond and security to the state for the faithful collection and paying over the tax to the state treasurer. The sale and collection in this case was made by a company collector, residing in a distant state; who gave no bond to the state, nor was in any manner accountable to it. The sale was made, without the reservation of the right of redemption, which the law of *Ohio secured [*162
to infants, and to others laboring under legal disabilities. The collector for the corporation exacted fees and charges not allowed by the laws of Ohio; and thus increased the amount of the tax beyond what the state collector was authorized to receive. In all these particulars, and others that might be enumerated, the sale was contrary to the settled law and policy of Ohio, and therefore vicious.

5. Admitting the corporation had the power to assess and collect the tax in question; still, in making the collection, the company's collector did not conform to all the requisites prescribed to him by the act of incorporation. That act requires the collector to give notice of the time when the tax became due, by advertising the same, for at least three weeks, in a newspaper published in each of the counties of New Haven, Fairfield and New London, in the state of Connecticut. If the tax was not then paid, the collector was required to make another and further publication of the time and place of sale, for default of payment. The record shows an advertisement of sale for non-payment; but does not show that proof was made of an advertisement of the time when the tax became due. The cases of *Williams* v. *Peyton*, 4 Wheat. 79, 83, and of *Parker* v. *Rule's Lessee*, 9 Cranch 64, are expressly in point; and they show conclusively, that the advertisement can-

not be presumed, in the absence of proof; and that its omission is a fatal irregularity.

Wright, in reply, contended, that the provisions of the law of Ohio under which the tax was assessed, laid the tax on the whole body of the lands owned by the eighteen hundred persons. It was a common charge on the whole lands, which, at the time, were held by the proprietors undivided. It was, consequently, a necessary expense upon the company, for which the directors were authorized to provide, by the assessment of a tax. The law of Ohio looked to the land for the tax, and required the collectors to sell for the collection of it; and for the tax due on an entire undivided tract, an entire
*163] portion of the whole was directed to be sold. An *attempt to sell in parcels, would be to make a partition among the proprietors. No one could pay his own tax, and preserve his own share, because he owned no specific part: his joint interest would be more or less prejudiced, if any sale for taxes of the entire tract took place. He proceeded to show, by a reference to the law of Ohio laying the tax, further difficulties which would have attended the sale of part of the whole body of the land for the tax; and he argued, that the payment of the tax by the directors was necessary to preserve the lands of the company.

It is said, the 10th section of the act of incorporation confers no power to tax. That section was intended to give some power, and it authorizes that to be done which is "necessary and proper for the well-ordering and interests of the owners and proprietors." These terms fully comprehend the power, and authorized the doing of that which would save the property from sale under the state law.

It is objected, that the assessment is void for uncertainty, being in part for undefined purposes. It was for the Ohio tax, and other necessary expenses for the good of the proprietors of the land. While it is admitted, that it ought to have mentioned the objects, it is denied, that it was required that they should be specified. Were they for the general interest, and for the general good? This has not been denied.

In the act of incorporation, there is no reservation in favor of minors. In the general law, minors are allowed to redeem in a year after attaining adult years. In what manner? Not by treating the sale as void, but by paying the tax, interest and penalties, and for the improvements. These requisites suppose the sale valid. But the question before the court is one of power, not of policy. The omission of the legislature to make a politic provision concerning the rights of minors, does not deny the right; on the contrary, it admits the power. It cannot be maintained, that this affects the validity of the sale. All the incapacities and all the privileges of minors are the mere creatures of municipal law. The state of minority itself is created and regulated by that law, and the period of its duration varies in different states.
*164] *The act of incorporation of Ohio operated upon adults and on minors alike. No distinction is made in respect to their rights. The courts cannot originate such distinctions.

No authorities have been adduced in support of our positions. They are supposed to rest on principles familiar to the profession. Their application to the case before the court cannot be tested by precedent, for the whole case is one *sui generis*. The analogies illustrative of their application, result

more directly from the principles themselves than from adjudged cases; which can bear but remotely upon an insulated controversy. *Knowler, Douglass and others* v. *Coit*, 1 Ohio 519.

McLean, Justice, delivered the opinion of the court.—This was an action of ejectment, brought in the circuit court of Ohio, to recover possession of 1200 acres of land, parcel of 2400, in what is called the Connecticut reserve.

On the trial below, it was agreed, that Jonathan Douglass, the ancestor of the plaintiff's lessors, became proprietor of the premises in question, in May 1792, under the laws of Connecticut, granting lands to certain sufferers, and died the 6th of March 1800, vested with the legal title; which he held in common with many other proprietors, the land not being set apart, or apportioned to any one of the whole. That the lessors of the plaintiff were his heirs-at-law, and held as copartners or tenants in common. On the trial, it was proved by the plaintiff below, that on the 5th of May 1808, four of the lessors were minors. The defendant set up a title under a tax-sale, which was made by the company incorporated for the management of said lands.

This company was first incorporated by the Connecticut legislature, in the year 1796. No person is named in the act; but the corporators are designated, as the "Proprietors of the half million of acres of land lying south of lake Erie." Under this law, the corporation was organized. In 1797, the Connecticut legislature passed an amendment to this law. *On the 15th of April 1803, the legislature of Ohio passed an act [*165 incorporating those owners and proprietors, by the name of "The Proprietors of the half million of acres of land lying south of lake Erie, called sufferers' land;" and by that name gave succession to them, their heirs and assigns. This was called the sufferers' land, from the circumstance of its having been given by the state of Connecticut to indemnify the losses its citizens had sustained in the revolutionary war.

The act of incorporation by the legislature of Ohio required nine directors to be appointed, who were authoriezd to hold their meetings out of the state. In the second section, power is given to the directors to extinguish the Indian title; to survey the land into townships, or otherwise to make partition, as they should order, among the owners, in proportion to the amount of loss, and amongst other things, the act provided, "that to defray all necessary expenses of said company, in purchasing and extinguishing the Indian claim of title to the land, surveying, locating, and making partition thereof, as aforesaid, and all other necessary expenses of said company, power be and the same is hereby given to, and vested in, the said directors and their successors in office, to levy a tax or taxes (two-thirds of the directors present agreeing thereto) on said land, and have power to enforce the collection thereof." The ninth section provides, "that all sales of rights, or parts of rights, of any owner or proprietor in said half million acres of land, made by the collector, shall be good and valid, so as to secure an absolute title in the purchaser; unless the said owner and proprietor shall redeem the same, within six calendar months next after the sale thereof, by paying the taxes for which the said right or rights, or parts thereof, had been sold, with twelve per cent. interest thereon, and costs of suit." The act contains no provision in favor of the rights of infants or *femes covert*. By the tenth

section of this law, it is provided, "that said directors shall have power and authority, and the same is hereby given to them and their successors, to do whatever shall to them appear necessary and proper to be done, for *166] *the well-ordering and interest of the said owners and proprietors, not contrary to the laws of the state." The eleventh directs, that "supplies of money which shall remain in the hands of the treasurer, after the Indian title shall be extinguished, and said land located, and partition thereof made, shall be used by said directors for the laying out and improving the public road in said tract, as this assembly shall direct." The act is declared to be a public one, in the twelfth section.

An act imposing a land-tax was passed by the Ohio legislature in 1806, which remained in force in 1808. This act required entry to be made of lands for taxation. A perpetual lien was imposed on the land, whether entered or not, for the amount of the tax, and minors had a right to redeem their land sold for taxes, within one year after their minority expired. It appeared in proof, at the trial, that at a meeting of the directors of the company, convened at the court-house in New Haven, on Thursday, the 5th of May 1808, agreeable to a notification duly issued according to the ordinances of said directors, it was unanimously voted by six directors, being all that were present, that a tax of two cents on the pound, original loss, be assessed on the original rights or losses, in said half million acres of land, to be paid by each proprietor thereof, in proportion to each person's respective share or loss, as set in the grant of said lands made by the state of Connecticut; to be collected and paid by the several collectors to the treasurer of this company, on or before the 1st of July 1808, to defray the expenses of a tax laid by the legislature of the state of Ohio, and other necessary expenses, for the good of the proprietors of said land. The defendant gave in evidence the assessment of a tax upon the rights of the said Jonathan Douglass, the appointment of a collector, the issuing of a warrant of collection, the advertisement of a sale for taxes, the sale of a part of the right of said Douglass, amounting to twelve hundred acres, for taxes, to Elias Perkins, who conveyed the tract to the defendant.

The circuit court instructed the jury, that the directors had no power to assess said tax. And that the infant lessors were *not concluded *167] or bound by such assessment. To these instructions, the defendant excepted. The jury found a verdict of guilty, and judgment was rendered thereon. A reversal of this judgment is prayed for by the plaintiff in error, on the following grounds: 1. The court erred in their instruction to the jury, that the directors had no legal authority to assess the tax: 2. That the minor proprietors were not bound and concluded by the assessment and sale.

It is not contended in this case, that this company could derive corporate powers to do any act in Ohio, in relation to the suffierers' land, under the statute of Connecticut. All their powers must be derived from the law of Ohio. This law, it is insisted, is a private act, not designed for public purposes, and consequently, cannot affect the rights of any individual who did not assent to its provisions. That the provision declaring it to be a public act, does not alter the principle; for the rights derived under it are of a private nature, being limited to those who have an interest in the land; and it is denied, that any evidence of assent has been shown by the lessors

of the plaintiff or their ancestor. Several authorities were cited, as having a bearing upon the objections thus stated. The names of the sufferers are published in the Connecticut act or resolution in 1792, with the amount allowed to each, as his indemnity for losses sustained. In this act is found the name of the ancestor of the lessors of the plaintiff. His right descended to them, subject to the same conditions by which it was originally held.

The provision of the law of incorporation, that it should be considered a public act, must be regarded in courts of justice, and its enactments noticed, without being specially pleaded; as would be necessary, if the act were private. That a private act of incorporation cannot affect the rights of individuals who do not assent to it, and that in this respect it is considered in the light of a contract, is a position too clear to admit of controversy. But in the present case, this objection seems not to have been made in the court below; where proof of the assent, if necessary, might have been submitted to the jury. *From the nature of the right asserted, and the circumstances under which it was originated, this court cannot doubt, [*168 that the assent of the proprietors may be fairly presumed, both to the act of Connecticut and to that of Ohio. Rights have been protected and regulated under those laws, and to the provisions of the latter are the claimants indebted, in a great degree, for the present value of the remainder of the land, which they still hold; and, as has been well argued, if they participate in the benefits of the law, they can set up no exemption from its penalties.

The main question in the case is, whether the directors have the power, under the act of incorporation, to assess a tax on each proprietor's share, to pay a tax to the state. That a corporation is strictly limited to the exercise of those powers, which are specifically conferred on it, will not be denied. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended byond the letter and spirit of the act of incorporation. In the second section of the act, power is given to the directors to extinguish the Indian title, under the authority of the United States, when obtained; to survey and locate the land into townships, or otherwise to make partition; and to defray all necessary expenses in carrying those objects into effect; and to meet these and "all other necessary expenses of said company," the directors are authorized to levy a tax or taxes on said land, and to enforce the collection thereof. As the power to tax for the purpose of paying a tax to the state, is not found among the enumerated powers of the directors, it must be derived, if it exist, under the words, "all other necessary expenses of said company;" or under the tenth section, which provides, that "the directors shall have power to do whatever to them shall appear necessary and proper to be done, for the well-ordering and interest of the proprietors, not contrary to the laws of the state." In favor of this construction, it has been ingeniously argued, that partition not having been made of the land, it could not be entered for taxation, as required by the law of the state. That the half million of acres must be entered on the duplicate of the collector as one tract, and that it would be *impracticable for the collector to ascertain and collect from each proprietor his just proportion of the [*169 tax. That many of the proprietors are non-residents, and that any proportion of them, being desirous of paying their part of the tax, would not be discharged by doing so; as a part of the entire tract, involving their

interests, would be liable to be sold for any balance of the tax which remained unpaid. Whether partition was made of the land, when the directors assessed the tax, does not appear, nor is it considered a fact of much importance in the case. No argument drawn from convenience, can enlarge the powers of the corporation. Was the tax imposed a "necessary expense of said company," within the meaning of the act?

That these words would cover the expense of necessary agents to assess and collect a tax legitimately imposed by the directors, is clear, and also other incidental expenses, arising from carrying into effect the powers expressly given; but do they invest the directors with a new and substantive power? If they do, how is the exercise of the power to be limited? Must it depend upon the discretion of the directors, to determine all necessary expenses of the company? Ample provisions are found in the state law imposing a land-tax, for assessment and collection of the tax. A lien is held on all the taxable land in the state, whether entered for taxation or not; and if the tax should not be paid by a time specified, the collector was authorized, after giving notice, to sell the smallest part of the tract, which would bring the amount of the tax. For the convenience of non-residents, district collectors were appointed, who were required to hold their offices at places named in the act. The collector for the district including the sufferers' land, held his office at Warren, within what is called the reservation of Connecticut. The law imposing the tax operates upon the land in controversy, and raises a lien, the same as on any other taxable lands in the state.

It appears, therefore, that it was not the intention of the legislature to look to the corporation for the payment of the tax assessed under the law, but to the land, as in all *other cases. And if any part of the land *170] had been sold by the state, in which minors had an interest, under the law, they had a right to redeem it, within a year after they became of age. This is an important provision, and is not contained in the act of incorporation. The agents of the state were paid for their services out of the tax collected; those of the corporation, by the company. It would seem, therefore, that the tax collected by the state would be less expensive to the proprietors, than if collected by their own agents; and less hazardous to their rights, as the interests of minors were protected. If, therefore, the argument drawn from convenience could have any influence, it could not operate favorable to the power of the directors. The power to impose a tax on real estate, and to sell it, where there is a failure to pay the tax, is a high prerogative, and should never be exercised, where the right is doubtful.

In the preamble to the Ohio act of incorporation, there is a reference to the Connecticut act, and to the cession of the reserve, by that state, to the Union; and a statement that it was annexed to the state of Ohio. And as a reason for the passage of the act, it is stated, that said "half million of acres of land are now within the limits of Trumbull county, in said state, and are still subject to Indian claims of title; wherefore, to enable the owners and proprietors of said half million acres of land, to purchase and extinguish the Indian claim of title to the same (under the authority of the United States, when the same shall be obtained), to survey and locate the said land, and to make partition thereof to and among said owners and proprietors, in proportion to the amount of losses, which is or shall be by them respectively

owned," &c. These are the objects to be accomplished by the act of incorporation, and which could not be attained by the individual efforts of the proprietors. In the eleventh section of the act, it is provided, " that supplies of money which shall remain in the hands of the treasurer, after the Indian title shall be extinguished, and said land located and partition thereof made, shall be used by said directors for the laying out and *improving the public roads in said tract, as the legislature should direct." From a careful inspection of the whole act, it clearly appears that the incorporation of the company was designed to enable the proprietors to accomplish specific objects, and that no more power was given than was considered necessary to attain these objects. [*171

The words "all necessary expenses of the company" cannot be so construed as to enlarge the power to tax, which is given for specific purposes. A tax to the state is not a necessary expense of the company, within the meaning of the act. Such an expense can only result from the action of the company, in the exercise of its corporate powers. The provision in the tenth section, that the " directors shall have power to do whatever shall appear to them to be necessary and proper to be done, for the well-ordering of the interest of the proprietors, not contrary to the laws of the state," was not intended to give unlimited power, but the exercise of a discretion, within the scope of the authority conferred. If the words of this section are not to be restricted by the other provisions of the statute, but to be considered according to their literal import, they would vest in the directors a power over the land, only limited by their discretion. They could dispose of the land and vest the proceeds in any manner which they might suppose would advance the interest of the proprietors. It is only necessary to state this consequence, to show the danger of such a construction. The restrictions imposed, in other parts of the statute, very clearly demonstrate, that it was not the intention of the legislature to invest the directors with such power. Upon a full view of the various provisions of the act of incorporation, the court do not find a power given to the directors to assess a tax, as has been done, in the case under consideration, to pay a tax to the state. The judgment of the circuit court must, therefore, be affirmed, with costs.

Judgment affirmed.

*John V. Wilcox and Thomas Wilcox *v.* Executors of Kemp Plummer.

Statute of limitations.

Action of *assumpsit* to recover from the defendant, in the character of an attorney-at-law, the amount of a loss sustained by reason of neglect or unskilful conduct.

A promissory note was, by the plaintiff, placed in the hands of P. for collection; he instituted a suit in the state court thereon, against the maker, on the 7th of May 1820, but neglected to do so against the indorser; the maker proved insolvent; on the 8th of February 1821, he sued the indorser, but committed a fatal mistake by a misnomer of the plaintiffs; upon which, after passing through the successive courts of the state, a judgment of nonsuit was finally rendered against the plaintiffs; before that time, the action against the indorser was barred by the statute of limitations, to wit, on the 9th of November 1822; this suit was instituted on the 27th of January 1825; the statute of limitations of North Carolina interposes a bar to actions of *assumpsit* after three years.

The questions in the case were, whether the statute of limitations commenced running when the error was committed in the commencement of the action against the indorser? or whether it commenced from the time the actual damage was sustained by the plaintiffs by the judgment of nonsuit? whether the statute runs from the time the action accrued? or from the time that the damage was developed, or became definite? *Held*, that the statute began to run from the time of committing the error, by the misnomer in the action against the indorser.

The ground of action here is a contract to act diligently and skilfully; and both the contract and breach of it admit of a definite assignment of date; when might this action have been brought? is the question; for, from that time, the statute must run.

When the attorney was chargeable with negligence or unskilfulness, his contract was violated; and the action might have been sustained immediately; perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but on the other hand, it is perfectly clear, that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict; if so, it is clear, that the damage is not the cause of the action.[1]

This case came before the court, on a division of opinion between the judges of the Circuit Court of the United States for the district of North Carolina. It was an action of *assumpsit*, to which was pleaded the statute of limitations.

It was alleged, and proof offered, that on the 28th of January 1820, the *173] testator of the defendants, who was a collecting *attorney, accustomed to collect for John V. Wilcox & Co., received from them, for collection, a note which had been drawn by Edmund Banks, on the 2d of October 1819, payable to John Hawkins, two months after date, and by him indorsed, on the 9th of November 1819, to Hinton & Brame, and by them, subsequently,

[1] The same question came before the supreme court of Pennsylvania, in 1880; an attorney neglected to prosecute a claim, until it was barred by the statute of limitations, and it was determined, that the statute began to run in his favor, at least, from the time the claim was so barred, and not from the period when the consequent special damage was sustained. Moore v. Juvenal, 92 Penn. St. 484. So, in an action against an attorney, for a failure to collect, the statute begins to run from the time he first became liable; it is the duty of the client, to notice the neglect of the attorney, after a reasonable time has elapsed. Rhoner *v.* Evans, 66 Penn. St. 192. And see Campbell *v.* Boggs, 48 Id. 554; Stephens v. Downey, 53 Id. 424; Derrickson *v.* Cody, 7 Id. 27; Mardis *v.* Shackelford, 4 Ala. 493; Smith *v.* Owen, 7 Lea (Tenn.) 53. A cause of action against a recorder of deeds, for damages suffered by reason of his giving a false certificate of search, arises, when the search was given and the plaintiff parted with his money on the faith of it; not from the development of the damage. Owen *v.* Western Saving Fund, 97 Penn. St. 47. In Iowa, it has been decided, that the statute does not begin to operate upon a cause of action against the clerk of a court for negligence, in accepting an insufficient stay-bond, until the stay expires, and a right of actual accrues on the bond. Steel *v.* Bryant, 49 Iowa 116.

to the plaintiffs. On the 7th of February 1820, the testator, Kemp Plummer, instituted a suit in the name of John V. Wilcox and Thomas Wilcox, who composed the firm of John V. Wilcox & Company, against Banks, and at August 1820, recovered a judgment against him. Banks proved insolvent, and on the 8th of February 1821, the testator caused a writ to be issued in the names of John V. Wilcox, Arthur Johnson and Major Drinkherd, as copartners in the firm and style of John V. Wilcox & Company, against Hawkins, the indorser of the note. This action, thus instituted and docketed as a suit by John V. Wilcox & Company against John H. Hawkins, was, after various delays, brought to trial in April 1824, when the plaintiffs were nonsuited; and this nonsuit was affirmed on an appeal to the supreme court, at June term 1824.

Thereupon, the present suit was instituted, viz., on the 27th of January 1825, by John V. Wilcox and Thomas Wilcox, copartners under the firm and style of John V. Wilcox & Company, against the testator of the defendants; and on his death, this suit was revived against them by *scire facias*. Two breaches were assigned, in distinct counts, by the plaintiffs, in their declaration: The first, that the testator neglected to institute any suit for them against the indorser, until the 9th of November 1822, on which day, the remedy against the indorser was barred by statute. The second, that he instituted and carried on for them the suit, as hereinbefore stated, against the indorser, negligently and unskilfully; and before the same was terminated, the remedy against him was barred as aforesaid, as fully appeared by the record. The jury found a verdict for the plaintiffs, subject to the opinion of the court on the statute of limitations. The time allowed by this statute for bringing all actions on the case, *is three years after the cause of action accrues, and not afterwards. [*174

In the circuit court, it was contended by the defendants, that on the first count of the declaration, the cause of action arose from the time when the attorney ought to have sued the indorser, which was within a reasonable time after the note was received for collection; or, at all events, after the failure to collect the money from the maker; and that on the second count, his cause of action arose at the time of committing the blunder, in the issuing of the writ in the names of the wrong plaintiffs. It was contended by the plaintiffs, that on the first count, their cause of action accrued when the testator of the defendants suffered the remedy to be extinguished by a neglect to sue on or before the 9th of November 1822; and on the second count, when the suit unskilfully brought and prosecuted was terminated; or, at all events, on the 9th of November 1822. It was agreed, that if the positions taken on the part of the defendants be correct on both counts, then a judgment is to be entered for the defendants. If those taken by the plaintiffs be correct, then a judgment is to be entered for the plaintiffs on both counts; or if either of the positions thus taken by the plaintiffs be correct, then a judgment to be entered for the plaintiffs on the count wherein the statute ought not to bar. On which questions, the judges divided in opinion, and directed the difference to be certified to the supreme court.

Wirt, for the plaintiff, maintained, that the positions taken by the plaintiffs in the circuit court were correct, and that the same should be so certified to the circuit court, by this court.

The action is against an attorney for negligence, by which the plaintiffs lost their debt. It is admitted, that an attorney is only liable for gross negligence. 2 Stark. Evid. 133. In all the cases, it is held, that the action is not maintainable until the debt is not recoverable. *Russel* v. *Palmer*, 2 Wils. 328; 3 Day 390. *It is the loss of the debt which gives the
*175] action; and where the object of the action is to recover the whole debt from the attorney, the cause of action does not arise until the debt is lost. If the plaintiff has sustained a special damage by the negligence of the attorney, which is short of the loss of the whole debt, he may have an action for such special damage; and the cause of action will arise from the date of the negligence which produces it. But, where the negligence if charged to be the cause of the loss of the whole debt, the cause of action does not arise, until the negligence has continued so long as to produce that effect. Thus, in this case, it was not the negligence of one or two years which produced the loss of the debt; it was not until the continuance of this negligence for three years had raised the bar of the statute of limitations in favor of the original debtor, that the loss of the debt became complete, and the cause of action for the whole debt arose against the attorney.

Starkie says, in an action against an attorney for negligence, it seems, that the statute runs from the time when the plaintiff was damnified, and not from the time of the negligence. If this be law, it decides the case before the court; for the plaintiff was not damnified to the extent of the demand made by this action, until his right of action was extinguished against the original debtor; that is, until the bar of the statute arose to protect that debtor. Ballantine on Limitations 100–1. Now, the universal principle is, that the cause of action runs from the act or ommission which produces the injury.

There are some modern cases which, on their first aspect, may seem to bear adversely on this action; but when examined with reference to this principle, and compared with the cause of action stated in this declaration, they will be found to proceed on a marked distinction between these cases, and the case at bar. In the case of *Short* v. *Mc Carthy*, 3 Barn. & Ald. 626, the attorney had neglected to examine whether certain stock the plaintiff was about to purchase, stood in the name of the seller on the books of the Bank
*176] of England; he reported, *that it did, and the plaintiff purchased. The court held, that the cause of action arose from the time of the neglect to make the examination, and his false report that he had done so; this was a single act, by which the mischief was done. The case of *Howell* v. *Young*, 5 Barn. & Cres. 259; this is a case similar to that of *Short* v. *Mc Carthy*; the attorney neglected to examine if real property was incumbered, and the statute was held to run from his neglect, which was a single act. In both those cases, the injury was consummated at once, by an act of negligence; and herein the cases have a strong resemblance to that of *Gillon* v. *Boddington*, 1 C. & P. 541, cited by Holroyd, Justice, in *Howell* v. *Young*.

In reply to the argument for the defendant, Mr. Wirt said, the question is, whether, during the whole of the connection of Mr. Plummer with his clients, he had used due diligence? The distinction is between a single act of wrong, and a continuing act of wrong. The first cause of action was not sufficient in itself; until its effect was fatal to the plaintiff's interest, no suit could have been maintained. The error in the inception of the suit, was

a continuing cause of action. The principle being acknowledged, that an attorney is not liable but for gross negligence, and not for every negligence—for that only which produces the injury—could an action have been brought, on the failure of Mr. Plummer to institute the suit properly? This would not have been permitted. In this case, every year was a new negligence, until the final loss of the plaintiff's debt. It is suggested, that the principle which in some cases makes the statute of limitations run from the time of the knowledge of the fraud or injury, will apply.

STORY, Justice.—This principle applies only in cases of torts; and it has been expressly decided, not to apply to cases of *assumpsit*.

Webster, for the defendant.—The question is, whether the statute of limitations was not a sufficient bar to both counts in the declaration?

*To consider them separately. The first count alleges, that no [*177
suit was brought against the indorser, until he was discharged by the act of limitations; which was on the 9th of November 1822. Mr. Plummer received this note for collection, on the 28th of January 1820. He sued the maker of the note, and had judgment in August 1820; but obtained no satisfaction, the maker having failed. According to the allegations on this count, he then delayed more than two years, before he took any steps against the indorser. This was negligence, clear and actionable. He should have used all reasonable diligence, and as soon as he intermitted that diligence, he was liable to an action for neglect. The cause of action against him is, his omitting to sue the indorser so soon as he ought to have sued him; and the true question is, when did this cause of action arise?

The plaintiff contends, that this cause of action arose, when the indorser was discharged by lapse of time; but this cannot be maintained. Suppose, there had been no statute of limitations, by which an indorser would have been discharged, would not an action have lain against Mr. Plummer for not suing him? He had a reasonable time, according to the course of the courts, and the practice of the country, within which to sue the indorser; and if he did not sue within such reasonable time, he himself was subject to a suit for negligence. He had promised to use all common diligence to collect the note. Uncommon delay was a breach of that promise, and a cause of action. It is not at all material to this cause of action, whether the full extent of damage was then ascertained or not ascertained. It was enough, that there was a cause of action; from that moment the statute began to run. The law regards the time when the cause of action arises, not the time when the degree of injury, more or less, is made manifest; and when the cause of action is a breach of promise or neglect of duty, the right to sue arises immediately on that breach of promise or neglect of duty; and this right to sue is not suspended, until subsequent events shall show the amount of damage or loss. This may be shown at the time of trial; or, indeed, if it be not *actu- [*178
ally ascertained at the time of trial, the jury must still judge of the case as they can, and assess damages according to their discretion. A rule different from this would be attended with one of two consequences, either no action could be brought in such a case until the full amount of injury was ascertained; or a fresh and substantive cause of action would arise on every new addition to the probability of loss.

The cases are clear and decisive, to show that in such cases as this, the

cause of action arises with the original neglect. *Short* v. *McCarthy*, 3 Barn. & Ald. 626, 630; *Battley* v. *Faulkner*, Ibid. 288; *Howell* v. *Young*, 5 B. & C. 254; 2 Saund. on Plead. & Evid. 645. *Howell* v. *Young* is much like this case. It was an action against an attorney for negligence, where no loss actually resulted, and where the negligence itself was not discovered for some years; the court held the action accrued from the time of the breach of duty. There, the action was case; but the court looked to the real nature of the transaction, and applied the statute to it, disregarding the form of action. HOLROYD, Justice, said, "the loss does not constitute a fresh ground of action, but a mere measure of damages; there is no new misconduct or negligence of the attorney, and consequently, there is no new cause of action." This language is strictly applicable to the case before the court. Omitting to sue, beyond a reasonable time, Mr. Plummer was guilty of negligence; a cause of action had then accrued against him: his omitting still further to sue, was no new neglect; it was no new cause of action, but merely the continued existence of the former cause.

Counsel below illustrated this rule of law very well, by referring to the cause of action for defamation. If words, not in themselves actionable, be spoken, and special damage result, the party injured may sue within the time limited for such suits, after the happening of the injury; because, in such case, the specific injury is the cause of action. But if words be spoken which are of themselves actionable, and *special damage result also, *179] in such case, notwithstanding, or not regarding, the time of the happening of the special damage, the statute of limitations will run from the time of speaking the words.

It seems to have been contended for the plaintiff, in the court below, on this first count, that Mr. Plummer was bound to sue the indorser; that this was a continuing obligation; and that every day furnished a new fault and a new injury, till the claim on which he should have sued was extinguished. If this mode of argument be plausible, it is no more. The same reasoning would apply, and with equal force, to every case of implied promise. If one borrows money, it is his duty to pay; and he is in default every day, and commits a new injury every day, until he does pay; yet the statute runs in his favor from the day when he first ought to pay. Mr. Plummer was bound to sue at the first court, because that was reasonable time; not suing then, he was, from that moment, liable to an action for negligence; and supposing him not to have sued at all, as this first count charges, his fault was then complete.

But the true view of the case, no doubt, is that attempted to be raised under the second count. Mr. Plummer did sue; but he sued negligently or unskilfully. He brought a suit against the right party, on the plaintiffs' note; but he misdescribed the plaintiffs. This was his error; here was the negligence; and therefore, here the cause of action. He might have been sued for this negligence, the next day after he issued the writs; and the plaintiffs would have been entitled to recover such damages as they could show, at the time of trial, and on the trial, they had sustained. This original error in the attorney was a breach of duty, from which the failure in the suit resulted as a consequence. The failure in the suit was not his breach of duty; the loss of the debt was not his breach of duty; these were both but the consequences of that breach; they were

its results, and they fixed the measure of damages, but were not the negligence which was alone the cause of action. It is established law, that the limitation of the statute is to be referred to that act or omission which gives the cause of *action, without any regard to the consequences which ascertain the amount of damages. 1 Salk. 11. [*180

In the view which the plaintiffs' counsel takes of this matter, it would necessarily follow, that after the first term or court, in which Plummer could have sued, and ought to have sued, the plaintiff had a new cause of action against him, every day, for three years; each day's neglect being, as it is said, a new default, or new cause of action. If each day's neglect be a new default, and new cause of action, it is quite clear, that the pendency of a suit for yesterday's default would be no bar to a suit founded on a default of to-day; and if these causes of action be, as is contended they are, all new, independent and distinct, then it follows, that independent and distinct damages may be given in each. Arguments can be no more than specious which lead to results like these.

Johnson, Justice, delivered the opinion of the court.—This suit was instituted in the circuit court of the United States, in North Carolina, to recover of the defendants the amount of a loss sustained by reason of the neglect or unskilful conduct of their testator, while acting in the character of an attorney at law. A promissory note was placed in his hands for collection, by the plaintiffs. He instituted a suit in the state court thereon, against Banks, the maker, on the 7th of February 1820, but neglected to do so against Hawkins, the indorser. Banks proved insolvent; and then, to wit, on the 8th of February 1821, he issued a writ against the indorser, but committed a fatal misnomer of the plaintiffs, upon which, after passing through the successive courts of the state, a judgment of nonsuit was finally rendered against them. Before that time, the action against the indorser was barred by limitation, to wit, on the 9th of November 1822, and this suit was instituted on the 27th of January 1825. The form of the action is *assumpsit;* and the plea now to be considered is the act of limitation, which in that state creates a bar to that action in three years.

The case is presented in a very anomalous form; but in order to subject it to any known class of rules, we must *consider it as coming up upon opposite bills of exception, craving instructions, on which the court divided. This court can only certify an opinion on the points so raised; that part of the agreement stated in the record which relates to the rendering of judgment on the one side or on the other, must have its operation in the court below. [*181

There were two counts in the declaration: the one laying the breach in not suing at all, until the note became barred, thus treating as a mere nullity the suit in which the blunder was committed; and the other, laying the breach in the commission of the blunder; but both placing the damages upon the barring of the note by the act of limitation. As this event happened on the 22d of November 1822, this suit is in time, if the statute commenced running only from the happening of the damage. But if it commenced running, either when the suit was commenced against the maker, or a reasonable time after, or at the time of Banks's insolvency, or at the time when the blunder was committed; in any one of those events, the

three years had run out. And thus, the only question in the case is, whether the statute runs from the time the action accrued, or from the time that the damage is developed or becomes definite? And this we hardly feel at liberty to treat as an open question.

It is not a case of consequential damages, in the technical acceptation of those terms, such as the case of *Gillon* v. *Boddington*, 1 C. & P. 541, in which the digging near the plaintiff's foundation was the cause of the injury; for in that instance, no right or contract was violated, and by possibility, the act might have proved harmless, as it would have been, had the wall never fallen. Nor is it analogous to the case of a nuisance; since the nuisance of to-day is a substantive cause of action, and not the same with the nuisance of yesterday, any more than an assault and battery. The ground of action here, is a contract to act diligently and skilfully; and both the contract and the breach of it admit of a definite assignment of date. When might this action have been instituted, is the question; for, from that time, the statute must run.

*182] *When the attorney was chargeable with negligence or unskilfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but on the other hand, it is perfectly clear, that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action. This is fully illustrated by the case from Salkeld and Modern; in which a plaintiff having previously recovered for an assault, afterwards sought indemnity for a very serious effect of the assault, which could not have been anticipated, and of consequence, could not have been compensated in making up the verdict.

The cases are numerous and conclusive on this doctrine. As long ago as the 20th Eliz. (Cro. Eliz. 53), this was one of the points ruled in the *Sheriffs of Norwich* v. *Bradshaw*. And the case was a strong one; for it was altogether problematical, whether the plaintiffs ever should sustain any damages from the injury. The principle has often been applied to the very plea here set up, and in some very modern cases. That of *Battley* v. *Faulkner*, 3 B. & Ald. 288, was exactly this case; for there the damage depended upon the issue of another suit, and could not be assessed by a jury, until the final result of that suit was definitely known. Yet it was held, that the plaintiff should have instituted his action, and he was barred for not doing so. In the case of *Short* v. *McCarthy*, which was *assumpsit* against an attorney, for neglect of duty, the plea of the statute was sustained, though the proof established, that it was unknown to the plaintiff until the time had run out. And the same point is ruled in *Granger* v. *George*, 5 B. & C. 149. In both cases, the court intimating, that if suppressed by fraud, it ought to be replied to the plea, if the party could avail himself of it. In *Howell* v. *Young*, the same doctrine is affirmed, and the statute held to run from the time of the injury, that being the cause of action, and not from the time of damage or discovery of the injury.

*183] The opinion of this court will have to be certified in the *language of the defendants' supposed bill of exceptions, to wit, "that on the first count in the declaration, the cause of action arose at the time when the attorney ought to have sued the indorser, which was within a reasonable

time after the note was received for collection, or at all events, after the failure to collect the money from the maker. And that on the second count, his cause of action arose at the time of committing the blunder in issuing the writ in the names of wrong plaintiffs."

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 North Carolina, and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, in pursuance of the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that it be certified to the said circuit court of the United States for the district of North Carolina, "that on the first count in the declaration, the cause of action arose at the time when the attorney ought to have sued the indorser, which was within a reasonable time after the note was received for collection, or at all events, at the failure to collect the money from the maker; and that on the second count, his cause of action arose at the time of committing the blunder in issuing the writ in the names of wrong plaintiffs; all of which is accordingly hereby certified to the said circuit court of the United States for the district of North Carolina.

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*Adam Bartle *v.* William D. Nutt, Administrator of George Coleman. [*184

Illegal contracts.

A contract was made for rebuilding Fort Washington, by M., a public agent, and a deputy quarter-master-general, with B., in the profits of which M. was to participate; false measures of the work were attempted to be imposed on the government, the success of which was prevented by the vigilance of the accounting officers of the treasury; a bill was filed to compel an alleged partner in the contract to account for and pay to one of the partners in the transaction, one-half of the loss sustained in the execution of the contract: *Held*, that to state such a case is to decide it; public morals, public justice, and the well-established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this; to enforce a contract which began with the corruption of a public officer, and progressed in the practice of known wilful deception in its execution, can never be approved or sanctioned by any court.

The law leaves the parties to such a contract as it found them; if either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply-practised fraud; he must not expect that a judicial tribunal will degrade itself, by an exertion of its powers, to shift the loss from one to the other, or to equalize the benefits or burdens which may have resulted from the violation of every principle of morals and of law.[1]

Bartle *v* Coleman, 3 Cr. C. C. 283, affirmed.

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[1] No court will lend its aid to enforce the performance of a contract, which contravenes the provisions of a positive law, or is contrary to public policy. Pratt *v.* Adams, 7 Paige 615; Barton *v.* Port Jackson and Union Falls Plank-road Co., 17 Barb. 397; Otis *v.* Harrison, 36 Id. 210; Smith *v.* Albany, 7 Lans. 14; s. c. 61 N. Y. 444. When the parties are *in pari delicto*, no remedy can be had in a court of justice on an illegal contract. Saratoga County Bank *v.* King, 44 N. Y. 87. Thus, if a contract be entered into, in violation of the spirit and policy of a public statute, and one party pay money to the other in furtherance thereof, and the contract be in part executed, leaving a balance of the money unexpended, no action will lie to recover back such balance. Perkins *v.* Savage, 15 Wend. 412. As between parties who enter into a fraudulent combination against a third person, no relief will be given, either in law or equity. Warburton *v.* Aken, 1 McLean 460.

Bartle v. Coleman.

APPEAL from the Circuit Court of the district of Columbia and county of Alexandria. The appellant was complainant in that court.

The case was argued by *Swann* and *Jones*, for the appellant; and by *Taylor*, for the appellee.

BALDWIN, Justice, delivered the opinion of the court.—This suit was brought on the chancery side of the circuit court of the district of Columbia for the county of Alexandria, by the appellant (complainant) against the appellee (respondent). The object professed is to obtain a settlement of accounts arising out of a partnership charged to have existed between the complainant and respondent and one Ferdinand Marsteller.

The bill charges, that in 1814, a contract was entered into between the complainant and the government of the United States for rebuilding Fort Washington. *That when the contract was made, it was agreed *185] between the respondent, Ferdinand Marsteller, and the complainant, that they should share the profits of the contract—that is, that each of them should receive one-third part of the profits. That the respondent was to furnish the concern with such merchandise as might be necessary, disburse the funds of the concern, and keep the accounts relative to such disbursements; that the complainant was to superintend the work, and Marsteller to drawing and furnishing the money for carrying it on. The bill charges, that under this arrangement the work was commenced and finished, and that on its measurement, it was supposed a profit had been made of about $4500; and that, accordingly, $1500 was advanced to the respondent as his share of the profits. That, about the close of the business, it was discovered, that Marsteller had committed great frauds on the government; and that the complainant gave information of these frauds to the department of war, in consequence of which, Marsteller was disgraced, and soon after died insolvent. That, soon after this development, the respondent instituted suit against the complainant, for a balance claimed on his store account, and for money disbursed by him for complainant. That the complainant instituted a cross-action against the respondent; and both suits were, by mutual consent, referred to arbitrators. That when the reference was made, the complainant expected that the arbitrators would go into a full examination of the partnership accounts in relation to the government contract, as well as in relation to the individual accounts of the parties. But that when the arbitrators proceeded to act, they declined looking on the tranaction as a partnership one, and thought themselves bound to consider the accounts as unconnected with that concern; and finally awarded against the complainant $4497.42, in which was included an allowance of $1500 for Coleman's *186] share of the profits of the contract, and *$1534 for commissions in disbursing the money received from the government. That the copartnership has been always indebted to the complainant on account of the contract with government. The bill then proceeded to some details respecting the accounts, at this time not important, and prayed for on account and general relief.

The answer admitted that the complainant, in 1814, entered into a contract with Ferdinand Marsteller, agent for the United States, for the rebuilding of Fort Washington; with the terms and conditions of which contract the respondent had no concern. That it being necessary to have an agent in

Alexandria, to procure supplies for carrying the contract into effect, and as Marsteller had expressed a wish that the money should be disbursed through the agency of the respondent, and that the respondent should keep the accounts between Marsteller and the complainant; the latter agreed, that the respondent should act as agent, and in the first instance, offered him as a compensation, a share of the profits, and the complainant afterwards offered him a commission of five per cent. on the disbursements. That the respondent accepted of the latter offer, and under it entered on the agency, after having refused the first. The respondent denied, that he was in any shape interested as a copartner with the complainant and Marsteller, or with either of them, in relation to the said contract, or that he ever received any share of the profits; but admitted the charge of a commission of five per cent. on the money disbursed by him. He admitted, that the complainant having refused to pay the balance due from him to the respondent on private account, he did institute suit against him. That a cross-suit was brought by the complainant against the respondent; that both suits were referred to arbitrators, who awarded in the respondent's favor the sum of $4497.42. That on the investigation before the arbitrators, the complainant set up as a set-off the same claim which he prosecuted in this suit, and that it was rejected as unsupported by evidence. *The respondent relies on that award, and the judgment on it, as a bar to further proceedings. [*187

The cause came on to be heard on the bill and answer, and after various proceedings, not necessary to notice, the bill was dismissed without costs; the court being of opinion, that the partnership charged was contrary to public policy and sound morals, and that a court of equity ought not to lend its aid to either of the parties against the other.

Among the exhibits in the cause, was the contract between the complainant and the government, dated 17th September 1814, signed and sealed by complainant, and witnessed by Thomas Lowe.

"Accepted for the United States, by order of Colonel Monroe, secretary of war. September 30th, 1814.

F. Marsteller,
Deputy quartermaster-general."

The proposition for this contract was addressed by Bartle to Marsteller in writing, and the contract was signed on the same day.

From the evidence taken in the case, it clearly appears, that Marsteller acted as the agent of the United States in making the contract. That the materials furnished, and the labor performed, were under the direction of Bartle. That the money was principally received from the government by Marsteller, paid over by him to Coleman, who disbursed it on the orders of Bartle. There can be no doubt, that Bartle and Marsteller were partners in the profits of the contract; but the capacity in which Coleman acted does not seem to be so certain. There is very strong evidence of his being a partner; but it is not very material, whether he was an agent, or a party, in a contract made and carried into effect under the circumstances which attended this. The shades of difference which would, in either event, distinguish the moral or legal aspect of the cause, are too slight to engage the attention of the court.

By the account of the complainant against the firm of Marsteller, Coleman and Bartle, it appears, that his charges amount to $58,374; and that

there is a loss to the concern of *$10,538, one-half of which he charges to Coleman; and he seeks to recover this, by deducting the amount from a judgment obtained against him by Coleman, in the circuit court, affirmed here, on a writ of error. Of the alleged loss on this contract, the sum of $8860 is thus accounted for in the complainant's account against the firm. "To deductions made by the government (which are against the operative mechanic) from the work and materials; *vide* abstracts B, F, $8860 of this sum." Of this sum, it appears by abstract B, that $3198 were for an overcharge of fifty cents per perch of stone, and fifty cents per thousand of bricks, beyond the contract price; and by abstract F, that $5661, were for over-measurement of stone, brick and carpenter work; so that deducting these two items from the amount of the loss on the contract, it is reduced to $1678.

The case, then, presented for the consideration of the circuit court, and now before us for revision, is this: a contract made by the complainant with a public agent, a deputy quartermaster-general, to an amount exceeding $50,000, in the profits of which he was to participate; false measures attempted to be imposed on the government; the fraud discovered by the vigilance of its accounting officers; and a bill in equity filed to compel an alleged partner to account for, and pay to one of the parties in such a transaction, the one-half of a loss sustained by an unsuccessful attempt to impose spurious vouchers on the government. To state such a case is to decide it. Public morals, public justice, and the well-established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which began with the corruption of a public officer, and progressed in the practice of known and wilful deception in its execution, can never be consummated or sanctioned by any court. *The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply-practised fraud; which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself, by an exertion of its powers, by shifting the loss from the one to the other; or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws.

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This court is unanimously of opinion, that the circuit court were right in dismissing the complainant's bill, and affirms their decree, 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 Alexandria, and was argued by counsel: On consideration whereof, it is ordered, adjudged 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.

*James Caldwell, Appellant, *v.* John Taggart and Mary, his wife, and others.

Parties in equity.

Where a bill was filed to compel the execution of securities for money loaned, which securities, it was alleged in the bill, were promised to be given upon particular real estate purchased by the money loaned, and the complainants had omitted to make the prior mortgagees of the premises on which the securities were required to be given, parties to the bill, the court said; it has been urged, in reply to those grounds of reversal for want of parties, or for want of due maturation for a final hearing, that nothing is ordered to be mortgaged or sold, besides the interest of the party who is ordered to execute the mortgage, or whose interest is to be sold, whatever that may be; but this we conceive to be an insufficient answer. It is not enough, that a court of equity causes nothing but the interest of the proper party to change owners; its decree should terminate and not instigate litigation; its sales should tempt men to sober investment, and not to wild speculation; its process should act upon known and definite interests, and not upon such as admit of no medium of estimation; it has means of reducing every right to certainty and precision; and is, therefore, bound to employ these means, in the exercise of its jurisdiction.

The general rule is, "that however numerous the persons interested in the subject of a suit, they must all be made parties, plaintiff or defendant, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice, by embracing the whole subject; deciding upon and settling the rights of all persons interested in the subject of the suits; to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation.

Where in the course of proceedings in a suit in chancery in the circuit court, it is apparent, that a father has not presented the interests of his children for protection, the court said; although there is no appeal taken in behalf of the children, the court, while interfering to prevent the breach of a trust in behalf of the father, can hardly be expected to pass over, without noticing, an omission in the father, amounting to a breach of trust, to the prejudice of his infant children. p. 201.

Appeal from the District Court of the Western District of Virginia. The appellees, who were citizens of Maryland, filed their bill in the court of the United States for the western district of Virginia, in which the material allegations set forth were:

That on the 22d of June 1809, Grizzle Taggart, mother of John Taggart, conveyed to William Copeland Goldsmith and James Caldwell, all her estate, for the uses and purposes *mentioned in the deed exhibited with the bill. A part of the estate so conveyed consisted of a debt [*191 due to the said Grizzle from Keller & Foreman, of Baltimore, which was secured by a mortgage on valuable real property, called the Salisbury Mills. That about the year 1817, Caldwell, who was the nephew of Grizzle, importuned her, and her son John, and his wife, to consent to permit him to receive the money due on the mortgage, and to use it in the purchase of an estate called the White Sulphur Springs, situate in Greenbrier county, Virginia, and which belonged to the heirs of Michael Bowyer; and to induce them to yield their assent, he represented that estate to be very valuable, and promised that he would incumber it (when purchased) by a mortgage to secure the money which he should receive from Keller & Foreman. The complainants further stated, that consent was accordingly yielded on the conditions proposed; in consequence of which, Caldwell (who was then sole trustee, the other being dead) received from Keller & Foreman the sum of $15,760.70, in discharge of their mortgage, which he appropriated to the purchase of several shares of the copartners of the said Michael Bowyer in

the said estate, or paid therewith for some shares previously purchased. Some time afterwards, as the complainants further alleged, in order to satisfy Grizzle Taggart of the propriety of his purchase, and that the security promised would be ample, Caldwell brought her from her residence in Baltimore to the White Sulphur Springs. That she returned about the beginning of October 1817, well pleased with the property; that Caldwell promised to execute the mortgage immediately after her return, but that in a very short time, Grizzle departed this life, without its having been done. A few days after this event, Caldwell, secretly and unknown to the complainants, as they stated, executed a mortgage in favor of Jeremiah Sullivan and others, on his interest in the White Sulphur Springs estate, to secure the sum
*192] of $20,000. *A second mortgage, to secure the same debt, was executed by Caldwell, bearing date the 15th of September 1819, and both were duly recorded (and were in the record). It was stated, that some defect, unknown to the complainants, was supposed to exist in the mortgage of the 24th of October 1817, which was the reason for the second being executed. After the death of Grizzle Taggart, her son, John Taggart, as the complainants stated, applied to Caldwell, to execute the mortgage which he had promised on the White Sulphur Springs estate. He then informed the said John, that he had executed the mortgage of the 24th of October 1817, before mentioned, on which the said John upbraided him with his breach of trust. Caldwell then promised to extinguish the incumbrance, out of the annual profits of the estate, and to make provision for the debt created as before mentioned. Nothing however was done; the complainants being without any written evidence of their claim, until the 9th of September 1823, when Caldwell executed a paper, exhibited with the bill, acknowledging the sum of $15,260.70 to be due on account of principal, and $2900 on account of interest. The bill further stated, that the mortgagees, Jeremiah Sullivan and others, instituted a suit to foreclose the equity of redemption; but before the case was brought to a hearing, a certain Richard Singleton purchased the mortgage and obtained a transfer thereof; that to secure the money paid for the mortgage and other money advanced, he obtained a deed of trust from Caldwell on his interest in the estate, that is four-sevenths obtained by purchase, and one-seventh in right of his wife, who was a daughter of Michael Bowyer. The complainants further stated, that the profits of the said estate were great; but that such was the imprudence of Caldwell, that he had never paid any part of the principal or interest on the mortgage, either before or since Singleton acquired it; that he was incurring other large debts, and that he had no other means to pay the money due to them, except his interest in the White Sulphur Springs estate. They
*193] insisted, that they held an equitable lien on that estate, so far *as Caldwell's interest intended; and they prayed that it might be subjected to their debt; that another trustee might be appointed to execute the trust created by the deed of the 22d of June 1809, and for general relief.

To this bill, James Caldwell and his wife filed a joint answer, sworn to on the 30th of September 1827, the material statements of which were the following: He admitted the execution of the deed of the 22d of June 1809; though he stated, that he was not apprised of its existence, until after it was recorded. He admitted, that he received from Keller & Foreman the sum of $15,760.70, due to Grizzle Taggart, and embraced in the deed executed

by her ; but he alleged that he was her debtor to that amount, and that to secure the debt, he had given a deed of trust to Nicholas Brice, as trustee. That at his request, Grizzle and her son John consented to release his deed of trust, so as to enable him, Caldwell, to sell the property (Salisbury Plains) to Keller & Foreman, which was accordingly done, and he received the money. That the release exhibited with the answer was executed by Nicholas Brice, Grizzle Taggart, John Taggart and Mary his wife, when he was not present. He alleged, that Brice agreed, on his behalf, without consulting him, that the debt due from him to the said Grizzle, or a part thereof, should be vested in bank-stock, and that the agreement and instrument of writing mentioned in the release contemplated that object ; that he never executed any such writing, though he was informed, before the delivery of the release, of the proposition to invest the money due from him in bank-stock, and refused to accept it on that condition, of which the parties interested were informed ; but that the release was afterwards, by their consent, or without objection from them, delivered. That he was unwilling to accept the release, on the condition proposed, because his object in desiring it was the use of the money. He alleged, that the money which he obtained from Keller & Foreman was applied to the payment of his debts, and not to the purchase of the White Sulphur Springs, or any interest therein, or anything due therefor. *He denied, that it was his object [*194
to invest the money obtained by him in the White Sulphur Springs property ; or that he obtained the release by any such representation, or by any promise to give an incumbrance thereon. That he acquired the White Sulphur Springs property, with other funds, and never contemplated securing the debt due to Grizzle Taggart on that property ; but expected to pay it out of a large debt due to him from another person, which he failed to realize. He admitted that Grizzle Taggart visited the White Sulphur Springs ; that he returned with her in 1817 ; but denied, that she was brought there with the views mentioned in the bill. He said, he did not recollect, and had no reason to believe, that a single word passed between him and her, in relation to his giving a mortgage or other lien on that property, either during the said visit, or at any other time.

Caldwell denied that there was any stipulation between him and John Taggart and Mary his wife, or either of them, that the debt should be secured by a mortgage on the White Sulphur Springs property. He stated, that he did not recollect that the said John ever upbraided him with a breach of trust. He admitted, that he had a conversation with John, in 1819, upon the subject of his giving the mortgage to secure other persons, and that John Taggart then said, that he ought, in the first place, to have secured the debt in which he was interested. In reply to which, he stated, that he was willing to secure that debt, by a lien on the property, as soon as the other was extinguished, which he supposed he would be able to do, after the lapse of some time. Previous to this, Caldwell stated, that he has no recollection of having conversed with John Taggart on the subject of giving a lien, though the fact of his having executed the other mortgage was known to John as early as 1817. He stated, that he did not believe that John Taggart ever thought that he had deceived him. That there was no privacy in giving the mortgages of the 24th of October 1817, and 15th of September 1819, which he admitted he executed to secure the same debt. As evidence

to show that *John did not believe he had been deceived, he exhibited a letter from him, which was in the record. He admitted the execution of the paper exhibited with the complainants' bill, bearing date the 9th of September 1823; the pendency of a bill to foreclose the equity of redemption on the mortgage of the 15th of September 1819; the subsequent purchase of Richard Singleton, and the execution of a deed of trust for his benefit, as stated in the bill. James Caldwell then proceeded to state in his answer, the interest which he has in the White Sulphur Springs property. 1. That his wife was entitled to one-seventh, as one of the heirs of Michael Bowyer. 2. That she was entitled to another seventh, by virtue of a conveyance made to her by her brother, John Bowyer. 3. He claimed one-seventh, by purchase from William Bowyer, to whom he paid only $100 of the purchase-money. The contract was referred to, and filed among the papers of this court. He stated that William Bowyer was dead, having made a will, which was exhibited and copied into the record. 4. He claimed another seventh by purchase from William Bedford, who was stated to have purchased the interest of Thomas Bowyer, a son of Michael. That for this interest he stood indebted $6000, with interest, for which a deed of trust was executed on the property purchased, a copy of which was exhibited; and a suit had been brought to enforce this lien. 5. He claimed the interest of James Bowyer, another son of the said Michael. The remaining two shares, he stated, were in Frances Bedford and Elizabeth Copeland, daughters of Michael Bowyer.

Caldwell insisted, that if, contrary to his expectation, the complainants should establish a specific lien on any part of the said property, that it could only extend to such interests as he owned when such lien originated; and that it ought not to be extended to defeat the rights of others, or their equitable lien for purchase-money due to them from him; and he required that their rights should be precisely ascertained and adjusted, before any effort should be made to enforce such lien in favor of the complainants, and that partition should be made according to the rights of the parties.

*196] *Caldwell further stated, that an indenture was executed by him and his wife, and the other persons interested, by which it was agreed, that all the lands and tenements of which Michael Bowyer died seised, should be divided between the parties, by commissioners chosen for that purpose, except two hundred acres, including the White Sulphur Springs, buildings, &c., which should be held in common; that this partition had never been made. He insisted, that if the complainants should establish the lien demanded by them, that partition should be made according to said agreement, and his part in the two hundred acres first subjected. He admitted, that the White Sulphur Springs estate was valuable; but regretted that the profits were not as great as estimated by the complainants. He deemed it unnecessary and irrelevant to exhibit a schedule of his receipts and expenditures, or an account of his management and history of his domestic affairs. He stated, that he was desirous of paying all the debts which he owed, and particularly that claimed in this case, the justice of which he had never denied; that he trusted an apology would be found for not having effected that sooner, in the embarrassed situation of his affairs. Such was the condition of the White Sulphur Springs property, when he obtained possession, that he had been compelled to incur many expenditures to make

it at all productive. He had well-founded hopes, that if he was suffered to continue his exertions, in a few years, he would be able to do full justice to all the world; but that the interests of his creditors required, that he should not be destroyed by an unmerciful pressure of their demands.

Caldwell objected to the measure of relief sought by the complainants, as not being warranted by the laws of the land, the principles of equity, or the dictates of justice. So far as they set up any pretended parol agreement, he insisted, that it was within the operation of the statute of frauds and perjuries; of which he prayed the benefit, as if it had been specially pleaded. Caldwell moreover stated, that he felt it his duty to protect the trust fund committed to his care, from any appropriation not contemplated by the donor. He denied the right of the complainants to take that fund *from the control of the trustees; or to exhaust or expend the principal; and said, that the interest or profits only could be applied to the use of the *cestuis que trust.* [*197

The defendant, the wife of James Caldwell, stated, that her interests in the White Sulphur Springs property were, in some respects, different from those of her husband; and that she was advised that no agreement made by him, in which she had not concurred, in the form prescribed by law, affected her rights, derived by descent, devise or conveyance. She referred to a copy of the deed (which was not in the record) executed by her brother John Bowyer, to show that she was entitled to the sole and exclusive use and benefit of his share. As to the interest of her deceased brother, William Bowyer, she contended, that she was entitled to the same, or the purchase-money thereof, during her life, in the same exclusive and separate manner; and that after her death, the property passed to her children and nephew. She referred to the agreement between her husband and the said William Bowyer, to show that the latter had the privilege to revoke the contract, if the purchase-money should not be paid; which privilege she said passed to her by the will of the said William, which privilege she claimed to exercise, so far as the same might be necessary for her complete protection. She prayed that she might be permitted to answer separately, or that her rights might be investigated and decided, as if she had done so. She said, she had no knowledge of the justice of the debt claimed, and how it originated.

Depositions were taken in the district court, establishing certain facts which are sufficiently referred to in the opinion of this court; and when the cause came on to a hearing, the court made the following decree:

This cause came on to be heard, on the bill, answers, exhibits and examination of witnesses, and was argued by counsel: On consideration whereof, and for reasons set forth in a written opinion filed among the papers in this cause, it is adjudged, ordered and decreed, that the defendant, James Caldwell, do forthwith execute a proper deed of mortgage to Silas H. Smith, who is hereby appointed a trustee for that purpose, providing for the annual payment to *the said trustee, of the legal interest on the sum of $15,760.70, the amount of the sum withdrawn by the said defendant from the trust fund, to commence this day; to be paid by the said trustee to John Taggart, during his life; and on his death, that the principal, with any interest that may accrue after the death of the said John, to be paid to the children of said John and Mary his wife, according to the provisions of the deed executed by Grizzle Taggart, on the 22d of June 1809, and filed [*198

among the papers in this cause. And it is further adjudged, ordered and decreed, that the said defendant pay unto the plantiff, John Taggart, the sum of $7513.40, being the amount of interest now due on the said sum of $15,760.70 ; and in case the said defendant shall make default in the payment of the said sum of money, so that the same or any part thereof shall remain due and unpaid on the 5th of August next, then it shall be the duty of the marshal of this court to proceed to sell all the right, title and interest which the defendant may have in the White Sulphur Springs estate, in the county of Greenbrier, for ready money; having first advertised the time and place of sale, in some newspaper published in Richmond, Staunton and Lewisburg, for thirty days before such sale, and that he report his proceedings to this court. And it is further adjudged, ordered and decreed, that the said defendant pay unto the plaintiffs their costs expended in the prosecution of this suit. From this decree, the said James Caldwell prayed and obtained an appeal to the supreme court of the United States.

The case was argued by *Wirt*, for the appellant ; and by *Sheffy*, for the appellees.

Wirt contended, 1. That the necessary and proper parties had not been called before the district court when the decree was pronounced. 2. That as to those who had been called before the court, the cause had not been
*199] matured for a decree, when the same was pronounced. *3. That the decree is inconsistent with the relief prayed for by the bill. 4. That the decree was not justified by the evidence in the cause. 5. That even if such a decree could have been justified by the general evidence, it would only have been after the prior liens on the property had been marshalled, by the report of a master commissioner, and the remaining interest of Caldwell in the property precisely ascertained and fixed by the decree.

Sheffy, for the appellees, argued, that there is no error in the decree, injurious to the rights of the appellant.

Johnson, Justice, delivered the opinion of the court.—The material facts of this case may be thus stated : Grizzle Taggart, whishing to make provision for the family of her son John Taggart, conveyed a considerable property to one Goldsmith, and the defendant, James Caldwell, to the use of herself for life, then to the joint use of John Taggart and his wife for life, to the use of the survivor for life, and finally, to be distributed among their children. The children, together with their parents, preferred this bill. The deed bears date the 22d of June 1809, and contains a clause, empowering John and his wife, or the survivor of them, to sell and dispose of the trust property, " and invest it in other property, subject to the like uses and trusts, and to repeat the same as often as they may think beneficial for them and their children." In July 1812, Goldsmith being dead, Caldwell prevailed upon the *cestuis que trust*, Taggart and wife, to permit him to make use of a large sum of money raised upon the trust property, and secured it to them by a mortgage on the Salisbury Mills, executed to Nicholas Brice, in terms adapted to the purposes of the original trust deed. Afterwards, in the year 1816, Caldwell prevailed upon the *cestuis que trust* to make another change of application of the trust fund in his favor, by executing a release of the mortgage, to enable him, as is alleged in the bill, to make a purchase

*of the Sulphur Springs, in Virginia, and under a promise to mortgage that property when purchased, to secure the money according to the original trusts.

These facts make out the complainants' case; and excepting the three allegations, that the last loan was solicited for a specific purpose, that it was applied to that purpose, and under a promise that the property, when purchased, should be mortgaged to secure the loan according to the trusts, the answer admits the facts set out in the bill. It is then a clear case for relief; since the defendant Caldwell, uniting in himself the two characters of trustee and debtor to the trust fund, was guilty of a clear breach of trust, in availing himself of the release of 1816, without seeing the debt well secured, agreeable to the deed of 1809. He must, in any event, be decreed to substitute such security as he ought to have taken upon any other change of investment effected in pursuance of the original trust. But the complainants here go for specific relief, claiming to stand in the relation of *cestuis que trust* or mortgagees of a specified property; upon the ground, as to the first relation, of having paid the consideration-money, and as to the second, of having surrendered their existing mortgage, upon Caldwell's promise to execute that in contemplation; and in one or the other or both those rights, to have the property placed in the hands of a receiver, that the income may be applied to extinguish prior incumbrances, and leave the property free to satisfy this claim. The bill also contains the prayer for general relief, but the specific claim must first be disposed of, before the general prayer can be considered.

The court below sustained the allegations of the bill relative to the promise to mortgage the specific property, and decreed Caldwell to execute a mortgage accordingly, to secure the principle sum of $15,760. It then goes on to order the interest, calculated to the date of the decree, amounting to $7500, to be paid by a day prescribed, or in default thereof, that the property so ordered to be mortgaged to secure the principal, shall be sold to raise the interest. We think it clear, that there is an error in this, since the *interests of those in remainder would thus be sacrificed to the first taker. And although there is no appeal taken in their behalf, yet [*201 the court, while interfering to prevent the breach of a trust in behalf of the father, can hardly be expected to pass over, without noticing, an omission in the father, amounting to a breach of trust, to the prejudice of his infant children. In an instance, therefore, in which a decree so obviously needs reforming, it is without reluctance, that the court lays hold of such legal grounds for reversing it, as may be considered under the appeal taken by the defendant.

The complainants in their bill set out, that soon after receiving and using the release before mentioned, Caldwell purchased the five-sevenths of the interest in the Sulphur Springs, and shortly after mortgaged the same to Sullivan and others, to secure certain large sums which they had assumed for him; that this mortgage was foreclosed according to the laws of Virginia, and finally lifted and assigned to Mr. Richard Singleton, who advanced thereon, for the relief of Caldwell, $23,000, to secure which the latter executed a trust deed to A. Stevenson and F. Bowyer, which it appears became absolute, by failure of payment, more than a year since. And when the defendant, Caldwell, as well as Frances Bedford, come to answer to the alle-

gation of the purchaser of the property in question, we find that, although Caldwell has repeatedly executed deeds conveying or incumbering five-sevenths of the whole, he does not pretend to make title to more than one-seventh, to wit, the share of James Bowyer. The rest are either vested in his wife or his children, or incumbered with prior liens, which will probably sweep the whole.

His answer also introduces into the cause a deed of partition, or one partaking of that character, executed by the parties interested in this property, bearing date in 1810, by which a division or distribution has been agreed upon, adapted to the nature of the property, and in which every individual has so distinct an interest, that it may well be questioned, whether, until it
*202] is in some way carried into *execution, it will be possible for any purchaser to know what he is buying. This deed has not been copied into the record sent up, but it is presumed, that it could hardly have been passed over in the court below. Of the interests thus introduced into the cause by the answer, that of the children of Thomas Bowyer, as set out in Mrs. Bedford's answer, and that of the children of Mrs. Caldwell and Mrs. Copeland, as shown by the will of William Bowyer, are wholly unrepresented. And as to the interest of Mrs. Copeland or her representatives, although there was an order for a decree *nisi*, the decree nowhere appears to have been entered, nor evidence of the service or return of the rule exhibited in the record.

In reply to all these grounds of reversal, for want of parties, or for want of due maturation for a final hearing, it has been urged, that nothing is ordered to be mortgaged or sold beside Caldwell's own interest, whatever that may be. But this we conceive to be an insufficient answer. It is not enough, that a court of equity causes nothing but the interest of the proper party to change owners. Its decrees should terminate, and not instigate, litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has the means of reducing every right to certainty and precision, and is, therefore, bound to employ those means in the exercise of its jurisdiction.

There is no want of learning in the books, on this subject. The general rule is laid down thus: "however numerous the persons interested in the subject of a suit, they must all be made parties, plaintiffs or defendants, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice, by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit; to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation." And again, "all persons are to be made parties who are legally or beneficially interested in the sub-
*203] ject-matter and result of the *suit;" extending, in most cases, to heirs-at-law, trustees and executors. Thus, in a case in which a remainder-man in tail brought a bill against the tenant for life, to have the title-deeds brought into court, and there were annuitants on the reversion, and a child interested under a trust term of years, prior to the limitation to the plaintiff, that is, incumbrancers prior and posterior to the plaintiff, Lord Hardwicke, 3 Atk. 570, refused a decree, without first making them parties. So, where husband, tenant for life, remainder to his wife for life, remainder

over, brought his bill, without joining the wife ; the objection was made and sustained, on the ground, that if there was a decree against the husband, it would not bind the wife. 1 Atk. 289. So, if an under-mortgagee brings his bill to foreclose the original mortgagor, he must make the first mortgagee a party. 3 P. Wms. 643. This is the relation in which the complainants here seek to place themselves in reference to Mr. Singleton. And there are various cases in which, though the heir-at-law is not a necessary party, he is made such in practice, and the reason assigned is, to free the estate from every blame that may lessen its value at the sale. 2 Ves. 431 ; 3 P. Wms. 91 ; 3 Bro. C. C. 229, 365. And so, in cases of indefinite or blended interests, all the participators are necessary parties ; as, where a residue is devised to several, or even devised by specified shares.

It is clear, then, that this cause must go back, as well to have the necessary parties made, as to have the decree reformed and reduced to legal precision. It is true, this course might have been avoided, if this court, upon looking through the complainants' case and allowing the full benefit of everything that has been legally established, had seen that a decree might now finally be rendered against the appellant. It would then have been nugatory to send it back for parties. But such is not the conclusion to which this court has arrived ; it has already expressed the opinion, that to a certain extent, it is a very clear case for relief, and all the difficulties arise upon the nature of the *relief prayed and granted. There is no [*204 knowing what new aspect may be given to the cause, when all the necessary parties come in and answer. But as it is now presented, had the prayer for specific relief upon the Sulphur Springs been out of the cause, it would not have been sent back, without such a decree against the defendant, Caldwell, as the court below ought to have rendered.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the district of West Virginia, and was argued by counsel: On consideration whereof, it is ordered and decreed by this court, that the decree of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court, for further proceedings to be had therein, according to law and justice.

*John Lloyd, Plaintiff in error, *v.* Charles Scott, Bailiff of William S. Moore, Defendant.

Usury.

S. being seised in fee of four brick tenements and lots of ground, in Alexandria, in consideration of $5000, granted to M. an annuity or yearly rent-charge of $500, to be issuing out of and charged upon the houses and ground, and covenanted, that the same should be paid to M., his heirs and assigns for ever thereafter, with the right to distrain, in case of non-payment of the same. In the deed granting the rent-charge, M., the grantee, covenanted, that at any time after five years, on the payment of $5000, with all arrears of rent, he, M., would release the said rent-charge, and the same should cease; S. covenanted to keep the buildings in repair, and that he would have them fully insured against fire, and assign the policy of insurance for the protection of M., the money from the insurance to be applied to the rebuilding or repairing the houses, if destroyed or injured by fire. Afterwards, S., by deed of bargain and sale, conveyed to L., the plaintiff in error, the houses and lots of ground, subject to the payment of the rent to M., who, since the same conveyance, had been seised of the same; the rent being unpaid M. levied a distress for the same, and L. brought replevin; and the defence to the claim for rent set up to the avowry was, that the transaction was usurious, and the deed granting the rent-charge was, by the laws of Virginia, absolutely void.

The statute of Virginia, of 1793, provides, that no person shall take, directly or indirectly, more than six per cent. per annum on loans of money, or for forbearance, for one year; and it declares, that all bonds and other instruments for a greater amount of interest shall be utterly void. p. 223.

The requisites to form an usurious transaction are—1. A loan, either express or implied. 2. An understanding that the money lent shall or may be returned. 3. That a greater rate of interest than is allowed by the statute shall be paid. The intent with which the act is done, is an important ingredient to constitute this offence. p. 224.

An ignorance of the law will not protect a party from the penalties of usury, where it is committed; but where there was no intention to evade the law, and the facts which amount to usury, whether they appear upon the face of the contract, or by other proof, can be shown to have been the result of mistake or accident, no penalty attaches. p. 224.

The act of usury has long since lost that deep moral stain which was formerely attached to it; and is now generally considered only as an illegal or immoral act, because it is prohibited by law. p. 224.

If the court were, in this case, limited by the pleas, to the words of the contract, and it purported to be a purchase of an annuity, and no evidence were adduced giving a different character to the transaction; the argument, that though the annuity may produce a higher rate of interest than six per cent. upon the consideration paid for it, as it was a purchase, it was legal; would be unanswerable. An annuity may be purchased like a tract of land or other property; and
*206] the *inequality of price will not of itself make the contract usurious; if the inadequacy of consideration be great in any purchase, it may lead to suspicion; and connected with other circumstances, may induce a court of chancery to relieve against the contract. p. 225.

In this case, $5000 was paid for a ground-rent of $500 per annum; this circumstance, although ten per cent. be reserved on the money paid, does not make the contract unlawful; if it were a *bonâ fide* purchase of an annuity, there is an end of the question; and the condition which gives the option to the vendor to repurchase the rent, by paying the $5000, after the lapse of five years, would not invalidate the contract; the right to repurchase, as also the inadequacy of price, would be circumstances for the consideration of a jury. p. 225.

The purchase of an annuity, or any other device, used to cover a usurious transaction, will be unavailing; if the contract be infected with usury, it cannot be enforced. p. 226.

If a party agree to pay a specific sum, exceeding the lawful interest, provided he do not pay the the principal by a day certain, it is not usury; by a punctual payment of the principal, he may avoid the payment of the sum stated, which is considered as a penalty. Where a loan is made, to be returned at a fixed day, with more than the legal rate of interest, depending on a casualty, which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury. p. 226.

All the material facts to constitute usury are found in the second plea; it states a corrupt agree-

ment to loan the money at a higher rate of interest than the law allows; that the money was advanced, and the contract executed in pursuance of such agreement; that on the return of the principal, with the full payment of the rent, after the lapse of five years, the annuity was to be released; the amount agreed to be paid above the legal interest for the forbearance, is not expressly averred, but the facts are so stated in the plea as to show the amount with certainty; $500, under cover of the annuity, were to be paid annually for the forbearance of the $5000; making an annual interest of ten per cent. Do not these facts, uncontradicted as they are, amount to usury? Is it not evident, from this statement of the case, that the annuity was created as a means for paying the interest, until the principal should be returned, and as a disguise for the transaction? such is the legitimate inference which arises from the facts stated in the plea. p. 227.

The principle seems to be settled, that usurious securities are not only void, as between the original parties, but the illegality of their inception affects them even in the hands of third persons, who are entire strangers to the transaction; a stranger must "take heed to his assurance at his peril;" and cannot insist on his ignorance of the corrupt contract, in support of his claim to recover upon a security which originated in usury. p. 228.

In the case of De Wolf *v.* Johnson, 10 Wheat. 367, the first mortgage being executed in Rhode Island, in 1815, was not usurious by the laws of that state; and the second mortgage, executed in Kentucky, in 1817, being a new contract, was not tainted with usury; the question, therefore, whether the purchaser of an equity of redemption can show usury in the mortgage, to defeat a foreclosure, was not involved in that case. p. 229.

The law of Virginia having declared that a contract infected by usury is void, and by the deed from S. to M., a right to enter on the premises and distrain for the *rent is claimed under a deed, which, upon the admissions in the pleadings, is usurious; the premises upon which the distress was made, being held by L. under a conveyance from S.; L. may set up the defence of usury in the deed, against the summary remedy asserted by M., under the deed. p. 290. [*207

This case came before the court on a judgment in the circuit court, for the defendant, the avowant in replevin, he having demurred in the pleas of the plaintiff in an action of replevin; the court having reversed the judgment of the circuit court, remanded the cause, with instructions to the circuit court to overrule the demurrer, and permit the defendant, the avowant, to plead. p. 231.

ERROR to the Circuit Court of the District of Columbia. This was an action of replevin, brought by the plaintiff, to replevy certain goods and chattels which the defendant, as bailiff of William S. Moore, had taken upon a distress for rent, claimed by the said Moore to be due upon certain houses and lots in Alexandria, owned and held by the plaintiff. The sum for which distress was made was $500. The declaration was in the usual form; and the damages claimed $1000.

The defendant filed his cognisance, in which he acknowledged the taking of the goods, &c., in the declaration mentioned, and stated that a certain Jonathan Scholfield was seised in fee of four brick tenements and a lot of ground, in the town of Alexandria, and being so seised, he, by his indenture, dated the 11th of June 1814, of which deed *profert* was made, in consideration of $5000, by the said William S. Moore paid to him, the said Jonathan Scholfield, granted, bargained and sold to him, the said William S. Moore, one certain annuity or yearly rent of $500, to be issuing out of and charged upon the said four brick tenements and lot of ground, to be paid to the said William S. Moore, his heirs and assigns, by equal half-yearly payment of $250 each, on the 10th of December, and on the 10th of June, in each year for ever thereafter. To have and to hold the said annuity or rent, charged and payable as aforesaid, to the said William S. Moore, his heirs and assigns, to his and their only proper use for ever. It also stated, that the said Jonathan Scholfield, for himself, his heirs and assigns, did, by the said

indenture, among other things, covenant with the said William S. Moore, his
*208] heirs and assigns, that he, the said *Scholfield, his heirs and assigns, would well and truly pay and satisfy to him, the said Moore, his heirs and assigns, the said annual rent of $500, by equal half yearly payments for ever; and if the rent should not be paid as it became due, that on every default it should be lawful for the said Moore, his heirs and assigns, to make distress for it. That the said William S. Moore was seised of the said rent on the said 11th of December 1814, and had since remained seised thereof.

The cognisance further stated, that on the 29th of October 1816, the said Jonathan Scholfield, by his deed of bargain and sale, conveyed to the said John Lloyd, the plaintiff, for ever, certain tenements and lots of ground, in the said town of Alexandria, whereof the said four brick tenements and lot of ground before mentioned, on which the said distress was made, were parcel; subject, by the terms of the said deeds, to the payment of the said annuity or rent of $500 to the said William S. Moore, his heirs and assigns. That the said John Lloyd had been ever since seised and possessed of the same; and that on the 10th of June 1824, $250, a part of the said rent, was due, and on the 10th of December 1824, $250, the balance of the said annual rent, was due and unpaid to the said William S. Moore, for which said sum of $500, the said defendant, as bailiff aforesaid, levied a distress. It concluded by praying judgment for $1000, being double the rent in arrear and distrained for.

By the deed from Scholfield to Moore, he, Moore, for himself and his heirs and assigns, covenanted with Scholfield, his heirs and assigns, that if he, the said Scholfield, his heirs or assigns "shall at any time after the expiration of five years from the date of the deed, pay to the said Moore, his heirs or assigns, the sum of $5000, together with all arrears of rent and a ratable dividend of the rent for the time which shall have elapsed between the half-year day then next preceding and the day on which such payment shall be made, he, the said Moore, his heirs and assigns, will execute and deliver any deeds or
*209] instruments which may *be necessary for releasing and extinguishing the rent or annuity hereby created, which, on such payments being made, shall for ever after cease to be payable." By the same deed, Jonathan Scholfield covenanted, that he was then, in his own right, seised in fee-simple of the premises charged as aforesaid, free from any condition or incumbrance other than which was specified and provided for in a deed from him, Scholfield, to Robert I. Taylor, dated the day before the date of the deed to Moore. The said Scholfield further covenanted, for himself, his heirs and assigns, that he "will for ever hereafter keep the buildings which now are, or hereafter may be erected on the premises charged, fully insured against fire, in some incorporated insurance office, and will assign the policies of insurance to such trustee as the said Moore, his heirs or assigns, may appoint, to the intent that if any damage or destruction from fire shall happen, the money received on such policies may be applied to rebuilding or repairing the buildings destroyed or damaged." There was also a covenant on the part of Scholfield, for a further conveyance to carry into effect the intention of the parties; and also a warranty on his part, to warrant and defend the said annuity or rent, to the said Moore, his heirs or assigns, against any defalcations or deductions for or on account of him the said Scholfield, his heirs or assigns.

To this cognisance, the plaintiff, after praying *oyer* of the indenture from Scholfield to Moore, demurred specially; and assigned the following causes: 1. Because the deed of indenture from Jonathan Scholfield and Eleanor his wife, to William S. Moore, in the said cognisance mentioned, shows upon its face a corrupt and usurious contract between Jonathan Scholfield and William S. Moore, altogether void in law, and entirely incompetent to justify the taking of the said goods and chattels in the plaintiff's declaration mentioned. 2. Because the essential parts of the indenture are not set forth in the cognisance. 3. Because the indenture is variant, and different from that alleged in the cognisance. *4. Because the whole cognisance is void and insufficient in law to justify the taking of the goods and chattels in the declaration mentioned. [*210

At the same time, the plaintiff filed four pleas. In each of which pleas he craved *oyer* of the deed of indenture in the cognisance mentioned, which was granted to him.

The first plea stated, that before the making of the indenture, that is to say, on the 11th of June 1814, it was corruptly agreed between Scholfield and Moore, that he, Moore, should "advance" to Scholfield, the sum of $5000, and in consideration thereof, that Scholfield and his wife should grant, by a deed of indenture, duly executed and delivered to Moore, his heirs and assigns for ever, a certain annuity or yearly rent of $500, to be issuing out of and charged upon a lot of ground, and four brick tenements and appurtenances thereon, which lot was particularly described in the said plea, and stated to be in the town of Alexandria: which annuity or rent of $500 was to be paid to Moore, his heirs and assigns, by equal half-yearly payments of $250, on the 10th of December and on the 10th of June for ever thereafter. It was further corruptly agreed, that he, Scholfield, in and by the deed, should bind himself, his heirs, executors, administrators and assigns, to Moore, his heirs and assigns, that Scholfield would well and truly pay to him, Moore, his heirs and assigns, the said rent or annuity of $500, by equal half-yearly payments, on the 10th of June and the 10th of December in each year for ever thereafter, as it became due. It further stated, if the same should not be paid as it became due, the right of distress for it was reserved to Moore, his heirs and assigns. The plea also stated, if sufficient property could not be found on the premises to make the said rent or annuity, after the expiration of thirty days from the time the same became due, it should be lawful for Moore to enter on the premises, and to remove Scholfield, his heirs and assigns, and for him, Moore, his heirs or assigns, to possess and hold the same as his or their property. The plea further stated, that it was corruptly agreed *between Scholfield and Moore, that he, Scholfield, should further covenant in the said indenture, that he, Scholfield, was seised at the time of making the deed in his own right, in fee-simple, in the premises, free from any condition or incumbrance other than such as was specified in a deed from him to Robert I. Taylor; and that he would thereafter keep the buildings fully insured, in some incorporated insurance office, and assign the policies to such trustee as Moore, his heirs or assigns, should appoint; and that he would make any other deed for a further assurance of the title to the premises; and that he would warrant and defend the title of Moore to the rent or annuity. It was also stated in said plea, that Moore did further corruptly agree, that he would, in the indent- [*211

ure, covenant for himself, his heirs or assigns, with Scholfield, his heirs and assigns, that if he, Scholfield, his heirs or assigns, should, at any time thereafter, at the expiration of five years from the date of the indenture, pay to Moore, his heirs or assigns, the sum of $5000, together with all arrears of rent, and a ratable dividend of the rent for the time which should have elapsed between the half-year's day then next preceding, and the day on which such payment should be made, he, Moore, his heirs and assigns, would execute and deliver any deeds or instruments which might be necessary for releasing and extinguishing the rent or annuity. The plea then averred, that on the 11th of June 1814, in pursuance and in prosecution of this corrupt agreement, William S. Moore did advance to Jonathan Scholfield the sum of $5000, and that Scholfield and his wife, and William S. Moore did make, seal and duly deliver to each other, respectively, the said deed, as their act and deed, which was duly acknowledged and recorded; that the deed was made in consideration of money advanced upon and for usury; and that there had been reserved and taken above the rate of six dollars in the hundred, for the forbearance of the sum of $5000, so advanced as aforesaid, for the term of one year. The plea concluded with a verification, and prayed judgment for damages for the unjust taking and detention of the goods, &c.

*212] *The second plea was in all respects like the first, except it stated that the agreement was, that Moore should "lend" to Scholfield $5000. It then stated, that the parties agreed, a deed should be made containing all the covenants set forth in the first plea. It then averred, that in pursuance and in prosecution of this corrupt agreement, Moore did advance to Scholfield, the sum of $5000; and that Scholfield and wife, and Moore, made and executed the deed aforesaid, in pursuance of this corrupt agreement, which was duly acknowledged and admitted to record. And that the deed was made in consideration of "money lent upon and for usury:" and that by it there had been reserved and taken above the rate of six dollars in the hundred, for the forbearance of the sum of $5000 so lent as aforesaid, for the term of one year. This plea concluded as the first did.

The third plea was more general than the first and second. It stated, that before the making of the indenture, that is to say, on the 11th of June 1814, it was corruptly agreed between Scholfield and Moore, that he, Moore, should "advance" to him, Scholfield, the sum of $5000, upon the terms and conditions, and in consideration of the covenants and agreements in the indenture mentioned and contained; and that in pursuance of this corrupt agreement, and in the prosecution and fulfilment of the same, Moore did advance to Scholfield the sum of $5000, and they, Scholfield and Moore, did make, seal and duly deliver the deed to each party, respectively, as their act and deed. And that the deed was in consideration of money advanced upon and for usury, and that by the indenture there had been taken and reserved above the rate of six dollars in one hundred, for the forbearance of the sum of $5000, so advanced as aforesaid, for the term of one year. This plea concluded as the first did.

The fourth plea was like the third, except it is stated that the agreement was to "lend" $5000 upon the same terms stated in the third plea. It then averred, that in pursuance and in execution of the corrupt agreement in the indenture mentioned, Moore did "lend" to Scholfield the

*sum of $5000; that the deed was duly executed by the parties and recorded; that it was made in consideration of money lent upon and for usury, and that by the said deed there had been reserved and taken above the rate of six dollars in the hundred for the forbearance of the sum of $5000, so lent as aforesaid, for the term of one year. This plea concluded as the others did.

To each of these pleas the defendant demurred specially, and assigned for causes: 1. That the said pleas do not set forth with any reasonable certainty the pretended contract which is alleged to have been usurious, and do not show an usurious contract. 2. That they do not state the time for which the said pretended loan was made. 3. That they do not state the amount of interest reserved, or intended to be reserved, on the said pretended contract. 4. That they do not set forth any loan or forbearance of any debt. 5. That they neither admit nor deny the sale and conveyance of the premises charged with the said annuity or rent, to have been made by Jonathan Scholfield to the plaintiff.

Upon the demurrer to the cognisance, and on the demurrer to the pleas, the circuit court rendered judgment for the defendant for $1000, the double rent claimed in the cognisance, and costs.

The plaintiff sued out this writ of error, and before this court assigned for error: 1. That the deed which forms a part of the cognisance is on its face usurious. 2. That the pleas set forth, with sufficient certainty, a usurious contract.

The case was argued by *E. J. Lee* and *Swann*, for the plaintiff in error; and by *Jones* and *Taylor*, for the defendant.

For the *plaintiff*, in was contended, that the deed of Scholfield to Moore, of the 11th of June 1814, was a contract to pay $500 per annum, for five years, for the use of $5000, which is equal to ten *per cent. per annum. The object of this device was to evade the statute against [*214 usury. The deed does not set forth the purchase of an annuity; but Scholfield, being seised of the property in fee, receives $5000 from Moore as a loan, and then grants to Moore a rent of $500 per annum, for the use of the money. The stipulations in the deed are to pay the rent half-yearly; for five years, not to redeem the property, by paying the $5000; and after that time, on his continuing to pay the $500, the property is to remain charged with the same. The deed gives a right of distress and entry on the premises, and stipulates that the property shall be kept in repair, and the buildings insured at the expense of Scholfield and his assigns. If any of the houses shall be destroyed by fire, they are to be rebuilt, and there is a covenant for the payment of the rent against any defalcations or deductions by Scholfield. The whole sum payable by Scholfield in five years for interest, insurance, taxes and repairs, including the $5000, would amount to $8750—a large excess beyond legal interest. There must have been great distress, to induce such a contract; and upon its face, it exhibits all the features of usury; although there is no stipulation which plainly expresses the contract to be one of mere loan, with a compensation for forbearance beyond what is lawful. It is not necessary that it should appear on the face of the deed, that it was a loan or forbearance. If this is the result, it will authorize the application of the statute.

To show that the transaction, on the face of the deed, though it assumes the form of a ground-rent, is a usurious contract, was cited, 1 Inst. b. 3, § 534; 5 Co. 69; *Lawley* v. *Hooper*, 3 Atk. 278; *Floyer* v. *Sir Brownlow Sherard*, Ambl. 19; 3 Barn. & Ald. 664; 4 Camp. 1; *Powell* v. *Waters*, 17 Johns. 176; 5 Rand. 347; *Barnard* v. *Young*, 17 Ves. 44. The preceding cases show, that where there is a covenant either on the part of him who advances the money to accept of repayment, or of the borrower to repay it; or where *the right to repay the money is reserved by the contract; *215] that the money was advanced as a loan, and a contract entered into for its repayment, it is usurious.

But if it is urged, that this is a contract for the sale of a rent-charge: the answer is, that at the time the contract was made, no rent existed. It is an original grant of an annual rent, to be issuing out of, and to be charged on certain houses. Technically, an annuity is not a ground-rent. 2 Bl. Com. 41, 461; Co. Litt. 144.

Is the usury properly pleaded? It is said, that the contract is not set forth with reasonable certainty in the pleas. But the pleas bring out the whole deed in which the contract is shown; and thus the defendant is fully informed what that contract is, upon which the allegation of usury arises. An indenture set out upon *oyer*, becomes a part of the plea. 1 Chitty 664. By becoming a part of the plea, they set out the contract, and by so doing, the defendant is informed of what he is to answer. It is admitted, that in a plea of usury, it is necessary to set out the facts with such certainty, as that they can be understood by the party to answer them, by the jury who are to ascertain them, and by the court who are to give judgment upon them. 1 Chit. Plead. 236, 237. All these objects are fully obtained by the pleas filed in this case.

The second objection is, that the pleas do not show a usurious contract. It is submitted to the court, that the deed does show that $5000 were paid, not for an existing ground-rent, but that Scholfield was to pay for five years certain, $500 per annum, for the use of that sum. The facts, as has been alleged, show this intention, and the desire of the parties to conceal it, and give it the appearance of the purchase of an annuity or rent-charge. If the document produced by the plaintiff as his cause of action, exhibits such facts as would, if pleaded, show a loan; then, the defendant need not prove that the money advanced to him was a loan, nor need he prove by other evidence than the deed, that the loan was mentioned by the lender, *before the *216] making of the contract, in the form in which it was executed. Usury is a question of law; and if all the facts which go to show the intent of the parties, appear by the showing of the plaintiff, by a special verdict or otherwise, it is sufficient; it is not necessary to state in the pleadings, or that the jury should find them, that there was a corrupt agreement; it is sufficient, if facts appear which in law amount to usury. *Roberts* v. *Trenayne*, Cro. Jac. 508; 1 Call 62; *Price* v. *Campbell*, 5 Ibid. 119. The intention of the parties is a legal inference from established facts. 5 Rand. 145, 146–162; *Whitworth* v. *Adams*, Ibid. 352, 560; 4 Munf. 66; 6 Cranch 652. The facts set forth by the deed, which forms a part of the pleas, according to the cases cited, show an usurious contract. The first plea states an advance of $5000, for $500 to be paid annually. Scholfield could not release himself from the payment of the sum for five years. The plea states that this advance

was made, and the deed executed, in pursuance of this corrupt agreement, and that the $5000 were advanced upon and for usury, and that there had been thus reserved and taken by Moore above the rate of six per cent. for forbearance of $5000 for the term of one year. All this is admitted by the demurrer. The second plea states this as lent. The third plea states the sum to have been advanced upon the agreement stated in the first plea; and the fourth is general, and states the sum as lent. The demurrer admits the money to have been lent and advanced as stated in the pleas.

The second objection to the pleas is, that they do not state the time for which the loan was made. This is immaterial; as the pleas state that $500 are to be paid each year for the forbearance of $5000. The plea expressly states, that above the rate of six per cent. in the hundred dollars, for the forbearance of $5000, is reserved; and by making the deed a part of it, does state the forbearance to be for five years certain, and so long after as Scholfield pleased, or as his inability to return the money continued. The answer to the third objection is *of the same character; the deed shows the amount of interest reserved, and to be paid. It is expressly [*217 stated to be more than legal interest. To this point, see 3 T. R. 533; 4 Ibid. 35; 6 Rand. 661.

But in this case, the party to the contract is not before the court, and he is not bound to set forth the usurious contract, as those are who were the immediate parties to it. *Hill* v. *Montague*, 2 Maule & Selw. 377. The plaintiff in the replevin is not a party to this usurious contract; the defendant claims to make him liable to pay $500, by distraining his goods and chattels found on the premises charged by the contract between him and Scholfield; he is, therefore, a stranger to the particulars of the agreement, and he puts in the plea of usury. Less certainty is required, when the law presumes that the knowledge of the facts is particularly in the opposite party. 1 Chit. Plead. 258; 13 East 112; Com. Dig. Plead. C, 626.

The fourth objection is, that no loan or forbearance is set forth in the pleas. It is true, the term loan is not used; but it is said, the money was advanced, and that he was to receive $500 as a ground-rent, annually, for five years, for the advance; and that it was lent, and that Moore did lend $5000 to Scholfield, for which he was to pay him $500 per year. The pleas all state that for the forbearance of the sum of $5000 so advanced and lent, above the rate of six dollars in the hundred for one year was reserved and taken.

The fifth objection, is, that the pleas neither admit nor deny the sale by Scholfield to the plaintiff of the premises charged with the rent. This is not material. If it was admitted, that the sale was made by Scholfield to Lloyd, charged with the annuity or ground-rent claimed by the avowant, under a contract which in law is usurious, and therefore void; the plaintiff could not be compelled to pay, in the form of a rent, the usurious interest reserved by this contract. The cause of demurrer was probably suggested by the case of *De Wolf* v. *Johnson and others*, 10 Wheat. 367. It is contended, that the principles involved and decided in *that case do not [*218 apply to the case now before the court. The decision in that case rested mainly on the fact that the contract originally made was not usurious by the law of Rhode Island. The case before the court is one, where the

defendant seeks, in the form of a distress for rent, to make the personal property of the plaintiff liable, under a contract which is usurious and void at law; and the question is, whether the defendant can avail himself of such a contract. A party, in whose favor a contract which is usurious has been made, cannot make use of it for any purpose whatever. *Barnard* v. *Young*, 17 Ves. 44; 1 Stark. 385; Comyn on Usury 175; *Whitworth* v. *Adams*, 5 Rand. 356; *Harrison* v. *Hannel*, 5 Taunt. 780; *Gaither* v. *Farmers' Bank of Georgetown*, 1 Pet. 37; *Jackson* v. *Henry*, 10 Johns. 195.

Taylor and *Jones*, for the defendants in error.—The pleas do not anywhere charge a loan to have been made on an usurious contract; it is only stated, "and so the money was loaned upon usury." The charge of usury is a mere deduction from facts. The pleas state no collateral agreement as a loan, and the whole of the contract is that which is contained in the deed. The deed in itself contains no contract which is usurious. It is a contract to pay the sum of $500 per annum, in half-yearly payments, for five years certain; and after that time, the payment of $5000 will be an extinguishment of the obligation, and a restoration of the property which is given to secure the payment. It is one thing to decide upon this contract, as contained in the deeds, and another to decide on a collateral statement of usury.

The first question is, whether Lloyd can avail himself of this usury, if it existed? He is bound by a contract with his vendor Scholfield; he is bound to pay this annuity to Moore, and it is important to Scholfield, that he shall do so; as he, Scholfield, is under a personal contract to pay the same. A deed is not void for usury; it is only voidable; as all deeds which take effect from delivery are not void; and *must be made so by pleading. *219] 3 Burr. 1804; Bull. N. P. 224; 5 Co. 119. As this contract is only voidable, who can avoid it? can any one do it? Certainly, not a stranger. By a reference to the usury act of Virginia, which is very full, its whole object will be seen to be to protect the parties to the contract. The spirit and objects of it do not extend to other parties. By the third and fourth sections, the relief in equity is confined to the borrower. He may go into chancery, and recover the money lent, and the interest; but if Lloyd recovers in this case, if he escapes the payment of the rent, Scholfield will lose the money given to him; he cannot afterwards recover from Moore. Lloyd is not here a stranger; but he was acquainted with the facts and is bound to pay the rent. He cannot set up a plea of usury, which injures his vendor. He is estopped by his purchase from so doing.

The law of usury is different in cases of personal and real property. The assignee of an equity of redemption cannot plead usury in the mortgage; and a purchaser under a mortgage is not affected by usury in the origin of the contract. 10 Wheat. 367; 10 Johns. 185. A mortgage upon an usurious consideration is void only against the mortgagor, and those who may lawfully hold the estate under him. A purchaser of the mere equity of redemption, cannot avoid the mortgage by plea or proof of usury. 13 Mass. 515. Is it competent for an intruder to set up a title? or for a tenant at will to contradict the title of his landlord? A tenant in possession cannot set up usury against the title of his landlord. Idiocy and lunacy may

be avoided by the parties, but not by strangers; and these rules will fully apply to other deeds. 8 T. R. 390; 4 Co. 123; 8 Ibid. 42; Co. Litt. 271 *a*.

This transaction does not constitute an usurious contract. To such a contract, the obligation to repay the money is essential. Ord on Usury 23. If the money may be returned or not, at pleasure, is it such a loan? and there must be a loan, to make it usury. An option to return makes the *transaction a purchase. These questions are exclusively proper for a jury, and the court cannot decide them. This mode of investment [*220 is common in Alexandria. The purchase of a ground-rent or rent-charge is a usual mode of providing for families and children; and the usual price of such rents is ten years' purchase.

The pleas are bad in form and substance. 1. In pleading the statute. A general plea is bad; the agreement and sum taken must be charged and shown; the contract must be specially set out; and the usurious intention with which it was made must be set out. Forbearance, and giving day, are the effective words of the statute; and they must be averred. 1 Hawkins's P. C. 332, § 24; 1 Show. 329; 2 Maule & Selw. 377; 1 Saund. 295; Steph. on Plead. 343. The pleas do not show an usurious agreement. They do not aver one collateral to the deed, but set out the deed in its terms. They call it usury. And the effect of the demurrer is not to assist the plaintiff; a demurrer admits facts well pleaded, not epithets, or names, or illegitimate conclusions. If the facts do not make out usury, no usurious intent can alter the legal character of the deed. *Burton's Case*, 5 Co. 69, was the grant of an annuity; the plea sets out the facts, and charges them to be usurious; on demurrer, the court said, that the matter shown does not amount to usury; the allegation, that it is so, is repugnant to the matter shown, and a demurrer is not an admission of all the matters pleaded, but of such only as are well pleaded.

The question, then, is, is the deed, *per se*, usurious? not whether it is evidence of another collateral contract. What is its legal import? Does it import a loan? It says, it is a purchase. Does it mean anything else than the purchase of a redeemable annuity? It does not. The right to redeem, after five years, is secured by the deed. It has been repeatedly decided, that the purchase of an annuity, at however extravagant a price, is not usury. 1 Wils. 295; Cro. Eliz. 27; 2 Lev. 7; 3 Wils. 390; 2 Sch. & Lef. 393; 1 Bro. C. C. 94; Holt 295.

**Swann*, in reply, stated, that the demurrer was entered to the deed, because on its face it showed an illegal contract, and required [*221 no plea. Chitty on Cont. 239–40; 1 Sid. 285; 1 Saund. 295; 2 Mod. 593. At the same time, the pleas were entered; which present, in different forms, the contract as a loan; as an advance; as a corrupt agreement. The demurrer admits the facts stated in these pleas, and all the inferences may be drawn which could be from facts found by a special verdict.

In answer to the arguments of the counsel for the defendants there were cited, 3 Atk. 280; 1 Wils. 295; 7 Bac. Abr. Usury, 194; 3 Bos. & Pul. 159; 3 Barn. & Ald. 664; 4 Camp. 1; 3 Har. & Johns. 109; 5 Munf. 223.

McLean, Justice, delivered the opinion of the court.—This is an action of replevin, brought to replevy certain goods and chattels which the defendant, as bailiff of William S. Moore, had taken upon a distress for rent, claimed

to be due upon certain houses and lots in Alexandria, owned and possessed by the plaintiff. The sum for which the distress was made is $500. The declaration is in the usual form, and the damages are laid at $1000; the defendant filed his cognisance, in which he acknowledges the taking of the goods specified in the declaration; and states that a certain Jonathan Scholfield, being seised in fee of four brick tenements and a lot of ground in the town of Alexandria, by his indenture, dated the 11th of June 1814, in consideration of $5000, granted, bargained and sold to William S. Moore, one certain annuity or yearly rent of $500, to be issuing out of, and charged upon, the said houses and ground, and paid to the said Moore, his heirs and assigns, by equal half-yearly payments of $250, on the 10th of December, and on the 10th of June, in each year, for ever thereafter; to have and to hold the said annuity or rent, charged and payable as aforesaid, to the said William S. Moore, his heirs and assigns for ever. It also states, that the said Scholfield, for himself and his heirs and assigns, did, by the said indent-
*222] ure, among other things, *covenant well and truly to pay to the said Moore, his heirs and assigns, the said annual rent of $500, by equal half-yearly payments for ever. And if the rent should not be paid as it became due, it should be lawful for the said Moore, his heirs and assigns, to make distress for it. That Moore was seised of the rent on the 11th of December 1814, and has since remained seised thereof. The cognisance further states, that on the 29th of October 1816, the said Jonathan Scholfield, by his deed of bargain and sale, conveyed to Lloyd, the plaintiff, for ever, certain tenements and lots of ground in the town of Alexandria, whereof the said four brick tenements and lot of ground were parcel, and subject to the rent-charge stated. That Lloyd has been seised ever since and possessed of the same; and that on the 10th of June, 1824, $250, a part of the rent, was due, and on the 10th of December following, $250, the balance of the annual rent, was due and unpaid; for which sums the defendant, as bailiff, levied a distress. The cognisance is concluded by praying a judgment for $1000, being double the amount of the rent in arrear.

Moore covenants in the deed, that if Scholfield, his heirs or assigns, "shall, at any time after the expiration of five years from the date of the deed, pay to the said Moore, his heirs or assigns, the sum of $5000, together with all arrears of rent, and a ratable dividend of the rent, for the time which shall have elapsed between the half-year day then next preceding and the day on which such payment shall be made; he, the said Moore, his heirs and assigns, will execute and deliver any deeds or instruments which may be necessary for releasing and extinguishing the rent or annuity hereby created; which, on such payment being made, shall for ever after cease to be payable." Scholfield covenanted for himself, his heirs and assigns, that he would keep the buildings in repair; have them fully insured against fire; and would assign the policies of insurance to such trustee as Moore, his heirs or assigns, might appoint, that the money may be applied to the rebuilding
*223] of *the houses destroyed by fire, or repairing any damage which they might suffer.

To this cognisance, the plaintiff filed a special demurrer; which in the argument he abandoned, and relies upon the special pleas of usury. To each of the four pleas, the defendant demurs specially, and assigns for causes of demurrer: 1. That the said pleas do not set forth with any reasona-

ble certainty, the pretended contract which is alleged to have been usurious, and do not show an usurious contract. 2. That they do not state the time the said pretended loan was made. 3. That they do not state the amount of interest reserved or intended to be reserved, on the said pretended contract. 4. That they do not set forth any loan or forbearance of any debt. 5. That they neither admit nor deny the sale and conveyance of the premises charged with the annuity or rent to have been made by Scholfield to the plaintiff below.

Upon these demurrers, the circuit court rendered judgment for $1000, the double rent claimed in the cognisance. The plaintiff here prays a reversal of this judgment. 1. Because the deed, which forms a part of the cognisance, on its face, shows an usurious contract. 2. Because the pleas set forth, with sufficient certainty, an usurious contract.

The statute of Virginia against usury was passed in 1793, and provides, that no person shall take, directly or indirectly, more than six dollars for the forbearance of one hundred dollars per annum; and it declares, that all bonds and other instruments, for a greater amount of interest, shall be utterly void.

In support of the demurrer, it is argued, that the pleas are defective, as they do not contain any allegation of facts which amount to usury; and that the decision must turn on the construction of the contract between Scholfield and Moore. And it is contended, that although usury appears upon the face of a deed, yet advantage can only be taken of it by plea. That the obligee may explain the contract, by *showing a mistake in [*224
the scrivener, or a miscalculation of the parties. In Comyn on Usury 201, it is laid down, that in an action on a specialty, though it appear on the face of the declaration that the bond, &c., is usurious, still no advantage can be taken of this, unless the statute be specially pleaded. 3 Salk. 291; 5 Co. 119; Chitty on Cont. 240; 1 Sid. 285; 1 Saund. 295 a. The decision of this point is not necessarily involved in the case.

The requisites to form an usurious transaction are three: 1. A loan, either express or implied. 2. An understanding that the money lent shall or may be returned. 3. That a greater rate of interest than is allowed by the statute, shall be paid.

The intent with which the act is done, is an important ingredient to constitute this offence. An ignorance of the law will not protect a party from the penalties of usury, where it is committed; but where there was no intention to evade the law, and the facts which amount to usury, whether they appear upon the face of the contract, or by other proof, can be shown to have been the result of mistake or accident, no penalty attaches.

At an early period in the history of English jurisprudence, usury, or as it was then called, the loaning of money at interest, was deemed a very high offence. But since the days of Hen. VIII., the taking of interest has been sanctioned by statute. In this country, some of the states have no law against taking any amount of interest, which may be fixed by the contract. The act of usury has long since lost that deep moral stain which was formerly attached to it; and is now generally considered only as an illegal or immoral act, because it is prohibited by law. Assuming the position, that the pleas contain no averments which extend beyond the terms

of the contract; the counsel, in support of the demurrers, have contended, that no fair construction of the deed, will authorize the inference that it
*225] was given on an usurious consideration. *It was the purchase of an annuity, it is contended; and though the annuity may produce a higher rate of interest than six per cent. upon the consideration paid for it, yet this does not taint the transaction with usury.

If the court were limited by the pleas to the words of the contract, and it purported to be a purchase of an annuity, and no evidence were adduced giving a different character to the transaction, this argument would be unanswerable. An annuity may be purchased, like a tract of land or other property, and the inequality of price will not, of itself, make the contract usurious. If the inadequacy of consideration be great, in any purchase, it may lead to suspicion; and, connected with other circumstances, may induce a court of chancery to relieve against the contract. In the case under consideration, $5000 were paid for a ground-rent of $500 per annum. This circumstance, although ten per cent. be received on the money paid, does not make the contract unlawful. If it were a *bonâ fide* purchase of an annuity, there is an end to the question: and the condition which gives the option to the vendor to repurchase the rent, by paying the $5000 after the lapse of five years, would not invalidate the contract. 1 Bro. C. C. 7, 93. The right to repurchase, as also the inadequacy of price, would be circumstances for the consideration of a jury.

The case reported in 2 Co. 252, is strongly relied on by the counsel for the defendant. In that case, an action of debt was brought upon an obligation of 300*l.*, conditioned for the payment of 20*l.* per annum, during the lives of the plaintiff's wife and son. The defendant pleaded the statute of usury, and that he applied to the defendant to borrow of him 120*l.*, at the lawful rate of interest; but that he corruptly offered to deliver 120*l.* to him, if he would be obliged to pay 20*l.* per annum. The court considered this as an absolute contract for the payment of 20*l.* per annum during two lives; and no agreement being made for the return of the principal, it was not consid-
*226] ered usury. But they stated, if there had *been any provision for the repayment of the principal, although not expressed in the bond, the contract would have been usurious. This is a leading case, and the principle on which it rests has not been controverted by modern decisions.

Scholfield, it appears, was under no obligation to repurchase the annuity, but he had the option of doing so, after the lapse of five years, which is a strong circumstance to show the nature of the transaction. The purchase of an annuity, or any other device used to cover a usurious transaction, will be unvailing. If the contract be infected with usury, it cannot be enforced. Where an annuity is raised, with the design of covering a loan, the lender will not be exempted by it from the penalties of usury. 3 Bos. & Pul. 159. On this point, there is no contradiction in the authorities. If a party agree to pay a specific sum, exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, which is considered as a penalty. Where a loan is made, to be returned at a fixed day, with more than the legal rate of interest, depending upon a casualty which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury.

Does the decision in this case, as has been contended, depend upon a construction of the contract? Are there no averments in the pleas which place before the court material facts to constitute usury, that do not appear on the face of the deed? If the court were limited to a mere construction of the contract, they would have no difficulty in deciding that the case was not strictly embraced by the statute.

In the second plea, the plaintiff below prays *oyer* of the deed of indenture, and among other statements alleges, "that it was corruptly agreed between the said Scholfield and the said Moore, that the said Moore should lend to him the sum of $5000, and in consideration thereof, that he should *execute the said deed, &c." And in another part of the same plea, it is stated, "that the said Moore did corruptly agree, that he would, [*227 in the said indenture, covenant, &c., that if the said Scholfield, his heirs and assigns, should, at any time after the expiration of five years from the date of said indenture, pay to the said Moore, his heirs and assigns, the sum of $5000, together with all arrears of rent, he, the said Moore, would release to him the said annuity." And it is further alleged, "that the said Moore, in pursuance and in prosecution of the said corrupt agreement, did advance to the said Scholfield the sum of $5000." And again, "that the said deed of indenture was made, in consideration of money lent upon and for usury; and that, by the said indenture, there has been reserved and taken above the rate of six dollars per annum in the hundred, for the forbearance of the said sum of $5000 so lent as aforesaid." The fourth plea contains, substantially, the allegations as to the lending, &c., that are found in the second plea.

The facts stated in the pleas are admitted by the demurrers, and the question of usury arises on these facts, connected as they are with the contract. Although the second and fourth pleas may not contain every proper averment, with technical accuracy, yet they are substantially good. All the material facts to constitute usury are found in the second plea. It states a corrupt agreement to loan the money at a higher rate of interest than the law allows; that the money was advanced and the contract executed, in pursuance of such agreement; that on the return of the principal, with a full payment of the rent, after the lapse of five years, the annuity was to be released. The amount agreed to be paid above the legal interest, for the forbearance, is not expressly averred, but the facts are so stated in the plea as to show the amount with certainty; $500, under cover of the annuity, were to be paid, annually, for the forbearance of the $5000, making an annual interest of ten per cent. Do not these facts, uncontradicted *as they are, amount to usury? Is it not evident, from this state- [*228 ment of the case, that the annuity was created as a means for paying the interest, until the principal should be returned, and as a disguise to the transaction? Such is the legitimate inference which arises from the facts stated in the plea.

At this point in the case, an important question is raised, whether Lloyd, the plaintiff in the replevin, being the assignee of Scholfield, can set up this plea of usury in his defence. It is strongly contended, that he cannot. He purchased this property, it is alleged, subject to the annuity, and paid for it a proportionably less consideration. That knowing of the charge before he made the purchase, it would be unjust for him now to evade the payment.

And the inquiry is made, whether Lloyd could plead usury in this contract, if the annuity had been purchased by Scholfield? He would be estopped from doing so, it is urged, by the obligations of his own contract, as he is now estopped from resisting the claim of Moore. As to the injustice of the defence, it may be remarked, that the objection would apply with still greater force against Scholfield, if he were to attempt, by a similar defence, to evade the payment of the annuity. He received the money, after assenting to the contract; but he is at liberty to evade the payment of the annuity by the plea of usury. Is the position correctly taken, that no person can avail himself of this plea, but a party to the original contract? The principle seems to be settled, that usurious securities are not only void, as between the original parties, but the illegality of their inception affects them even in the hands of third persons who are entire strangers to the transaction. Comyn on Usury 169. A stranger must "take heed to his assurance, at his peril;" and cannot insist on his ignorance of the contract, in support of his claim to recover upon a security which originated in usury.

In the case of *Lowe* v. *Waller*, 2 Doug. 735, the plaintiff was the indorser of a bill originally made upon a usurious contract: though he had received it for a valuable *consideration, and was entirely ignorant of its vice, the court of king's bench, after great consideration, determined, that the words of the statute were too strong; and that after what had been held in a case on the statute against gaming, the plaintiff could not recover. If a bill of exchange be drawn, in consequence of a usurious agreement for discounting it, although the drawee to whose order it was payable was not privy to this agreement, still it is void in the hands of a *bonâ fide* indorsee. 2 Camp. 599. In Holt 256, Lord Ellenborough lays down the law, that a *bonâ fide* holder cannot recover upon a bill founded in usury; so neither can he recover upon a note, where the payee's indorsement, through which he must claim, has been made by a usurious agreement. But if the first indorsement be valid, a subsequent usurious indorsement will not affect him; because such intermediate indorsement is not necessary to his title to sue the original parties to the note. If a note be usurious in its inception, and it pass into the hands of a *bonâ fide* holder, who has no notice of the usury, and the maker give to the holder a bond for the amount of the note, the bond would not be affected by the usury. 8 T. R. 390.

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In the case of *Jackson* v. *Henry*, reported in 10 Johns. 185, a plea of usury was set up, to invalidate the title of a purchaser at a sale of mortgaged premises. This sale, under the statute of New York, is equivalent to a foreclosure by a decree in chancery; and the court decided, that the title of the purchaser was not affected by usury in the debt for which the mortgage was given. The statute of New York declares, all bonds, bills, contracts and assurances, infected with usury, "utterly void." And so say the court, on the adjudged cases, when the suit at law is between the original parties, or upon the very instrument infected.

The case of *De Wolf* v. *Johnson*, reported in 10 Wheat. 367, is relied on by the counsel for the defendant, as a decision in point. In that case, it will be observed, that the first mortgage, *being executed in Rhode Island, in 1815, was not usurious by the laws of that state; and the second one, executed in Kentucky, in 1817, being a new contract, was not tainted with usury. The question, therefore, whether the purchaser of an

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equity of redemption can show usury in the mortgage, to defeat a foreclosure was not involved in that case.

The Virginia statute makes void every usurious contract; and the second plea contains allegations which, uncontradicted, show that the contract between Moore and Scholfield was usurious in its origin. This contract, thus declared to be void, is sought to be enforced against Lloyd, the purchaser of the property charged with the annuity. Between Scholfield and Lloyd there is a privity; and if the contract for the annuity be infected with usury, is it not void as against Lloyd? In this contract, a summary remedy is given to enter on the premises, and levy, by distress and sale of the goods and chattels there found, for the rent in arrear; and if the distress should be insufficient to satisfy the rent, and it should remain unpaid for thirty days, Moore is authorized to enter upon the premises, and to expel Scholfield, his heirs and assigns, and hold the estate. Lloyd, as the assignee of Scholfield, comes within the terms of the contract; and is liable, being in possession of the premises, to have his property distrained for the rent, and if it be not paid, himself expelled from the possession. Under such circumstances, may he not avail himself of the plea of usury, and show that the contract, which so materially affects his rights, is invalid? Moore seeks his remedy under this contract, and if it be usurious, and consequently void, can it be enforced?

If usury may be shown in the inception of a bill, to defeat a recovery by an indorsee, who paid for it a valuable consideration, without notice of the usury, may not the same defence be set up, where, in a case like the present, the party to the usurious contract claims, by virtue of its provisions, a summary mode of redress? The court entertain no doubt on this subject. They think a case of usury is made out by the facts stated in the second plea, and that Lloyd may avail himself of such a defence.

*The judgment of the circuit court must be reversed, and the cause remanded, with instructions to overrule the demurrers to the second and fourth pleas, and permit the defendant to plead. [*231

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 ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with instructions to overrule the demurrers to the second and fourth pleas, and to permit the defendant to plead, and for such further proceedings as to law and justice may appertain.[1]

[1] For a further decision in this case, see 9 Pet. 418, reversing s. c. 4 Cr. C. C. 206.

*JOHN P. VAN NESS and MARCIA his wife, complainants, Appellants, *v.* The MAYOR, ALDERMEN AND BOARD OF COMMON COUNCIL OF THE CITY OF WASHINGTON, and the UNITED STATES OF AMERICA, Defendants.

City of Washington.

In 1822, congress passed an act, authorizing the corporation of Washington to drain the ground in and near certain public reservations, and to improve and ornament certain parts of the public reservations; the corporation were empowered to make an agreement, by which parts of the location of the canal should be changed, for the purpose of draining and drying the low grounds near the Pennsylvania avenue, &c.; to effect these objects, the corporation was authorized to lay off in building lots, certain parts of the public reservations, No. 10, 11 and 12, and of other squares, and also a part of B street, as laid out and designated in the original plan of the city, which lots they might sell at auction, and apply the proceeds to those objects, and afterwards to inclosing, planting and improving other reservations, and building bridges, &c., the surplus, if any, to be paid into the treasury of the United States. The act authorized the heirs, &c., of the former proprietors of the land on which the city was laid out, who might consider themselves injured by the purposes of the act, to institute in the circuit court a bill in equity, in the nature of a petition of right, against the United States, setting forth the grounds of any claim they might consider themselves entitled to make, to be conducted according to the rules of a court of equity; the court to hear and determine upon the claim of the plaintiffs, and what portion, if any, of the money arising from the sale of the lots they might be entitled to; with a right of appeal to this court. The plaintiffs, Van Ness and wife, filed their bill against the United States and the corporation of Washington, claiming title to the lots which had been thus sold, under David Burns, the original proprietor of that part of the city, and father of one of the plaintiffs, on the ground, that by the agreement between the United States and the original proprietors, upon laying out the city, those reservations and streets were for ever to remain for public use, and, without the consent of the proprietors, could not be otherwise appropriated or sold for private use; that the act of congress was a violation of the contract; that by such sale and appropriation for private use, the right of the United States thereto was determined, or that the original proprietors re-acquired a right to have the reservations, &c., laid out in building lots, for their joint and equal benefit with the United States, or that they were, in equity, entitled to the whole or a moiety of the proceeds of the sales of the lots: *Held*, that no rights or claims existed in the former proprietors or their heirs, and that the proceedings of the corporation of Washington, under and in conformity with the provisions of the act, were valid and effectual, for the purposes of the act.

APPEAL from the Circuit Court of the District of Columbia for the county of Washington. The original bill in this case was filed the 16th of April
*233] 1823. *It set forth, that the complainant, Marcia Van Ness, was the only child and heir-at-law of Davin Burns, deceased. That Burns was, in his lifetime, and particularly on the 6th of July 1790, seised and possessed of a considerable tract of land, within the limits of the present city of Washington; that a part of this land constituted so much of the land mentioned in the second section of an act of congress, of May 7th, 1822, c. 96, as was indicated in a map annexed to the bill of complaint, by the words "Reservation No. 10, 11 and 12, on the north side of the Pennsylvania Avenue."

That by virtue of the said act of congress, the corporation of the city of Washington had proceeded to lay off and divide the said land into lots; that they had sold some, and were about to sell others; that the land thus disposed of was to be held by the purchasers for their own private use and exclusive benefit; and the bill complained of these proceedings as a breach of trust. It averred, that on the 6th of July 1790, an act of congress

passed, establishing the temporary and permanent seat of government of the United States. By this act, the president was authorized to appoint commissioners who were authorized to purchase or accept such quantity of land within the district, as the president might deem proper, for the use of the United States, and according to such plans as the president should approve. By virtue of this act, various proposals were made concerning cessions of land for the site of the city of Washington; the substance of which proposals was, that the president might retain any number of squares he might think proper, for the public improvements, or other public uses, and that the lots only which should be laid off should be a joint property between the trustees on behalf of the public, and each of the three proprietors, and that the same should be equally divided between the public and the individuals, as soon as might be, after the city should be laid off. For the streets the proprietors were to receive no compensation. For the squares and lands in any form which should be taken for public buildings, or any kind of public *improvement or uses, the proprietors, whose lands might be so taken were to receive compensation, &c. [*234

On the 28th of June 1791, David Burns, by his deed, conveyed to Thomas Beall and John Mackall Gantt, in fee-simple, for the purposes and trusts therein mentioned, a considerable quantity of land, part of which constituted the land described in the act of May 7th, 1822. The whole of the land thus conveyed to Beall and Gantt was, afterwards, 30th of November 1796, conveyed by them to the commissioners appointed under the act aforesaid, upon the same trusts and uses as are expressed in the deed of conveyance to them. The plan of the city, as originally projected by L'Enfant, improved and matured by Ellicott, was approved and adopted, in 1792, by the president of the United States. According to this plan, the land described was within the operation of the act of the 7th of May 1822, except so much thereof as might have been sold by virtue of an act of February 24th, 1817, entitled "an act authorizing the sale of certain grounds belonging to the United States, in the city of Washington." The complainants were ignorant of the extent of these sales, but claimed all which might thus have been disposed of.

The map referred to in the bill, exhibited the division that was made, under the direction of the corporation, of the land in question, into lots, and was the guide by which the sales had been conducted. A part of the land in question was not reserved for public improvements, or other public uses, but belonged to a street called North B street.

The complainants averred, that the land in question, if sold to private individuals, to be held by them for their individual benefit, would be placed entirely out of the reach of the trusts and purposes which were intended to be created and secured by the deed and agreement aforesaid. The complainants were advised this could not be done, without their consent, which they were willing to give upon the terms of the original contract. They were willing to occupy the same ground they would have occupied, if what was now proposed to be done had been proposed in 1792: that is, that the land then reserved as public squares and streets, and now designed to be *divided into private building lots, should be divided between them and the United States, or the corporation, claiming the title of the United States. [*235

The complainants referred to an act of May 6th, 1796, authorizing a loan for the use of the city of Washington, and to other acts of congress, as uniformly holding out the idea, that the land in question was not subject to congressional control. They referred also to the proceedings of the commissioners in *Davidson's Case*, in January 1794, a copy of which was annexed; and to the opinion of the attorney-general in that case.

The complainants averred, that they had presented their claim to the corporation of Washington, and to the commissioners appointed by the corporation, and urged a postponement of any further sale.

On the 19th of May 1826, the complainants filed an amended bill, the substance of which was: That Marcia Van Ness, the complainant, was the only child and heir-at-law of David Burns, deceased; that David Burns, in his lifetime, was lawfully seised in fee of the premises in question; that under an act of congress of July 16th, 1790, and a supplementary act of March 3d, 1791, proposals were made, by and on behalf of the president, thereto lawfully authorized, to various persons, then the owners of different portions of land lying within the present limits of the city of Washington, relating to the purchasing and accepting from the proprietors, various parts of their lands lying within the limits aforesaid. In consequence of such proposals, an agreement was finally made between the proprietors, among whom was David Burns, and the United States, the terms and nature of which were set forth in an entry under date of April 1791, in a book, &c., as set forth in the original bill. On the 28th of June 1791, David Burns, in pursuance of the agreement and arrangement as aforesaid, made and executed his deed of conveyance to Beall and Gantt, as set forth in the original bill. Beal and Gantt conveyed, as recited in the original bill (setting out the trusts). Afterwards, on the 13th of December 1791, the president transmitted to congress a plan of the city, which had been adopted as the permanent seat of government; that subsequently, *various
*236] alterations were made in the same, at different times, under the authority and sanction of the president. Many building squares had been introduced, in addition to those contained in the plan originally adopted; alterations had been made in the number and directions of the streets; in the dimensions of the building squares and public appropriations; and in all such cases, when such alterations had been made, and those pieces of ground which had been at any time appropriated as streets, or public reservations, had been subsequently converted, either in whole or in part, into building lots, the variations had been, by the mutual consent of the United States and the original proprietors, respectively; and the lots in such building squares had been, uniformly, divided between the United States and such original proprietors. They insisted, that such mutual consent and such distribution were not only required by the true meaning and legal and equitable interpretation of the original compact and agreement, but such practice, acquiesced in by both parties, ought to be deemed and received as the mutual understanding and design of the parties, at the time of entering into it.

In pursuance of such original agreement, and of the acts of congress, the president did select and appropriate for streets, squares, parcels and lots, for the use of the United States, all the premises therein before described, lying on the north and south sides of the Pennsylvania avenue, as aforesaid; being

part and parcel of the premises, as therein before mentioned, conveyed and transferred by the said David Burns to Beall and Gantt, upon the trusts and confidences mentioned and declared in the deed of conveyance. That for all said premises, neither Burns, in his lifetime, nor the complainants, since his death, had received any other consideration than such as is set forth in the deed, either from the trustees or from the United States. The said parcels of land continued to be held for the use of the United States as a public street or streets, or public appropriation, according to the plan and selection, until an act of congress, entitled "an act authorizing the sale of certain grounds belonging to the United States in the city of Washington," *was passed, February 24th, 1817; which act was procured at the [*237 instance and by the consent of the corporation of the city of Washington. Under this act, the commissioner of the public buildings in the city of Washington was authorized to lay off into building lots, and to sell a portion of them, being part of the premises therein before described as lying on the north side of the Pennsylvania Avenue. The residue of said premises continued to be held for the public use as aforesaid, until an act of congress was passed on the 22d of May 1822, also procured at the instance and with the consent of the corporation, entitled, "an act to authorize and empower the corporation of the city of Washington, in the district of Columbia, to drain the low grounds," &c. These acts of congress were charged to be a clear and manifest departure from the terms and spirit of the original agreement and compact between Burns and the United States. The object and effect of them were, to divert the premises from the trusts expressed and declared in the deed; that under such deed an interest still remained and continued in David Burns, which, on his death, descended to and remained vested in the complainants; that the said acts of congress were passed without their concurrence or consent, and that the constitutional power of congress and the rights of complainants, would not permit or sanction the sale of the premises to private parties, without such assent and concurrence.

The complainants insisted, and submitted to the court, whether the legal operation and effect of said acts were not to determine the trusts originally created as to said premises, and to revest the same in them; and whether, if they choose to assent to such appropriation of the premises, the same were not thereby immediately subject to the same trusts as in and by the indenture were expressed and declared as to all those portions of the premises thereby conveyed, as were not deemed proper and necessary by the president; or whether the complainants were entitled to the whole, or simply to a moiety of the money arising from said sales.

The bill proceeded to set forth, that under the act of February 24th, 1817, *the commissioner was authorized to sell any number of the lots [*238 therein mentioned, not exceeding one-half; and that by the act of May 22d, 1822, the corporation of Washington was authorized to sell and dispose of the right of the United States of, in and to, the building lots therein mentioned; and if, by virtue of said acts, any sales had been or should be made, previous to ascertaining and settling the rights of the complainants, much confusion, perplexity and trouble might ensue, as well to the corporation and the individual purchasers, as to the complainants. Whereas, in and by the said last-mentioned act, it was expressly enacted, that it should

and might be lawful for the lawful representatives of any former proprietor of land directed to be sold, &c., at any time within one year from passing of the same, to institute a bill of equity, in the nature of a petition of right, against the United States, in this honorable court, in which they might set forth the ground of their claim to the land in question, the complainants did, within the terms of said act, present their bill, and claim such relief in the premises as might be conformable to the provisions of said acts, or agreeable to equity and good conscience. And inasmuch as the corporation of Washington was authorized by said act of congress to carry the provisions of the same into effect, and denied any right or interest to the premises, or any part thereof to be in complainants, but claimed a right to sell and dispose of the entire premises, and the exclusive right to receive and appropriate all the proceeds of the sales to their own use and benefit, and gave out and insisted, that the complainants had no claim, in law or equity, to the land or proceeds, and had proceeded to carry the act of congress into operation; they prayed, &c.

To this bill, the defendants filed their joint and several demurrer, plea and answer; the substance of which was, they claimed the benefit of all the prior exceptions and grounds of demurrer and plea theretofore taken to the original bill, and denied the equity of the bill. They specially set forth—

*239] 1. That the subject-matter of complaint, the title therein *pretended, and the entire relief prayed, were against an act of congress passed in the due exercise of a legislative discretion and constitutional power; and therefore, not cognisable before any municipal court.

2. That the complainants had not shown any title, or any individual and proprietary interest in themselves; but a mere participation of the general interest inherent in them as members of the community at large, in common with all the citizens of the United States, in the administration of a public trust by the government.

3. They denied that the complainants had equity; and prayed, that if they had any title to the land, it might be established at law.

4. That the bill was defective in its frame, scope and end. Because it was multifarious, and purported to have joined therein several matters and claims of different natures, and repugnant characters. It was uncertain as to the nature, extent and degree of the relief claimed, and as to the party against whom it was prayed. It prayed no process, except an injunction against the corporation.

5. It was not in the nature of a petition of right, demanding any portion of the money arising from the sales of the lands, and merely setting forth the complainants' title to the land, to lay a foundation for their claim to the money, or to a portion thereof, as authorized by the act of congress; but it purported to claim against, and in derogation of the authority of said act, and to draw the United States into suit touching this claim. The United States and the corporation were joined in the suit, contrary to the design of the act, and without showing or alleging any interest in the corporation.

The defendants, by way of answer, admitted, that David Burns was seised, and did convey, as averred in the bill, and that the trustees conveyed to the commissioners as therein set forth; that the whole of the lands thus conveyed, except so much as, from time to time, had been divided and reconveyed, or had been sold or otherwise disposed of, still remained vested

in the United States, or their officers or agents, absolutely and perpetually, for the use of the United States. The defendants insisted, that the legal as well as equitable *estate had become vested in the United States, or at all events, that the legal interest had passed to the commssioner [*240 of public buildings, in trust for the United States. In either case, they insisted, that the United States had the only beneficial interest and estate, and the absolute dominion and disposal of the same; and that congress might and ought to dispose of the same, on the terms and in the manner most advantageous to the general interest. They admitted, that about 542 acres were reserved for the use of the United States, and not allotted and divided; that these lands, thus reserved, were purchased at the rate of twenty-five pounds, or $66.66 per acre, paid out of the public treasury, which price was more than three-fold the market price or real value, independently of the adventitious and speculative valuation, superinduced by making this the permanent seat of government. The lands thus purchased for the use of the United States, and for which there was no responsibility to the original proprietors, beyond the payment of the stipulated price, were distributed throughout the city, and were commonly known and distinguished as reservations, numbered from 1 to 17 inclusively. Of these, the commissioners accounted with David Burns, in his lifetime, for about 110 acres, and paid him 2750*l.*, or $7333.33; but without any specification of the boundaries or lines. All the lands described in the second section of the act of May the 7th, 1822, and which the corporation was authorized to lay out and sell, consisted of parts of the reservations, so purchased as aforesaid, excepting that part over which No. 10 was directed to be extended to Pennsylvania avenue, which comprised so much of B street as lies between said avenue and said reservation, and was so taken in order to square out to said avenue the house lots into which the reservation was to be divided.

It was admitted, that the part of B street, any more than the residue of the street, or the other streets, was not, when originally purchased for the use of the United States, set down *at any price, specifically appro- [*241 priated to such parts of the property; but was included as an appendage in the purchase of the general mass of property paid for at the rate of twenty-five pounds per acre, without being taken into the computation of the area to be paid for at that rate. The defendants denied, that there was any agreement, condition, understanding or trust, express or implied, between the United States, or any of their officers, agents or trustees, and the original proprietors or vendors; or that anything was given out or promulgated, in the form of proposals or otherwise, either before or after the consummation of the contracts and conveyances by which the lands were sold and conveyed for the use of the United States as aforesaid, importing or implying, or in any manner holding out the idea, hope or expectation, that the lands, or any part or parcel of the same, should be perpetually and inalienably retained as public property, or dedicated to any particular object of public improvement; or that the general declaration of use should be limited and restrained, so as to control the discretion of the government or congress of the United States in the use or application of the property; except that these defendants had heard and believed, that at a very early stage in the adjustment of the plan of the city, the two principal quarters of the city, and the particular appropriations of ground for the

sites of the president's house and executive departments and capitol, were designated, and an implied pledge of the public faith was held out, not merely to the original proprietors, but to the public in general, that those great improvements should be permanently distributed and seated; but as to all the residue of the lands so purchased for the use of the United States, it was to remain at the absolute disposal of congress.

The defendants had been informed, and believed, that the intent and object for keeping such extensive reservations of land in the heart of the city, unappropriated, were to leave the hands of the government unfettered, and its discretion uncontrolled, to dispose of such reservations in furtherance of such future and contingent purposes and views of improvement, ornament
*242] or utility, as were not contemplated *or provided for in the original plan; and to leave the government at full liberty to modify and improve such plan, according to such future and contingent views. That the practice of the government, its officers, agents and trustees, had always been conformable to this view of the uses and objects to which it was originally destined. If any of the reservations had received names, as if appropriated to particular objects, they had been merely popular and arbitrary; and not from any authority, or founded on any pledge or trust, public or private, that they should be so appropriated. Whenever the public convenience had been thought to require it, the lands had been applied, without regard to such popular and arbitrary designations, or to any such terms or conditions as the complainants pretended. That the specific purposes and objects designated in the act of congress for the application of the proceeds, were of the first importance and highest public utility, in reference to the primary design of laying out and embellishing a splendid, populous and well-ordered capital; which was to be reclaimed from wasted tobacco fields and noxious morasses; and that without the improvements to be accomplished by these means, the city never could fulfil the ends and purposes for which it had been selected, as the permanent seat of government.

The corporation, answering for themselves, further said, that without delay, a board of five commissioners was organized for the purpose of carrying into execution the act of 1822, according to certain directions in the act, and in the ordinance of the corporation; that the commissioners did proceed to lay off the parcels of ground into squares and building lots, and proceeded to make sale of some of them, when they were stopped by the injunction issued at the prayer of the complainants. When the same was dissolved, they again proceeded, and had disposed of the greater part of the same, and intended with all convenient speed to dispose of the residue. Of all which actings and doings, they were prepared to render an account, when they should be so required and directed.

The complainants filed a general replication; and after argument, the circuit court dismissed the bill with costs. The complainants appealed to this court.

*243] *The case was argued by *Coxe* and *Taney*, for the appellants; by *Berrien*, Attorney-General, for the United States; and by *Jones* and *Wirt*, with whom was *Webster*, for the corporation of Washington.

Coxe, for the appellants, stated, that the claim of the appellants was

founded on the admitted original right of the ancestor of Mrs. Van Ness in the premises, and upon the contracts and conveyances by which he parted with these lands. It is contended: 1. That these conveyances and contracts did not vest in the United States an absolute and indefeasible title, but passed an imperfect and qualified estate, to which certain trusts and conditions were annexed, intimately connected and interwoven with the title; and the condition having been broken, and the trusts violated or run out, the estate granted has terminated. 2. If such should not be deemed the legal result from the facts in the case, the complainants will contend, that according to the only fair interpretation which can be given to the contracts in question, these premises must now be considered as if originally converted into building lots, and to be equally divided between the government and the original proprietor: or, 3. That if the interest vested in the United States could not be divested, without an actual sale to individuals, then, under one aspect of the case or another, the plaintiffs must be entitled to the whole or a moiety of the proceeds.

1. It is admitted, that the soil originally belonged to David Burns, the father of the complainant Marcia. This could only be divested by his voluntary act. The right of sovereignty, before the cession, was in the state of Maryland. The first article, section 8th, of the constitution of the United States, gives to congress the right of exclusive jurisdiction over the district, and in other cases. Under this clause, the right of sovereignty over the district is in the general government, and under the 2d section, the right is recognised to acquire real property for certain designated and stipulated purposes. *It is a fair inference from this part of the constitution, that if congress can constitutionally acquire the ownership of property within any particular state, its rights are simply those of an individual; and the assent of the states must concur, before the sovereign power can be vested. This is specifically provided for, as to the district of Columbia, by the cessions of Maryland and Virginia. (Burch's Dig. 213, 218, 219.) Under these acts, as sovereign, congress has no right in, or connection with, private property, further than the states held, which ceded their jurisdiction. The rights of the United States are derived from individual authority, and are not granted by the states. The whole foundation then of the government title to the real estate in the district of Columbia, rests upon compact with individual proprietors. All the powers which can be lawfully exercised over the property, must be derived from the same source. No rights can thus be created, which the former owner did not himself possess. The private compacts and conveyances which confer this right, must be subject to the same rules of interpretation and construction, as if they were contracts between private citizens. The government, in making these contracts, descends from its sovereign elevation, lays down its privileges and prerogatives, and places itself in all respects, as to right, upon a level with the individual citizen. [*244

2. What then is the character, and what the terms of the conveyance and agreement under which the controversy arises? Under the powers reposed in him by law, President Washington, having selected a site for the contemplated city, met the proprietors of the land covered by it on the 12th of April 1791 (Burch's Dig. 332), when he made to them certain propositions, and explained his views relative to the same. The owners generally

came to an agreement, which formed the basis of the various deeds of trust which were executed immediately after. The language of this agreement is peculiar and unambiguous. The president is authorized "to retain any *245] number of squares, &c., he may think proper, for public *improvements, or other public uses." The form of the conveyance is not alluded to, neither is the extent of the estate to be granted; the object exclusively regarded is the purpose for which the land is to be retained. This agreement may be considered, in connection with the legislative acts and the coveyances, as the contract between the parties. 4 Wheat. 656. It contains the stipulations which were to be executed by formal conveyances.

The conveyances to Beall and Gantt, the trustees, will be found to correspond with this agreement. The language of those conveyances is, "to the said Beall and Gantt, and the survivor of them, and the heirs of such survivor;" the *habendum* is in these words, "to have and to hold the hereby bargained and sold lands, with their appurtenances, unto the said Beall and Gantt, and the survivors of them, and the heirs of such survivor, to and for the special trust following, and no other," &c. And this trust is created by these words, "and the said Beall and Gantt, or the survivor of them, and the heirs of such survivor, shall convey to the commissioners, &c., and to their successors, to the use of the United States for ever, all the said streets, and such of the said squares, parcels and lots, as the president shall deem proper, for the use of the United States." It is obvious, that the parties considered the contract as still executory; no legal title passed to the United States, or even to the commissioners; but a subsequent conveyance for this purpose was evidently contemplated. The abolition of the office of commissioner has prevented the execution of this design. The agreement of the 12th of April 1791, must still be considered as substantially setting out the intentions of the parties; and although wholly informal, "it is an agreement showing the intent of the parties, and therefore, sufficient to declare a use." 4 Mod. 264.

The Maryland act of cession refers to this agreement, as well as to the conveyance; and the inquiry is, what was the intention of the parties, as the same can be gathered from the documents referred to? It embraces *246] three distinct species of property: 1. The *public streets. 2. The public reservations. 3. The building lots. All the ground within the limits of the city is comprehended within one or other of these descriptions. The first were to be absolutely vested in the government, without any compensation, further than such as should arise from the enjoyment of this public right of way. The second was to embrace the squares, parcels and lots which the president might deem proper for the use of the United States; or, as the original agreement expresses it, "which the president might deem proper for public improvements or other public uses." These were to be paid for at the rate of twenty-five pounds per acre. 3. The building lots, which were to be equally divided between the United States and the original proprietors. All the premises in controversy in this case are comprehended within the first two descriptions.

If the language employed in this agreement and conveyance can receive any precise construction, it means, that the parties agree to convey, and did convey, "such squares, parcels and lots as the president might deem proper for the use of the United States." If this be ambiguous, all doubt will be

removed, by reference to the terms of the agreement, where the property, as well as the object of the conveyance, is specifically described "as lands, in any form, which shall be taken for public buildings, or any kind of public improvements," and "for public improvements or other public uses." These then are the objects of the grant. Where an agreement embraces a number of distinct subjects, which admit of being separately executed and closed, it must be taken distributively; each subject being considered as forming the matter of a separate agreement, after it is closed. 11 Wheat. 237, 251. Also 1 Coxe 270; Sugd. 209; 12 Johns. 436. It might have occurred, that the land of one proprietor was appropriated to these public objects, and all that of another to building squares. The construction then to be given to the various matters must be the same, as if three distinct conveyances had been executed, after the plan of the city had been adopted, and with a specific appropriation of each portion of the premises. *A conveyance, then, of a particular tract of land to the United States, [*247 "for public improvements or other public uses," "for public buildings or any kind of public improvements," or "for a street," would have fixed, beyond a doubt, the purpose to which the subject conveyed was to be applied, and would have constituted an agreement of the most solemn obligatory character.

3. Having ascertained the substance of the agreement, it is immaterial, whether we consider the contract as creating a charity, a trust, an estate upon condition, a dedication to the public, or anything else of a similar character. In England, it would have been deemed a charity. 4 Ves. 543; 7 Johns. Ch. 292; 5 Har. & Johns. 392; 6 Ibid. 1. It is immaterial, that we have no statute similar to that of 43 Elizabeth. The object and effect of that statute appear to have been, to give validity to certain dispositions of property, which otherwise would have been void. If, in the cases put, the will required the aid of the statute, such was its operation. If, in this case, the assistance of a similar statute should be deemed necessary, it must be on the principle that, at common law, the conveyance would be void. If, however, no assistance is thus required, or should the various statutes under which these arrangements have been made legalize them, the trusts designated are valid as a charity. But a charity must be accepted upon the same terms upon which it is given, or it must be relinquished to the right heir; for it cannot be altered by any new agreement between the heirs of the donor and the donees. 4 Wheat. app'x, 15; Finch 222; 3 Meriv. 400, 401, 417.

Considering it as a condition annexed to the grant, that the land should be appropriated to "public buildings," or "other public uses," the result would be the same. By the disposition the government has made of the premises, the sale of all its interests to individuals, it has misapplied this property, and deprived itself of the power to perform the condition. Such a misapplication was held, in *Porter's Case*, to give to the heir of the donor a right of entry. 1 Co. 16.

*The interest created is, however, as well from the nature of it, [*248 as from the terms employed, nothing more than a trust in some of its modifications. The contract is entirely executory in its character. It indicates the general object of a conveyance thereafter to be made. Even the deeds from the proprietors to the trustees were but a part execution of the agreement. They contemplated another instrument to convey the legal title

to the United States. The conveyance to the trustees being a deed of bargain and sale, the estate of the United States under it could be nothing more than an equitable one. It is a settled principle, that no use, to be executed by the statute, by force of such a conveyance, can be declared, excepting to the bargainee. 3 Johns. 383 ; 4 Cruise's Dig. 494 ; 16 Johns. 302. To the whole extent of this controversy, the contract is still executory, and completely within the control of a court of chancery ; who, in framing a conveyance, will make it correspond with the intention of the parties. This intention is to be collected from the original agreement. It is clearly established, that without any strict adherence to the forms of instruments, the intent of the parties will operate. 4 Mod. 264 ; 2 Atk. 577, 582 ; 1 P. Wms. 123 ; 1 Bro. P. C. 288 ; 3 Ibid. 31–33 ; 3 Com. Dig. 587 ; 1 Jac. & Walk. 550 ; 1 Prest. on Estates. The beneficial interest, under these instruments, in the United States, is clearly an executory equitable interest. It rests *in fieri*, and the court will endeavor to ascertain the design of the parties in relation to the extent of this interest, and measure their rights by such intention. All trusts are, indeed, executory. 1 Cruise's Dig. 489 ; 1 Prest. 186.

If the view of the intention which has been taken is the correct one, the premises in question were to be apportioned exclusively to objects of a public character ; to public improvements, or other public uses. The property has, however, been diverted from these objects, and has been sold out to individual proprietors, and is *now occupied and enjoyed by them for their private advantage. What then is the result of this misappropriation? The rule of equity seems to be, that when the purpose for which a trust is created, either ceases or never comes into existence, it is to be considered as if it had never been contemplated. And the benefit of the estate upon which it has been charged, must result to those to whom the law gives the estate, in default of disposition by the right owner. This is the whole foundation of resulting trusts. Estates vested in trustees for the purpose of raising money ; if the power is never exercised, or the incumbrance is discharged, the estates granted to the trustees terminate. Estates vested in trustees to preserve contingent remainders ; if the contingency never arises, or the estate in the trustee is at an end, before it occurs, revert to the grantor. 1 T. R. 760 ; 4 Ves. 60 ; 2 Ibid. 399, 406 ; 7 Com. Dig. 588 ; 1 Cruise's Dig. 475 ; Prec. in Ch. 541 ; 2 P. Wms. 20 ; 1 Prest. on Est. 182–3. This sale of the premises amounts to an abuse of the trust ; and it can confer no right on the party abusing it, or on those who claim in privity with him. 7 Com. Dig. 619 ; 3 Maule & Selw. 574.

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No beneficial interest vested in the trustees, Beall and Gantt. They took an estate, for the single purpose of conveying it to the commissioners. In the execution of this power, they were bound to regard the intention of the parties, without any scrupulous adherence to the phraseology of the conveyance. Whatever might be the nature of the words of the conveyance to them, nothing more passed to them than was necessary to enable them to execute the power confided to them. If they could now be required to execute that power, and convey the premises in pursuance of it, in framing their deed, they must look to and be governed by the obvious intention of the parties. 2 Doug. 565, 573 ; 3 T. R. 665, 674.

If the formal parts of the conveyance should be deemed immaterial, and the equitable interests of the parties alone be regarded, this may be consid-

ered as a qualified or base fee in the premises, in the United States. *Qualified or base fees are, substantially, nothing more than fees upon condition. In general, the qualification is annexed to the person of the tenant; but it is not material, whether it was annexed to the land or the person holding the land; whether the condition should be determined by the tenant personally, by an act different from that upon which the estate depended, or by the land being discharged of the condition. In this case, it would be equally immaterial, whether the language of the conveyance made it the personal duty of the tenant to appropriate the land for the designated purposes, or whether it required the land to be so applied. 1 Prest. on Estates 431. The residuary estate is in the grantor. Ibid. 117, 156.

Such a grant may well operate as a dedication to public uses; in which case it would also partake of the qualities of a trust, and be governed by the rules applicable to trusts. 2 Str. 1004; 9 Cranch 331; 2 Johns. 363; 12 Serg. & Rawle 29. Upon these grounds, or some of them, it is apparent, that by the operation of the acts of congress, to which reference has been made, and the sale to the individuals who have purchased, the premises have been discharged of the trust originally created. The public, to whose use they have been dedicated, have renounced the interest thus created; and the original proprietors are re-invested with their original title.

It is objected, that congress possess the powers of sovereignty, responsible to the entire people of the Union, and answerable to the nation at large for the manner in which it discharges its duties and executes its powers. This is said, to exclude all claims for recompense for the exercise of these powers, by individuals. To this it is answered, that such political powers may belong to congress, and the position assumed may be true, so far as the rights of individuals are not, by compact, connected with the operations of government. But when it acts upon individual rights, the party whose person is violated, or whose property is invaded, is separated from the mass of the community; and if his *case be one in which a court may act, [*251
he may invoke the constitution and law for his protection and indemnity. Compacts may be made by the government, and individuals may acquire rights under those compacts. It is incompatible with our institutions, to say, that holding these rights, government is acting as a sovereign, and is responsible only to the nation for its doings. The property of individuals may be wrested from them by acts of the government; but it will not do, in a case where the law can interpose, that the citizen shall not claim its aid, because it is a sovereign act. When government enters into contracts with individuals, it parts with its sovereignty. 9 Wheat. 907. In the case of the *United States* v. *Barker*, the government was held bound in all proceedings upon bills of exchange, to adhere to the same rules as govern individuals.

According to the general principles of the law of nations, the act of cession would not have impaired individual rights. But the peculiar provisions of the act of cession give this principle additional sanction; all the right of the United States to land here, depends exclusively upon the compacts made with individuals. It is then immaterial, whether it holds its powers and property in trust for the community or not. The question is, what is the extent of its property, and its rights to that property? and this cannot be affected by the inquiry, for whose benefit they are holden. They cannot

be enlarged or diminished by the circumstance that they are held by a sovereign power, for the general good.

If the appellants are right in their view of the nature of the estate existing in the premises, if this was a charity, and the object of the donation was the public, congress, representing that public, may renounce this beneficial interest. If it is a trust, and the public are the *cestui que trust*, congress, representing them, may relinquish all the advantages secured to the community. If it is a dedication to the public, congress may discharge the estate of this servitude or easement. While it is conceded, that congress, in the exercise of their power over the public property, are absolute, and are *252] *responsible only to the nation ; the legal effect or operation of such renunciation is wholly disconnected with any question of sovereignty.

It is objected, that the original proprietors have been paid a full price for the lands in controversy. It is not considered as of any moment how this fact was. In determining what was conveyed, what estate did pass, the question of what was paid for it, is an immaterial one. The party was paid for what he conveyed ; he received his compensation for what he granted ; but the question still recurs, what did pass by the conveyance ? No court can enlarge or diminish the effect of the granting part of a deed, by referring to the amount of consideration, and deducing from that any rule of interpretation.

It is also insisted, that the beneficial purposes to which the proceeds of these sales are applicable, are fatal to this claim. These can have no effect upon the question really involved in this case. However judicious the appropriation of the proceeds arising from a violated trust, it will not influence the inquiry, whether it was violated.

As to the suggestion that the remedy of the appellants was at law, and not in equity ; it is answered, that the act of congress furnishes the specific remedy by bill, in the nature of a petition of right ; and if the case presents a trust, it is peculiarly within the guardianship of a court of chancery. Whether there is, in this proceeding, a misjoinder of parties, will depend upon the result of the case. The corporation of Washington, acting under the act of congress, sells the land, and receives and applies the proceeds ; if an account is to be directed, it is the only party which can furnish one. It is also submitted, that the only effect of sustaining this objection, would be a decree in favor of the corporation. The consequences of a misjoinder in chancery are very different from what they are at law, in an action *ex contractû*.

The parties appellants have a beneficial interest in the continued devotion of the property to public uses, which a court can notice. 4 Wheat. 630, 641, 697. The proprietors of every lot are interested in the size of the *253] streets, and in *their direction ; in the situation of public squares, and in the location of public institutions and buildings. The original proprietors are especially interested : 1. In diminishing the number of building lots thrown into market. 2. By the enhanced value of their remaining property, in consequence of its vicinity to a public square, or fronting on a commodious street. Such was the intention of all the parties to the compacts and arrangements relative to the city of Washington ; and this fully

appears from all the circumstances of the case, as well as from the language employed.

The act of congress of July 1790, the only act passed before the execution of the instruments, did not authorize the purchase or acceptance of property in general, and without limit. The third section authorizes the commissioners to purchase or accept such quantity of land, within the district, as the president might deem proper, for the use of the United States. The fourth section empowers the president to accept grants of money to defray the expenses of such purchases, and of erecting the necessary buildings. There is nothing in this act, relating to the city, or the plan of the city, to public streets, or to reservations for city objects. No authority is given even relative to the building lots, considered as real estate conveyed to the government. The building lots never were conveyed to the United States. They were granted to trustees, a moiety of them to be regranted to the proprietors, and the residue to be sold: and after deducting so much from the proceeds as would pay the former proprietor twenty-five pounds per acre, the residue was to go to the United States, as a donation in money; the objects to which the money was to be appropriated being specifically designated. The act of the legislature of Maryland of 1791 conforms to this view of the case. The president and the commissioners are, by the act of congress, invested with special powers, which they cannot transcend; and it appears, that either the estate conveyed must be strictly in accordance with those powers, or that the instruments of conveyance are void. The authority is *vested in them in affirmative words, and this is equivalent to a negation of any other authority. 2 P. Wms. 207. [*254

A review of the various acts of congress passed subsequently, shows, that the government never contemplated that the contract was susceptible of the interpretation now the subject of complaint. Mr. Coxe here cited and commented on the acts of May 6th, 1796, April 18th, 1798, April 24th, 1800, January 12th, 1809, and July 5th, 1812, and contended, that these various legislative acts conclusively settled the interpretation of the contract, and showed, that the signification attached to the phrase, "use of the United States," was synonymous with "public purposes," and other similar forms of expression. A resolution of congress in the session of 1804 is to the same effect.

But the government has in fact paid nothing for these lands. The various instruments between the parties, and the various acts of congress already cited, show, that each proprietor whose lands were appropriated to public purposes was to recover the compensation of twenty-five pounds per acre, out of the proceeds of the building lots selected on his own tract. No other fund was pledged, and this was the practical construction placed upon the compact by the commissioners.

Wirt and *Jones*, argued the case for the corporation of the City of Washington.

Wirt contended, that there was but one aspect in which the bill of the appellants presents a case which is within the jurisdiction of the court. It is that in which it asks a partition of the proceeds of the sales of the lots. The only substantial defendant is the United States, and the United States

being a sovereign, cannot be sued. It is said, that the act of congress of 1822 dispenses with this sovereignty, and permits this suit. This is true, so far as the act does dispense with the sovereignty, but no further. The terms of the law are to be carefully observed. The dispensation is a limited one. It permits a suit for the proceeds; and the court cannot assume jurisdiction beyond this point. So much of the bill, therefore, as
*255] seeks to enjoin the *United States from letting lots, or asks for a decree for the land specifically, is *coram non judice*. It did not require a plea, to raise this question of jurisdiction; for the want of jurisdiction is apparent on the bill. On the face of the bill, the court will see, that the United States is the only material defendant; and the bill refers expressly to the act of 1822, as the authority for the proceedings. That act thus becomes a part of the bill; it authorizes a suit for no other purpose, and to no other extent, than to ascertain whether the defendants be entitled to any part of the proceeds.

As to dismissing the bill against the United States, and retaining it against the corporation. Can this be done? The act of 1822 declares, that the proceedings shall be conducted according to the principles of equity; and can a court of equity proceed to a decree, in the absence of a material party? But it is clear, that the corporation is merely the organ of the government, under the act of 1822; and thus a limited agency, confined to the selling of the lots, and applying the proceeds under the sale, is in the corporation. Can the agent of a sovereign be sued, for the purpose of stripping the sovereign of his rights of property. Again, what decree could be rendered against the corporation? Could there be a decree for this property? The corporation has no right of property. It is not even an agent of the government to defend the property in a judicial proceeding; its agency being limited to the special ministerial acts designated by the law of 1822. Under what principles, then, which regulate the proceedings of courts of equity, could a decree for this property pass against the corporation of the city of Washington? Of what avail would such a decree be against the United States? Decrees bind those only who are parties and privies; and if the bill be dismissed against the United States, for want of jurisdiction, in what sense could they be said to be parties or privies to the suit which would remain against the corporation? The corporation claim no rights of property, and are intrusted with no agency to defend this suit;
*256] *they are the mere servants of the government, in performing the ministerial acts presented by the law of 1822.

We might well insist, that the whole bill should be dismissed, as not conforming in its character to the only bill permitted by the law to be settled by the appellants. But it is the interest of all parties that this controversy shall be terminated. There is, it is repeated, but a single aspect in which this case can be regularly presented; it is, that it shall be considered a bill in the nature of a petition of right, claiming the proceeds of the sales. In deciding this question, the court must necessarily decide, incidentally, on the title of the complainants to the property. If they have a right to half the proceeds, it can only be, because, on some principle of law or equity, they show title to half the property.

2. Are the complainants entitled to the proceeds, or to any portion of them? This must depend upon the contract under which the original pro-

prietor parted with the property and conveyed it to the United States. If he parted with the property *sub modo;* if there was any condition in the contract, that it should be applied to a specific use, and that, if not so applied, it should return to the original owner, or to his heirs; then, if it has not been so applied, the claimants are entitled to the proceeds. But if the conveyance to the United States was absolute, and for a good and full consideration, and the indication of the use was referred by the terms of the contract to the pleasure of the United States; then it must be manifest, that the complainants are not so entitled.

It would seem, that the opinion, that the complainants are entitled to some part of these proceeds, has arisen from confounding the case with others reported in the books, to which it bears no just resemblance; but from which it is distinguished by circumstances which withdraw it entirely from the influence of those decisions. Thus, cases are cited of charities, which are free gifts of property, dedicated on the face of the instrument itself, which made the gift to a special use—free gifts, in which the donor *had been induced to make them, by no pecuniary interest, but which proceeded solely from his disinterested bounty and charity. But these [*257 reservations were not free gifts. They were sales founded on a most valuable consideration, in which the vendor had most important pecuniary interests at stake; and this consideration was of a twofold character. 1. The establishment of the federal city on their lands, which has made the desert smile. 2. The direct consideration of twenty-five pounds paid for every acre of these reservations. The cases of charities have, therefore, no application; because these were not gifts, but purchases. They have no application; because here there was no dedication on the face of the instrument to any specific use, but that was left open, and was placed solely at the pleasure of the United States.

Nor is there any trust, express or implied, raised on the face of the contract, in behalf of the original proprietors, nor any use for them; the whole trust and use being for the benefit of the United States.

Neither is there seen in the case a single feature which brings it in any degree within the range of those cases which have been cited of estates granted on condition, or of cases of determinable fees. For here is no condition annexed to the grant, unless it may be regarded as a condition, that the property is to be applied to the use of the United States; a condition, in the due performance of which the original proprietor had no other interest than any other citizen of the United States. Nor is there anything which makes this a defeasible or determinable fee; because the fee is in perpetuity to the United States.

The argument on the other side proceeds entirely on these two propositions. 1. That this was a free gift of property on the part of Mr. Burns. 2. That it was a gift for a specific purpose; and that this specific purpose having been entirely given up, Mr. Burns, or his representatives, are entitled to a return of the property. Now, on the other hand, if it appears: 1. That this is not a free gift, but a sale for a valuable consideration, which has *been received by the grantor; on this single ground, then, there [*258 must be an end of this claim. 2. If it shall further appear, that it was not even a sale for a specific use, but for the use generally of the United States, there must be an end to all pretension of claim. And the truth of

these latter propositions will result from an inspection of the contract, and a steady look at the real character of the case, and at the circumstances out of which the contract grew, and with relation to which it is to be construed. This was not a gift, but a sale for a valuable consideration, which has been paid, and this consideration was two-fold. 1. The establishment of a federal city on these lands. 2. The receipt of twenty-five pounds per acre for the reservation.

The establishment of a federal city on the lands. This feature alone distinguishes this case from all others which have been cited from the English or American books. Was not this a valuable consideration? not an empty, speculative, imaginary consideration, but one real and solid; one which suddenly converted these exhausted and unproductive tobacco fields into mines of almost countless opulence. The value which was given to the property of former owners, is fully shown by the history of the period when the location of the federal city was about to be made. It was in the power of the president to fix the site of the city where he should decide. He could have put it were it now is, or have gone to Georgetown, and there erected the public buildings. Every public body, and every private individual who in those days touched this subject, has left us proofs of the interest which the land-holders were expected to take, and did take, in the important question of the precise location of the city; and have thereby borne testimony of the reality and value of the consideration. Act of Congress of the 16th of July 1790 (Burch's Dig. 226); Act of the Legislature of Maryland of the 19th of December 1791.

*259] Suppose, the whole of the land on which the city stands *had been purchased by the United States, before the location of the city; and paid for by twenty-five pounds per acre out of the public treasury, and such a deed had been taken as that which has been executed, a conveyance in trust to the United States; could the vendor have any color of right to restrict the United States as to any use of the property thus purchased? Suppose, the property had been condemned by inquisition, under the law of Maryland, to the use of the city of Washington; could it possibly be contended, that the former proprietor would retain any control over the property or its application, the land being paid for out of the public treasury? Now, if it be true, that if the property is paid for by the United States, either by voluntary contract, or by writ of *ad quod damnum*, the former proprietor would cease to have any control over it; what is there in the mode of payment which was adopted, and the benefits which he received, to vary the rights of the parties? It is urged, that as the payment was made out of the funds of the ancestor of the complainants, the reservations were virtually free gifts. Now, there was nothing in the case which deserves the name of a free gift; for the establishment of the city was a consideration which produced the whole increased value of the property. By the parties themselves, it was never pretended, that these reservations were a gift; on the face of the deed itself, they are treated as bargained and sold to the use of the United States; and nothing is pretended to be a donation, except so much as shall remain of the proceeds of the sales of the alternate lots, after the payments for the reservations have been made.

But suppose, that the money which was produced by the sales of the lots and was paid for the reservations, is to be considered as a gift of money by

the original proprietors; is not money so given as absolutely the property of the United States as if it had been raised by a tax? That such gifts would be made was anticipated by congress, gifts in consideration of the establishment of the city on the lands of the proprietors. *But it is said, that the proceeds of those lots were a gift of money for a limited [*260 purpose; that is, for the purpose of its being applied to pay for these reservations, at the rate of twenty-five pounds per acre; and these were to be purchased for a specific use, from which the United States have departed by the act of 1822. Such is not the agreement; nor the deed which was to give effect to the agreement. The agreement is to be taken all together, not distributively.

Berrien, Attorney-General, for the United States, stated, that by the act of congress of 1822, it was made his official duty to represent the interests of the United States in this case. The act authorizes the circuit court to entertain jurisdiction of a bill in equity, in the nature of a petition of right, against the United States; to hear and determine upon the claim of the appellants; and to determine what proportion, if any, of the money arising from the sale directed by the act they are entitled to. The purpose of the government in passing the law is fulfilled by meeting the claim on its merits.

The bill states, that the United States had no right, without the consent of the complainants, to dispose of the lands directed to be sold by the law; that such a disposition of them determines the trusts and revests the property in the original proprietors, or their representatives; or that, at their option, the trusts originally declared, attach to the property so transferred, or to the proceeds arising from the sale. It is not necessary, in this proceeding, to consider the question of forfeiture. If such an effect was produced by the act of 1822, the complainants have their remedy against the purchasers under the act. They have, however, relinquished that ground; and they seek relief against the United States, under the special provisions of the law; thus affirming the sale and seeking a dividend of the proceeds of the sale. But in any view of the case, the circuit court had no jurisdiction to hear and determine such a claim; and the only question presented for the consideration of this court, and *which was properly before [*261 the court below, is, whether the complainants, coming in, and assenting to the appropriation of the lands made by the act of 1822, are entitled to a moiety of the proceeds of the sales?

These propositions are maintained on the part of the United States.

1. The legal effect of the conveyance from David Burns to Thomas Beall and John M. Gantt, and by the latter to the commissioners of Washington, was to divest David Burns and his heirs of all right, title, and interest in the several squares or parcels of land selected for the use of the United States.

2. The deed from David Burns to Thomas Beall and John M. Gantt conveyed the legal estate of David Burns to all the lands held by him within the limits of the contemplated city, to those persons, "to have and to hold," to them and the survivor of them, and the heirs of such survivor for ever, on certain special trusts, among which were the following, to convey to the commissioners of Washington, &c., and their successors, to the

use of the United States for ever, and for the consideration of twenty-five pounds per acre, the lands which are the subject of this controversy; all which they covenanted to do. In the execution of this trust, and in the fulfilment of their covenant, Thomas Beall and John M. Gantt did convey to the commissioners. The legal title to the lands then became vested in the commissioners, in trust, to hold that portion of them which is now in controversy, for the use of the United States. In equity, the title became absolutely vested in the United States. 1 Eden 226. For the limitations of trusts are to be construed the same as those of legal estates. 8 Com. Dig. 1006. It was, in the eye of equity, a grant to the United States for ever. Such a grant vests the fee. A grant to the king *in perpetuum* gives him a fee, without the words heirs or successors; for he never dies. So also is the law as to a grant to a corporation aggregate. 4 Com. Dig. 12; 2 Bac. Abr. 536. If this were not so, the continuance of any right, title or *interest in David Burns or his heirs, was inconsistent with the authority under which the purchase was made; which being special, created by a public law, and therefore, known to the vendor, the conveyances given and received must be construed in reference to it. The act of congress under which the purchase was made is to be taken as part of the contract.

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The commissioners were authorized to purchase or accept lands within the district, for the use of the United States; they were moreover authorized to accept grants of money. Under this latter authority, they entered into a contract between the United States and the original proprietors for the division of those building lots. But it was in the execution of their power to purchase, for the use of the United States, that they did purchase the reservations selected by the president, and paid for them at the rate of twenty-five pounds per acre. These they were required to purchase for the use of the United States—for their sole use. They were not authorized, in relation to these lands, to admit any community of interest. They had simply the power to purchase or accept; but in either case, for the use of the United States; not for the joint use of the United States and any other persons. The preliminary agreement expressly negatives the idea of such joint use or joint property in the United States and the former proprietors. It was a power to purchase for the use of the United States generally, without a specification of the purpose to which the land should be applied, or any limitation whatever upon the direct and absolute dominion which the United States were to acquire by the purchase.

Would an express stipulation that the United States should hold these squares in perpetuity, as such, without power to appropriate them to any purpose, have been pursuant to the authority under which the commissioners acted? They were authorized and directed to purchase such lands as the president should deem proper, for the use of the United States. Can such a stipulation be implied from a grant to the use of the United States? But if it could, the implication must be *extended further. From a grant to the use of the United States, without qualification, absolutely, and for ever, you must imply: 1. That the United States must be for ever restrained in the use of the thing granted to the specific purpose to which it was applied at the date of the grant. 2. That a breach of this condition would raise a new trust, for the benefit of the United States and the original proprietors, or their representatives. It would not operate as a for-

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feiture; but it would raise a new trust, for the joint benefit of the parties, absolute in its terms. From a grant to the United States, a condition is implied, and then a breach of that condition; which, however, does not operate a forfeiture, but serves as a basis of a new trust, to be raised by implication, for the joint benefit of the United States and the original proprietors.

3. Construing the contract according to its plain import and intent, there is no equity in the complainants' claim. The proprietors conveyed to Beall and Gantt certain lands, which were to be laid out as a city, with such streets or squares, parcels or lots, as the president of the United States should approve, on certain trusts. 1. To convey to the commissioners of the city of Washington, and their successors, for the use of the United States for ever, all the streets and such of the squares, parcels and lots, as the president shall deem proper for the use of the United States. 2. Of the residue of the lots, one-half were to be reconveyed to the original proprietors. 3. The other moiety was to be sold, under the direction of the president; and the proceeds, after paying twenty-five pounds per acre for the lots, squares and parcels taken for the use of the United States, were to be paid over to the president, as a grant of money, to be applied for purposes, and according to the act of congress "for establishing the temporary and permanent seat of government of the United States." The result of this was, that the land conveyed, or so much of it as was necessary, being laid out in a city, the United States were to take, to their own separate use, for ever, such squares, parcels or lots as the president should prefer, and to pay therefor twenty-five pounds per acre; the *remaining lots to be [*264
divided between the United States and the original proprietors. The streets were, of course, given up, without compensation. One moiety of the remaining lots, and any lands not included in the city, to be conveyed to the original proprietors; the other moiety to be sold, as has been stated.

The appellants pretend, that the lots and parcels taken for the use of the United States, and paid for at the rate of twenty-five pounds per acre, must be retained as squares, or as the sites of public buildings, or for other public works; and cannot be sold to individuals for building lots, without entitling the appellants to a moiety of the purchase-money. It is contended, that there is no equity in this claim. 1. Because excluding the adscititious value given to the property of the original proprietors, by the location of the city as the seat of government, a full price was paid by government for the land. 2. As against the United States, the proprietors have no right to make any claim, on account of this factitious value. 3. Independently of the consideration paid per acre for the lands appropriated to the United States, the proprietors by the sale of the moiety of the building lots, which were reconveyed to them, were liberally compensated for their property. 4. It was expressly denied in the answer, and no contradictory testimony is offered, that the lands reserved from sale, and appropriated to the use of the United States, were so reserved, to be appropriated, or under a pledge to appropriate them, to any specific purpose whatever, except the sites of the capitol and president's house. 5. No such pledge was necessary to secure to the original proprietors an advantageous sale of the moiety of the lots reserved to them; for the interests of the United States concurred in not overstocking the market, as they were entitled to the proceeds of the sales

of the other moiety. 6. Such a pledge would have been much more strongly implied in behalf of the purchasers, or individual lot-holders, the value of whose acquisitions might be affected in various ways by laying off the reservations into building lots. But both and all claims must yield to the
*265] right of the *United States, to dispose, as congress may think proper, of that to which an unconditional title had been acquired; and the interests of all were secured, by the consideration that the government had a deeper interest than any individual could have in the prosperity of the city. 7. It was a fund reserved for the future improvements of the city. Improvements would be required, and the quantity reserved proves that this was the object of the reservation.

The Attorney-General then went into an examination of the practice which had prevailed under the acts of congress, in relation to the city of Washington; and contended, that it had been in accordance with the views of the United States, as now represented by him. He denied, that on any occasion, a construction different from that which he had given to the contract with the proprietors, and to the laws relative to the city, had ever been assented to by the government, or by their officers.

Taney, for the appellants, in reply, contended, that whatever rights congress or the government had in the property within the city of Washington depended on the contract with the original proprietors, and not on their rights of sovereignty. The act of Maryland of 1791 is the act which was accepted by congress; and all the rights of sovereignty which can be exercised are derived from that act. They cannot be greater than those which were possessed by the former sovereign who granted them. If the United States accepted a cession, with limited powers of sovereignty, they are bound by the limitations. They might have refused the terms; but having accepted them, they are bound by them. The constitution of the United States declares, that congress shall have exclusive legislation; but it does not require, that the power shall be despotic or unlimited. It merely excludes the states from all interfering legislation.

The act of 1791, § 2, passed by Maryland, limits the power of congress, and declares, that the cession shall give them no other right in the land than may be transferred by the individuals. All the rights, therefore, which the United States had, or have, in the soil in the district, must have been
*266] *acquired by contract. They can acquire none by the exercise of sovereign power; for they have surrendered that portion of sovereignty in this district, by accepting it upon the terms stated. Deriving their rights from contract with the proprietors; under no provision in the same, nor under the act of cession, could they condemn the land for public uses; for that would not be a transfer from the proprietor, but would be to acquire it, without a transfer from him, and by a mere act of sovereign power. If, however, the sovereignty of congress is not limited by the cession, yet the exercise of despotic power on this subject is restrained by the constitution; and if the law of 1822 was intended to seize on the private property of individuals, and dispose of it for public profit, merely for public gain, it would be contrary to the letter and spirit of the constitution, and be void. For if they may take it for such a purpose, they must give the owner of it

a fair compensation; and they have no right to fix that compensation at what they may sell it for.

But the seizure of the property of an individual, merely to sell it to another, to raise money for any purpose, can hardly be supposed to be authorized by any principles of a free government, and is in manifest opposition to the spirit of the amendment of the constitution. 2 Dall. 314. But the act of 1822 has no such object. It proposes to sell the right of the United States, and no more. It has no terms to divest the right of the individual owners, and obviously has no such design. It submits these rights to judicial decision, to be tried by the principles of a court of equity. In submitting to such a trial and decision, they place themselves on the ground of contract, and waive any rights their sovereignty might give. For it would be absurd, indeed, to suppose that the United States gave to the court the mere power of hearing a cause, when that hearing could produce no judicial result.

If congress, by mere despotic power, might seize and sell this property, without compensation to the owner, and if their will be the only principle of equity by which it is to *be decided; then all this controversy authorized by law is nugatory. For in that case, we have lost the [*267 land by seizure; and we are not entitled to payment for it, unless they will it; and as they do not will it in the law, we are sent to this highest tribunal to show rights which have no existence, as they have been extinguished by the despotic power of the sovereignty. The whole frame of the act of congress shows that such is not the meaning of the law. The court are to decide according to the principles of equity; and what the equity may be depends on contract, express or implied. The government stands before this tribunal as a suitor; having the same rights, and subject to the same rules, as an individual.

Assuming the questions in the case to depend on contract: The agreement between the United States and the proprietors was entered into on the 12th of April 1791; the deed of conveyance was executed in July 1791. Before this agreement, the site of the city was fixed. There was no contract as to the location of the city, with the proprietors. Everything had been done, independently of the proprietors, and without their consent. The agreement was among the proprietors themselves; neither the commissioners nor the president are parties to it. It does not purport to be entered into, in consideration of the fixing of the city here, that was done; but, expecting immense advantages, they were willing to make liberal return. The government are not, therefore, purchasers for this consideration. It was merely voluntary on both sides; both parties derived advantages, but not by the contract with one another; and if there was no contract, there was no purchase.

Neither does the twenty-five pounds per acre paid for the public ground constitute them purchasers. The agreement and the deed must be taken together. The United States were not the founders of the city, but the proprietors. The president was authorized by the United States to fix on this site for the seat of the government; and to accept such quantity of land as he should deem proper, for the use of the United States. In the plan of the city, and in the regulation *of the streets, he was the agent of the proprietors, not of the United States. Such was the opinion of Mr. [*268

Breckenridge, attorney-general of the United States. (Burch's Dig. 337.) Squares, public walks, and grounds for gardens, were reserved, not necessary and proper for the use of the United States.

The deed executed by the proprietors conveyed the land absolutely and unconditionally, and without the payment of any consideration. Nothing is required in return; nothing is reserved for the land dedicated to the use of the United States, unless it shall be obtained from the sales of the lots to be disposed of under the contract. This is a deduction from the donation of the proprietors. Thus, the squares cost the United States nothing. Had the whole of the land of any of the proprietors been laid out in squares, he would have received nothing for the same. The act of 1791 confirms this construction of the contract, and was accepted by congress.

These being the provisions in the deed, the next question is, what is the construction of the instruments by which these contracts were made? Was the absolute and unqualified use given or conveyed? or was the use for public purposes, as distinguished from private property? And this question mainly depends on another. What was the character of the estate conveyed to Beall and Gantt? If it was a conveyance under the statute of uses, or was an executed trust, the words must receive a technical construction. If an executory trust, it is otherwise. If it be such, is it to be construed by the principles applicable to such contracts? Preston on Estates 186–7; Fearne 136–7. No act of the trustees can change the character of the trust, or the rule of construction. If Beall and Gantt have conveyed a different estate from the one authorized, the conveyance gives no title beyond the trust. And the case is now to be considered, as if the court of chancery were, in the absence of any conveyance, called on to direct the proper deeds. It is to be executed now, as it would have been the day after the contract was made; lapse of time has not altered its meaning.

*269] *Suppose, chancery so called on, what would be the stipulations directed in the deed? The objects in view are manifest. Suppose, the government should have abandoned Washington, and fixed itself elsewhere; would they have been allowed to sell the squares? Suppose, they abandon it in part, instead of the whole; does it alter the principle?

Upon the point that this was an executory trust, Mr. Taney argued, that the conveyance to the trustees, Beall and Gantt, and by them to the commissioners, did not vest the legal title to the public squares in the United States, but created a trust for their benefit. The trust being an executory one, is to be carried into execution according to the intent of the party who created it. Fearne 124, 136–7; Preston on Estates 187–8. The deed from Mr. Burns is not, therefore, to be construed by technical rules, nor the words of it taken according to their strict legal interpretation, if such a construction appears from the whole case to be contrary to the intention of the grantor.

The United States are not asserting a legal title, in directing the squares to be sold. They are exercising a power, as *cestuis que trust*, over a trust fund; and the extent of their right in the fund, they have submitted to judicial decision. And although the words in the deed of Mr. Burns might, in a conveyance of the legal estate, under the statute, be held to pass the absolute and unqualified use in the squares; yet in the interpretation of a trust, the court will look to the real intention of the parties, and are not

bound by the strict legal meaning of any particular words used in the instrument. The United States have no rights, except by transfer from individuals. Act of 1791, § 3. In submitting the right to judicial decision, they subject themselves to the rules which govern contracts with individuals. Expounding the deed of Mr. Burns on these principles, it may be safely assumed, that he intended to authorize Beall and Gantt to convey to the commissioners, the squares and streets, for the purposes authorized by the act which fixed on Washington as the seat of the government. He did not mean to authorize a conveyance for any other purpose, nor of any *greater estate than the United States desired; for his deed refers to and recites the title of the law of congress. [*270

The question then is, did the law propose to purchase, or accept as a donation, the absolute and unqualified interest in the land? or to obtain it for special purposes, and for certain specified uses? The first proposition supposes that congress looked forward to a speculation in the land, and expected to gain by the rise of property. This could not have been; and such a presumption is negatived by the terms of the acts of congress. These different acts of congress have expounded the meaning of the words, "proper for the use of the United States," in the act of 1790; and show for what purposes the president was authorized to accept or purchase land. His authority to accept or purchase land being a special one, and for special purposes, he could not accept or purchase for any other purpose; and if he did, the grant would be void. He might accept donations of money, but not of land.

But the proprietor obviously intended to convey for the purposes mentioned in the law, and none other. This is shown by the agreement, proposed March 1791; accepted, April 1791; and by the deed of June 29th, 1791. The deed refers to the act of congress, recites its title, and uses the words of the law. Streets are associated with squares, and to be conveyed to the use of the United States. This being an executory trust, "the court may ascertain the meaning of the grantor," from the nature of the contract and the object of the provision. 1 Prest. 187. The object of the proprietor could not have been, to allow the president to select all or any of the building lots at this price. He was to be paid out of the sales of the lots. There might not have been lots enough to pay him. Such an intention would have been the surrender of his whole property, without compensation, and without motive. The contract then and now means the same thing; and if such a use of the power of selection, by the president, would have been, at that time, contrary to the intention of the grantor, it is equally so now. Yet we are now inquiring what was the intention of the *grantor; and being a trust executory, it is to be executed according to that intention. [*271

It is said, that the United States paid its full value. There is no proof of that fact; and the fact is otherwise. The consideration on which the squares were sold for twenty-five pounds, was, that the erection of the public buildings, and the laying out of public walks, &c., would render the city a more agreeable and desirable place of residence, and enhance the price of the lots retained by the proprietor. If he was to retain no lots, or only the refuse lots, it does not by any means follow, that he would have taken the twenty-five pounds. The very case on trial proves that such could not have been

the intention of the proprietor. His lots no longer front on a magnificent square. He is cut off from the most public avenue in the city.

The United States are, in no sense of the words, purchasers. The public squares are, in truth, as has been stated, donations from the proprietors. But if considered as purchasers, they yet purchase for a specific purpose, and having made the contract, they cannot depart from it. They cannot violate their contract. 5 Wheat. 642, 684, 695. The grantor is entitled to the execution of his contract, whether he does or does not receive a consideration for it. And it matters not, whether his contract is express or implied; whether by way of trust, or in any other manner, as by mere dedication to public uses. In the case of a road or street, the same interest passes to the public, and the same remains in the proprietor. Whether he is paid for it or not, no more passes than the party intended to grant. And if these squares were granted for specific public uses, and not to be converted into private property, that trust, whether created for a valuable consideration or not, must be executed according to the intention of the grantor. The contract is one entire contract; and being executed in part, must be executed throughout. Being an executory trust, it must be exe-
*272] cuted according to the intention of the *parties, whether made for a valuable consideration or not. Marriage is a valuable consideration, and is one class of the cases in which this principle is most commonly applied.

Suppose, a chancery court now called on by the United States to compel the trustees to execute the legal conveyances, what would be the conditions and covenants? Would not the squares be made to revert to the grantor when the uses ceased? The lots were pure donations; and equity would not extend the gift further than the contract. It did not extend to squares. Assuming that the public squares were granted for specific public purposes, as has been stated, the United States were the *cestuis que trust* for such purposes, and none others. The United States had a right to erect public buildings on them, and to make them public walks or gardens; they were so far *cestuis que trust;* they were not trustees for others. As this was a trust for the benefit of the United States, they had a right to renounce it. The proprietors could not compel them to erect the public edifices, or to lay out and ornament the public grounds. They had not bound themselves by contract to do so; they might, or might not, do it, at their pleasure. And they might renounce the trust intended for their benefit, and the trust would then end; it would be extinguished. The act of 1822 is a renunciation of the trust. They, the *cestuis que trust*, declare that they will not use it for the specific purposes for which it was conveyed. It is not a forfeiture. It is admitted, that a trust is not forfeited by its abuse; it is not claimed as a forfeiture; but having renounced it, the trust in their favor, by directing it to be converted into private property, to whom does the property belong? It goes to the heirs of the grantor. 4 Ves. 60; 9 Ibid. 399; 5 Har. & Johns. 400; 4 Wheat. 39, app'x, 15.

If the power exists anywhere, either in congress or elsewhere, to convert these squares into building lots and private property, under the provisions of the original agreement and deed; then, as soon as that power is exer-
*273] cised, and the *property so converted, the provisions and stipulations of that agreement attach upon it, and the original proprietor is entitled to the one-half; for whether the power given to lay off the building

lots was exercised sooner or later, can make no difference. If, under the agreement and deed, the power can be rightfully exercised, the consequence of that exercise of power must follow; and the original proprietor is entitled to one-half of the lots so laid off, under and by virtue of his agreement. The act of 1822 is obviously framed on this interpretation of the contract. It directs the corporation to sell the right of the United States, and then provides for a decision on these rights. Congress obviously supposed, when passing the law, that the United States had a right in these lots. And if they had the power to convert the squares into private property, under the original agreement and trust, then they would have been tenants in common with the proprietor, and entitled to sell the half, and receive the proceeds.

Upon the whole, if the United States had only the right to use these squares for specified purposes, and no right to change the use; if they were merely *cestuis que trust;* they have renounced the trust, and the whole belongs to the original proprietors; it reverts to the donor or grantor. If, on the contrary, they have the right to change the plan of the city and convert the squares into building lots, then, whenever this is done by a competent authority, acting under the contract, the proprietors are entitled to a conveyance of one-half of the lots.

The relief. In either view of the case, the relief is complete against the corporation. If the United States could not sell the half, or could not sell the whole, they could give no right to the corporation to do so; and we were entitled to a perpetual injunction against them. 9 Wheat. 739. If the law of congress does not authorize the court to decree against the United States, as to the land itself, but only as to the money received on sale, then the bill may be dismissed *against them; and a perpetual injunction decreed against the corporation. The great object is to have the [*274 rights of the parties adjusted, and no doubt can be entertained, that congress will faithfully carry into execution the principles settled by this court.

But the law of congress gives the court power to decree against the United States, as to the land, as well as the money. The act of 1822, § 6 authorizes the party to set out in his bill, his title to the land. His bill, therefore, brings that question directly before the court for decision, and imposes upon them the duty of deciding it; and if they must decide it, it follows, that they must give the appropriate relief. And if the court come to the conclusion, that congress had no right to sell the land, they can have no right to compel the party to accept money in lieu of it. The 8th section of the act is only an enlargement of the power of the court. The proprietors might have assented to the sale, and offered to ratify it, and accept the proceeds. The law of 1822 provided for this contingency, in the 8th section. It enabled the court to dispose, finally, of the case, in whatever shape it should be presented to them.

Finally, it is a question between the government and an individual, on a subject of the most interesting character. How far may the government, by a new act of legislation, deprive him of his rights of property, and of the remedy to assert them? On such a question, it may be assumed as certain, that the rights of the individual, whatever they may be, will be protected by this court. It it peculiarly one of those questions on which congress, with the best dispositions, are most liable to error. It is out of the usual

scope of legislation. They cannot be expected to engage in minute investigation of titles. And they ought not to be held to have exercised wilfully a despotic power, even if they possess it, for the purpose of depriving a private citizen of a full and adequate remedy for the wrong done him. The act of 1822 is in a very different spirit, and requires the rights of the parties to be decided by the terms of the contract, and not by power.

*275] *As to the forms of this proceeding, it is hardly necessary to discuss them. It is the great object of all parties, to understand their rights, and that is the great purpose of the whole proceeding. Enough appears on the record, to enable the court to decide on these. There does not appear, however, any well-founded objection that can interfere with the relief we ask.

Story, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court of the district of Columbia, sitting at Washington, upon a bill in equity, in which the appellants were original complainants.

On the 7th of May 1822, congress passed an act to authorize and empower the corporation of the city of Washington, in the district of Columbia, to drain the low grounds, on and near the public reservations, and to improve and ornament certain parts of such reservations. By that act, the corporation were, among other things, to change, by contract with the proprietors of the canal, the location of such parts of the canal passing through the city as lay between Second and Seventh streets West, into such course as should most effectually, in their opinion, drain and dry the low ground lying on the borders of Tiber creek. And to effectuate this object, the corporation were further authorized, after having extended the public reservation designated on the plan of the city as No. 10, so as the whole south side should bind on the line of Pennsylvania Avenue, and after having caused to be divided the said public reservation No. 10, and also the public reservations Nos. 11 and 12, into building lots, to sell and dispose of the right of the United States of, in and to the said lots, or any number thereof, laid off as aforesaid, at public sale, &c. And the corporation was further authorized to cause to be laid off, in such manner as the president should approve, two squares, south of Pennsylvania Avenue, &c.; and also to lay off, north of Maryland Avenue, two uniform and correspondent squares; and the said four squares, when so laid off, to divide into building lots, and

*276] to sell and dispose of the *right of the United States in such lots, &c. The proceeds of these sales were, in the first place, to be applied to the purposes above mentioned, and in the next place, to inclosing, planting, or otherwise improving certain public reservations, and building certain bridges, &c.; and the surplus, if any, to go into the national treasury. The sixth section of the act then provides, "that it shall be lawful for the legal representatives of any former proprietor of the land directed to be disposed of by this act, or persons lawfully claiming title under them, and they are hereby permitted and authorized, at any time within one year from the passing of this act, to institute a bill in equity, in the nature of a petition of right, against the United States, in the circuit court for the district of Columbia, in which they may set forth the grounds of their claim to the land in question." The seventh section provides for the service of process

upon, and the appearance of the attorney-general, &c. The eight section provides, "that the said suit shall be conducted according to the rules of a court of equity. And the said court shall have full power and authority to hear and determine upon the claim of the plaintiff or plaintiffs, and what proportion, if any, of the money arising from the sale of the land hereby directed to be sold, the parties may be entitled to." The ninth and last section of the act provides for an appeal to this court.

The plaintiffs filed their bill in the present case, within the time prescribed by the act, making the United States and the corporation of the city of Washington parties. They claim title to the lands in controversy, which have been laid off into lots for sale, under David Burns, one of the original proprietors of the city, and of whom the plaintiff Marcia is the only daughter and heir. These lots embrace part of the reservations above referred to, and also a part of the street called B, according to the original plan of the city. The ground of the bill is, that by the original contract of the government with the proprietors, upon the laying out of the city, these reservations and streets were for ever to remain for public use, and were incapable, without the consent of the proprietors, of being otherwise appropriated or *sold for private use; that the act of 1822, authorizing such sale, is a violation of the contract; that by such sale or appropriation for private use, the right of the United States thereto was determined; or that the original proprietors re-acquired a right to consider them in the same predicament as if originally laid out for building lots; or that, at all events, they were entitled, in equity, to the whole or a moiety of the proceeds of the sale, if the act of 1822 were valid, for the purposes which it professed to have in view. [*277

Some difficulty has arisen at the argument, from the peculiar structure of the bill, it professing in some parts to seek relief under the act of 1822, and in other parts insisting upon a title inconsistent with it, and demanding an injunction to prevent all sales of the land by the corporation. The opinion of this court certainly is, that under the act of 1822, the plaintiffs can proceed by a bill in equity, in the nature of a petition of right, against the United States, only for the money arising from the sales, and cannot claim a decree for the land itself, or for any injunction against sales of it. The view, however, of the case, which we are disposed to take, renders it unnecessary to consider, whether the bill is so framed that, with reference to the act of 1822, the court could pass a definitive decree against the United States upon it, from the incongruities alluded to. As it is manifestly the interest and desire of all the parties to have an opinion upon the merits, so as to put an end to the controversy, we shall waive all consideration of minor objections, and proceed at once to the consideration of the substantial ground of the claim.

Congress, by an act passed on the 16th of July 1790, provided that a district of territory, not exceeding ten miles square, to be located as therein directed, on the river Potomac, at some space between the mouths of the eastern branch and Conogocheague, be and the same was thereby accepted for the permanent seat of the government of the United States. Three commissioners were by the same act to be appointed, to survey, and by proper metes and bounds, to define and limit the district; and they were authorized to purchase or accept such quantity of land on the eastern side *of the said river, within the said district, as the president should deem [*278

proper, for the use of the United States; and according to such plans as the president should approve, the commissioners were to provide suitable buildings for the accommodation of congress, and of the president, and for the public offices of the government of the United States. A subsequent act, passed on the 3d of March 1791, authorized some alterations of the limits of the district. Suitable cessions of the jurisdiction and soil of the territory, subject to the private rights of property of the inhabitants, were made by the states of Maryland and Virginia.(*a*) And the former act further provided for the removal of the seat of government to the district, on the first Monday of December 1800. The limits of the district were accordingly ascertained and defined; as made known by the proclamations of the president of the 24th of January and the 30th of March 1791.

As yet, no public designation had been made of the site of the federal city, which was contemplated to be laid out within the limits of the district, nor of the places on which the public buildings should be erected; nor, indeed, had there been any purchase or donation from any of the proprietors of lands within the district, by or to the commissioners, for that object. There cannot, however, be a question, that various negotiations had been entered into with the proprietors, and informal proposals made by them, with a view to obtain so important and valuable a boon as the location of the city within the boundaries of their estates. And it can admit of as little question, that preparatory steps had been taken, on the part of the government, to procure suitable plans for the laying out of the metropolis.

In this state of things, nineteen of the proprietors of the land constituting the present site of the city of Washington, among whom was David Burns, on the 30th of March 1791, entered into an agreement, which was presented
*279] to the *commissioners as the basis of the terms on which they were willing to dedicate their lands for the location of the city. The agreement was accepted by the commissioners, and recorded in their books. It is in the following terms: "We, the subscribers, in consideration of the great benefits we expect to derive from having the federal city laid off upon our lands, do hereby agree and bind ourselves, our heirs, executors and administrators, to convey in trust, to the president of the United States, or commissioners, or such persons as he shall appoint, by good and sufficient deeds, in fee-simple, the whole of our respective lands, which he may think proper to include within the lines of the federal city, for the purposes and on the conditions following: The president shall have the sole power of directing the federal city to be laid off, in what manner he pleases. He may retain any number of squares he may think proper, for public improvements or other public uses; and the lots only which shall be laid off, shall be a joint property between the trustees in behalf of the public and each present proprietor. And the same shall be fairly and equally divided between the public and the individuals, as soon as may be, after the city shall be laid off. For the streets, the proprietors shall receive no compensation; but for the squares or lands, in any form, which shall be taken for public buildings, or any kind of public improvements or uses, the proprietors whose lands are taken, shall receive

(*a*) See acts of Maryland of the 23d of December 1788, 19th of December 1791, 23d of December 1792, and of the 28th of December 1793. Act of Virginia of the 3d of December 1789.

at the rate of twenty-five pounds per acre, to be paid by the public." There are some minor arrangements as to growing timber, and grave-yards, &c., which are not necessary to be mentioned. It is material, however, to observe, that no time or mode of payment is prescribed in the agreement, of the twenty-five pounds per acre; and no fund out of which it was to be paid is designated. The agreement was merely preparatory, and to be carried into effect by formal conveyances.

Now, it is upon the terms of this agreement, that the plaintiffs assert their title to relief in the present case. They contend, that though the whole land was to be conveyed, yet the portion of it, which should be taken for streets and public reservations, according to the plan approved by the president, was clothed with a perpetual condition or trust, that *they should for ever remain streets and public reservations, and never [*280 should be liable to be appropriated to any private use, or changed from their original public purpose. That upon any such change or appropriation, the title reverted to the original proprietors, or at all events, was to be disposed of and divided between them in the manner provided for, in respect to the land laid off into lots. They also contend, that the lands, so devoted to streets and public reservations, was a mere donation from the proprietors, and not a purchase by the United States; and therefore, ought to be governed by the rules applicable to public charities, and the trust strictly construed and enforced.

It is not very material, in our opinion, to decide what was the technical character of the grants made to the government; whether they are to be deemed mere donations or purchases. The grants were made for the foundation of a federal city; and the public faith was necessarily pledged, when the grants were accepted, to found such city. The very agreement to found a city was, of itself, a most valuable consideration for these grants. It changed the nature and value of the property of the proprietors to an almost incalculable extent. The land was no longer to be devoted to mere agricultural purposes, but acquired the extraordinary value of city lots. In proportion to the success of the city, would be the enhancement of this value; and it required scarcely any aid from the imagination, to foresee, that this act of the government would soon convert the narrow income of farms into solid opulence. The proprietors so considered it. In this very agreement, they state the motive of their proceedings, in a plain and intelligible manner. It is not a mere gratuitous donation, from motives of generosity or public spirit; but in consideration of the great benefits they expect to derive from having the federal city laid off upon their lands. For the streets, they were to receive no compensation. Why? Because those streets would be of as much benefit to themselves, as lot-holders, as to the public. They were to receive twenty-five pounds per acre for the public reservations; "to be paid (as the agreement states it) by the public." They understood themselves then to *receive payment from the public for the reservations. It makes no difference, that by the subsequent arrange- [*281 ments, they were to receive this payment out of the sales of the lots, which they had agreed to convey to the public, in consideration of the government's founding the city on their lands. It was still contemplated by them as a compensation—as a valuable consideration, fully adequate to the value of all their grants. It can, therefore, be treated in no other manner than as

a bargain between themselves and the government, for what each deemed an adequate consideration. Neither considered it a case, where all was benefit on one side, and all sacrifice on the other. It was, in no just sense, a case of charity; and was never so treated in the negotiations of the parties. But, as has been already said, it is not, in our view, material, whether it be considered as a donation or a purchase; for in each case, it was for the foundation of a city.

And in construing this agreement, this fact should never be lost sight of. It is obvious, that the proprietors or their heirs could not be presumed, for any great length of time, to have any interest in the streets or public reservations, beyond that of other inhabitants. If the city became populous, the lots would be sold and built upon, and in the lapse of one or two generations, at most, the title of the original proprietors might well be presumed to be extinguished by sales or otherwise; so that the interest of themselves or their heirs, in the streets and reservations, would not be distinguishable from that of other citizens. They must also have contemplated, that a municipal corporation must soon be created to manage the concerns, and police, and public interests of the city; and that such a corporation would and ought to possess the ordinary powers for municipal purposes, which are usually confided to such corporate bodies. Among these are certainly the authority to widen or alter streets, and to manage, and in many instances to dispose of, public property, or vary its appropriation. They might, and indeed must also, have placed a just confidence in the government, that in founding the city, it would do no act, which would obstruct its prosperity, or interfere with its great fundamental objects or interests. It could
*282] *never be supposed, that congress would seek to destroy what its own legislation had created and fostered into being.

On the other hand, it must have been as obvious, that as congress must forever have an interest to protect and aid the city, it would, for this very purpose, be most impolitic and inconvenient to lay any obstructions to the most free exercise of its power over it. The city was designed to last in perpetuity: *Capitoli immobile saxum.* No human foresight could take in the great variety of events, which might render great changes in the plan, form and locations of the city indispensable for the health, the comfort and the prosperity of the city. Cases might easily be imagined, as in other cities, where the desolations of fire have made alterations in the streets and public squares of a city, most important and valuable to the whole community. A prohibition, which should for ever close up the legislative power of congress on such a subject, under all circumstances, ought not lightly to be presumed, nor readily admitted. It should be proved by the most direct and authentic documents, before we should admit the belief, that the wisdom of the first president of the United States yielded up such a valuable franchise.

If the case had stood solely upon this preparatory agreement, as an executory contract, there might have been stronger grounds to impose limitations upon the grant of the streets and public reservations. The language of the instrument is, that the president may retain any number of squares he may think proper, for public improvements, or other public uses. Yet, even then, the appropriation of these squares for public uses would not necessarily carry with it an implied obligation, that they should for ever remain

dedicated to those uses, and to none other. If such had been the intention of the parties, we should naturally expect to find there some direct expression of it, some acknowledgment of the obligation, or some condition carrying it to such a political mortmain. If the stipulation was so important and valuable as is now contended for, and constituted an object of permanent solicitude, it would scarcely escape the notice of the proprietors, in laying down the fundamental basis of their cessions. If it did then escape them, we *should have reason to look for its incorporation into the more solemn instruments, which were contemplated thereafter to be executed by the parties, and were, in fact, executed by them, in fulfilment of their original agreement. But no such stipulation is there to be found. [*282

On the 29th of June 1791, the proprietors severally executed deeds of indenture, to consummate the agreement of the preceding March; they are all in the same form, and contain the same declarations of trust. That executed by David Burns conveys to Thomas Beall and John M. Gantt (the trustees designated by the president), all the lands of the proprietor, within the bounds of the city, upon the following trusts, viz: "That all the said lands, &c., as may be thought necessary or proper to be laid out, together with other lands within the said limits, for a federal city, with such streets, squares, parcels and lots as the president of the United States, for the time being, shall approve; and that the said (the trustees), &c., shall convey to the commissioners for the time being, appointed by virtue of the act of congress, entitled, &c., and their successors, for the use of the United States for ever, all the said streets, and such of the said squares, parcels and lots, as the president shall deem proper, for the use of the United States; and that as to the residue of the said lots into which the lands, &c., shall be divided, a fair and equal division of them shall be made, and if no other mode of division shall be agreed on, by consent of the said (grantor) and the commissioners for the time being, then such residue of the said lots shall be divided, every other lot alternate, to the said (grantor), &c., and all the said lots which may in any manner be divided or assigned to the said (grantor) shall thereupon, &c., be conveyed by the said (trustees) to the said (grantor), his heirs and assigns; and that the said other lots shall and may be sold at such time, &c., as the president of the United States for the time being shall direct; and that the said (trustees), &c., will, on the order and direction of the president, convey all the lots so sold, and ordered to be conveyed, to the respective purchasers in fee-simple, &c." Provision is then made that the twenty-five pounds per acre, *to be paid by the United States for the squares, should be paid out of the proceeds of such sales, and the residue shall be paid to the president, as a grant of money to be applied for the purposes, and according to the act of congress. Provision is also made for other objects, not material to be mentioned, and for a conveyance of the trust property to such other persons as the president might thereafter direct, in fee, "subject to the trusts then remaining to be executed, and to the end that the same may be perfected." In pursuance of this last provision, Beall and Gantt, the trustees, made a conveyance of the premises, by an indenture, dated the 30th of November 1796, to certain commissioners appointed under the act of congress, subject to the trusts then remaining to be executed; and, among other things, conveyed to the commissioners all that part of the lands, &c., which had been [*284

laid off into squares, parcels or lots for buildings, and now remaining so laid off, in the city of Washington.

Now, it is important to observe, that the object of the indenture to Beall and Gantt, in 1791, was, to carry into full and entire effect the preliminary agreement entered into by the proprietors. There is no pretence to say, that that indenture has not fully carried that agreement into effect. There is no allegation in the bill, of any mistake in the draft of the indenture, or that the instrument was not precisely what the parties intended it should be. The argument at the bar has not attempted to set up any such mistake, as a ground of equity. And, indeed, after such a lapse of time, and acquiescence in its legal accuracy and sufficiency, by all the parties, and after so many acts done under it, which have been silently confirmed by the parties, it would be impossible to insist upon any such mistake, with a chance of success. We must take the indenture, therefore, as we find it, as a complete execution of the preliminary agreement, and as expressing the true intent and definitive objects of the parties. The preliminary agreement then became, upon the execution of the indenture, *functus officio*, and was merged in the more formal and solemn stipulation of the latter. It was no longer executory, but executed. The indenture itself contained many executory trusts; and so far as any of them *yet remain unexecuted, the instrument itself may still be denominated executory. But so far as the trusts have been fulfilled, as by the conveyance of lots to the grantors, or to purchasers, and especially, by the conveyance of the streets and squares, &c., to the commissioners, in 1796, the indenture can no longer be deemed executory. Its functions have been final and complete.

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We need not, therefore, inquire into the distinction taken in a court of chancery, between executory and executed agreements; or into the extent to which its equitable jurisdiction will be interposed to reform instruments, upon grounds of mistake, or to grant other relief; because the present bill presents no case falling under either predicament. Here, we have a solemn instrument embodying the final intentions and agreements of the parties, without any allegation of mistake; and we are to construe that instrument according to the legal import of its terms.

Now, upon such legal import, there do not seem grounds for any reasonable doubt. The streets and public squares are declared to be conveyed "for the use of the United States for ever." These are the very words, which by law are required to vest an absolute unconditional fee-simple in the United States. They are the appropriate terms of art, if we may so say, to express an unlimited use in the government. If the government were to purchase a lot of land, for any general purpose, they are the very words, which the conveyance would adopt, in order to grant an unlimited fee to the use of the government. There are no other words or references in the instrument, which control in any manner the natural meaning of them. There are no objects avowed on the face of it, which imply any limitation. How then can the court defeat the legal meaning, and resort to a conjectural intent?

It has been said, that by looking at the preliminary agreement, the court will see that terms of a more limited nature are there used. Be it so. But will that justify the court in resorting to it to explain or limit the legal import of words in a solemn instrument, which contains no reference to it? If we could resort to it, the natural conclusion would be, in the

*absence of all contrary proof, that the last instrument embodied the real intent of the parties; that the preliminary agreement either imperfectly expressed their intent, or was designedly modified in the final act. The general rule of law is, that all preliminary negotiations and agreements are to be deemed merged in the final, settled instruments executed by the parties, unless a clear mistake be established. In this very case, it may be true, for aught that appears, that the president might have insisted upon the introduction into the trust deed of the very words in controversy, to the use of the United States for ever, in order to avoid the ambiguity of the words of the preliminary agreement. He may have required an unlimited conveyance to the United States; so that they might be unfettered in any future arrangements for the promotion of the health, the comfort, or the prosperity of the city. But it is sufficient for us, that here there is a solemn conveyance, which purports to grant an unlimited fee in the streets and squares, to the use of the United States; and we know of no authority, which would justify us in disregarding the terms, or limiting their import, where no mistake is set up and none is established. It would, indeed, be almost incredible, that any substantive mistake should have existed, and never have been brought to the notice of the trustees, or to that of the commissioners, upon their succeeding to the trust; or seriously insisted on by any party, down to the time of filing the present bill. The present is not a bill to reform a contract or deed; but to assert rights supposed to grow out of the trusts declared in the deed.

This view of the matter renders it unnecessary for the court to go into an examination of the facts insisted upon in the answer, to repel the allegations in the bill, or to disprove the equity, which it asserts. If the United States possess, as we think they do, an unqualified fee in the streets and squares, that defeats the title of the plaintiffs, and definitively disposes of the merits of the cause.

It is the opinion of the court, Mr. Justice BALDWIN dissenting, that the decree of the circuit court, dismissing the bill, be affirmed with costs.

Decree affirmed.

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*FRANCIS LAGRANGE *alias* ISIDORE, a man of color, Plaintiff in error, *v.* PIERRE CHOUTEAU, Jun. [*287

Record.

After the decision of the case in the supreme court of the state of Missouri, the plaintiff presented a petition for a rehearing, claiming his freedom, under the provisions of the ordinance of congress of the 13th of July 1787, for the government of the territory of the United States north-west of the river Ohio; the supreme court refused to grant the rehearing; and the plaintiff prosecuted a writ of error to this court, under the 25th section of the judiciary act of 1789: *Held*, that as the petition for rehearing formed no part of the record, it could not be noticed; the jurisdiction of this court depends on the matter disclosed in the bill of exceptions.

ERROR to the Supreme Court of the State of Missouri. An action of trespass *vi et armis* was brought in the state circuit court of the county of St. Louis, state of Missouri, by the plaintiff in error, a man of color, against Pierre Chouteau, the defendant, for the purpose of trying his right to free-

dom. The judgment of the circuit court was against the plaintiff; and on an appeal to the supreme court of Missouri, that judgment was affirmed.

The case was brought before this court by writ of error to the supreme court of Missouri, under the 25th section of the act to establish judicial courts of the United States, passed on the 29th of September 1789. The case is fully stated in the opinion of the court.

Kane, for the defendant in error, objected to the court taking jurisdiction of the case, as it did not come within the provisions of the 25th section of the act of congress. It could not be found, on the most careful examination of the record, that the construction of any act of congress had been brought into question in the courts of Missouri, where the suit was originally entertained. All the questions in the case before those courts might have been, and were, decided, without reference to the act of congress. The claim to freedom, asserted by the plaintiff, was left to the jury, by the court before which it was tried; and if, in any of the instructions *given by the court, reference to the ordinance of congress of the 13th of July 1787, can be supposed to have been made, the construction given by the court to that ordinance was in favor of the plaintiff in error.

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Lawless, for the plaintiff in error, argued, that as the provisions of the 25th section do not declare in what stage of the proceedings, the construction of an act of congress shall have been questioned, to give this court jurisdiction; the refusal of the supreme court of Missouri to allow to the plaintiff a rehearing, he having petitioned for the same, alleging his right to freedom under the ordinance, made this a case for the cognisance of this court. *Hickie* v. *Starke*, 1 Pet. 94.

Marshall, Ch. J., delivered the opinion of the court.—This was an action of trespass *vi et armis*, brought by the plaintiff against the defendant, in the circuit court for the county of St. Louis, in the state of Missouri, for the purpose of trying the right of the plaintiff to freedom. The general issue was pleaded, and a verdict found for the defendant. The judgment on this verdict was carried by appeal to the supreme court for the third judicial district, where it was affirmed. This judgment has been brought into this court by writ of error.

The pleadings do not show that any act of congress was drawn into question; but the counsel for the plaintiff has read a petition for a rehearing, which sets forth a claim to freedom, under the ordinance of congress, passed on the 13th of July 1787, for the fiovernment of the territory of the United States north-west of the river Ohio.[1] But as a petition for rehearing forms no part of the record, it cannot be noticed. The jurisdiction of the court depends on the matter disclosed in the bill of exceptions.

At the trial, the plaintiff proved, that Pascal Carre, in 1816, was desirous of selling the plaintiff, who was then his slave, and the defendant wished to purchase him. The offer of the defendant was declined, because the witness

[1] The ordinance of 1787 was superseded by the adoption of the constitution; such of its provisions as are yet in force, owe their validity to subsequent federal or state legislation. Strader *v.* Graham, 10 How. 82; Vaughan *v.* Williams, 3 McLean 530; Woodman *v.* Kilbourn Manufacturing Co., 1 Abb. U. S. 158.

was *desirous of selling the slave to some person who would take him out of St. Louis. Some time afterwards, he sold the slave to Pierre Menard, a resident of Kaskaskias, in the state of Illinois, for the sum of $500.

Pierre Menard deposed, that some time in the year 1816, Pascal Carre offered to sell the plaintiff to him; which proposition was rejected, because he resided in Illinois, where slavery was not tolerated. On understanding that the defendant was desirous of purchasing a slave, the witness informed him, that Mr. Carre had one for sale; but the defendant replied, that Carre would not sell the slave to him, because he resided in St. Louis. It was suggested by Mr. Berthold, that the witness might purchase the slave for Mr. Chouteau; which witness declined doing, because it would be treating his friend Carre incorrectly. He, however, ultimately agreed to buy the said slave for Mr. Chouteau, take him down the river, and keep him there some months, and then deliver him to the defendant. He accordingly bought the slave, took him to St. Genevieve, in Missouri, and put him to work at mine La Motte, with some other hands. Some time afterwards, he was sent to Kaskaskias, and put on board a keel-boat as a hand. After remaining there about two days, he went in the boat to New Orleans, whence he returned to Kaskaskias about the 30th of March 1817, as a hand in the boat. After remaining a few days, for the purpose of unlading the boat, he was sent in her to the Big Swamp, in Girardeau county, state of Missouri, where he remained five or six weeks; after which he returned in the boat to Kaskaskias, from which place, after two or three days, he was sent to St. Louis, and delivered to the defendant, who returned to the witness the $500 he had advanced for him. The witness stated, that he purchased the said slave for the defendant, and not for himself, and that he never intended to make Kaskaskias the place of his (the slave's) residence. Some other testimony, substantially proving the same fact, was introduced by the parties. Upon this testimony, the plaintiff's counsel moved the court to instruct the jury:

1. That if they shall be of opinion, that the plaintiff remained in the state of Illinois, with the person who purchased *him, and who was a resident of the said state, they must find for the plaintiff. This [*290 instruction was refused.

2. That the right of the plaintiff to his freedom is not affected by any secret trust or understanding between the person who purchased and brought him to Illinois and any other person whatsoever. This also was refused.

3. That if the jury shall be of opinion, that the plaintiff was, during any time, lawfully a resident of the state of Illinois, and in the service of a citizen of that state, claiming property in, and owner of, the said plaintiff, they shall find for the plaintiff. This instruction was given.

4. That if the jury shall be of opinion, that the plaintiff was sold absolutely, by a citizen of the state of Missouri, to a citizen of the state of Illinois, and belonged, under such sale, to such purchaser; no secret understanding between said purchaser and a third person shall affect the rights which the plaintiff may otherwise have to his liberty, as a consequence of his residence in the state of Illinois. The court refused to give this instruction as asked; but did instruct the jury, that if they believed the plaintiff was bought by Colonel Menard, for his own use, and taken to Illinois, and kept there, with the intention to make that his permanent place of residence, they ought to find for the plaintiff. The counsel for the

plaintiff excepted to the opinions given by the court, and to its refusal to give those which were asked.

The right of the plaintiff to liberty was supposed by the court to depend on the question of his being purchased, in fact, by a citizen of Illinois, and on his being carried to Illinois, with a view to a residence in that state. The facts were left to the jury, and found for the defendant. It is not perceived that any act of congress has been misconstrued. The court is, therefore, of opinion, that it has no jurisdiction of the case.

The writ of error is dismissed; and the cause remanded to the supreme court for the third judicial district of Missouri, that the judgment may be affirmed.

Writ of error dismissed.

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*291] *John Conard, Marshal of the Eastern District of Pennsylvania, Plaintiff in error, *v.* Francis H. Nicoll, Defendant in error.

Priority of the United States.

The principles decided in the case of Conard *v.* Atlantic Insurance Company, 1 Pet. 386, relative to the priority of the United States, examined and confirmed.

Error to the Circuit Court for the Eastern District of Pennsylvania. The defendant in error brought an action of trespass in the court below, against the plaintiff in error, for a quantity of merchandise, consisting of teas, cassia, nankeens, &c., all of the value of $193,725. Also, for four ships, viz., the Addison, the Woodrop Sims, the Thomas Scattergood, and the Benjamin Rush, all of the value of $100,000.

The defendant below pleaded, that he, as marshal of the district of Pennsylvania, had a writ of *fieri facias* against one Edward Thomson, in favor of the United States, and that he seized the merchandise and ships as Thomson's property. The plaintiff replied, property in himself, &c., in the common form. It was agreed between the parties to the suit, that the title of Francis H. Nicoll to the property should be tried, the property having been placed in the hands of trustees to abide the event of the suit.

The case was tried in the circuit court, before Mr. Justice Washington, and a verdict was given for the plaintiff for $39,249.66 damages. The defendant in the circuit court excepted to the charge of the court, and prosecuted this writ of error. The whole charge delivered to the jury in the circuit court, was brought up by the writ of error.

By direction of the court, the whole of the charge delivered by Mr. Justice Washington in the circuit court is inserted, as follows:

*292] *This is an action of trespass brought against the marshal of this district, for levying an execution, at the suit of the United States, against Edward Thomson, on the ships Addison, Woodrop Sims, Benjamin Rush, and Thomas Scattergood, and certain parts of their cargoes, alleged to have been the property of the plaintiff. The defendant justifies his proceedings under the allegation that the property levied upon belonged to Edward Thomson, against whom the execution was sued out.

The evidence given by the plaintiff to prove his title to the property in dispute, is substantially as follows: 1. A *respondentia* bond in the usual

form, dated in April 1825, on a certain part of the outward cargo of the ship Addison, with a memorandum annexed, reciting an agreement, that the outward bill of lading should be indorsed to the plaintiff, as a collateral security for the sum mentioned in the bond, and that the property to be shipped homeward, being the proceeds of the outward cargo, should be for account and risk of Edward Thomson, but to be consigned to order, and the bill of lading for the same to be forwarded to the plaintiff. 2. The bill of lading of the outward cargo, referred to on the bond and memorandum, for account and risk of Edward Thomson, indorsed by him in blank, and delivered to the plaintiff. 3. A homeward bill of lading and invoice for account and risk of Edward Thomson, consigned to order, and indorsed by the shipper at Canton, dated in November 1825; which, upon the arrival of the ship, in the spring of 1826, were delivered by Peter Mackie, the head clerk of Edward Thomson, before his failure, and afterwards one of his general assignees, to the plaintiff. The title to the cargoes of the other ships is in all material respects the same with that just stated. The title to the ships themselves is claimed under bills of sale by Edward Thomson to the plaintiff, dated on the 9th of July and 27th of October 1825.

On the 19th of November 1825, Edward Thomson made a general assignment of all his estate to Peter Mackie and Richard Renshaw for the benefit of his creditors. *The United States having obtained judgments against Edward Thomson to an immense amount, sued out and levied executions on these ships and their cargoes, at the moment of their respective arrivals, in the spring and autumn of 1826. [*293

In October 1826, the whole of this property was restored by the United States to the plaintiff, under an agreement between them, that it should be without prejudice to any existing right, and that the plaintiff should sell the same to the best advantage, and should immediately invest the net proceeds, in the name of the secretary of the treasury, in productive stock, and place the certificates thereof in the Bank of the United States, &c.; and that the plaintiff should institute a suit against the marshal, to ascertain the right to the said proceeds; in which action, if the plaintiff, in his own right, or as representing Smith & Nicoll, should establish his right thereto, then that the said proceeds should be paid to him; otherwise, the same to be paid to the United States. This agreement is recited in the condition of a bond executed by the plaintiff, with sureties, to the United States. An agreement had been previously entered into by the counsel in the cause, dated the 27th of September 1826, stipulating that the merits only should be litigated, without regard to form.

In the case of the *Atlantic Insurance Company* v. *Conard*, a great variety of objections of a legal character to the title of the plaintiff in that cause, which are equally applicable to that of this plaintiff, were stated and overruled by the supreme court, and they have, of course, been abandoned by the defendant's counsel in this cause. They rely, nevertheless, upon other objections, partly legal, but mainly resting upon the particular facts belonging to this case, and which are now to be examined. The duty of the court will be, to give to the jury an opinion upon every question of a legal nature which the case presents; and after laying down certain general principles of law applicable to the evidence which has been given, to leave the facts to be decided by the jury.

I. The first objection to the plaintiff's title is, that the *transfers executed by Edward Thomson to the plaintiff, for the property in dispute, were given without consideration. It is denied, that anything, much less the amount stated in those transfers, was due by Edward Thomson to the plaintiff, or to Smith & Nicoll, at the time they were executed. Upon this point, it is proper that the jury should be satisfied; and it is for them to decide, upon the evidence, whether the securities were given for value received or not; if they were given without consideration, the plaintiff will have failed in establishing his right to the property, which they professed to transfer.

The plaintiff relies upon the following evidence to prove the consideration for which those securities were given. 1. The *respondentia* bonds and memorandum annexed, both under seal, and both of them acknowledging a loan to Edward Thomson of the sum expressed in them. 2. The negotiable notes of Edward Thomson to the plaintiff, or to Smith & Nicoll; produced in evidence by the plaintiff. 3. A settled account, signed by Mackie, on the part of Edward Thomson, and by Mr. Worthington, on that of the Nicolls. 4. Sundry entries in Edward Thomson's memorandum book. The correspondence between the Nicolls and Edward Thomson is relied upon by the plaintiff as additional proof of the fact; and by the defendant's counsel, for the purpose of disproving it.

Upon this evidence, the court has only to observe: 1. That even bills of exchange and negotiable notes of hand are *primâ facie* evidence of value received, as well between the original parties, as third persons, so as to throw upon the party who denies the fact the burden of disproving it. *Mandeville* v. *Welch*, 5 Wheat. 282; *Riddle* v. *Mandeville*, 5 Cranch 322; Chitty on Bills, note 17. The presumption is certainly not less strong, where the acknowledgment of value received is under the seal of the party. If this be the settled law, as the authorities cited prove it to be, it is not competent to the defendant to shift the burden of proof, by giving notice to the plaintiff that *he would be required on the trial to prove that the securities under consideration were given for value received. 2. That a settled account between a creditor and his debtor being proved, is *primâ facie* evidence of the balance stated on it having been due; which may, nevertheless, be impeached and disproved, by pointing out errors in the account, and maintaining their existence.[1]

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It is insisted, however, by the defendant's counsel, that the consideration for these securities, admitting it to be proved, flowed from Smith & Nicoll, and that the plaintiff has given no evidence of an assignment by them to him. But, without noticing the agreement between the plaintiff and the United States as to the interest of Smith & Nicoll, represented by the plaintiff; it may be observed, that if the Nicolls and Edward Thomson were contented, and so agreed, that these securities should be given to the plaintiff, for debts originally due by Edward Thomson to Smith & Nicoll, it cannot be essential to the plaintiff's recovery in this case, that he should produce a written assignment by Smith & Nicoll to him. If the plaintiff, as between himself and Smith & Nicoll, be not entitled beneficially to the property in dispute, or to its proceeds, that is a matter to be settled between them, and can form

[1] Harden *v.* Gordon, 2 Mason 541; Perkins *v.* Hart, 11 Wheat. 237.

no question in this cause. That Edward Thomson assented to this arrangement is proved, *primâ facie*, at least, by the securities themselves; and the objection relied upon cannot with propriety be urged by the United States, who claim the property in dispute as belonging to him.

II. The second objection to the plaintiff's title, and the one mainly relied upon, is, that the transactions between the plaintiff, and Smith & Nicoll, and Edward Thomson, upon which the transfers of the property in dispute were founded, were, as they respected the United States, fraudulent and void. Whether they were so or not, will be submitted to the decision of the jury upon the evidence which has been given, after the court has stated some general principles of law to assist them in their investigation. The first inquiry is, what is fraud? From a view of all that has been said by learned judges and jurists upon this *subject, it may be safely laid down, [*296
that, to constitute actual fraud between two or more persons, to the prejudice of a third, contrivance and design, to injure such third person, by depriving him of some right, or otherwise impairing it, must be shown.[1] In the case of *Chesterfield* v. *Jansen*, 2 Ves. 155, Lord HARDWICKE terms it *dolus malus*. Lord COKE defines covin to be a secret assent determined in the hearts of two or more, to the defrauding and prejudice of another. Co. Litt. 357 *c*. The acts of 13th Eliz., ch. 5, and 27th Eliz., ch. 4, which did little more than affirm the doctrines of the common law, afford substantially the same definition. The case stated by Lord MANSFIELD, in *Worseley* v. *De Mattos*, 1 Burr. 474 (see also *Cadogan* v. *Kennet*, Cowp. 434), of a person, who knowing that a creditor has obtained judgment against his debtor, buys the debtor's goods, though for a full price, with a view to defeat the execution of the creditor, is a strong illustration of the same principle; the purchase was declared to be fraudulent, not because a man may not lawfully purchase the property of a defendant against whom there is a judgment, but because of the intention with which it was made.

The question then for you to decide will be, whether the transactions between these parties, which are alleged to have been fraudulent, were contrived or intended to delay or defeat the United States of the debts due to them by Edward Thomson, or otherwise to prejudice their rights. How far the Nicolls might lawfully take care of their own interests, although by doing so the United States might thereby be prejudiced, will be seen, when we come to consider more particularly the alleged instances of fraud which have been relied upon. But previous to this examination, it may be proper to lay down the following principles, which seem to be incontrovertible. 1. That actual fraud is not to be presumed, but ought to be proved by the party who alleges it.[2] 2. If the motive and design of an act may be traced to an honest and legitimate source, equally as to a corrupt one, *the [*297
former ought to be preferred. This is but a corollary to the preceding principle. 3. If the person against whom fraud is alleged, should be proved to have been guilty of it in any number of instances; still, if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot

[1] An act, legal in itself, and violating no right, cannot be made actionable, by reason of the motive which superinduced it. Adler *v.* Fenton, 24 How. 407; Simpson *v.* Dall, 3 Wall. 461.

[2] Clarke *v.* White, 12 Pet. 178; Hager *v.* Thomson, 1 Black 80; Phettiplace *v.* Sayles, 4 Mason 312; Ridgeway *v.* Ogden, 4 W. C. C. 139; Hubbard *v.* Turner, 2 McLean 519; McLean *v.* Lafayette Bank, 3 Id. 587. See Freund *v.* Paten, 10 Abb. N. C. 311.

be affected by those other frauds, unless in some way or other it be connected with or form a part of them. It may be proper in this place to observe, in relation to the frauds alleged to have been committed by Bailey and Edward Thomson, to the prejudice of the United States, that they cannot affect the rights of the plaintiff, or of Smith & Nicoll, unless it be proved to your satisfaction, that Bailey was, at the time he committed them, the general agent of those parties, or that he committed them in some transaction within the scope of a special agency, and in connection with, or otherwise affecting, these securities.

The first instance of alleged fraud, by the plaintiff, or by Smith & Nicoll, is the taking of these securities from a man known by those persons to be a debtor to the United States, and believed by them to be in a state of insolvency. But this is not a fraud, even in England, unless the security be given in contemplation, or on the eve, of bankruptcy, and unless the assignment or transfer in favor of such preferred creditor or creditors, exhaust the whole estate of the debtor, or approach so near as that the exception is merely colorable. 1 Burr. 478–81. But in a case where the bankrupt law does not apply, there can be no doubt, that a debtor may lawfully give a preference to a particular creditor or set of creditors, if there be a delivery of possession, where it can be done, although his other creditors may thereby be hindered or delayed in payment of their debts. The case of *Holbird* v. *Anderson*, 5 T. R. 235 (see also, 8 Ibid. 521), is a strong case in support of this principle. How far the right of preference of the United States can be affected by an assignment of their debtor for the benefit of his creditors, will be considered under another head.

*298] *The other instances of alleged fraud are—2. Alteration in the form of the memorandum to the *respondentia* bonds, thereby making the homeward cargoes deliverable to order. 3. Taking bills of sales of Edward Thomson's vessels, by the plaintiff, or by Smith & Nicoll; surrendering them on arrival of the vessels, and then taking new ones; practised by those persons, in repeated instances, prior to the year 1825. 4. Having on board these vessels, on their arrival, double papers; that is to say, a general bill of lading of the whole homeward cargo, and also several bills of lading of the parts covered by the *respondentia* bonds and outward bills of lading. 5. Upholding the credit of Edward Thomson by the Nicolls; although the desperate state of his affairs was known to them. 6. Ante-dating the *respondentia* bonds, to make them conform to the outward bills of lading. 7. Want of possession of the vessels and cargoes covered by the plaintiff's securities. Lastly, the persuasions used by the Nicolls, to induce Edward Thomson to trade on the credit for duties allowed by the United States. It may be sufficient for the present to observe, generally, that these acts, nor either of them, although they should be proved to the satisfaction of the jury, are or is, *per se*, fraudulent. This, it is believed, may be satisfactorily shown by a more particular consideration of these acts of alleged fraud.

1. As to the alteration in the form of the memorandum: it will be sufficient to observe, that no principle of law has been referred to, nor case cited, to countenance this objection. It would, on the contrary, seem to have been strictly correct, to make the alteration, in a case where the outward and homeward cargoes were transferred, not absolutely, but merely as collateral security, if the debt for which they were pledged should not be paid, on the

arrival of the vessel, or be otherwise secured, according to the stipulations of the bond.

2. As to the practice of the plaintiff, and of Smith & Nicoll, prior to the year 1825, in surrendering the bills of sale *which they had obtained of Edward Thomson's vessels, upon their arrival, and then renewing them, as soon as those vessels had been entered: should it be admitted (which I am not to be understood as admitting), to have been fraudulent as it concerned the United States; it is not easy to perceive, how it can be made to infect with fraud the bills of sale made to the plaintiff in July and October 1825; which never were surrendered, but on the contrary, were used as the foundation of the plaintiff's claim to the possession of the vessels, which they respectively conveyed, immediately on their arrival in 1826. If there has been any evidence given to connect these transactions together, so as to bring them within the operation of one of the principles before mentioned, the jury will judge of it. [*299

3. As to the double papers on board of these vessels: the question is, were they contrived with a view to defraud the United States of the duties on the cargoes of those vessels, or may not a legitimate purpose for the use of them be fairly presumed? Let it always be kept in mind, that these cargoes were not sold to the plaintiff, but were merely pledged as collateral security. If, on their arrival, they were redeemed, they would then become the absolute property of Edward Thomson; who would be absolved from his obligation to deliver the particular bills of lading to the plaintiff, and be entitled to enter them, as owner, under the general bill of lading. If they were not redeemed, then, the plaintiff would enter them, as the owner of the bills of lading to order, and which, by the agreement, were to be delivered to him. There would seem, therefore, to have been a fitness to this state of things, in the arrangement now complained of.

4. That a false representation by one person of the credit of another, by which a third person is deceived and injured, is a fraud upon the parties so deceived, is undeniable. A letter of credit, giving to the person in whose favor it is written, a character for solidity, which the writer knows to be untrue, is of this description. But to uphold the credit of a merchant, by advances to any amount, made by his friends, or by his creditors, for the purpose of preventing his failure, and of enabling him to go on, under the expectation that he *may thereby acquire the means of discharging his debts, and of maintaining a standing in the commercial world; has never yet been decided, by any English or American court, to be a fraud upon any third person, who, misled by appearances, may have dealt with and given credit to the person so assisted. No case resembling it has been produced or alluded to. There is, in fact, an absence of that kind of *suggestio falsi*, or *suppressio veri*, which the law considers as amounting to actual or even constructive fraud. It is insisted, that the conduct of the Nicolls, in this particular, was a contrivance to give a false credit to Edward Thomson at the custom-house, for the purpose of enabling him to defraud the United States of their duties on the goods entered in his name. But is this likely? If the custom-house officers were faithful to the duties which the law imposed upon them, and which they had solemnly engaged to perform; how was it possible, that the United States could be defrauded, or in any manner prejudiced by such a contrivance? Their duty was to [*300

retain the custody of the teas, under their own lock and key, until the duties were paid, or such security given as should be entirely satisfactory to them. Could it have entered into the minds of any persons, that officers so bound and so confided in by their country, could so far betray their trust, as to open the doors of their warehouses to Edward Thomson, to take out teas, whenever and to whatever amount he pleased, without permits, and without paying, or securing, the duties upon them, by giving solid and satisfactory sureties to pay them when they should become due? It is the sufficiency of the sureties, and not that of the principal, that the law looks to. I am not to be understood as saying, that the conspiracy or contrivance imputed to these parties was not, or could not, have been in their contemplation. But when we are upon the subject of motives and intention, the improbability of their existence deserves consideration. If, indeed, the illegal abduction of the teas, with the anticipated and known connivance of the custom-house officers, formed a part of the contrivance, a case of fraud would be made out; and it will be for the jury to decide, whether
*301] the participation of the plaintiff, or of Smith & *Nicoll, in those disgraceful transactions, is made out by the evidence in the cause.

5. I pass over the next objection, with this single observation; that the indorsement of the outward bills of lading to the plaintiff for a full consideration (if it should be the opinion of the jury that such was the fact), transferred to him the property mentioned in them; and if the bonds, with the memorandum annexed, were agreed by the parties to form parts of the securities to be given to the plaintiff, there was no impropriety, much less fraud, in ante-dating the latter, so as to make them conform to the former.

6. The objection, that possession of the ships and their cargoes was not delivered, at the time they were transferred, was so fully refuted by the supreme court, in the case of *Conard* v. *Atlantic Insurance Company*, that it would be a waste of time for this court to notice it, further than by observing, that the outward cargoes and their proceeds were mortgaged, not conveyed absolutely, to the plaintiff; that the ships were at or beyond sea, at the time they were conveyed; and that possession of them was demanded and refused by the officers of the United States, as soon as they arrived. These facts are not disputed, and the legal result is, that under these circumstances, the want of possession is not a badge of fraud.

7. The last instance of fraud relied upon by the defendant's counsel is, that Edward Thomson was induced by the Nicolls, contrary to his own wishes, to trade upon the credit for the duties allowed him by the United States, instead of holding his funds in order to discharge those duties when they should become payable. To this objection, it has been asked, and it seems to the court, with great propriety, for what other purpose was the extended credit of two years given, but to enable the owner of teas in store, or on bond, to trade on his capital in the meantime? If it was a fraud in him, to employ his capital otherwise than in retaining it to meet the claim of the United States, at the expiration of the two years, it is difficult to perceive the advantage which the credit bestowed upon him, or the policy of
*302] the law in granting it. And if it was *not a fraud in Edward Thomson so to employ his capital; it could not be so in the Nicolls, to influence him to exercise the privilege to which he was legally entitled.

I now pass from the question of fraud, to other objections to the plain-

tiff's right of recovery, which not having occurred in the case of *Conard* v. *Atlantic Insurance Company*, will demand particular attention.

III. The third objection to the plaintiff's recovery is founded upon an acknowledged variance, though to a very trifling amount, in the number and description of the boxes or packages of teas, between the declaration and the proof. I do not understand the objection as being urged to the extent of defeating the action altogether; since the counsel who urged it could not but know, that a mere variance as to number, magnitude, extent, &c., is immaterial, even in criminal prosecutions, unless the quantum be descriptive of the nature of the charge or claim. Stark. Evid. 1528, 1538. The objection is, no doubt, intended to apply to the damages claimed by the plaintiff, in case the jury may legally give any in this case. As to this view of the subject, I take the rule, in ordinary cases, to be, that the plaintiff can only recover according to his proof, where that falls short of the number, &c., stated in the declaration; but if it exceed, the plaintiff cannot recover beyond what his declaration demands. Although the agreements between the plaintiff and the United States and their counsel, might, in this case, vary this rule unfavorably to the United States; still, as the difference between the number of chests stated in the declaration, and those given in evidence, is trifling in amount, I shall direct the jury to adopt the rule in ordinary cases, as already mentioned.

IV. The next objection is of a more serious character. It is insisted, that the transfers made by Edward Thomson to the plaintiff, under which he claims the proceeds in question, divested him of all, or nearly all, of his property; and that the plaintiff, in respect to the right of preference of the United States, is to be treated as a trustee or general assignee *of the effects of Edward Thomson, within the meaning of the 65th section [*303 of the duty act of the 2d March 1799. I take the rule, as now well settled by the supreme court, to be, that the preference of the United States does not extend to cases where the debtor has not made an assignment of the whole of his property. If the assignment leave out a trivial part of his property, for the purpose of evading the act giving the preference, it will be considered as a fraud upon the law, and the court will treat it as a total divestment. *United States* v. *Hooe*, 3 Cranch 91. But does this rule, or the reason upon which it is founded, apply to a mortgage of the whole of the debtor's property? I ask the question, and shall reason upon it, without meaning to decide it; since it was not made or discussed at the bar. On the contrary, and for that reason, I shall instruct the jury to consider these transfers as absolute, so far as they concern the right of preference claimed by the United States. The difference between a mortgage, and an absolute conveyance, of the whole of the debtor's estate and effects, for the benefit of a particular creditor or set of creditors, is, that in the latter case, he divests himself of the whole, not only of his property, but of his credit, and his intention to do so is apparent from the act itself. If he be a merchant, he must stop; and the conclusion is inevitable, that the conveyance was made with a view to a legal insolvency. But a mortgage does not necessarily divest the mortgagor of the whole of the property which it conveys. An equity of redemption still remains in him, which is property, worth to the owner of it all the difference between the value of the pledge and the sum for which it is pledged; which he may sell and convey, or devise; which

will descend ; and may be levied upon under an execution. Suppose, that, from some of those circumstances which are constantly occurring to raise or to depress the market for particular articles of commerce, the teas in question had been worth, at the period of importation, greatly more than the amount for which these securities were given ; the excess would have
*304] belonged, not *to the plaintiff, but to Edward Thomson ; in which event, it would appear, that no act of legal insolvency had been committed ; and yet it was committed, if at all, at the time the securities or mortgages were given. Neither does it follow, that such a mortgage as has been spoken of destroys the credit of the debtor, compels him (if a merchant) to stop, or that it is given in contemplation of a legal insolvency. The reverse would seem to be the case, since (if the transaction be *bonâ fide*) the mortgage can be preferred to an absolute conveyance, for no other purpose but to avoid those consequences. I say, if made *bonâ fide*, because I admit, that if the mode of conveyance by way of mortgage or pledge, be a mere device to defeat the right of preference of the United States (a fact to be decided by all the circumstances of the case), it would be a fraud, and the mortgagee would be treated as a trustee to the extent of the claim of the United States. I shall pursue this inquiry no further ; since, for the reason before mentioned, I shall instruct the jury to consider these securities, in reference to the question now under consideration, as if they were absolute transfers.

Evidence has been given in this case, that Edward Thomson continued his commercial transactions as usual, until the 16th or 17th of November 1825, when the Nicolls entered up judgments against him, which entirely prostrated him, so that, on the 19th of that month, he made a general assignment for the benefit of his creditors. The questions then for the jury, under this head, will be : 1st, Was Edward Thomson insolvent and unable to pay all his debts, at the time when these securities were given to the plaintiff ? and 2d, Did they divest him of all his property (or if not, was the part reserved trivial), with intent to defeat the rights of preference of the United States ? If these facts are proved to your satisfaction, then the transfers are to be considered as constructively divesting Edward Thomson of all his property, so as to let in the priority of the United States against the plaintiff. The cessation from business by Edward Thomson, after the transfers ; an intention to make a general assignment, and to commit an act
*305] of legal insolvency, at the time these securities *were given, may be considered, if proved, as evidence that they were colorable and fraudulent as to the United States. But if Edward Thomson, though unable to pay all his debts, did not divest himself of all his property, either actually or constructively ; and if the securities were given *bonâ fide* to secure debts justly due to the plaintiff, in the ordinary course of business ; the right of preference of the United States did not attach, as a consequence of those securities, so as to defeat the right of the plaintiff to the property in question. The facts that Edward Thomson continued to transact his mercantile business, and to pay his debts as usual, and finally made a general assignment, not voluntarily, but by compulsion, may, if proved to your satisfaction, be considered as evidence that these securities were not colorable, or intended to defeat the right of preference of the United States.

V. The next subject of your inquiry is, whether the homeward cargoes,

forming parts of the property in dispute, where the proceeds of the outward cargoes which were pledged to the plaintiffs? Unless this fact be proved to your satisfaction, the plaintiff shows no title whatever to them. The evidence relied upon by the plaintiff is: 1st. The correspondence in amount and value between the outward and homeward bills of lading and invoices; except in one instance, where it was stated by Rodney Fisher, part of the outward cargo was used for the disbursements of the ship. 2d. The delivery of the homeward bills of lading to the plaintiff, immediately on their arrival, by Peter Mackie, the confidential and chief clerk of Edward Thomson, before his failure, and one of his general assignees; through whose hands, and by whose agency, it is insisted, all these negotiations, from their commencement, were transacted, and who knew, better than any other person, to whom the respective bills of lading belonged. 3d. The evidence of Peter Mackie, which you have heard. The fact must be decided by the jury, upon this and any opposing evidence given on the part of the defendants.

VI. It is not objected, that the securities in question were *gived in consideration of responsibilities entered into by the Nicolls, and [*306 not for moneys actually paid by them for, or lent to Edward Thomson. In *Conard* v. *Atlantic Insurance Company*, it was objected, that the debt for which the *respondentia* and other securities were given, was of too contingent a nature to uphold a mortgage as collateral security. In answer, it was said by the judge who delivered the opinion of the court, "We know of no principle or decision to warrant this conclusion; mortgages may as well be given to secure future advances and contingent debts, as those that already exist, and are certain and due; the only question is the *bona fides* of the transaction." I understand the objection now made to apply to the discharge by the Nicolls of Edward Thomson's *respondentia* bonds to the New York insurance offices. There is no proof, it is said, that these were paid by the Nicolls, but merely that they made themselves responsible to those offices that they should be paid. But if you are satisfied, from the evidence before you, that the Nicolls discharged Edward Thomson from those debts, by taking up and delivering over to him the evidence of them, Edward Thomson, from that moment, became the debtor of the person who had thus discharged him; and it is not important to the plaintiff's recovery in this case, to prove how the arrangement was made with those creditors, and that actual payment was made, at the time when the securities in question were given. I know of no principle which prevents a person from taking a valid security, by *respondentia* or otherwise, in consideration of responsibilities entered into by him for debts due by the person giving them, which he afterwards pays off or satisfies, and from which he had discharged such person, as against his original creditor.

VII. It is objected, on the part of the defendant, that the securities in question are usurious, inasmuch as they cover interest on the debts due by Edward Thomson to the Nicolls, from a period antecedent to the loans or advances which created the debts. If this should appear to the jury to be the fact, the charge of usury is made out, and the securities *would [*307 be void, according to the law of the state of New York. But the law of this state is otherwise; it does not avoid the security, but merely prevents the creditor from recovering more than the legal interest. Whether more than legal interest was covered by these securities, or any, or either

of them; and whether they were executed in this state, or in the state of New York; are questions for the decision of the jury. If the objection is intended to apply to the marine interest merely, it presents a different subject for consideration. Marine interest is allowable, though exceeding the rate of legal interest, as a compensation, not for forbearance, but for the risk which the lender assumes, by which both principal and interest may be lost by the casualties of the voyage.[1] As to that, the question turns solely upon the *bona fides* of the transaction—whether the security given be a *bonâ fide* marine contract, bottomed upon property of sufficient value on board, and at the risk of the lender, or is a mere device to cover an usurious transaction; and whether it was the one or the other in the present case, are questions for the jury to decide.

VIII. The last objection to the plaintiff's right to recover is, that the conveyances and securities given by Edward Thomson to the plaintiff amounted to acts of legal bankruptcy; in consequence of which, the preference of the United States attached, and the plaintiff is to be considered as a trustee, to the extent of the claims of the United States. The argument is, that these conveyances and securities, considering them as one transaction, would, according to the bankrupt laws of England, amount to an act of bankruptcy; and that the 65th section of the duty act of the 2d of March 1799, was intended to give to the United States a right of preference, from the time when, according to that law, an act of bankruptcy was committed. This is by no means the opinion of the court. The section refers to state bankrupt laws; and perhaps, to a bankrupt law of the United States, when one should pass; but could have no reference whatever to the bankrupt laws of England. Nor does it, in my opinion, refer the right of *preference of the United States to an act of bankruptcy, unaccompanied by some other act. To understand the meaning of this section, we must construe the enacting clause, and the proviso together. The former declares no more than that in all cases of insolvency, or where an estate in the hands of an executor, administrator or assignees, should be insufficient to pay all the debts of the deceased, the debts due to the United States should be first satisfied by those persons. It provides for only two cases, viz., a living insolvent, having an assignee, and a dead insolvent, represented by executors or administrators.

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But the inquiry would naturally have arisen in the mind of the legislature; how is the expression "insolvency" to be understood? This is explained by the proviso; for which purpose alone, it is apparent, it was introduced. It declares, that the expression shall extend to the following cases, viz: 1st. Where a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof for the benefit of his creditors. 2d. Where his estate and effects have been attached, on account of his being an absconding, concealed or absent debtor. 3d. To cases in which an act of legal bankruptcy shall have been committed; that is, as the construction of the proviso in connection with the enacting clause seems necessarily to require, to cases where the property is in the hands of assignees, not by voluntary assignment only, but by assignment made in virtue of any state bankrupt law, or (possibly) of any bankrupt law of the

[1] Spain *v.* Hamilton, 1 Wall. 605.

United States which might thereafter be passed. There must be an assignment, either voluntary or compulsory, or else there can be no assignee, to be made liable to the United States, under the enacting clause. If a mere act of bankruptcy be sufficient to give rise to the preference of the United States from the moment of its commission, where is the assignee who is first to satisfy the claims of the United States out of the estate of the debtor, under the penalty, stated in the enacting clause, of satisfying it out of his own estate. *If it be said, that when the assignment of the bankrupt's estate shall be made, the preference of the United States [*309 will relate back to the act of bankruptcy, so as to overreach intermediate *bona fide* securities given by the insolvent to creditors, I can only answer, that the assumption is altogether gratuitous, and receives no countenance from any part of this or any other act on this subject.

The last question to be decided is, whether the jury are prevented, by the agreement between the plaintiff and the United States, or their counsel, or by the delivery of the property levied upon by the defendant to the plaintiff, under the agreement, from giving damages in this case? I am clearly of opinion, that they are not. As to the surrender of the property to the plaintiff, that could not, in an ordinary case, if put into the form of a plea, bar the right of the plaintiff to damages for an illegal taking, unless it were surrendered by the defendant, and received by the plaintiff, in satisfaction of damages. But so far from the accord in this case having been in satisfaction of damages, the bond expressly stipulates that it is to be "without prejudice to any existing right." The jury may, therefore, give such reasonable damages as the plaintiff has actually sustained by the seizure and detention of the property in dispute, in case they should be of opinion, that the plaintiff is entitled to that property or to its proceeds. They ought not to give vindictive or speculative damages.[1]

Upon the whole, if the plaintiff has established his right of property in the ships and cargoes claimed by him, under the assignments and conveyances that have been given in evidence to establish that right; he is entitled to their proceeds, and to your verdict in his favor, together with such damages as you may think him entitled to. If, on the other hand, he has failed to establish such right, or if, in your opinion, his title is invalidated by the objections, or some one or more of them, made to it, then the United States are entitled to the proceeds; and in that case, you ought to find for the defendant.

The case was submitted to this court, without argument, *by [*310 *Berrien*, Attorney-General, for the plaintiff in error; and by *Sergeant* and *Webster*, for the defendant.

Baldwin, Justice, delivered the opinion of the court.—This cause has been submitted, without argument. It is, in all its leading features, both in the points of law which arose and the evidence given at the trial, so similar to the case of *Conard* v. *Atlantic Insurance Company*, decided by this court at January term 1828, 1 Pet. 386, that we do not think it necessary to enter into an examination of the principles on which the judge submitted the cause to they jury. They appear to us to be in perfect accordance with the opinion delivered in that case, on great deliberation; of the entire

[1] Conard *v.* Pacific Insurance Co., 6 Pet. 262; s. c. Bald. 138.

correctness of which, we do not entertain a doubt. There is no error in the record of the circuit court, and the judgment is affirmed, with six per cent. interest and costs.

Judgment affirmed.

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*311] *John W. King and others, Appellants, *v.* James Hamilton, James Stricker and Frances his wife, Hezekiah Fulkse, Abraham Hancy and John Hopkins, Appellees.

Specific performance.

The complainants, in the circuit court of Ohio, filed a bill to enforce the specific performance of a contract; the bill stated, that there was a surplus of several hundred acres, and by actual measurement, it was found to be 876 acres (the patent having been granted for 1533 1-3 acres), beyond the quantity mentioned in the contract.

It is a fact of general notoriety, that the surveys and patents for lands within the Virginia military district, contain a greater quantity of land than is specified in the grants; parties, when entering into a contract for the purchase of a tract of land in that district, and referring to the patent for a description, of course, expect that the quantity would exceed the specified number of acres; but so large an excess as in the present case, can hardly be presumed to have been within the expectation of either party; and admitting that a strict legal interpretation of a contract would entitle the purchaser to the surplus, whatever it might be, it by no means follows, that a court of chancery will, in all cases, lend its aid to enforce a specific performance of such a contract. p. 321.

The powers of a court of chancery to enforce a specific execution of contracts, are very valuable and important; for in many cases, where the remedy at law for damages is not lost, complete justice cannot be done, without a specific execution; and it has been almost as much a matter of course, for a court of equity to decree a specific execution of a contract for the purchase of lands, where in its nature and circumstances it is unobjectionable, as it is to give damages at law, where an action will lie for a breach of the contract; but this power is to be exercised under the sound discretion of the court, with an eye to the substantial justice of the case. p. 328.

When a party comes into a court of chancery seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity; when a contract is hard and destitute of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it.[1] p. 328.

It is a settled rule, in a bill for specific performance of a contract, to allow a defendant to show that it is unreasonable, or unconscientious, or founded in mistake, or other circumstances leading satisfactorily to the conclusion, that the granting of the prayer of the bill would be inequitable and unjust; gross negligence on the part of the complainant has great weight in cases of this kind; a party, to entitle himself to the aid of a court of chancery for a specific execution of a contract, should show himself ready and desirous to perform his part. p. 328.

If this large surplus of 876 acres in a patent for 1533 1-3 acres should be taken as included in the original purchase, it might well be considered a case of gross inadequacy of price. p. 329.

*312] *When there was so great a surplus of land in the patent, beyond that which it called for, nominally, as that it could hardly be presumed to have been within the view of either of the parties to the contract of sale; the court decreed a conveyance of the surplus, the vendee to pay for the same at the average rate per acre, with interest, which the consideration-money mentioned in the contract bore to the quantity of land named in the same. p. 330.

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[1] Whether specific performance of a contract for the sale of land will be decreed, depends upon the equity and justice of all the circumstances of the case; a case may occur, where the agreement is perfectly good and binding upon both parties, and not the slightest decree of blame attaches to the purchaser, and yet specific performance will be denied, and the parties left to their remedy in damages. Henderson *v.* Hays, 2 Watts 148; Freetly *v.* Barnhart, 51 Penn. St. 279; Weise's Appeal, 72 Id. 351. It is of grace, and not of right. Pennock *v.* Freeman, 1 Watts 401. And see Margraf *v.* Muir, 57 N. Y. 155.

King v. Hamilton.

APPEAL from the Circuit Court of Ohio. In the circuit court for the district of Ohio, James Hamilton, James Stricker and Frances his wife, late Frances Hamilton, heirs-at-law of Alexander Hamilton and others, grantees of Alexander Hamilton, filed a bill for a specific performance of a contract entered into between Elisha King, the father of John W. King, one of the appellants, and Alexander Hamilton, on the 8th of February 1815, for the sale of certain lands in the state of Ohio, within the Virginia military district, between the Little Miami and the Scioto river. The contract was in the following terms:

"I this day sell to Alexander Hamilton all my lands lying on the Miami river, in the state of Ohio, 1533⅓ acres, as by patent in my name; also, 333⅓ taken off the lands patented in the name of Sackville King, of 1000 acres. This land of 333⅓ acres, taken from S. King's, is to be done adjoining to the entry of E. King's of 1533⅓. He, the said Hamilton, is bound to pay to Elisha King, for this land, 946*l.* 16*s.* of current money of Virginia, in three annual payments, beginning December 25th, 1805; then to pay 315*l.* 12*s.* Also, in the years of 1806 and 1807, on each Christmas day, or before, to make the full payments, as is above. The manner and agreement made by us is in payment as tenders: the said Hamilton takes to this country horses, to be sold at twelve months' credit, taking bond and good security, which bonds is lawful tenders from year to year; and on these tenders being made, the said King is bound to give to the said Hamilton good titles to the said lands. We do bind ourselves, our heirs, executors, administrators, firmly, by these *presents, in the penalty of two thousand pounds, in this our bargain. Given under our hands and seals." [*313

When this contract was made, Elisha King had a patent for his entry, No. 1548. Sackville King's entry, No. 1549, was held by him, without any title to it; and afterwards, in 1812, Sackville King's whole entry was conveyed by him to another, who now held the same. Alexander Hamilton entered on No. 1548, immediately after his purchase, supposed to be 1533⅓ acres; and, with others holding under him, made valuable improvements on it, and still held possession of the same.

The bill stated, that Hamilton continued to make payments until the 22d June 1809, at which time, he having paid one-half of the purchase-money of the tract estimated at 1533⅓ acres, King made a conveyance to him of 766⅔ acres, supposed to be a conveyance of one-half of the same. The bill charged, that there was a large surplus of several hundred acres, and that this sale was in gross; and insisted on a conveyance of the whole of the lands in No. 1548. The patent to Elisha King for No. 1548, bore date the 10th of March 1804, and was for "a certain tract of land, containing 1533⅓ acres," as by survey bearing date the 13th of April 1792; and set forth the metes and bounds, according to this survey.

The bill claimed an allowance for the loss of 333⅓ acres of Sackville King's entry; and proceeded to state and charge sundry payments since the conveyance of the 22d of June 1809, the last of which was made on the 26th of March 1818. It then admitted, that there was due, at the time of filing the bill, on the tract of 1533⅓ acres (deducting the consideration money expressed in the conveyance for 766⅔ acres, the ratable value of the other tract of 333⅓ acres which was lost and all the subsequent payments), the sum of $1700, *yet to be paid by Hamilton to King on the contract [*314

for the 1533⅓ acre tract; which sum they said they were always ready to pay, since the death of Alexander Hamilton, if they could have procured a fair settlement; and also, that they were informed and believed, that Alexander Hamilton, when he could have a settlement and receive a title, was always ready in his lifetime to make payments. The bill then went on to state a number of improvements made on that part of the land not conveyed by King to Hamilton; which improvements were stated to have been made by Hamilton and the other appellees, claiming by purchase under him. The bill then prayed an injunction to a judgment in ejectment, recovered at June term 1824, for that part of the tract of 1533⅓ acres, not conveyed. It asked a decree for a conveyance, on payment of the balance; and for general relief.

The answer denied that the sale was in gross, and also, that the com plainants were at any time ready to perform the agreement, by the payment of the purchase-money for the tract which was agreed to be sold; and alleged, that the payment of the same was evaded and delayed, although frequent promises of performance were made. To this answer, there was a general replication.

At January term 1826, an agreement was entered into by the parties (which being entered of record, took the place of an interlocutory decree), in order to settle so much of the controversy; that there was then due to King, on the purchase-money and interest, $1896.88, after deducting $566.66 on account of the land sold, included in Sackville King's patent, which, with interest from that time, was all that was to be paid King, if the court decreed that the contract covered the surplus above 1533⅓ acres, in the entry 1548. The times for paying that sum were agreed; and also, that on the payment, deeds should be executed by respondents, covering the whole land, if the *315] *contract was decreed to be in gross, and the injunction be made perpetual against the proceedings in ejectment, &c. This agreement reserved for future decision the single question, whether the contract of sale was a sale in gross, or by the acre, as to the land in the entry No. 1548; and concluded as follows: "To avoid all dispute, it is the express understanding of the parties, that the whole question concerning the said surplus land is reserved for future decision; and all claims for damage respecting failure in the title for the tract of 333⅓ acres of land, in the bill mentioned, are waived."

At July term 1826, the court decreed, that the sale by Elisha King to Alexander Hamilton, was a sale of the whole of the land in No. 1548; and that the defendant, John W. King, should, within two months, convey to the complainants, in fee-simple, with covenants of special warranty, the lands not already conveyed by E. King to Alexander Hamilton; that the complainants, within two months, should pay the balance agreed, with interest; and that each party should pay their own costs, at or before the next term. As to the other defendant, the bill was dismissed generally. From this decree, John W. King appealed to this court.

Doddridge, for the appellants, contended: 1. That, under the agreement entered into by the parties to the suit, at January term 1826, John W. King reserved to himself the right to urge, as to the surplus land, whatever could have been urged as to the relief claimed for the land not surveyed, as

well as every other separate defence which he had a right to make as to the surplus, independent of the agreement. 2. That no evidence was given in the case, to establish the fact, that the payments made by Hamilton were for the land not conveyed; and that the payments made were to be applied to the land which had been conveyed. So that, for the land not conveyed, nothing had been paid for a period of nineteen years. 3. No possession of the land not conveyed was delivered by King to Hamilton. 4. That the *sale was not a sale in gross; and the sale in gross having been denied in the answer, and no evidence given, the court erred in finding for the appellees. 5. That the appellant ought not to be required in a court of equity to yield the title to so large a surplus, without compensation, and without the clearest proof of the agreement. [*316

The law of Virginia, regulating lands under military grants, declares, that as to the surplus lands in a grant, any one may give the warrantee notice to survey the quantity included in the grant; and if he neglects or refuses to do so, he may, after twelve months, apply to the county court, and have a survey made for himself; and he may then enter the surplus land, and thus become the legal owner of it. This gives the original grantee a right of pre-emption to all the surplus beyond five per cent., which is allowed in every grant. This must be done, during the life of the original grantee, and during the continuance of his title; after a sale, and after a descent cast, the right to the surplus is abandoned by the state to the grantee. In Ohio, there is no court to which an application for a re-survey can be addressed; and therefore, the right to the surplus lands in the Virginia reservation of military lands in that state is complete in the grantee, unless it was so great as to amount to a fraud. The right, therefore, of King to the whole land included in the grant, it being within the Virginia reservation, is complete. At law, it is necessarily so; and this is recognised in *Taylor* v. *Brown*, 5 Cranch 234, 241; and it is so in equity; *Dunlap* v. *Dunlap*, 12 Wheat. 574. The surplus lands are, therefore, to be considered as having passed to Elisha King, as fully as if the whole actual quantity had been stated in the grant.

It is next assumed as a position, that whenever there is an excess or deficiency of quantity of lands sold, and both parties are ignorant of the fact, at the time of the sale, equity will relieve the party aggrieved, by adding to or reducing the purchase-money *pro rata;* and the relief given proceeds *on the ground of mistake. In support of this principle, there have been decisions in the courts of Virginia. 1 Call 301; 2 Hen. & Munf. 244; *Hall* v. *Cunningham*, Ibid. 336. In a note to this case, authorities are referred to for the purpose of showing what relief ought to be granted under certain circumstances. 2 Hen. & Munf. 161, 179, 175, 177; 1 Ibid. 201. These authorities establish: 1. That if the excess be considerable, and the same of a deficiency, and each party is innocent; there should be a dissolution of the whole contract. 2. If the excess or deficiency be small, and there has been no eviction, there should be an addition to or deduction from the gross sum, after the rate of the whole contract. 3. If deeds have been made and possession given, and there has been an eviction of part, compensation should be decreed, according to the value at the time of the eviction. 8 Cranch 371, and note to the same case, p. 375. These cases show, that there is a general rule to give relief, where the excess [*317

exceeds five per cent.; and that this relief will be denied, when the contract was for a gross sum; or where the vendor had perfect knowledge of the land, and the vendee had not, but the vendee took upon himself the risk as to lines and quantity. That courts lean against the establishment of such contracts, having a gaming or immoral tendency. That whatever may be the terms of the written contract, the fact of a sale by the acre or in gross, lies in averment; and consequently, where either of these facts is charged in the bill, as a ground for relief, and the ground is denied in the answer, the answer will prevail, without proof of the fact; and the bill will be dismissed, the answer being responsive to a material charge in the bill. That the words "more or less," and proof that the whole tract was sold, are not, of themselves, sufficient to prevent relief; and there is no adjudged case proceeding on that ground alone.

An examination, with reference to these authorities, of the contract between Elisha King and Hamilton, will abundantly show, that had the *318] whole property sold been *conveyed, and paid for by Hamilton, a discovery of the surplus afterwards, would have entitled the vendor to relief. The situation of the country settled, and the property held by each grantee well known; the relations of the parties to it, Hamilton living on adjoining lands, and King residing at the distance of 600 miles, and ignorant of the practice and including a much larger quantity of land in the survey than the grant called for; are circumstances which should materially operate when the transaction and the claims arising out of it are considered. It is confidently asserted, that the facts of this case will not authorize a court to decree a specific performance of the contract; independent of the principles and the rules of law which have been urged. While it is admitted, that for a forfeiture occasioned by a breach of his contract, the vendor may be the subject of relief in a court of equity in favor of a vendee; it is relied upon, that the vendee must account for his non-performance, by circumstances which will exculpate himself. In this case, the failure of Hamilton to pay for the land according to the contract is fully proved by the whole case. *Picket* v. *Doudall*, 2 Wash. 115.

The counsel for the appellants also contended, that the operation and just construction of the transactions between the parties were, that the payments made were to be applied to the portion of the land which had been conveyed; and that this was considered a performance of the contract, so far as the purchaser was entitled to the same. He also contended, that the object of the complainant was not only to be relieved from a forfeiture, but also to ask the specific execution of a contract, certainly made under a mistake, and by which hard and unconscionable terms will be imposed on the appellant. Courts of equity are not bound to decree a specific performance in all cases; they do so only at their discretion; and they will withhold such a decree, where the terms would be hard, although no fraud should be proved. 1 Wash. 270.

*319] **J. C. Wright*, for the appellees.—In 1805, the whole tract was sold by Elisha King to Hamilton, referring to the patent by number and quantity. Hamilton took possession of the land under the contract, and improved it; and in 1809, a deed was made for one-half of 1533⅓ acres. Before the deed was made, there had been no survey; but an estimate of

the quantity was made by the parties. In 1818, Elisha King conveyed the remaining half to John W. King, according to a survey then made; and thus he took the legal estate, subject to the agreement with Hamilton, to which he had been a witness. He stands thus in the relations of his father; and the estate held by him is subject to the equities of the appellees, as he had full notice of this contract. He does not stand as an innocent purchaser, and entitled to favor; but if his purchase was made to the injury of the rights of Hamilton, he is to be considered as an intruder. When he received the conveyance, more than half of the purchase-money had been paid; or was paid before the suit. Those who purchased from Hamilton have improved the part so acquired; and these improvements are out of the 766⅔ acres conveyed by King. All the questions in the case, except that of the right to the surplus land, have been settled by the agreement of 1826. The appellees, upon that question, contend that the sale was in gross. The court will go behind the deed executed by Elisha King for part of the land, to ascertain what was the intention of the parties. 1 Call 301.

It is denied, that the rule laid down by the counsel for the appellant, as to surplus, exists. The principles which have been established are, that when a sale is made by metes and bounds; by general terms; where the whole thing is sold, as in this case, the land is described as held under a patent; and for a sum specified in amount, and not *pro rata* as to quantity; it is a sale in gross: and the purchaser takes all the land within the boundaries. 12 Wheat. 574; *Powell* v. *Clark*, 5 Mass. 355; 1 Caines 493; 2 Johns. 37; *Vowles* v. *Craig*, 8 Cranch 374; Sugden *on Vendors 200; 2 Bibb 451; 1 Madd. Ch. 74, 76, 77; 1 Call 301. [*320

What is the contract? "I this day sell to Alexander Hamilton all my lands lying on the Miami river, in the state of Ohio, 1533⅓ acres, as by patent in my name." The case admits, that the patent referred to was the one obtained on survey No. 1548; and the survey sets forth the metes and bounds of the tract within which is now the whole claim of the appellees. The contract is, therefore, one for the whole land, not by quantity, but by patent; and "all" the lands of the vendor are sold.

Thompson, Justice, delivered the opinion of the court.—This case comes up on appeal from the circuit court of the United States for the seventh circuit, in the district of Ohio. The bill, in the court below, was filed for the purpose of obtaining the specific execution of a contract entered into between Elisha King, the father of John W. King, and Alexander Hamilton, the father of James Hamilton; and also to enjoin all further proceedings at law on a judgment in an action of ejectment, obtained by John W. King for the recovery of possession of a part of the land alleged to have been comprised within the contract.

The answer to this bill is very inartificially drawn; but no exceptions were taken to it, and the general replication put in. No proofs were taken upon the principal matters in dispute; but the cause came on to a hearing upon the bill and answer, and exhibits, and the agreement which had been entered into between the counsel for the parties in the progress of the cause. This agreement puts at rest many of the questions that might otherwise have arisen, and reduces the subject of dispute to the single inquiry respecting what is called by the parties the surplus land: and this involves the

inquiries; first, whether this surplus is embraced in the original contract? and if so, then, secondly, whether, under the circumstances of the case, the complainants in the court below have not lost their right to call upon a court of equity to enforce a specific performance of that contract?

*321] *The contract signed by Elisha King and Alexander Hamilton bears date on the 8th of February, 1805, and is as follows: "I this day sell to Alexander Hamilton all my lands lying on the Miami river, in the state of Ohio, 1533⅓ acres, as by patent in my name; also, 333⅓ acres, taken off the lands patented in the name of Sackville King, adjoining to that entry of Elisha King of 1533⅓ acres. He, the said Hamilton, is bound to pay to Elisha King, for this land, 946*l.* 16*s.*, current money of Virginia, in three payments, beginning December 25, 1805; then to pay 115*l.* 12*s.* Also, in the year 1806 and 1807, each Christmas day, or before, to make the full payments, as is above. The manner and agreement made by us is in payments as tenders: the said Hamilton takes to this country horses, to be sold at twelve months' credit, taking bond and good security, which bond is lawful tenders from year to year; and, on these tenders being made, the said King is bound to give to said Hamilton good title to said lands," &c.

The bill states, that there is a surplus of several hundred acres, beyond the specific quantity mentioned in the contract. The answer alleges, that from actual survey, the patent is found to contain 2409½ acres; which will leave a surplus of 876 acres; a quantity equal to more than one-half of the whole number of acres mentioned in the contract.

It may perhaps be assumed as a fact of general notoriety, that the surveys and patents for lands lying within the Virginia military district, contain a greater quantity of land than is specified in the grant; and that parties would, of course, when entering into a contract for the purchase of a tract of land, and referring to the patent for a description, expect, that the quantity would exceed the specified number of acres. But so large an excess as in the present case can hardly be presumed to have been within

*322] the expectation of either party; and admitting that a strict legal *interpretation of a contract would entitle the purchaser to the surplus, whatever it might be, it by no means follows, that a court of chancery will, in all cases, lend its aid to enforce a specific performance of such a contract.

The agreement entered into by the counsel which has been hitherto, and which will be more particularly noticed hereafter, puts an end to all questions respecting the land, to the extent of 1533⅓ acres. Otherwise, it might well be questioned, whether the complainants in the court below could compel a conveyance for any more than has already been conveyed under the contract.

In 1809, a conveyance was given for 766⅔ acres; the full consideration for which, after deducting $566.66, for defect of title in Elisha King to the 333⅓ acres of land included in Sackville King's patent, had not been paid when the bill was filed.

If the rights of these parties were to be governed, and determined, solely by the question, whether the contract covers the surplus land, we should have no difficulty in coming to the conclusion that it does. There is nothing upon the face of the contract, from which it can be satisfactorily inferred, that it was intended to be a sale by the acre. The language of the contract on the part of King is, "I this day sell to Alexander Hamilton,

all my lands lying on the Miami river, in the state of Ohio, 1533⅓ acres, as by patent in my name." Had it been intended a sale by the acre, the language would doubtless have been, 1533⅓ acres of, or a part of, my lands, &c.; instead of which, it is "all my lands, as by patent in my name." Reference is made to the patent for a description of the land, and to ascertain the subject-matter of the contract. And whatever would pass under the patent to King, would be included in the sale to Hamilton. The number of acres is mentioned in reference to what appears by the patent (1533⅓ *acres, as by patent in my name), and not as designating the precise quantity sold. But admitting the contract covers the surplus land; [*323 it is contended on the part of the appellants, that a court of equity will not, under the circumstances of this case, enforce a specific performance of the contract. It is insisted, however, on the part of the appellees, that all equitable considerations are precluded by the agreement entered into by the counsel, which has been referred to; and that the question is narrowed down to the single inquiry, whether the surplus land is included in the original contract of 1805. If such is the construction to be given to this agreement, the question has already been answered. It becomes, therefore, very material to examine, whether this is the fair and reasonable interpretation of the agreement. It is as follows:

1. "It is agreed, that the complainants are, at this time, January 6th, 1826, indebted to the said John W. King, one of the defendants above named, for the balance of the purchase-money, including up to the date aforesaid the interest, $1896.88, for the 1533⅓ acres mentioned in the said bill or complaint. This amount, it is agreed between the parties, by their counsel, is now due to the said John W. King; after deducting from the gross sum agreed to be paid by the ancestor of the plaintiffs to the ancestor of the defendants, which will appear by contract, $566.66, for the 333⅓ acres patented to Sackville King, mentioned in the contract; to which the defendants, or their ancestor, never had title. The sum of $1896.88 is the whole amount due the said John W. King for the 1533⅓ acres of land, the number of entry 1548, as mentioned in said bill; and it is hereby expressly understood between the parties, by their counsel, that the sum last mentioned, if it should be decreed by the court hereafter, or by the parties agreed to, that the surplus lands lying within entry 1548, is covered by the contract before referred to, for *the gross sum named; the said sum, [*324 with interest from this time until it is paid, is the whole amount due the defendant, John W. King, upon said land contract; but it is hereby agreed between the parties, by counsel, that the question whether the said contract covers the surplus in said entry No. 1548, shall be reserved for future decision and determination; and whether the purchase for the sum mentioned in said contract does not entitle the complainants to the surplus land said to be contained in said No. 1548: and it is hereby agreed by the parties, that the complainants shall now pay to the clerk for the said defendants or counsel, $730, part and parcel of the said sum of $1896.88, before admitted to be due; and that the said complainant shall pay the balance by the next term of this court, or within a reasonable time afterwards. And it is further agreed by the parties, by their counsel, that the said John W. King, and the other defendants do join, if it appear necessary, shall execute to the complainants a good deed, with covenants of general warranty, for

the land which the complainants shall be entitled to under the contract aforesaid, immediately upon the payment of the purchase-money. It is further agreed by the parties, by their counsel, that the complainants shall pay the cost in the action of ejectment brought in this court for the lands named in the bill, and the costs of this suit; to abide the decision of this court thereon. It is further agreed by the parties, by their counsel, that upon the payment of the whole of the purchase-money which may be due the defendants for said land, then and in that case, the injunction to be made perpetual. And to avoid all dispute, it is the express understanding of the parties, that the whole question concerning the said surplus land is reserved for future decision; and that all claims for damages, respecting the failure in the title for the tract of 333⅓ acres of land, are waived."

This agreement is somewhat obscurely worded, and its construction not without difficulty. Doubts have been entertained by the court, whether the appellants have not thereby precluded themselves from resisting a specific *performance of the contract, on the equitable grounds that might otherwise be set up. We have, however, come to the conclusion, that the appellants, as to the surplus land, have reserved to themselves the right to set up whatever could have been urged against the relief sought, as to all the land not conveyed, as if the agreement had not been entered into. And that as to the surplus land, the case is open, and to be considered entirely independent of the agreement.

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Some of the leading objects of the agreement appear to have been, to settle and fix the amount of payments that had been made, and the deduction to be allowed on account of the failure of title to the land patented to Sackville King; and to ascertain the balance due, which was found to be $1896.88, and which by the terms of the agreement is declared to be the whole amount due for the 1533⅓ acres: thereby implying, that the consideration agreed to be paid, was for that quantity of land; and that as to that quantity, no further dispute existed; but at the same providing, that if the court should decree that the surplus land was covered by the contract, that balance should be deemed the full consideration for the whole. And then adds, "but it is hereby agreed, that the question whether the said contract covers the surplus land shall be reserved for future decision and determination." If this had been the only question intended to be reserved, the agreement would have stopped here; there is no ambiguity thus far, nor any necessity for putting the same question in a different shape. But the argument goes on, "and whether the purchase for the sum mentioned in the contract does not entitle the complainants to the surplus land said to be contained in No. 1548." There would appear to be two distinct questions reserved for future determination. 1. Whether the contract covers the surplus land? and if so, secondly, whether the complainants are now entitled to it, by virtue of their original purchase? If this view of the agreement be correct, the second question reserved must have been intended to leave open all objections to the claims for the surplus lands. If, however, *the agreement had stopped here, there might have been serious doubts, whether the question reserved was not, whether the contract covered the surplus land. But the concluding clause in the agreement seems to have been added, to remove all doubts upon the question. "And to avoid all dispute, it is the express understanding of the parties that the

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whole question concerning the said surplus land is reserved for future decision." If the only question reserved was, whether the contract covered the surplus land, there was no necessity or fitness in this last provision. That question had been explicitly and in terms reserved; and to superadd to it, that the whole question concerning the surplus was reserved, will admit of no other reasonable construction, than that as it respected such surplus, the case was to stand as if the agreement had not been made.

This being the construction given by the court to this agreement of the counsel, it remains to inquire, whether the complainants in the court below made out a case, which, according to the rules which prevail in courts of equity, entitled them to a specific execution of the contract as to the surplus land. This part of the case has not been much pressed upon the court, and it is difficult to perceive on what grounds it can be sustained. To have enforced a specific execution of this contract would, at any time and under any circumstances, have been granting a strict legal right against the substantial justice and equity of the case. To show this, it is only necessary to state some of the leading facts in this case. The contract bears date in the year 1805, and by it all the payments for the land were to be completed in December 1807, on which the title was to have been given. Payment only of a part of the purchase-money, and not even to one-half the amount, had been made, when the bill was filed. No remedy at law, therefore, ever did exist. The purchaser never was in a situation when he could aver performance of the contract on his part. It is very evident, that no consideration whatever has been given for this surplus land. The price was, doubtless, estimated by the parties upon the specific number of acres (although the *sale was not by the acre), and which at that time was probably supposed to be nearly the quantity of land covered by the patent to King. This, however, turns out to be otherwise. The surplus is very large, amounting to more than one-half the number of acres mentioned in the contract. There are no grounds for charging either party with any knowledge of this fact. King manifestly could not have known it, or it would not have been entirely overlooked in the sale. And Hamilton ought not to be charged with a knowledge of it, without satisfactory evidence; as it would be imputing to him a gross fraud. It is, therefore, a case of mutual mistake, or ignorance of an important fact, in relation to the subject-matter of the contract; and that contract still executory, and now sought to be enforced as to lands for which no consideration has been paid. It is, therefore, a case in which the parties ought to be left to their strict legal rights. [*327

The bill alleges, that Hamilton, in his lifetime, made valuable improvements on that part of the land not included in his deed of 1809. When these improvements were made, does not appear. The contract is silent as to the time when the purchaser was entitled to the possession, and the bill does not allege that possession was taken, or the improvements made, with the assent of King; and the answer expressly denies, that King put Hamilton in possession of any part of the land, except that for which the deed was given in 1809, and alleges that the possession of any other part was without authority, and unlawful. In 1818, John W. King, one of the appellants, became the purchaser of all the lands not included in the deed of 1809. He was, it is true, a purchaser with notice of the con-

tract between his father and Hamilton, but he also had notice of all the circumstances with respect to his failure in making payment; and that he had not, at that time, made payment even for the land which had been conveyed to him; and no further payments had been made, when this bill was filed, nor any disposition shown on the part of the appellees to perform the contract on their part; and the bill in this case was not filed, until nearly seven
*328] years from that time, *and not until a judgment in ejectment had been obtained, to recover possession of the land not covered by the deed of 1809. All the payments made upon this purchase might well be applied to the land which had already been conveyed; and were it not for the agreement entered into by the counsel, the complainants in the court below would have had no equitable grounds for asking a specific execution of the contract for any portion of the 1533⅓ acres not included in the deed of 1809. But that agreement has put an end to all questions in relation to the residue of the 1533⅓ acres; leaving the case open, as we understand it, to all objections to a specific execution of the contract as to the surplus land, to the same extent as if the agreement had not been entered into.

Did this case, then, thus made out in the court below, entitle the complainants to a specific execution of the contract as to the surplus land? We think it did not, according to the well-settled rules of courts of equity on this subject. This branch of the powers of the court of chancery is very valuable and important. For in many cases, even where the remedy at law for damages is not lost, complete justice cannot be done, without a specific execution; and it has become almost as much a matter of course, for a court of equity to decree a specific execution of a contract for the purchase of lands, where in its nature and circumstances it is unobjectionable, as it is to give damages at law, where an action will lie for a breach of the contract. But this power is to be exercised under the sound judicial discretion of the court, with an eye to the substantial justice of the case.[1] When a party comes into a court of chancery, seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity. Where a contract is hard, and destitute of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it. It is a settled rule, therefore, to allow a defendant in a bill for a specific performance of a contract to show that it is unreasonable or unconscientious,
*329] or founded *in mistake, or other circumstances, leading satisfactorily to the conclusion, that granting the prayer of the bill would be inequitable and unjust. Gross negligence on the part of the complainant, has great weight in cases of this kind. A party, to entitle himself to the aid of a court of chancery for the specific execution of a contract, should show himself ready and desirous to perform on his part. These are familiar and well-settled rules in courts of chancery, and have a strong bearing upon this case. If this contract had been carried into execution, by giving a conveyance for the land, a court of chancery would not have given relief to the other party. But the contract is still executory; and the complainants, after the lapse of twenty years, seek for the specific execution of a contract which has not been performed on their part, and the execution of which would be manifestly unjust and unequitable. If this large surplus of 876

[1] McNeil *v.* Magee, 5 Mason 244.

acres should be taken as included in the original purchase, it might well be considered a case of gross inadequacy of price.

So far, therefore, as the immediate rights of the complainants are involved, no equitable claim has been sustained, for a specified execution of the contract for the surplus land. It is, however, alleged in the bill, that sales have taken place, and valuable improvements made upon parts of the land not covered by the deed of 1809. This is not denied in the answer, although it is alleged, that such improvements were made without the assent of King. No proofs have been taken with respect to these improvements; their value and extent are left altogether uncertain. But the rights of third persons, who may be *bonâ fide* purchasers under Hamilton's supposed title, may be materially affected by dismissing the bill as to the surplus land. Some diversity of opinion has existed among us, as to the final decree, on account of those improvements. We have, however, come to the conclusion, that the complainants in the court below shall have a decree for the surplus land, at the average rate or price which the consideration mentioned in the contract bears to 1866⅔ acres, *the number of acres specified in the purchase; [*330
together with the interest thereon, from the 25th of December 1807, being the time at which all the payments were to have been completed, according to the contract. The decree of the circuit court must be so modified. It should have required payment of the consideration-money, before the conveyance was to be given. Such are the terms of the original contract, and also of the agreement of the 6th of January 1826.

The decree of the circuit court as to John W. King, must accordingly be reversed, and affirmed as to the other defendants in the court below; and the cause sent back, with instructions to cause a survey to be made, to ascertain the number of acres contained in the patent; and that, on payment of the balance and interest due, according to the settlement made on the 6th of January 1826, and also a further sum for the surplus land above 1533⅓, according as the quantity shall be found on actual survey, at the same average rate or price as in the original contract, with the interest therefor from the 25th day of December 1807; then the said John W. King to be required to make and execute a good and sufficient deed of conveyance in fee-simple to the complainants in the court below, for all the lands contained in the patent to Elisha King mentioned in the pleadings, and which have not been already conveyed by the deed of Elisha King, bearing date the 22d of June 1809. The money to be paid and the deed executed, at such time as the circuit court shall direct. The injunction to be continued for such time, and under such modification, as shall be judged necessary by the circuit court for the purpose of carrying this decree into effect.

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 decreed and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed as to John W. King; and that *the said judg- [*331
ment in this cause be and the same is hereby affirmed as to the other defendants in the court below. And it is further ordered and adjudged by this court, that the cause be and the same is hereby remanded to the said circuit court, with instructions to cause a survey to be made, to ascertain

the number of acres contained in the patent; and that on payment of the balance and interest due, according to the settlement made on January 6th, in the year of our Lord 1826, and also a further sum for the surplus land above 15331 acres, according as the quantity shall be found on actual survey, at the same average rate or price, as in the original contract, with the interest therefor from the 25th of December 1807; then the said John W. King to be required to make and execute a good and sufficient deed of conveyance, in fee-simple, to the complainants in the court below, for all the lands contained in the patent to Elisha King, mentioned in the pleadings, and which have not been already conveyed by the deed of Elisha King, bearing date the 22d of June 1809. The money to be paid and the deed executed at such time as the said circuit court shall direct. The injunction to be continued for such time, and under such modification, as shall be judged necessary by the circuit court for the purpose of carrying this decree into effect.

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*332] *William T. Galt and others, Appellants, *v.* James Galloway, Jr., and others, Appellees.

Land-law of Ohio.

The possession of a warrant has always been considered, at the land-office in Ohio, sufficient authority to make locations under it; letters of attorney were seldom, if ever, given to locators; because they were deemed unnecessary. p. 339.

An entry could only be made in the name of the person to whom the warrant was issued or assigned; so that the locator could acquire no title in his own name, except by a regular assignment. p. 339.

When an entry is surveyed, its boundaries are designated, and nothing can be more reasonable and just, than that these shall limit the claim of the locator; to permit him to vary his lines, so as to affect injuriously the rights of others, subsequently acquired, would be manifestly in opposition to every principle of justice. p. 340.

Since locations were made in the Virginia military district in Ohio, it has been the practice of locators, at pleasure, to withdraw their warrants, both before and after surveys were executed; this practice is shown by the records of the land-office, and is known to all who are conversant with these titles.

The withdrawal is always entered on the margin of the original entry, as a notice to subsequent locators; and no reason is necessary to be alleged, as a justification of the act. If the first entry be defective in its calls, or if a more advantageous location can be made, the entry is generally withdrawn. This change cannot be made to the injury of the rights of others; and the public interest is not affected by it; the land from which the warrant is withdrawn is left vacant for subsequent locators; and the warrant is laid elsewhere, on the same number of unimproved lands. p. 341.

As the records of the land-office are of great importance to the country, and are kept under the official sanction of the government, their contents must always be considered, and they are always received in courts of justice, as evidence of the facts stated. p. 342.

Under the peculiar system of the Virginia land-law, as it has been settled in Kentucky, and in the Virginia military district in Ohio, by usages adapted to the circumstances of the country, many principles have been established, which are unknown to the common law; a long course of adjudications has fixed these principles, and they are considered as the settled rules by which these military titles are to be governed. p. 343.

An entry, or the withdrawal of an entry, is, in fact, made by the principal surveyor, at the instance of the person who controls the warrant; it is not to be presumed, that this officer would place upon his records any statement which affected the rights of others, at the instance of an individual who had no authority to act in the case; the facts, therefore, proved by the records, must be received as *primâ facie* evidence of the right of the person at whose instance

they were recorded; and as conclusive, in regard to such things as the law requires to be recorded. p. 343.

*No principle is better settled, than that the powers of an agent cease, on the death of his principal. p. 344. [*333

A location made in the name of a deceased person is void; as every other act done in the name of a deceased person must be considered.[1] p. 345.

The withdrawal of an entry is liable to objection, subject to the rights which others may have acquired, subsequent to its withdrawal having been entered in the land-office; this is required by principles of justice as well as of law. p. 347.

APPEAL from the Circuit Court of Ohio. James Galt, as heir to his brother Patrick Galt, the ancestor of the complainants, on the 6th day of August 1787, made an entry for military lands, in the Virginia reservation, in the following words:

"No. 610: James Galt (heir) enters one thousand acres on part of a military warrant, No 194, on the Miami river, beginning at the upper corner of Francis Wheeling's entry, No. 438, running up the river five hundred poles when reduced to a straight line; thence at right angles with the general course of the river, and with Wheeling's line, for quantity."

The bill of the appellant stated, that this entry was valid on the 15th of November 1796, and that a survey under the same was made thereon agreeable to its calls; that James Galt died intestate, prior to the 2d of March 1807; and that posterior thereto, Elias Langham, without any authority from James Galt, or from the complainants, caused an entry of the withdrawal of 400 acres, to be made in the books of the surveyor; the effect of which was, to render the residue of the entry of such a shape as that it could not be legally surveyed, the law requiring that the breadth of a survey shall be one-third of its length. Subsequently to this withdrawal, the 400 acres which Langham attempted to have left vacant thereby, were located by Galloway, by entries of 300 acres in his own name, and 100 acres in that of Ladd, both of which were included in one survey, made on the 18th of June 1808; but afterwards, on the 20th of July 1809, Galloway having caused the word "error" to be entered on the face of the plats of the survey of 1808, had separate surveys executed in his own name and in that of Ladd, and also caused a survey to be made for himself, of 600 acres of James Galt's entry of August 1787, of *1000 acres, the part of the same, to withdraw which no attempt had been made by Elias Langham. [*334 A patent for the 400 acres was obtained by Galloway; and he afterwards conveyed the land included in the same, to different persons, who were made parties to the bill. The bill also stated, that Thomas Baker resided on part of the 1000 acres, claiming title under Joshua Collet. That Collet claimed title to part; that William Patterson was in possession of, claiming title to the residue; and that Galloway refused to withdraw the 400 acres. The complainants said, they could not procure a patent for the 600 acres, without jeopardizing their title not only to the 400 acres, but also to the 600 acres; and prayed for particular and general relief.

The answer of James Galloway, Jun., stated, that Langham withdrew the 400 acres of Galt's entry of 1000 acres; and that he believed the withdrawal was authorized, but knew not by whom; and that since the bill was

[1] McDonald *v.* Smalley, 6 Pet. 261; Galloway *v.* Finley, 12 Id. 278; McArthur *v.* Dunn, 7 How. 270. See Davenport *v.* Lamb, 13 Wall. 418.

filed, he had heard the same was authorized by Westfall. The survey on the 600 acres, the residue of Galt's entry, he said, he executed and returned, and that he was, at the time he made the same, a regular deputy under Anderson. He obtained a patent for 300 acres of the land included in the patent, and sold the same.

Joshua Collet and William Patterson, in their answers, claimed to hold title under Westfall—the same having been sold as his property, for his debts or responsibilities. Patterson represented, that he believed Westfall made a contract with Galt for the whole of warrant No. 194, on a part of which his claim was founded; and that Westfall obtained patents in his own name for other entries on the warrant, and sold them for his own benefit.

Elias Langham answered, that, at the request of Westfall, he withdrew the 400 acres, as charged. He believed, Westfall purchased the warrant No. 194 from Galt, in his lifetime. He considered himself in possession of the whole, as agent of Westfall, except 1000 acres transferred to Mallow from 1797; and never heard of complainants' claim, *until after the death *335] of Westfall. By order of Westfall, he laid off the town of Westfall, in Pickaway county, and sold several small tracts of land, part of warrant No. 194; and that he contracted with Westfall to withdraw and re-enter other lands, which entitled him to 600 acres.

Evidence was exhibited, tending to show that an impression prevailed generally, that Westfall was entitled to half of Galt's military land-warrant. That Galt's warrant was put into Westfall's hands to locate land. The opinion of the court states such parts of the testimony and other facts of the case, as were considered made out by proof. The circuit court of Ohio gave a decree against the complainants, and they appealed to this court.

The cause was argued by *Irvin*, for the appellants; and by *Doddridge*, contrà.

For the appellants, it was contended: 1. That the entry in question, of 1000 acres, was originally good and valid. 2. That the original survey of 1000 acres, included the lands embraced in said entry. 3. That James Galt, in whose name the said entry and survey were made, died intestate; and that the appellants were his heirs-at-law. 4. That on the death of said Galt, a right to 3000 acres, part of warrant No. 194, and of the lands appropriated thereby (which included the lands in question), vested in the appellants as his heirs-at-law. 5. That their right to the lands in question was not destroyed by either: 1st. Langham's attempt to withdraw 400 acres, part thereof; or 2d. The locations made in the name of Galloway and Ladd, on the part of said entry, so attempted to be withdrawn, and the surveys and patents on said entries; or 3d. The conveyances from Galloway to Stephenson, and the Gibsons, and from Ladd's executor to Wilson; or 4th. The conveyance bond executed by Westfall to Armstrong, and assigned by him to Davis, and by Davis to Patterson; or *5th. The proceedings in attachment *336] against Westfall, and the sale and conveyance to Collet.

Irvin argued, that there was no legal evidence to show that any authority had been given by Galt, the ancestor of the appellants, to any one, to withdraw his entry. The declarations of Westfall, that he had received such authority, were not evidence that it had been given; and the declara-

tions of an agent cannot be used against his principal, unless within the scope and purpose of his authority. A power to locate the entries, did not authorize their revocation; nor did it give to the agent the right to dispose of the property, or to make it his own. If any power was given by James Galt to Westfall, or to any other person, it should be shown. He who asserts it, must make it out by evidence. If the contents of the instrument, which is said to have given the power, are to be proved by parol evidence, its non-production should be accounted for. 8 East 550; 7 Wheat. 154; Phil. 77, 79; 2 Taunt. 21. The removal of the warrant and entry was thus without authority. Langham acted under Westfall; and Westfall had no authority to give to Langham, to do what was done by him. The whole of the proceedings of Langham were, therefore, void; and no titles obtained under them can be valid against those whose legal and known rights were infringed by the fraudulent contract of pretended agents.

After the survey was made, the warrants became *functi officio:* the warrant merges in the survey, if the survey was authorized; but not otherwise. 1 Ohio 225; 3 A. K. Marsh. 501, 96; 1 Ibid. 129, 144; Hardin 567.

Can the defendants avail themselves of want of notice? The assignee of an equity is in no better condition than the assignor, and there is no proof in the case, that Westfall owned an acre of the land. 6 Wheat. 560; 1 A. K. Marsh. 144.

Doddridge, for the defendants, contended: 1. That upon the whole case, the complainants have shown no title in themselves. *2. As to [*337 Galloway, and those claiming under him, that the 400 acres being actually withdrawn on the surveyor's books, vacated that quantity of the original entry; that they were not bound to look beyond the record; and are innocent purchasers without notice. 3. That owing to the particular position of the 1000 acre entry, the withdrawal of 400 acres necessarily left vacant the part located by Galloway.

The appellants have slept too long on their rights, if any existed. The bill was filed in 1821, and they have suffered too long a period to elapse, without complaint, on their part, of those proceedings which are now claimed to be void. Under those proceedings, sales had been made; *bonâ fide* titles, for a full and valuable consideration, had been acquired by the defendants; all of which are to be vacated and defeated, if the claims of the appellants prevail. He contended, that as to the 400 acres, the conduct of the surveyor, in withdrawing this part of the survey, was in accordance with the practice of universal prevalence; nor was it required by the law of Virginia, that, to transfer a warrant, a regular assignment of it should be made. This principle was recognised by this court, in the case of *Bouldin and Wife* v. *Massie's Heirs*, 7 Wheat. 122. It may, therefore, be well presumed, that the acts of Westfall were authorized; that he had an interest in the warrants; and therefore, what was done by Langham was correct. When an entry is made on the books of the office, by the principal surveyor, it must be supposed valid; especially, at a great distance of time, unless the contrary be plainly proved.

The land law of Virginia, which regulates this case, does not support the position, that a warrant surrendered is *functus officio*. 7 Wheat. 23; Virg. Laws 326, §§ 19, 24, 32, 42, 38.

McLean, Justice, delivered the opinion of the court.—This suit is brought to this court, by an appeal from the circuit court of the district of Ohio. The complainants claimed through their ancestor, James Galt, 1000 acres of land, under a military warrant *obtained by him, as heir to his brother, Patrick Galt. The entry was made on the 6th of August 1787, as follows: "No. 610, James Galt, heir, enters one thousand acres on part of a military warrant, No. 194, on the Miami river; beginning at the upper corner of Francis Whiting's entry, No. 438, running up the river five hundred poles, when reduced to a straight line; thence at right angles with the general course of the river, and with Whiting's line, for quantity."

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On the 15th of November 1796, the entry was surveyed agreeable to its calls, and the survey was recorded on the 31st of May 1798. James Galt died intestate in 1800. In 1805, Elias Langham, under the authority, as he alleges in his answer, of Westfall, who made the original entry, withdrew 400 acres of the warrant, on this entry, and located the same number of acres at another place, in the name of James Galt, heir, &c. The 400 acres left vacant by this withdrawal, were located by James Galloway, Jun.; 300 acres of which were entered in his own name, and 100 acres in the name of J. Ladd. These entries were surveyed on the 20th of July 1809, after Galloway had caused to be made a survey of the 600 acres, which remained of the entry in the name of Galt. A patent was issued on the entries and surveys of Galloway, and he has conveyed to four of the defendants, each, 100 acres. Thomas Baker and William Patterson are in possession of, and claim title to, the 600 acres, in the name of Galt. Baker's claim originated by a sale under an attachment against Westfall; and Patterson's by a purchase from him; but he does not appear, from the facts in the case, to have had any interest in the land. There is no evidence that Galloway had any agency in the withdrawal of a part of the entry, as stated by Langham. The complainants allege, that the withdrawal of the 400 acres will invalidate the residue of the entry; as a survey, agreeable to its calls, will give the 600 acres an illegal form. They pray for such general and particular relief as the nature and circumstances of their case may require.

*It is contended by the defendant's counsel, that no relief can be given against the defendants, who claim title to the 600 acres; as by the facts stated in the bill, it clearly appears, they have no title either equitable or legal. That the sale under the attachment could convey no title to Collet, as Westfall had no claim whatever to the land; and that Baker and Patterson, who are now in possession, must be considered as trespassers. These occupants can be considered in no other light by the court than instruders; and the remedy against them is at law, and not in chancery. No decree could be made against them, unless it be, that they should deliver possession of the premises; and to obtain this, the action of ejectment is the appropriate remedy.

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Jurisdiction of this branch of the cause cannot be taken as an incident to the other, for it does not appear, that the withdrawal of the 400 acres will destroy the entry for the residue; and if it did, it would only be necessary to relieve against the defendants who held the legal title, to restore to the complainants the means of perfecting their title to the 600 acres.

It appears, that a land-warrant, numbered 194, for 6000 acres, was issued to James Galt, heir-at-law and legal representative of Patrick Galt, deceased.

That this warrant was placed in the hands of Westfall, who located it on various tracts of land, including the tract in controversy. In 1798, 3000 acres of this warrant were assigned by Galt to Westfall. The assignment was made on three surveys, which had been executed under these entries; one of these surveys was assigned by Westfall to Adam and Henry Mallow, and on all of them, patents have been issued. The possession of the warrant by Westfall is the only evidence of his right to make the locations; and this has been uniformly considered, at the land-office, as a sufficient authority. Letters of attorney were seldom, if ever, given to locators; because they were deemed unnecessary. The entry could only be made in the name of the person to whom the warrant was issued or assigned; so that the *locator could acquire no title in his own name, except by a regular assignment. [*340

The power of Westfall to make the location is not contested; but the validity of the withdrawal is denied by the complainants, on two grounds: 1. That the warrant had become merged in the survey, and could not be withdrawn. 2. That Langham had no power to withdraw it.

Several authorities have been referred to, in support of the first position. Much reliance is placed on the decision in the case of *Estill and others* v. *Hart's Heirs*, reported in Hardin 567. In their opinion, the court in that case say, that, "whatever doubts might be raised as to the particular time at which the warrant shall be said to be merged in the survey; whether from the time it is approved by the chief surveyor and recorded, or from the time it was delivered out to the owner; or from the end of three months after making the survey, we conceive the case clear, that, after registering, the wararnt was no longer an authority to any surveyor to receive an entry or make another survey." The right of withdrawing a warrant after a survey had been executed, was not involved in this case. Two entries were made by Hart; one in 1780, the other in 1782; and both were surveyed in 1784. Boon subsequently entered land adjoining these surveys. Some years after this was done, Hart's executor, and one of his heirs, caused another survey to be made of the entries of his ancestor, which, varying from the former surveys, covered a part of Boon's land. The court decided, and very properly, that the second survey was void. When an entry is surveyed, its boundaries are designated, and nothing can be more reasonable and just, than that these shall limit the claim of the locator. To permit him to vary his lines, so as to affect injuriously the rights of others, subsequently acquired, would be manifestly in opposition to every principle of justice.

In the case of *Loftus and others* v. *Mitchell*, 3 A. K. Marsh. 598, it is laid down by the court, that a survey made by a person, without the authority of the owner of the entry, does *not merge the warrant. The same principle is recognised in the case of *Galloway's Heirs* v. *Webb*, 1 A. K. Marsh. 130. In the case of *Taylor* v. *Alexander*, 3 Ibid. 501, the court decided, that a second survey of the same entry was void. [*341

It will be perceived, that none of the authorities cited sustain the position, that a warrant cannot be withdrawn, after the survey has been executed and recorded. If the warrant merge in the entry, and the entry in the survey, as laid down in some adjudications; and if the warrant, being once merged, is beyond the control of the owner; an entry, equally with a survey,

would prevent a withdrawal of the warrant. Since locations were made in the Virginia military district of Ohio, it has been the practice of locators, at pleasure, to withdraw their warrants, both before and after surveys were executed. This practice is shown by the records of the land-office, and is known to all who are conversant with these titles. The withdrawal is always entered on the margin of the original entry, as a notice to subsequent locators; and no reason is necessary to be alleged, as a justification of the act. If the first entry be defective in its calls, or if a more advantageous location can be made, the entry is generally withdrawn. This change cannot be made to the injury of the rights of others, and the public interest is not affected by it. The land from which the warrant is withdrawn, is left vacant for subsequent locators; and the warrant is laid elsewhere, on the same number of acres of unappropriated land.

In the case of *Taylor's Lessee* v. *Myers*, reported in 7 Wheat. 23, one of the questions considered and settled was, "can the owner of a survey, made in conformity with his entry, and not interfering with any other person's right, abandon his survey, after it has been recorded?" The chief justice, who delivered the opinion of the court, says: "It seems to be an ingredient in the character of property, that a person who has made some advances towards acquiring it, may relinquish it; provided the rights of others be not
*342] affected by such relinquishment. This general principle *derives great strength from the usage which has prevailed among these military surveys. The case states, that it has been customary, ever since the year 1799, to withdraw surveys, after they have been recorded. The place surveyed has, of course, been considered as having become vacant; and has been appropriated by other warrants, which have been surveyed and carried into grant." In that case, the court did not decide, because it was unnecessary to do so, that the warrant thus withdrawn could again be located; but this would follow, as a matter of course. If the withdrawal leave vacant the land entered, the warrant remains unsatisfied, and may be again located on any other unappropriated land. It appears, therefore, that the right of the owner to withdraw his warrant, after the survey has been executed and recorded, is clear, both on principle and authority.

The power of Langham to make the withdrawal, is the next point to be considered. Possession of the warrant, as has been shown, is a sufficient authority to make the location, and it will not be questioned, that the locator may amend his entry, by changing its calls. If he may do this, he may withdraw it, and make a new location. The control which he must necessarily exercise over the warrant, cannot, consistently with the interest of the owner, be limited to the first attempt at making an entry. If that attempt be imperfect, or if the selection of the land be less advantageous to his employer than it might be, there is no reason why he should not change the entry. The authority necessarily extends to the withdrawal, as fully as to the location, and such has been the uniform construction of the power of the locator. Confidence is reposed in his knowledge and discretion, and he has only to act in good faith, to bind his principal.

The register of the land-office keeps a record of all entries and surveys; and on his official certificates, patents are issued by the government. His records are always under his control; and all entries made in them are made by himself, or by a person authorized to act for him. As the records

of this *office are of great importance to the country, and are kept under the official sanctions of the government, their contents must always be considered, and they are always received in courts of justice, as evidence of the facts stated. If a different rule were now to be established, and every act of the locator, in making an entry or withdrawing it, must be shown to have been done under a formal letter of attorney, it would destroy, in all probability, a majority of the titles not carried into grant.

Under the peculiar system of the Virginia land-law, modified as it has been in Kentucky, and in the Virginia military district in Ohio, by usages adapted to the circumstances of the country, many principles have become established, which are unknown to the common law. A long course of adjudications has fixed these principles, and they are considered as the settled rules by which these military titles are to be governed.

An entry, or the withdrawal of an entry, is, in fact, made by the principal surveyor, at the instance of the person who controls the warrant. It is not to be presumed, that this officer would place upon his records any statement which affected the rights of others, at the instance of an individual who had no authority to act in the case. The facts, therefore, proved by these records, must be received as *primâ facie* evidence of the right of the person at whose instance they were recorded, and as conclusive in regard to such things as the law requires to be recorded. It will be in the power of an individual to rebut this presumption of authority in a person whose acts have been injurious to him and were unauthorized, by an exhibition of facts and circumstances.

In the case of *Moore* v. *Dodd*, reported in 1 A. K. Marsh. 140, the withdrawal of an entry, by administrators, was declared to be void ; as the right had descended to the heir, and the administrators had no control over it. That the withdrawal in that case was made at the instance of the administrators, appeared from the entry on the record.

Langham, in his answer, states, that he made the withdrawal of the 400 acres, by the authority of Westfall. *This withdrawal was made [*344 eighteen years after the date of the entry, and nine years after the survey was executed. So great a lapse of time from the entry to the withdrawal, is a circumstance which must be considered as shaking the right of the locator ; which depends, alone, upon his having located the warrant. In this case, there is no positive evidence, that Westfall, after the entry, exercised any agency over the land, in the payment of taxes, or in any other manner, until this withdrawal took place, on the application of Langham. The survey which was executed by O'Connor in 1796, does not appear to have been done at the instance of Westfall ; though, from his having made the entry, he may be presumed to have directed the survey.

From the answer of Patterson, it appears, that Westfall sold the 300 acres claimed by him, to one Davis, in the year 1806, and gave a bond, with security, for a title. It is now apparent, that he had no claim to any part of the land in controversy. The right to the warrant for 6000 acres, by assignments on the surveys for 3000 acres, which seems to have been urged in the court below, is abandoned by the counsel, in the argument here ; and the power to withdraw the 400 acres is rested on the first location of the warrant. In the absence of any proof of right, the sale of a part of this tract by Westfall, is an evidence of bad faith on his part ; and tends to

throw suspicion over the act of withdrawal. It is a well-settled principle, that the locator, as such, has no right to sell the land.

It is in proof, that James Galt, to whom the warrant issued, and in whose name the locations under it were made, died in 1800. The withdrawal was made in 1805; and the question is presented, whether the decease of the owner of the warrant puts an end to the power of the locator. No principle is better settled, than that the powers of an agent cease, on the death of his principal. If an act of agency be done, subsequent to the decease of the principal, though his death be unknown to the agent, the act is void. On the death of James Galt, the land in controversy *de-
*345] scended to his heirs; and there is no proof, that they authorized Westfall to act in their behalf. If he had the power to withdraw any part of the warrant, it must have been derived from the single circumstance of his having had the control of the warrant, when the entry was made.

Under ordinary circumstances, this power, as has been shown, would be sufficient. But it is a power which may be revoked or terminated by circumstances. The possession of the warrant is tantamount to a letter of attorney to make the entry, to alter or withdraw it, and to direct the survey; but is there no limitation when this authority under the warrant shall cease? Can it be safely considered as investing the locator with a higher power than a letter of attorney? If the authority be in the nature of a power of attorney, and subject to the same principles of law, it ceased on the death of Galt. On that event, new interests sprung up, which could not be controlled by the agent of the deceased. In the case of *Hansford* v. *Minor's Heirs*, reported in 4 Bibb 385, the court decided, that, "after the death of Minor, as the law then stood, it was clearly irregular, to survey the entry and obtain the grant in his name: but as he, at that time, had a devisable interest in the land, upon his decease, that interest passed to Nicholas, the father of the appellees, and consequently, the title ought regularly to have been perfected in his name."

By a statute of Kentucky, passed in 1792, lands granted to deceased persons descended to their heirs or devisees. This statute is not in force in Ohio, so as to give validity to the location in the name of Jmes Galt of the 400 acres withdrawn by Langham. This location having been made in the name of a deceased person, is believed to be void; as every other act done in the name of a deceased person must be considered. An entry made in the name of a dead man is a nullity; as appears from the decision in the case of *McCracken's Heirs* v. *Beall and Bowman*, reported in 3 A. K. Marsh. 210; but such an entry, in Kentucky, under the statute of 1792, inures to the benefit of the heirs of the deceased.

*346] There is no pretence, that the withdrawal was made under *any authority from the heirs of Galt; such a presumption would be rebutted by the subsequent location of the 400 acres, in the name of the deceased. An attempt has been made, to show that the heirs of James Galt claim all the lands in Ohio entered in his name; and among other tracts, the 400 acres located by the withdrawn warrant. But no other proof of the fact has been adduced, except the vague declarations of David Collens, an alleged agent of William T. Galt, who acted for the other heirs; and these are not evidence. If the heirs had sanctioned the withdrawal, by claiming the new location, it would render the act valid; and if such evidence be in

the power of the defendants, it should have been produced. As the heirs are residents of another state, the lapse of time does not raise a very strong presumption against them.

No doubt can exist, that Langham, in making the withdrawal, acted without authority; and the question is presented, whether an act thus done shall bind the owners of the entry? There is much plausibility and force in the argument, that the entry of a withdrawal on the record, being notice to subsequent locators, must be held valid, though done without authority, in favor of rights subsequently acquired, without notice of the improper withdrawal. The law requires the principal surveyor to record entries and surveys; these, and any other matters which the law requires to be recorded, must be received as conclusive of the facts; and parol evidence cannot be received to invalidate them, unless fraud be shown. But the law does not require the withdrawal of an entry to be recorded; this is an act of the party, rendered essentially necessary to the regularity of entries; but it cannot be considered of as high validity as the record of an entry or survey. It operates as a notice to subsequent locators, and must be received as *primâ facie* evidence of the right of the persons who caused the withdrawal to be made. But unless the law had required the principal surveyor to judge of the authority by which the warrant is withdrawn, and to make *the withdrawal on his record, can it be considered as conclusive. [*347

The principal survivor may enter a withdrawal, as was done in the case under consideration, at the instance of an individual who has not the shadow of authority. If entries and surveys may be destroyed in this manner, they must be considered of little value. On the other hand, if the authority of the person who withdraws the warrant may be contested, under any circumstances, entries subsequently made may be annulled. In the latter case, however, it is always in the power of the locator, when he is about to enter a tract from which a warrant has been withdrawn, to ascertain at whose instance the withdrawal was made; and this fact will enable him to investigate the authority under which the act was done. If the withdrawal was made by the owner of the warrant, or the person who located it, the authority would be unquestionable. In the latter case, a great lapse of time might create doubts whether the power of the locator had not terminated, and this would lead to particular inquiry. If it appeared, that the warrant had been withdrawn by a stranger, should not that circumstance put the subsequent locator on strict inquiry? He has the means of guarding his interests, by reasonable diligence; and this the law always imposes. But the owner of the original entry, if it may be withdrawn without authority, has no means by which his interests can be protected. The principal surveyor is not under his control; nor, by the usuges of the office, is he answerable to him for damages. It seems, therefore, that the principles of justice, as well as of law, require the act of withdrawal to be liable to objection, within the limits above prescribed. As the withdrawal in this case was without authority, it was a void act; and consequently, no right was acquired by the subsequent location.

The decree of the circuit court must be affirmed, so far as relief is denied against Baker and Patterson, who are in possession of the 600 acres; and reversed, as to the *other defendants; and the cause is remanded to the circuit court, with instructions to decree, that William Wilson, [*348

Andrew Gibson, Matthew Gibson and William Stephenson, do, on or before the first day of November next, execute to the complainants, jointly or severally, a release of their interest in the premises; provided, before that time, they shall have been paid for their improvements, under the statute of Ohio. And the circuit court is hereby directed to proceed to ascertain the value of such improvements, agreeable to the above statute; each party to pay his own costs in this court.

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, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, so far as relief is denied by the said court against Baker and Patterson, who are in possession of the 600 acres of land; and that the said decree of the said circuit court in this cause be and the same is hereby reversed as to the other defendants. And it is further ordered by this court, that this cause be and the same is hereby remanded to the said circuit court, with instructions to decree, that William Wilson, Andrew Gibson, Matthew Gibson and William Stephenson, do, on or before the first day of November, in the year of our Lord 1830, execute to the complainants, jointly or severally, a release of their interest in the premises; provided, that before that time, they shall have been paid for their improvements, under the statute of Ohio. And that the said circuit court be and the same is hereby directed to proceed to ascertain the value of such improvements, agreeable to the above statute. And that the said court do and act further in the premises, as to law and justice may appertain. And it is further ordered by this court, that each party respectively in this court pay his own costs accruing in this court.

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*349] *Mary Ronkendorff, Plaintiff in error, *v.* James N. Taylor's Lessee, Defendant in error.

Tax-sales.

The official tax-books of the corporation of Washington, made up by the register from the original returns or lists of the assessors, laid before the court of appeals, he being empowered by the ordinances of the corporation to correct the valuations made by the assessors, are evidence; and it is not required, that the assessor's original lists shall be produced in evidence, to prove the assessment of the taxes on real estate in the city of Washington. p. 359.

In an *ex parte* proceeding, as a sale of land for taxes, under a special authority, great strictness is required; to divest an individual of his property, against his consent, every substantial requisite of the law must be complied with; no presumption can be raised in behalf of a collector who sells real estate for taxes, to cure any radical defect in his proceedings, and the proof of regularity devolves upon the person who claims under the collector's sale.[1] p. 359.

Proof of the regular appointment of the assessors is not necessary; they acted under the authority of the corporation, and the highest evidence of this fact is the sanction given to their returns. p. 360.

The act of congress, under which the lot in the city of Washington in controversy was sold;

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[1] Parker *v.* Overman, 18 How. 137; Clarke *v.* Strickland, 2 Curt. 439; Miner *v.* McLean, 4 McLean 138; Moore *v.* Brown, Id. 211; Raymond *v.* Longworth, Id. 481; s. c. 14 How. 76; Slater *v.* Maxwell, 6 Wall. 269; Mason *v.* Fearson, 9 How. 268.

required, that public notice of the time and place of sale of lots, the property of non-residents, should be given, by advertising, "once a week," in some newspaper in the city, for three months; notice of the sale of the lot in controversy was published for three months; but in the course of that period, eleven days at one time, at another, ten days, and at another, eight days transpired, in succeeding weeks, between the insertions of the advertisement in the newspapers. "A week" is a definite period of time, commencing on Sunday and ending on Saturday; the notice was published Monday, January 6th, and was omitted until Saturday, January 18th, leaving an interval of eleven days; still, the publication on Saturday was within the week preceding the notice of the 6th; and this was sufficient. It would be a most rigid construction of the act of congress, justified neither by its spirit nor its language, to say, that this notice must be published on any particular day of a week; if published once a week, for three months, the law is complied with, and its object effectuated.[1] p. 361.

No doubt can exist, that a part of a lot may be sold for taxes, where they have accrued on such part. p. 361.

The lot on which the taxes were assessed, belonged to two persons, as tenants in common: the assessment was made, by a valuation of each half of the lot. To make a sale of the interest of one tenant in common, for unpaid taxes, valid, it need not extend to the interest of both claimants; one having paid his tax, the interest of the other may well be sold for the balance. p. 361.

The advertisement purported to sell "half of lot No. 4, in square No. 491;" and the other half was advertised in the same manner, as belonging to the other tenant in common; this was not a sufficient advertisement; and a sale made under the same was void. p. 362.

It is not sufficient, that in an advertisement of land for sale for unpaid taxes, such *a description is given, as would enable the person desirous of purchasing to ascertain the [*350 situation of the property by inquiry; nor if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, would the sale be valid, unless the same information had been communicated to the public in the notice. p. 362.

The 10th section of the act of congress provides, that real property in Washingon, on which two or more years' taxes shall be due and unpaid, may be sold, &c.; in this section, a distinction is made between a general and a special tax; property may be sold to pay the former, as soon as two years' taxes shall be due; but to pay the latter, property cannot be sold, until the expiration of two years after the second year's tax becomes due. The taxes for which the property in controversy was sold, became due, by the ordinance of the corporation, on the 1st day of January 1821 and 1822; the special tax for paving was charged against the lot, in 1820, and became due on the first of January 1821; but the ground on which it was assessed was not liable to be sold for the tax, until the 1st of January 1823. The first notice of the sale was given on the 6th of December 1822, nearly a month before the lot was liable to be sold for the special tax of 1820: *Held*, that the whole period should have elapsed which was necessary to render the lot liable to be sold for the special tax, before the advertisement was published. p. 364.

ERROR to the Circuit Court of the district of Columbia, for the county of Washington. This was an ejectment, brought by the defendant in error, in the circuit court, for the recovery of an undivided moiety of a lot of ground, in the city of Washington, No. 4, in square No. 491.

The lessor of the plaintiff in the ejectment claimed to be entitled to the lot of ground, as tenant in common with the heirs-at-law of Henry Toland, deceased; and on the 10th of March 1823, the half of the lot so held by the lessor of the plaintiff, was set up and exposed to public sale, as assessed to James N. Taylor, for taxes due to the corporation of Washington, for the years 1820 and 1821, amounting, in the whole, including the expenses of the sale, to the sum of $47.91; and Henry T. Weightman became the purchaser of the same. Mary Ronkendorff, the plaintiff in error, held, as lessee, under the purchaser at the tax-sale.

In the circuit court, the jury returned a verdict for the plaintiff in the

[1] See Early *v.* Homans, 16 How. 610.

ejectment; upon which judgment for his unexpired term in an undivided moiety of the lot, as tenant in common, was rendered in his favor, under the instructions of the court; to which several exceptions were taken.

*351] *The plaintiff in the circuit court made out his title under the commissioners of the city of Washington, by regular conveyances to himself and Henry Toland, deceased; and it was agreed, that the plaintiff's lessee and Toland's heirs were, under the same, seised in fee, as tenants in common of the premises, before the sale of the half lot for taxes.

The defendant proved the assessment of the taxes on the lot, by the production of the regular evidence, and that the taxes were assessed and the assessments were entered in the tax-books, according to the forms usually pursued and authorized under the charter and ordinances of the corporation of Washington.

In the tax-book of 1820, the assessment of lot No. 4, in square No. 491, appeared arranged in columns, in the established and accustomed form; in which were placed the name and residence of the owner of the property; the number of the square; the number of the lot; its contents in square feet; the rate of assessment; the valuation; the valuation of the improvements; and the amount of the tax. The lot in controversy was entered in the tax-book of 1820 thus:

Names.	No. of square.	No. of lots.	No. of square feet.	Rate of assessment.	Valuation.	Total amount.	Amount of Tax.
Taylor, James N.	491	½ 4	4202	40	1680	1680	
						8 40	
Paving-tax.						23 46	31 86
Toland's heirs, Henry	491	½ 4	4202	40	1680	1680	8 40

In the tax-book for 1821, the assessments of the lot were entered as follows:

Taylor, James N.	491	½ 4	4202	40	1680	1680	8 40
Toland's heirs, Henry	491	½ 4	4202	40	1680	1680	8 40

It was also proved, on the part of the defendant in the ejectment, that the persons appointed to take the value of the property liable to assessments for taxes in the city of Washington, usually perform the duty in October

*352] in each *year, and make out annual lists of the same, and of its assessed value; which, after being laid before the board of appeal empowered to correct the valuations, are returned to the register of the corporation, with the corrections, if any; in whose custody and office, the original books containing such lists and valuations are preserved; and the register, by the authority of the corporation, then proceeds to digest the tax-books, year by year, in the form described, and transfers into such tax-books, from the original assessment-books so returned by the assessors, through the board of appeal, the lists of the several species, descriptions and parcels of property on which such taxes are imposed, and the assessed valuation of the same, as corrected by the board of appeal; extending in the proper column pre-

pared for the purpose, the amount of the taxes imposed upon the same respectively: which tax-books, given in evidence by the defendant, were so made up and arranged by the register, in the years 1820 and 1821, respectively; the general taxes therein respectively assessed becoming due and payable, according to the laws of the corporation, on the first day of January of each year then next ensuing; that is to say, the general tax (exclusive of the special tax for paving) for the year 1820, on the 1st of January 1821; and that for the year 1821, on the first of January 1822.

The court, on motion of the plaintiff, instructed the jury that the tax-books, so given in evidence by the defendant, were not competent evidence to prove the assessments of the lot for the years 1820 and 1821, unless the defendant first proved the regular appointment and authority of the assessors whose books and returns were used in making up and arranging the tax-books as aforesaid; and also produced the original books, so returned by the assessors, through the board of appeal, in each year, respectively; to which opinion and instruction of the court, the defendant in the circuit court excepted.

It was further proved on the part of the defendant, that the collector of the taxes imposed by the corporation in third and fourth wards, who was authorized to advertise and sell all property in those wards liable to be sold by taxes, on *Monday the 6th of December, in the year 1822, the taxes on lot in controversy being unpaid, caused to be inserted in the [*353 National Intelligencer, the following advertisement:

"Will be sold, at public sale, on Monday the 10th of March next, at 10 o'clock, A. M., at the City Hall, the following described property, to satisfy the corporation of Washington city, for taxes due thereon up to the year 1821 inclusive, with costs and charges; unless previously paid to the subscriber, to wit: (and among others are the following.)

To whom assessed.	No. of square.	No. of lot.	Amount.
James N. Taylor,	491	½ of 4	$16 80
Paving-tax, interest 10 per cent.			23 46
Henry Toland's heirs,	491	½ of 4	16 80

This advertisement was repeated, and republished, by the direction of the collector, on the several days following:

Friday, December 6th, 1822.
Saturday, December 14th, 1822.
Monday, December 16th, 1822.
Tuesday, December 17th, 1822.
Wednesday, December 25th, 1822.
Saturday, January 4th, 1823.
Monday, January 6th, 1823.
Saturday, January 18th, 1823.
Tuesday, January 21st, 1823.
Saturday, February 1st, 1823.
Tuesday, February 4th, 1823.
Thursday, February 6th, 1823.
Saturday, February 8th, 1823.
Tuesday, February 11th, 1823.
Wednesday, Februay 12th, 1823.
Thursday, February 13th, 1823.
Friday, February 14th, 1823.
Saturday, February 15th, 1823.
Monday, February 17th, 1823.
Tuesday, February 18th, 1823.
Wednesday, February 19th, 1823.
Saturday, March 1st, 1823.
Monday, March 3d, 1823.
Tuesday, March 4th, 1823.
Wednesday, March 5th, 1823
Monday, March 10th, 1823.

The tenth section of the act of congress of the 15th May 1820, "to incorporate the inhabitants of the city of Washington, and to repeal all other acts heretofore passed," requires that real estate upon which two years' taxes are unpaid and in arrear, shall be advertised "once a week" for three months.

In pursuance of his authority and duty, and according to the tenor of the advertisement, the collector, on the 10th of *March 1823, set up *354] at public sale one-half of the lot No. 4, in square 491; and the same having been purchased by Henry T. Weightman, he paid the amount of the purchase-money, on the 11th of March 1823, to the collector, who thereupon executed and delivered to him a certificate under his hand, and executed in the presence of a witness; stating, that "at a sale made by me, as collector of taxes for the third and fourth wards of the city of Washington, on the 10th of March 1823, after due notice given as required by the acts of the corporation of said city, I set up and exposed to public sale, half of lot No. 4, in square 491, assessed to James N. Taylor, for taxes due the said corporation on the same, for the years 1820 and 1821, amounting in the whole, including the expenses of sale, to the sum of $47.91; when a certain Henry T. Weightman, being the highest bidder, became the purchaser thereof, at and for the sum of $47.91: the receipt of $47.91 is hereby acknowledged, subject however to redemption as provided for by law.

The collector made a return of the sale in the following form:

Sqr.	Lot.	To whom assessed.	Purchaser.	Tax.	Expen.	Am. sold for.
491	½ 4	James N. Taylor,	H. T. Weightman,	45 33	2 58	47 91

Mr. Weightman entered upon the half lot so sold to him, and was possessed thereof, more than two years after the day of sale; and afterwards, on the 5th of October 1826, received in due form a conveyance in fee-simple of the said half lot, which deed was duly recorded; the plaintiff's lessor, James N. Taylor, or any person for him or in his behalf, or any person whatever, not having at any time paid or in any manner tendered to Mr. Weightman, or deposited in the hands of the mayor or other officer of the corporation, the money paid to the collector, or any part thereof.

The court, on the motion of the plaintiff, instructed the jury, that the advertisement of the property was defective and illegal in the several instances and particulars following, to wit: *1. That, being pub- *355] lished and republished as aforesaid, on the several days aforesaid, from the 6th of December 1822 to the 17th of March 1823, both inclusive, was not an advertisement "once a week," for three months, within the meaning of the tenth section of the act of congress, passed on the 15th of May 1820, "to incorporate the inhabitants of the city of Washington, and to repeal all acts heretofore passed for that purpose." 2. That the said corporation, or its collector of taxes acting under its authority, was not competent to advertise and sell any part of the said lot No. 4, in square No. 491, less than the entire lot, for the taxes so assessed on the same and due to the said corporation. 3. That the entire lot should have been assessed to the two tenants in common, Taylor and Toland; and accordingly advertised and sold, as assessed to them. 4. That the said advertisement did not sufficiently designate what half of the said lot was charged with the said taxes

and was to be sold for the same; and did not purport to be an advertisement of an undivided moiety of the same for sale. 5. That the said corporation, or its said collector, had no power or authority to advertise the said lot for sale, till the last of the two years' taxes, for which the same was advertised for sale, had remained unpaid and in arrears for two years. 6. That the said advertisement does not purport to advertise the said lot for two years' taxes unpaid and in arrears. 7. That the said property so attempted to be sold, was not described with sufficient certainty, either in the advertisement or at the sale. For which several defects, in the process of the assessment, advertisement and sale of the said lot, the said sale is illegal and void. The defendant excepted to all these instructions and opinions of the court, and prosecuted this writ of error.

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

**Jones*, for the plaintiff in error, contended, that the objections to the sale, which had been made for taxes, of the moiety of the lot, [*356 were untenable. The taxes for which the sale had been made, had been regularly assessed under the authority of the corporation of Washington, and in conformity to law; all the forms of the law and ordinances had been complied with in this assessment; the registering of the taxes; the advertisement; and the sale. He cited the charter and ordinances of the corporation in support of that position.

Burrell and *Key*, for the defendant, contended, that no proof had been made, on the trial in the circuit court, of the assessment of the taxes. The original books of the assessors should have been produced; and not the statements or abstracts from them, made by the register. There may have been alterations made on appeals, and the original books of the assessors were the only legal evidence. Laws for the sale of lands for taxes should be construed strictly, and their provisions should be strictly pursued. They are penal in their nature and effects. They go to wrest the property of the owner out of his hands by act of law; and every form which the law directs must be entirely and fully answered. 8 Wheat. 682.

The description of the property was imperfect; it did not designate the part of the lot to be sold with sufficient, if with any, precision. If the corporation could divide a lot, which is denied, in order to comply with the law, there should have been an assessment of a half lot, and a description of it as such. To show that such a description was insufficient, they cited, 1 Har. & Gill 172.

The publication of the advertisement was not made in conformity with the provisions of the charter. The tenth section directs that the advertisement shall be inserted once a week, for three months; but the case shows that this was not done. A period of twelve days had elapsed between the days on which the advertisement appeared; and no more than seven days should have passed. Once a week, means once in every seven days; from one day, a particular day, to *another, a corresponding day in the succeeding [*357 week. In every period of seven days, the insertion of the notice was not sufficient. If the advertisement commenced on one day in a week, it should have been repeated on the following corresponding day in the

succeeding week; and so on, until it had been inserted for three months. The stipulation to pay rent quarterly, and the construction given to such covenants, illustrate and explain the position of the defendant in error. Would it be a compliance with an agreement to pay two quarters' rent, quarterly, to make the payment at any time within six months, being two quarters? The payments are to be made, under such covenant, from quarter-day to quarter-day; and there is a breach, if the corresponding and succeeding quarter-day is suffered to pass without payment being made.

It was also contended, that the corporation had no authority to advertise the lot for sale, until the last of the two years' taxes were due, for which the sale was to be made; and that the advertisement does not purport to expose the property to be sold for two years' taxes unpaid, and in arrears.

Jones, in reply, argued, that the books of the assessors were not the original records of the assessment of the taxes. The returns are made to the register, and are entered by him; and his books exhibit regular and proper evidence of the charges and assessments on property in the city. The register is a public, sworn officer, and the duties he performs are official acts, which are shown by his books.

The advertisement was inserted in every succeeding period of seven days, and this was a compliance with the law. It was a publication in every succeeding week, or space of seven days; and this was according to the letter of the charter. When a term is fixed for the performance of an act, the whole time is allowed to do it; even to the last minute. So, to require advertising once a week, gives all the next week for the next advertising. On what succeeding day in the hebdomadal division of a week, the advertisement shall appear, is not required; the name of the day of the week on
*358] which it must be published is of no moment; as the names *of the days of the week are arbitrary. It is the period of seven days, which the law regards as the space of a week; and in this case, as there was no period of fourteen days in which the notice of the sale was omitted, no longer period than twelve days having passed during the three months in which the advertisement did not appear, all was regular.

As to the objection that the property sold had not been sufficiently described; as the powers of the corporation are to tax all interests in lands, the right to assess the tax on an undivided moiety of a tenant in common, cannot be denied. Such was this case; and the advertisement described sufficiently an undivided half of the lot, of which Taylor was the owner with Toland's heirs.

McLean, Justice, delivered the opinion of the court.—This writ of error is prosecuted to reverse a judgment of the circuit court for the district of Columbia. The defendant in error brought an action of ejectment in the circuit court, to recover possession of lot No. 4, in square No. 491, in the city of Washington, half of which had been sold for taxes; and under the special instructions of the court, recovered a verdict and judgment. Several exceptions were taken to the competency of the evidence admitted on the trial, all of which appear in the bill of exceptions.

The first objection was taken to the competency of the proof of the assessment of the lot for taxation: the legality of the tax is not disputed. To show the taxes assessed on the lot for the years 1820 and 1821, the

defendant below produced in evidence the official tax-books of the corporation, regularly made up by its officers; from which it appeared, that the plaintiff stood charged, for 1820, with $31.86, for the tax on the half of lot No. 4, which contained 4202 square feet, valued at $1680. For the year 1821, he stood charged with $8.40, tax on the same lot. It appeared in proof, that the assessors appointed by the authority of the corporation, make a valuation of *property within the city, about the month of October, annually, and a return of their proceedings; which are laid [*359 before the board of appeal empowered to correct the valuations of the assessors, according to the laws and ordinances of the corporation. The assessment lists are then returned to the register of the corporation; the register then proceeds to make out the tax-books, from the original assessment lists returned by the assessors, and corrected by the board of appeal. But it was contended, that the original lists of the assessors must be produced, and also proof of their appointment.

The court recognise the correctness of the principle contended for by the counsel for the plaintiff in error; that in an *ex parte* proceeding of this kind, under a special authority, great strictness is required. To divest an individual of his property, against his consent, every substantial requisite of the law must be shown to have been complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes, to cover any radical defect in his proceeding; and the proof of regularity in the procedure devolves upon the person who claims under the collector's sale.

In this case, was it necessary to exhibit proof of the regular appointment of the assessors? They acted under the authority of the corporation, and the highest evidence of this fact is the sanction which it has given to their return. This return has been examined and corrected by the board of appeal, and was then handed over to the register. What better proof can be required of the assessors' authority to act. The municipal powers of the corporation are conferred by a public law, and all courts are bound to notice them. Is it necessary, in any case, to go into the proof of the election of the mayor, or any of the other officers of this corporation? This has not been contended; nor can it be necessary to prove the appointment of an officer of the corporation, who has acted under its authority, and whose proceedings, as in the present case, have received its express sanction.

Did the court below err, in requiring the original assessment lists to be produced? These lists, under the law, were not conclusive on the *cor- [*360 poration, nor on the person whose property was assessed. They were laid before the court of appeal, for their correction and sanction, and they were then passed to the register. If the assessment was not conclusive, nor indeed, binding on either party, until sanctioned by the board of appeal; then, without this sanction, the assessment lists could not be received as evidence. These lists being handed over to the register, the law requires him to furnish a tax-book to the collector, from the original assessment lists on file in his office, according to a prescribed form. This was done in the case under consideration; and is not this book evidence? It was made out and arranged by an officer, in pursuance of a duty expressly enjoined by law. This not only makes the tax-book evidence, but the best evidence which can be given, of the facts it contains. In this book, are stated, the name of the owner of the property, and his residence, if known; the number of the

square, the number of the lot, the square feet it contains, the rate of assessment, the valuation, and the amount of the tax. Only a part of these appear upon the assessment list.

This court think, that the circuit court erred in their instructions to the jury, on both of the points stated. 1. In deciding that the proof was not competent to show the authority of the assessors: and 2. That the official tax-book, certified by the register, did not prove an assessment on the property.

The next point presented by the bill of exceptions is as to the legality of the notice of sale given by the collector. The court instructed the jury, that the advertisement was defective in several particulars. By the 10th section of the act of congress, which directs this proceeding, the collector is required to give public notice of the time and place of sale, by advertising, once a week, in some newspaper printed in the city of Washington, for three months; when the property is assessed to a person who resides within the United States, but without the district of Columbia. Notice of the sale of the lot in controversy was given by the collector; first, in a newspaper
*361] published the 6th of *December 1822, and last, in the same paper of the 10th of March 1823. These periods embrace the time the advertisement is required to be published; but it is contended, that the notice was not published once in each week, within the meaning of the act of congress. In examining the dates of the publications, it appears, that eleven days, at one time, transpired between them, and at another time, ten days, at another, eight. These omissions, it is contended, are fatal; that the publication being once made, it was essential to the validity of the notice that it should be published every seventh day thereafter.

The words of the law are, "once a week." Does this limit the publication to a particular day of the week? If the notice be published on Monday, is it fatal, to omit the publication until the Tuesday week succeeding? The object of the notice is as well answered by such a publication, as if it had been made on the following Monday. A week is a definite period of time, commencing on Sunday and ending on Saturday. By this construction, the notice in this case must be held sufficient. It was published Monday, January the 6th, and omitted until Saturday, January the 18th, leaving an interval of eleven days; still, the publication on Saturday was within the week succeeding the notice of the 6th. It would be a most rigid construction of the act of congress, justified neither by its spirit nor its language, to say that this notice must be published on any particular day of a week. If published once a week, for three months, the law is complied with, and its object effectuated. The circuit court erred on this point, in their instructions to the jury.

The court below also instructed the jury, "that the corporation, or its collector of taxes, acting under its authority, was not competent to advertise and sell any part of said lot No. 4, for the taxes assessed on the same." By the law, not less than a lot, when the property upon which the tax has accrued is not less than that quantity, may be sold for the taxes due thereon.
*362] *No doubt can exist, that a part of a lot may be sold for taxes, where they have accrued on such part; it appears, therefore, that the circuit court have also erred on this point.

It is again objected, "that the entire lot should have been assessed to the

two tenants in common, Taylor and Toland; and accordingly advertised and sold, as assessed to them. The same valuation was placed on each half of this lot; so that, so far as the assessment goes, it did not substantially differ from the instruction given. But the sale, to be valid, need not extend to the interest of both claimants. One having paid his share of the tax, the interest of the other may well be sold for the balance. The court, therefore, erred, in their instructions on this point also.

In their fourth instruction, the court say to the jury, "that the advertisement did not sufficiently designate what half of the said lot was charged with the said taxes, and was to be sold for the same, and did not purport to be an advertisement of an undivided moiety." The law requires "the number of the lots (if the square has been divided into lots), the number of the square or squares, or other sufficient or definite description of the property selected for sale, to be stated in the advertisement." Congress had two objects in view, in requiring this notice to be given. 1. To apprise the owner of the property; and 2. To give notice to persons desirous of purchasing. These objects are important. It is necessary for the interest of the owner, that he should be informed of a proceeding which, unless arrested by the payment of the tax, would divest him of his property. And it was of equal, if not greater, importance, that the property should be so definitely described, that no purchaser could be at a loss to estimate its value. It is not sufficient, that such a description should be given in the advertisement, as would enable the person desirous of purchasing to ascertain the situation of the property by inquiry. Nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property; yet the sale would be void, unless the same information had been communicated to the public in the notice. Its defects, if any exist in the description of the *property to be sold, cannot be cured by any communication made to [*363
bidders, on the day of sale, by the auctioneer.

What was the description given in the advertisement of the property in controversy? It was described to be half of lot No. 4, in square No. 491; and the other half was advertised, at the same time, under the same description, as belonging to Toland's heirs. What would be understood by such a description? Suppose, half a square had been advertised, it not having been divided into lots: would it convey that certainty to the public, as to the precise property about to be sold, that would enable any one to form an opinion of its value? No one could suppose that an undivided half of the square was to be sold under the notice; and which half was offered, could not be determined from the advertisement. Would this be a notice, under the requisites of the law? The value of a lot or half lot depends upon its situation. If one of the half lots front two streets in a populous part of the city, it is of much higher value than the other half. And this difference in value may still be greater, if the lot be situated near the middle of a square, fronting the street, and it be divided so as to cut off one-half of it from the street. It will thus be seen, that it is not a matter of small importance to the person who wishes to purchase, to know which half of a lot is offered for sale; and as any uncertainty in this matter must materially affect the value of the property at the sale, it is of great importance to the owner, that the desciption should be definite. That an undivided moiety of a lot may be sold for taxes, has already been stated. But would any one understand

that one-half of lot No. 4, means an undivided moiety? In all cities, half lots are as common as whole ones; and when a half lot is spoken of, we understand it to be a piece of ground, half the size of an entire lot, and of as definite boundaries. The illustrations given show how great a difference in value may exist between halves of the same lot. And would not the preferable half be of much higher value than an undivided moiety of the
*364] entire lot? *In every point of view in which this notice can be considered, under the act of congress, it was radically defective. The property should have been described, as an undivided half of lot No. 4. Under such a description, no one could be at a loss, as to its situation and value. The instructions of the circuit court on this point are not erroneous.

In their fifth instruction, the court say, "that the corporation, or its collector, had no power or authority to advertise the said lot for sale, till the last of the two years' taxes for which the same was advertised for sale, had remained unpaid and in arrear for two years." The tenth section of the act of congress, which governs this subject, provides, "that real property, whether improved or unimproved, in the city of Washington, on which two or more years' taxes shall have remained due and unpaid; or on which any special tax, imposed by virtue of the authority of the provisions of this act, shall have remained unpaid for two or more years after the same shall have become due, may be sold, &c." In this section, a distinction is made between a general and a special tax. Property may be sold to pay the former, so soon as two years' taxes shall be due; but to pay the latter, property cannot be sold, until the expiration of two years after the second year's tax becomes due. The taxes for which the lot in controversy was sold, were assessed in 1820 and 1821; and by the ordinance of the corporation, they became due on the 1st of January succeeding the assessment. A special tax for paving was charged against Taylor in 1820, and composed a part of the sum for which the property was sold. This special tax became due on the 1st of January 1821; but the ground on which it was assessed, was not liable to be sold for the tax, until the 1st of January 1823. On the 1st of January 1822, the same property was liable to be sold under the assessments of the years 1820 and 1821, for a general tax. The first notice of the sale was given on the 6th of December 1822,
*365] nearly a month before the lot was liable to be *sold for the special tax of 1820. Does this render the notice invalid? This court think that the whole period should have elapsed which was necessary to render the lot liable to be sold for special tax, before the advertisement was published. That the owner of the lot, by paying the tax, at any time before the 1st of January 1823, would save it from the liability of being sold; and that until this liability had attached, he could not be chargeable with the expense of notice, nor could it legally be given. The circuit court, therefore, did not err in their instruction to the jury on this point.

The court also instructed the jury, that the advertisement was defective, as it "does not purport to advertise the said lot for two years' taxes unpaid and in arrear." It states, that the lot was offered for sale, "for taxes due thereon up to the year 1821." This was sufficient; for if the taxes were due, and the property was liable to be sold for them, it can be of no importance to the purchaser to have a more technical description of the tax than the notice contained.

The seventh instruction, "that the said property, attempted to be sold, was not described with sufficient certainty, either in the advertisement or at the sale," is substantially embraced by the fourth instruction which has been considered.

For the errors specified, the judgment of the circuit court must be reversed, and the cause removed to that court for further proceedings, in conformity to this opinion.

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 ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, 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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* Bank of the United States, Plaintiffs in error, *v.* Levi Tyler, [*366
Defendant in error.

Promissory notes.—Liability of assignor in Kentucky.—Lien of judgment.—Liability to execution.—Discharge of assignor.

Action by the indorsees against the indorser of a promissory note, made and indorsed in the state of Kentucky.

The statute of Kentucky, authorizing the assignment of notes, is silent as to the duties of the assignee, or the nature of the contract created by the assignment; it only declares such assignments valid, and the assignee capable of suing in his own name; but the courts of that state have clearly defined his rights, duties and obligations resulting from the assignment. The assignee cannot maintain an action on the mere non-payment of the note, and notice thereof, until the holder of the note has made use of all due and legal diligence to recover the money from the maker; his engagement is held to be, that he will pay the amount, if, after due and diligent pursuit, the maker is found insolvent. p. 380.

The principles of the law of Kentucky, relative to the liability of indorsers of promissory notes, and proceedings to establish the same, as settled by the decisions of the courts of Kentucky. p. 381.

A judgment does not bind lands, in the state of Kentucky, the lien attaches only from the delivery of the execution to the sheriff; it then binds real and personal property, held by legal title; an execution returned, is no lien on any property not levied on; and no new lien can be acquired, until a new execution is put into the hands of the sheriff; and none can issue while a former levy is in force. Any delay, then, by the assignee, enables the debtor to alien his property, in the interval between judgment and the execution reaching the sheriff, as well as between the return of one and the lien acquired by a new execution. p. 383.

By the law of Kentucky, no equitable interest in real or personal property, unless it is held by mortgage, deed of trust, or other incumbrance, can be taken in execution; a *capias ad satisfaciendum* is the only mode by which the equitable estate of a debtor or his *choses in action* can be, in any way, reached, by any legal process; it may be the means of coercing the payment of the debt, and it must, therefore, be used. The return of *nulla bona* to an execution, is, in that state, the only evidence of there being no property of the debtor on which a levy can be made; it is not evidence of there being no equitable interest which is beyond the reach of such process; nor of his not having that kind of property, on which no levy can be made. p. 383.

After judgment obtained in the circuit court of the United States against the maker of a note, *capias ad satisfaciendum* was issued against him, by the holder, and he was put in prison, two jutices of the peace ordered his discharge, claiming to proceed according to the law of Kentucky in the case of insolvent debtors; and the jailer permitted him to leave the prison; the jailer made himself and his sureties liable for an escape, by permitting the prisoner to leave

the prison: *Held*, that the neglect of the holder of the note to proceed against the jailer and his sureties, prevented his making the indorser liable for the amount of the note. p. 388.

*The court finds no express decision of the courts of Kentucky enjoining a plaintiff who has sued the maker of a promissory note, and intends to charge the indorser, to proceed against a jailer and his sureties, when the defendant has been suffered to escape; yet, by the spirit of all the decisions, he is bound to do so. The general principle of all the cases is, that a plaintiff must pursue, with legal diligence, all his means and remedies, direct, immediate or collateral, to recover the amount of his debt, from the maker of the note, or of any one else who has put himself, or has, by operation of law, been put, in his place. p. 390. *367]

The decision of this court in the case of the Bank of the United States *v.* Weisiger, examined and confirmed.

ERROR to the Circuit Court of Kentucky. This was an action by the Bank of the United States, against Levi Tyler, upon two promissory notes; one for $3900, dated the 2d of May 1821, and payable sixty days after date, drawn by Anderson Miller, in favor of John T. Gray; it was negotiable, and payable, without defalcation, at the office of discount and deposit of the Bank of the United States, at Louisville, Kentucky, for value received. John T. Gray assigned the note to Levi Tyler, and Levi Tyler assigned it to the bank. The other note was of the same date, for $3800, payable to Samuel Vance; assigned by said Vance, and by the defendant. In all other respects, it was like the note above stated.

On the 24th of September 1821, suit was brought by the bank against the maker, Anderson Miller, in the circuit court of the United States for the district of Kentucky, for the first-mentioned note; and judgment was obtained at the November term 1821. On this judgment, a *fieri facias* issued, bearing date the 29th of December 1821, returnable on the first Monday of March, being the 4th day of the month following, which was in the hands of the marshal on the 19th of January 1822; and the plaintiffs introduced as a witness, the clerk of the court, who stated, that it had been his uniform habit, before and since the obtaining of the said judgment, to issue executions on all judgments obtained at the last preceding term, and place them in a window of his office, from whence it was the habit and custom of the marshal to take them. That it generally required from twelve to sixteen days after the *rising of the court, to prepare and issue the executions of the preceding term. That at the November term of the court, at which the before-mentioned judgment was obtained, the court adjourned on the 17th of December. To this *fieri facias*, the marshal returned a levy, and that he had not time to sell before the return-day. The return was filed the 28th of March 1822. On the 3d of April 1822, a *venditioni exponas* issued, returnable the first Monday in June. It was returned on the 17th day of June, "unsold for want of bidders," and the sale was postponed; an *alias venditioni exponas* issued, tested the 17th of June, returnable on the first Monday in September, returned on the 13th. The sales, amounting to $10.50, were credited to another execution. *368]

The 26th of September 1822, another *fieri facias* issued, which was levied on slaves, and sale made. It was returned the 9th of December 1822. The proceeds of the sale were $1300. The 19th of December 1822, another *fieri facias* issued, and returned, "levied on property mentioned, and not sold for want of time." This was returned on the first Monday in March 1823. The 20th of March 1823, a *venditioni exponas* issued, and was returned "unsold for want of bidders." The return was filed on the 30th

of June; returnable the first Monday in June. The 1st of July 1823, another *venditioni exponas* issued, and was returned "unsold for want of bidders." The return was filed the 12th of September 1823. The 19th of September 1823, another *venditioni exponas* issued, and the property was sold. The proceeds amounted to $4.50. It was returned the 19th of December 1823.

The 19th of December 1823, another *fieri facias* issued, to March 1824, and was returned, "no property found to satisfy the execution, or any part thereof;" returned the 16th of March 1824. The 16th of March 1824, a *capias ad satisfaciendum* issued, under which the defendant was committed; and so *returned on the 26th of April 1824. The commitment was to March 1824. The proceedings in the suit against Anderson Miller on the other note were also given in evidence. They also terminated in his committal to prison. On the 27th of March 1824, two justices of Kentucky discharged Anderson Miller from prison. [*369

Upon this evidence, the court instructed the jury to find for the defendant; and the jury found accordingly. The plaintiffs excepted, and the judge signed a bill of exceptions.

The plaintiffs offered witnesses, to prove, that Anderson Miller was notoriously insolvent when the note fell due, and had so continued ever since. The court rejected the evidence, and the plaintiffs excepted; this exception was stated in the bill.

The plaintiffs contended, that the court erred in charging the jury to find for the defendant; because they said, it was fully proved, that due diligence was used against the maker; and the remedies afforded by the law were exhausted, without obtaining the money, and therefore, they were entitled to recover from the indorser. They contended, also, that, under the circumstances of this case, the evidence offered of Miller's insolvency, ought to have been received.

The case was argued by *Sergeant*, for the plaintiffs in error; and by *Wickliffe* and *Bibb*, for the defendant.

Sergeant stated, that the first question was, whether due diligence had been used? The second, whether the proceedings had been carried so far as to establish the right of holders to sue the indorser or assignor of the note?

1. The principles of the case were settled at the last term, in the case of the *Bank of the United States* v. *Weisiger*, 2 Pet. 331. They decide this point, at all events; and it is thought, the whole case. It is to be remarked, that it appears on the face of these notes, that they were made for the purpose of discount; *they were indorsed for the same purpose; and they were discounted for Levi Tyler, for value received by him. The diligence used in the commencement of the suit appears from the statement of the case. It was brought to the first term, and in time to obtain a judgment at that term. No case in Kentucky requires more than this; the holder is not obliged to run a race against time; nor to sue the first term, if judgment could not be obtained. The general phrase is, "it must be in reasonable time." *Trimble* v. *Webb*, 1 T. B. Monr. 100; *Oldham* v. *Bengan*, 2 Litt. 132; *Collyer* v. *Whitaker*, 2 A. K. Marsh. 197. Bail was demanded, which would be necessary, if *non est inventus* was returned, 1 Bibb 542; but not otherwise, 2 A. K. Marsh. 197. Tyler was the bail. [*370

2. Judgment was obtained the first term, and a *fieri facias* issued on the same day, and was on the same day in the hands of the sheriff. 2 Pet. 333, 348–9. The *fieri facias* in the second case is said not to have been in the marshal's hands until the 9th of January; but this is probably a mistake; and if it was not, it was in good time. 2 Pet. 348. It was also immaterial; because the other *fieri facias* covered the whole property, as the return shows; and there was nothing to levy upon. Was it necessary to issue two writs of *fieri facias?* From that time forward, there was unceasing diligence; the process being followed up as fast as it was returned. It is true, that the marshal returned, he had not time to sell; but this was not because the writ came too late; it was because he found nothing to levy upon, until the 28th of September 1822; or perhaps, it is the ordinary course. Tyler was conusant of all this, for he was one of the defendants in one of the three executions. Suppose, however, the officer did wrong; are the plaintiffs responsible for that? It has never been so settled. *Postlethwaite* v. *Garrett*, 3 T. B. Monr. 346. Nothing was lost by it; for the property was secured, such as it was, and a *venditioni* issued immediately in each case. The proceedings went on, until the maker was committed to prison; and that was all that could be done, and no more was required.
*371] **Young* v. *Cosby*, 3 Bibb 227. Here, the diligence was fairly exhausted and at an end. The bail was discharged by this commitment, and there was no recourse to him.

Have the proceedings been carried so far as to entitle the holder to sue the indorser or assignor? It is contended, that there is an immediate right of action against the indorser, by the holder, after the confinement of the maker, which cannot be divested but by his own act or consent. He is not bound to take a single step to keep the maker in prison. *Young* v. *Cosby*, 3 Bibb 227. Authorities upon this principle, 1 A. K. Marsh. 535; 2 Bibb 34. All this has been done; and the burden of proof that anything has been omitted, is thrown upon the defendant. The plaintiffs are not bound to protract the imprisonment one moment. *Bank of the United States* v. *Weisiger*, 2 Pet. 331. In Virginia, the requirements are far short of this. *Violett* v. *Patten*, 5 Cranch 142. Ought the law of Kentucky, which professes to be the law of Virginia, to be carried further than judicial decisions in that state have carried it? The point to be established is the insolvency of the maker, or his inability to pay, to a reasonable extent; not that every possible chance of getting the money by any means is exhausted. That point was reached.

But it is insisted, that a new career was to be begun. It is founded upon this argument, that the justices had no authority to discharge; that it was, therefore, an escape, and the jailer and his sureties are liable. Supposing all this to be correct, is it necessary for the plaintiffs to proceed? It will be recollected, that there was no request to this effect. There is no decided case which gives any countenance to the position; the case of a replevy-bond has no analogy. But this proceeding would be collateral to the suit; it would be a new departure, on a different line of operations, the first suit being only the base. Were the jailer and his sureties liable by the Kentucky law? This cannot be decided, for want of evidence. Were there any sure-
*372] ties of the jailer, and to what amount? *Were they responsible men, or were they insolvent? Was the pursuit worth the cost? The

defendant should have shown this by evidence. He was to ask the pursuit to be undertaken, at his costs and for his account. The claim on the plaintiffs seems wholly inadmissible.

But the question presented is one of some peculiarity. Is there an escape, and who is liable for it? This is a new question, considering the circumstances. The United States have no prison in Kentucky, nor is the marshal furnished with any place of imprisonment in Kentucky, under his own jurisdiction. The jailer is not of his appointment; the moment he delivers a prisoner to the jailer, his authority is at an end. The matter depends on the resolutions of congress, and the acts of Kentucky. Resolution of September 23d, 1789 (Ing. Abr. 489); of March 3d, 1791 (Ibid. 496); of March 3d, 1821 (Ibid. 507); Acts of Kentucky (2 Litt. 57, 369). The marshal, therefore, cannot be liable. Is the jailer? He derives his authority from the state of Kentucky, and this discharge is under the law of Kentucky. It is a complicated question.

Two questions present themselves: 1. Is it required by the obligation of due diligence, in Kentucky, to issue a *capias ad satisfaciendum*, for the purpose of imprisonment, since the act abolishing imprisonment for debt? Does the law require that to be done, which the same law declares ought not to be done? 2. Can a citizen of Kentucky, and one of the law-makers, insist that this ought to be done? Suppose it to be clear, that the plaintiffs had a right of action, were they bound to pursue it? This is a question of evidence in the case, and it is contended, the evidence was inadmissible. *Violett* v. *Patten*, 5 Cranch 142; 2 A. K. Marsh. 255; 2 Bibb 34; 3 Ibid. 227.

Wickliffe and *Bibb*, for the defendant.—This court has uniformly expressed its disposition to adopt the construction which the courts of a state have given of the laws of the state. *Elmendorf* v. *Taylor*, 10 Wheat. 160. *In this opinion, the principle is clearly recognised, that the judicial department of every government is the appropriate expounder of the [*373 legislative acts of the government.

The law of Kentucky in relation to promissory notes, is applicable to those notes which are the foundation of this action; for the notes were made and executed in that state, and there assigned. The law of Kentucky is different from the usual commercial law. The responsibility of an assignor is to accrue, after due diligence, by suit, against the maker. *Smallwood* v. *Woods*, 1 Bibb 544; *Drake* v. *Johnson*, Hardin 223; *Duncan* v. *Littell*, 2 Bibb 35, 290. The statute of Kentucky which authorizes the assignment of such notes, omits the words "in the same manner as bills of exchange," contained in the statute of Anne. 1 Dig. Laws of Kentucky 99. The declaration in this case treats the notes as assigned under the law of Kentucky, and the attempt of the plaintiff has been, to make out a case of diligence under the Kentucky law; and this is essential to a recovery. By the decisions of the supreme court of Kentucky, the responsibility of an assignor of a bond or note is made to depend upon due diligence, by suit against the maker, to compel payment. The assignor must use every compulsory process afforded by law; and he must use it, until the insolvency of the maker of the note is established, until the suit and all the incidental remedies, however ramified, prove insufficient. *Smallwood* v. *Wood*, 1 Bibb 542; *Hogan* v. *Vance*, 2 Ibid. 35; 4 Ibid. 287; 1 A. K. Marsh. 523; 3 Ibid. 60; 1 T. B.

Monr. 103 ; 5 Litt. 331 ; 3 Bibb 7 ; 1 A. K. Marsh. 230. From these cases, the consequences are inevitable : that a failure to sue out successive executions in due time, until the officer returns " no property," is negligence ; that the first and every successive process must be diligently pursued, until the property is exhausted and the body taken ; and all the remedies have been employed and have failed.

Due diligence is a question of law for the court, when the facts are ascertained. *McKinney* v. *McConnel*, 1 Bibb 239 ; *Smallwood* v. *Woods*, Ibid. 544. *In the case before the court, the facts were ascertained by the plaintiffs' evidence, upon which the motion for instructions which prevailed was founded ; the plaintiff produced none. The rules of the law of Kentucky being fully established upon the authorities cited, the principles they enforce will be applied to this case. 1. By showing that the plaintiffs, as assignees, have not used due diligence against the maker, between the judgment and the *capias ad satisfaciendum*. 2. That the plaintiffs having failed to proceed against the jailer for an escape, cannot have recourse to the assignor.

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I. The plaintiffs have been guilty of *crassa negligentia*, between the judgment and the *capias ad satisfaciendum*. If suit must be brought to the first term (4 T. B. Monr. 15), why so? Because execution would otherwise be delayed. Not only suit, but execution must be sued in due time ; and although a *fieri facias* was sued in due time, yet a delay in pursuing the execution by *capias ad satisfaciendum* was adjudged negligence. 2 A. K. Marsh. 523. What is due diligence ; what is negligence in proceedings under executions ; must be tested by the properties and effects which the law gives to executions in respect to there subjects. 1. As to priority between creditors, where all cannot be satisfied. 2. In over-reaching alienations by the debtor to *bonâ fide* purchasers. 3. As to the command to the officer to levy or compel the debtor, or the obedience due by the officer to the precept.

1 and 2. As to the priority of lien amongst creditors, and the lien which over-reaches alienations by the debtor ; the statutes of Virginia and of Kentucky declare, that the property shall be bound only from the delivery of the execution to an officer ; and to that end he is required to indorse the time of delivery. Laws of Virginia, 1748, p. 276, § 10 ; Laws of Kentucky, 1 Dig. 513, 483. The common-law doctrine of relation to the beginning of the term by judgments, is abolished, and the lien commences as has been stated. *By the express provisions of the statutes, and decisions under them, it appears : That if several executions issue at the same time against the same debtor, and are delivered to the same officer, that which comes first to the officer's hands must be first satisfied, and it does not bind until delivery. An execution issued and delivered, creates no lien after the return-day, except upon such property as may have been seized. *Tabb* v. *Harris*, 4 Bibb 29 ; *Daniel* v. *Cochran's Executors*, 4 Ibid. 532. Thus, diligence in delivering the execution to the officer, is of the highest importance. In the exercise of the federal jurisdiction of the courts of the United States, the obligation to pursue with the utmost diligence the delivery of the execution, is more important ; for between conflicting jurisdictions, the officer who first levies has the right to retain the property. Due diligence then enjoins a speedy delivery of the process to the officer, and

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that the lien shall be preserved, by keeping the execution in the hands of the officer, until a return of the property. By the statutes of Virginia and Kentucky, one execution can be sued after another, if the first be not returned and executed. The great object of this law is, that the plaintiff may maintain a continued and unbroken lien upon the debtor's property. The laws of Virginia and Kentucky upon these points are the same, and the practice in the circuit court of the United States has been to mould their executions so as to embrace lands as well as goods and chattels ; and this is shown by the decisions of this court in *Wayman* v. *Southard*, 10 Wheat. 1; *Bank of the United States* v. *Halstead*, Ibid. 57. The question is, therefore, disentangled of any difficulties in the forms of the executions.

To apply these principles to the facts of the case ; and first, as to the note for $3900. In the executions against Miller, the plaintiffs were guilty of gross negligence. The first execution is tested the 29th of December 1822, and there was a delay of twenty-one days between the test *and [*376 the delivery ; and during this delay, other creditors might have come in, and the debtor might have aliened his property. This execution was levied on specified property, without any return that there was no other ; and a subsequent execution was levied on other property than that, which was sold for $1300. Had the execution been issued earlier, the officer might have sold before the return-day. Although the *fieri facias* was returnable the first Monday in March, the *venditioni* to compel the officer to sell was delayed until the 3d of April 1822. When that was delivered, does not appear. That *venditioni exponas* was returned, "not sold for want of bidders, and sale postponed by agreement," indorsed on execution No. 2130 ; but when that was returned, does not appear. The next *venditioni exponas* to compel the sale, was not issued until the 17th of June 1822 ; and the property was sold on the 1st and 2d of July. From the time of this sale (2d July), the plaintiff delayed to put another *fieri facias* into the officer's hands, until the 1st day of October ; ninety days were suffered to elapse without any effort. Had the plaintiff been vigilant, he would, immediately after the sales in July, have issued another *fieri facias* to bind the debtor's property. That there was other property appears by the execution and sale on this second *fieri facias ;* and also by the levy on the third *fieri facias.* These delays were so great ; there was such a want of vigilance and due superintendence ; such was the careless manner in which the executions were suffered to limp and halt and drag, by intervals, between the one execution and another ; that it has taken from the 29th of December 1821, to the 16th of March 1824, a period of twenty-six months and upwards, before the *capias ad satisfaciendum* issued. During these twenty-six months, there were three levies and three sales ; and the process upon which these three levies and sales were compelled, were at intervals which evince a total inattention on the part of the plaintiffs.

*His own testimony shows, that he relied on the clerk and the [*377 marshal. Neither clerk nor marshal have, by law, authority to issue executions, unless ordered. They are not, *virtute officii*, bound to act as agents of the plaintiff, in ordering and delivering executions. If they do so, it must be by special authority given by the plaintiff beforehand, or by adopting their acts afterwards. If the plaintiff has chosen to rely on the clerk and the marshal, to do that for him which it was his duty to do, he

must abide the loss by such delays as have been suffered. The clerk is to issue execution, when ordered, and of the kind directed, whether *fieri facias* or *capias ad satisfaciendum*, or *elegit* or *levari facias*; the marshal is bound to receive such, when offered to him. It is the business of the plaintiff to direct the clerk to issue, and it is the business of the plaintiff to deliver to the marshal the execution when issued. It is no excuse for the delays which have happened, for the plaintiff to say, it was the clerk's habit to issue executions, and put them into a window in his office, and it was the habit of the marshal to call and get them. A reliance upon such habits shows the want of that superintendence and vigilance which was due from an assignee who expects recourse against the assignor.

3. It is no excuse for the lapse of time between the return-day of one execution, and the *teste* of the ensuing execution, to say, that the marshal did not return the execution at the return-day. He was bound to return the execution, according to the command of the precept; and was subject to a fine and penalty for failing to return the precept at the day appointed. At each rule-day on which the process was returnable, the plaintiff had a right to call for it, to demand it; to proceed against the officer for a failure to return the precept according to its mandate. Moreover, whether returned or not, he had the right by law, on the rule-day, and even before, to sue out any other execution and deliver it, so as to preserve his lien. The officer, *378] upon such second execution, would, of *course, regulate his conduct by what he had done on the previous execution.

So much for the delay between judgment and *capias ad satisfaciendum* on the note of $3900, by Miller to Gray, who assigned to Tyler, who assigned to the bank. The two notes, and the process upon them, cannot be brought to the aid of each other. The parties are different, and each must be pursued independently. 2 A. K. Marsh. 523, 198, 199. Upon the principles already stated, and supported by authorities, the proceedings against the maker of the note for $3800, are liable to charges of the most gross and entire negligence. The *fieri facias* issued on the 29th of December 1821, and did not come to the hands of the marshal until the 19th of January 1822, nearly one month after its issue. From the return-day, the first Monday in March, until the 3d of April 1822, there was no movement, when a *venditioni exponas* issued, returnable in June; and then there was no sale; but this was postponed by agreement. The next *venditioni* was issued on the 17th of June, and sales were made on the 1st and 2d of July; and from that time the process was suffered to sleep, until the 28th of December 1822, a period of 170 days. Even between the return-day in September, and the *teste* of the next execution in December, there was an interval of 111 days.

II. The defendant having failed to proceed against the jailer for the escape, cannot have recourse to the assignor. The cases before cited are adjudicated upon the principle, that not only the direct remedy by suit, but the incidental remedies and secureties given by law, and arising in the course of the suit, must all be resorted to. The remedy must be pushed in all its ramifications. *Owings* v. *Grimes*, 5 Litt. 331; *Parker* v. *Owings*, 3 A. K. Marsh. 60; *McGinnis* v. *Burton*, 3 Bibb 7; *Campbell* v. *Hopson*, 1 A. K. Marsh. 230. That the jailer and his sureties are liable for an escape *379] cannot be denied. The discharge was altogether unlawful: the jailer should have resisted, or have refused to obey the *order to discharge

the maker. *Hubbard* v. *Newhouse*, 1 Bibb 555. The law of Kentucky gives the use of the prisons of the state to the United States; and declares it to be the duty of the jailer, to receive persons committed under the authority of the United States, and to keep them until discharged according to law (2 Dig. 679); and the jailer gives bond with sureties. The statute of Kentucky abolishing imprisonment for debt, does not operate upon the process of the courts of the United States. The justices had no color for the jurisdiction they assumed. The plaintiffs have a remedy for the escape, and no person but the plaintiffs can pursue it. It is a remedy incidental to the action against the maker, and they should have employed it before they instituted this suit.

The case of the *Bank of the United States* v. *Weisiger* has no analogy to this. There, the complaint against the plaintiff was, that he had been too swift.

Sergeant, in reply, said, it was admitted, that the suits had been regularly brought, and in good time; and the only question upon this point was, whether the subsequent proceedings were also in time. He contended, that they were, upon the authority of adjudged cases in Kentucky; and it is not necessary to go further than the judicial decisions of that state had gone.

As to the obligation to pursue the officer for an escape, the claim is ungracious, after charging the plaintiff with the length of his pursuit. No decision was ever yet made upon which the position assumed rests. If there is no decision, there is no such obligation. The law of the case is one of judicial proceedings. No law exists, unless found in these decisions. But it has been decided, that the holder of a note is not bound to pursue extraordinary remedies. This is an extraordinary remedy. And why should it be required? The officer is guilty of *no injury; for the insolvency of the maker of the note is manifest; it cannot be doubted. [*380

Baldwin, Justice, delivered the opinion of the court.—In this case, the plaintiffs sue, not as the indorsers of two notes, negotiable under the statute of Anne, which has never been adopted in Kentucky, but as assignees, for a valuable consideration, of promissory notes, which are assignable by the laws of that state, and on which the assignee may sue in his own name. 1 Kentucky Digest 99.

The first note was made by Anderson Miller, dated at Louisville, May 2d, 1821, for $3900, in favor of John T. Gray, negotiable and payable, sixty days after date, at the office of discount and deposit of the Bank of the United States, Louisville, Kentucky, for value received. The note was assigned in the following manner: "For value received, I assign the within note to Levy Tyler, or order—John T. Gray, by Levy Tyler, his attorney." "For value received, I assign the within to the president, directors and company of the Bank of the United States—Levi Tyler."

As this note was made, assigned, and payable in Kentucky, the obligations and rights of the parties must depend on the laws of that state. The statute authorizing the assignment of notes is silent as to the duties of the assignee, or the nature of the contract created by the assignment. It only declares such assignment valid, and the assignee capable of suing in his own name; but the courts of that state have clearly defined the rights, duties and obligations resulting from the assignment. The assignee cannot maintain

an action on the mere non-payment of the note and notice thereof, or of a protest to the assignor, until the holder of the note has made use of all due and legal diligence to recover the money from the maker. But if this fails, then the assignor may be resorted to on his assignment; which is held to be an engagement to pay the amount of the note, if, after due and diligent pursuit, the maker is insolvent. This contract results from the act of assign-
*381] ment, without any express agreement to be *answerable; the law is the same, whether this contract is expressed in terms, or is implied from the assignment; the rights and duties of the parties are the same in both cases. 4 Bibb 286; 1 A. K. Marsh. 229. This case may then be considered as an assignment of a promissory note, with an express promise by the assignor to pay, if, by legal process and due diligence, the assignee is unable to recover the amount due from the maker. Viewed in this light, the case is more readily comprehended.

The means which the assignee is bound to use, the time within which he must commence, and the diligence with which he must pursue his legal remedies against the maker, and the extent to which he must carry them, have been the subject of much litigation and discussion in the courts of Kentucky; they have, however, adopted the following as principles, which must be taken to be the law of the state. That the assignee is not bound to run a race against time, or to use extraordinary means; that he is not required to prosecute a maker or obligor further than a man of ordinary prudence and diligence would do, in a case where he was solely and exclusively interested. But in order to bring himself within these rules, he must commence a suit against the maker at the first term after the note becomes due, if a judgment could be obtained then. He must sue, within such time, before the term, as will authorize him to procure judgment. After suit is brought, he must prosecute it to judgment, without delay, or giving time to the maker of the note. Though he be notoriously insolvent, and die on the third day of the first term after the note becomes due, and no administration is taken out on his estate, the assignor is discharged, if no suit has been brought. After judgment, there must be the same diligence in pursuing the debtor's property by execution, as in the commencement of the suit. There must be no delay in putting the execution into the hands of the sheriff, or in making sale of the property levied on; he must continue the process of execution until the property of the maker is exhausted, and the sheriff returns *nulla bona* to the last execution; and after his insolvency is thus ascertained, a *capias ad satisfaciendum* must be taken for his body;
*382] *and if he be committed, the assignee must show what has become of the debtor, and how he has been discharged. If the debtor assigns property, it must be sold. If property is taken in execution, and replevin-bond given, the bond must be put in suit; if there is bail to the action, and the principal cannot be taken on a *capias ad satisfaciendum*, bail must be pursued; and all incidental and collateral remedies, which may accrue to the assignee, must be adopted and prosecuted; and the discharge of the maker by the insolvent act, at the suit of a third person, will be no excuse for any relaxation in the diligence required to fix the assignor; who is suable only after the exhaustion of all legal means of obtaining payment. The cases on this subject have been collected in a note in 2 Pet. 338–40; and were all cited and ably commented on by the counsel on both sides.

It is believed, that the principles which exact such an unusual degree of vigilance from the assignee, are peculiar to the jurisprudence of Kentucky; but they have been established by a long series of cases adjudged in their highest courts for many years; they have long formed the law of that state as to notes and bonds assigned under their statute; and the legislature has not thought proper to change it. The courts in Virginia have given a very different construction to their statute on the same subject; and there are no decisions in any state which have extended the rule of diligence so far. But this court has always felt itself bound to respect local laws, however peculiar, in all cases where they do not come in collision with laws of higher authority and more imposing obligation. Such a case is not presented in the record now under our consideration.

These are the duties imposed by the law of Kentucky on the assignees of promissory notes, before they can commence a suit against the assignor on his promise. These rules are the law of this case; and although, in our opinion, they carry the doctrine of diligence to an extent unknown to the principles of the common law, or the law of other states, where bonds, notes and bills are assignable, we must adopt them as the guide to our judgment. They must be considered, with *a reference to the laws of Kentucky respecting judgments and executions, in order to form a correct opinion of their true character. A judgment does not bind land, in that state; the lien attaches only from the delivery of an execution to the sheriff; it then binds real and personal property, held by a legal title. An execution returned, is no lien on any property not levied on; and no new one can be acquired, until a new execution is put into the hands of the sheriff; and none can issue while a former levy is in force. (6 Kentucky Digest, 485, § 8.) Any delay, then, by the assignee enables the debtor to acquire, hold or alien his property, in the interval between judgment and the execution reaching the sheriff; as well as between the return of one and the lien acquired by a new execution. There is, therefore, more reason in exacting strict diligence on the part of the assignee, than in those states where real estate is bound by a judgment, without an execution. On general principles, it is certainly a rule of very great rigor, to require a *capias ad satisfaciendum* to be issued and served, after a return of *nulla bona*. But as, by the law of Kentucky, no equitable interest in real or personal property, except where it is held or covered by mortgage, deed of trust or other incumbrance, can be taken in execution; a *capias ad satisfaciendum* is the only mode by which the equitable estate of the debtor or his *choses in action* can be, in any way, reached by any legal process. (1 Ken. Dig. 504, § 5; 505, § 6. It may be the means of coercing the payment of the debt, and it must, therefore, be used. The return of *nulla bona* to an execution, is, in that state, evidence only of there being no property of the debtor on which a levy can be made. It is not evidence of there being no equitable interests, which are beyond the reach of legal process; or of his not having that kind of property on which no levy can be made. A debtor, confined by an execution from the federal courts, can only be discharged under the insolvent act of congress, passed January 1800; the provisions of which are effectual to compel a disclosure of all his property. In the language of this court, "the coercive means of this law are to be found in the searching oath to be administered, and in the fear of a *prose- [*383 [*384

cution for perjury, and recommitment in the same action. *Bank of the United States* v. *Weisiger*, 2 Pet. 352.

The creditor has a right to use these coercive means; and where he intends to make the insolvency of the debtor the ground of a resort to the assignor of the note on which the judgment was obtained, he is, by the principles of the Kentucky decisions, bound to use them to the full extent authorized by the laws of that state, as expounded by its highest judicial tribunals.

In discarding from our minds all considerations unconnected with the peculiar local law which governs this case, and considering it in all its bearings on both parties; we are not prepared to say, that either has any right to complain of the severity of the rules which impose on them their respective obligations. If the law-merchant were to govern, the plaintiff would be without remedy. Suing as the indorser of a negotiable note, he must fail, for want of a protest, or demand of payment of the maker, and notice to the indorser. The diligence exacted of him is quite as extreme, if not more so, as when he sues as assignee. He must not give the maker time for one day beyond the days of grace, or what local usage permits. His notorious insolvency; his being discharged as an insolvent debtor, or a certified bankrupt; will not excuse the holder. This court have decided, at this term, in the case of *Magruder* v. *Union Bank of Georgetown*, that where a maker of a note dies, before it becomes due, and the indorser administers on his estate, demand of payment and notice to the indorser are indispensable. No decisions in Kentucky on assigned notes establish a more rigid doctrine than is applicable to indorsers by the law-merchant. In such cases, demand and notice are required to fix the indorser, because the debtor may pay by the interference of friends; not because he is supposed to have the means of doing it otherwise. It is too late, to inquire into the reason of these rules; which have become settled and established as the general law of negotiable notes in the commercial world, and of assignable notes in Kentucky. They must be submitted to, as the law of the contract into which *385] *the parties respectively enter, on becoming indorsers in the one case, and assignees, in the other. If it is not going beyond the principles of the common law of England and this country, it is, at least, extending them to their utmost limits, to say, that the assignor of a note, without fraud, or a promise to pay, in the event of the insolvency of the maker, should by liable by the mere effect of the assignment; and that there is no difference between his assigning with, or without, an express promise. It is, at least, testing the contract of assignment, by the rules of the *summum jus*. Neither the statute of Anne, nor of any of the states of this Union, making notes assignable (so far as is known), expressly impose on the assignor any obligation which did not attach to the assignment of a *chose in action* at common law. Such assignments are recognised; and though the assignee cannot sue in his own name, his rights are as much protected in courts of law as those of assignees, by virtue of the statute. 3 Bibb 293; 4 Ibid. 557. It is not easy to assign any sound reasons for construing the assignment as, *per se*, importing a higher obligation in the one case than the other. But the law of Kentucky has given this effect to assignments of notes, under the statute of that state; and as the plaintiffs cannot sustain this action, in their own name, without the aid of the law, they must submit

to the conditions which the settled judgments on the action have imposed on them. If, in availing themselves of this strict obligation imposed on the assignor, they find themselves compelled to use a corresponding degree of vigilance on their part, exceeding that which is required in other states, under similar statutes; this court cannot afford them an exemption from its exercise. The local law is clearly settled, and we must submit to it; however we might be inclined to construe the law, if it were now open to a construction more consistent with that which has been uniformly given to statutes authorizing the assignment of bonds, bills and notes.

In the application of these rules to the first note which is the subject of this action, the defendant admits, that up to the time of issuing the first execution, there has been no want of due diligence on the part of the plaintiff; but he alleges, that from that time, there was unnecessary delay in various *particulars, which have been pointed out and dwelt upon with much earnestness. As the statement of the case contains the [*386
teste, the return-day, the day of the return of each execution, and the time of their coming to the hands of the marshal, it is unnecessary to examine in detail, the alleged instances of negligence by the lapse of time: but there is one rule for which the defendant contends, which deserves some more particular notice.

By the 5th section of a law of Kentucky, passed in 1811, it is made the duty of the courts of that state, to appoint, by rule of court, some day in each month as a general return-day of executions. The provisions of this law having been carried into effect, the defendant insists, that in the exercise of the legal diligence incumbent on the plaintiff, he was bound to take out his execution, returnable on some rule-day, and attend at the office to watch its progress and effect. We think this would be applying the doctrine of diligence with unreasonable strictness. We find no decision which warrants the extension of it to so extreme a point; and we are not disposed to go one step in advance of the principles heretofore adopted. The case of the *Bank* v. *Weisiger* is conclusive on this part of the defendant's case; it was there settled, that a lapse of thirty-six days between the judgment and the delivery of the execution to the marshal, did not amount to that want of diligence which exonerated the assignor of the note on which the judgment was obtained.

We have been furnished with no adjudged cases in Kentucky which fix any definite time within which an execution must be made returnable. On examining the executions which have issued on the judgment on the first note, they are all returnable within three months from their *teste*; and no period of three months has been suffered to elapse, within which an execution has not been in the hands of the marshal, unless when writs of *venditioni exponas* were out; and they appear to have issued, in all instances within that period. The greatest time which has intervened between the issuing of an execution and placing it in the hands of the marshal, appears to be thirty-one days; and from the return of one execution or *venditioni*, until the issuing of another, thirty *days; and we are not aware, that [*387
in any of these cases, there is any decision that this would be a want of diligence in the assignee. In the absence of any such decision, and feeling at liberty to decide upon them, as open questions, we are of opinion, that the plaintiff, in the proceedings subsequent to the judgment, has, at no

time, omitted to pursue the maker of this note with all the diligence which the law required of him. On this part of the case, we think the decision of this court in the case of the *Bank of the United States* v. *Weisiger* is strongly applicable. That was a case of the assignee against the assignor of a promissory note; judgment was entered November term 1821; execution issued on the 29th of December; was placed in marshal's hands on the 19th of January, thirty-six days from the entry of judgment; returned *nulla bona*, at March term 1822, the 3d day of the month; and a *capias ad satisfaciendum* issued on the 11th of April 1822, thirty-eight days from the return-day of the *fieri facias*. This was held not to be such a want of diligence as exonerated the assignor. This decision seems to us to cover all the grounds assumed by the plaintiff, up to the time of the discharge of Miller from his imprisonment on the *capias ad satisfaciendum*; and thus far we think he has done or omitted no act which has impaired his right of action.

It remains now to consider the last allegation of the want of diligence imputed to the plaintiff, and its effect on the suit. Miller was arrested and imprisoned on the 27th of March 1824; and on the same day, was discharged by the jailer, on the order of two justices of the peace, acting, or pretending to act, under a law of Kentucky, passed in 1820 (1 Ken. Dig. 503, §§ 1, 3), abolishing imprisonment for debt, and authorizing a justice of the peace, on application of any person in jail, or in prison bounds, on reasonable notice to the party at whose suit he has been committed, to issue an order for his discharge. It is not necessary to inquire, whether this law would apply to process from the federal courts, so as to legalize the discharge of a prisoner from the execution issued in this case, and protect the jailer and his sureties from an action by the plaintiffs for an escape. The laws of Kentucky on *this subject was are too clear to admit of a doubt; *388] they authorize the discharge of a a debtor from imprisonment, on making a schedule of his property, surrendering it to the use of his creditors, and taking the oath prescribed. (1 Ken. Dig. 490–2, act of 1819; Ibid. 564, act of 1821.) It was under this law, that the justices acted, in issuing the order of discharge. But it could not apply to a commitment by the marshal, under an execution from the federal courts; because an express provision was made by prior laws, which made it the duty of the jailer to safely keep such prisoners, until they shall be discharged according to the laws of the United States. (2 Kentucky Digest 676.) The act of 1798 provides, that jailers shall receive into their custody all persons committed under the authority of the United States, and keep them safely, until discharged by the due course of the laws of the United States; and the jailer is subject to the same pains and penalties for neglect of duty, as if the commitment had been by state authority. By the act of 1800, the marshal of the United States has a right to use any prison for the imprisonment of any one by legal process, in the same manner as the sheriff of a county may, if the prisoner was delivered by him; and this law was unrepealed and in force, at the time of Miller's discharge. To entitle a debtor to a discharge, under the insolvent law of January 1800, he must give the creditor thirty days' notice of his application, and take an oath that he is not worth thirty dollars, &c. The jailer was bound to take notice of this law, and of the laws of Kentucky, which required him to detain the prisoner, until he complied with these provisions; he knew the conditions of his bond, and acted at his peril,

in releasing him, without one day's confinement, without notice, oath, or the order of the district judge. The discharge was wholly unauthorized and illegal; the order of the justices did not protect the jailer; and he was liable to the plaintiff in an action for the escape, to the full amount of the execution.

The act of 1812 (2 Ken. Dig. 679) requires all jailers to execute, in their county court, a bond, with one or more approved sureties, in at least the sum of $1000, *and as much more as the court may deem proper; payable to the commonwealth, and conditioned for the faithful discharge [*389 of the duties of the office of jailer; which may be put in suit by any person injured by his acts. And the act of 1811 enacts, that where a bond is given by any public officer to the commonwealth, the recovery against the principal and his sureties shall not be limited to the penalty; but they shall be liable according to law, and to the full extent of the official obligations of such officer, as the same are enumerated in the condition of such bond. (2 Ken. Dig. 978.) The remedy thus afforded to the plaintiff was a substantial one; extending to his whole claim, if the jailer or his securities were solvent. It was not indirect, remote or doubtful. He had acquired a new security, of which the assignor had a right to claim the benefit, but which he could not use for his protection; the plaintiff could alone sue for the escape, or bring an action on the jailer's official bond, which inured to his use, but not to the use of the defendant. If this new security had been a bond for the prison-bounds, there would be no doubt that it would be his duty to pursue the parties to it, before resorting to the defendant; and it was equally his duty to pursue the jailer, and his sureties, on his bond of office. The jailer had violated his duty; his bond became forfeited; he and his sureties had put themselves in the place of the debtor, who was permitted to escape; and they thus assumed all his responsibility to the plaintiff. No event could arise by which they could be disharged. A voluntary return, or a reception of the prisoner, would not avail them; they were under a stronger and more direct obligation to pay the money than special bail; against whom, it is admitted, that legal proceedings must be used with due diligence, before resorting to the assignor.

Although we find no express decision by the courts of Kentucky, enjoining on a plaintiff the necessity of suing a jailer and his sureties for the escape of a prisoner; yet it seems to us, that, in the spirit of them all, he is bound to do so. The general principle of all the cases is, that a plaintiff must pursue, with legal diligence, all his means and *remedies, direct, [*390 incidental or collateral, to recover the amount of his debt from the defendant, or any one who has put himself, or has by operation of law, been put, in his place. This the plaintiffs in this case have wholly omitted, with a plain, undoubted cause of action against the jailer and his sureties; with legal means of compelling them to pay, to the whole extent of their estates, and, for aught which appears, to the full amount of his claim against Miller, the maker of the note in question, they have made no attempt to assert their rights against either. According to the spirit and principle of the Kentucky decisions, we are constrained to say, this is not due diligence; but that kind of legal negligence, which entitled the defendant to a judgment in his favor in the circuit court.

This view of the case renders it unnecessary to consider the effect of the

proceedings on the second note; which were conducted with less diligence than those on the first.

Having thus disposed of the first error assigned by the plaintiff, it remains to consider the second; which is, that the circuit court erred in rejecting the evidence offered of Miller's notorious insolvency at the time the note became due. If the court are correct in overruling the exception taken to the charge of the circuit court, we cannot reverse their judgment for overruling this evidence. It did not conduce to prove any fact material to the issue between the parties; which was, not whether Miller was in fact insolvent; but whether the plaintiff had, by due diligence, ascertained his insolvency, by legal process, commenced in time, diligently conducted till its final consummation, and by the exhaustion of all incidental and collateral remedies afforded by the law, without obtaining the debt. The proof, or the admission of actual insolvency, would in no wise relieve the plaintiffs from the duty imposed on them; it would not accelerate their right to sue the defendant, nor enlarge his obligation to pay, which did not arise by the mere insolvency of the maker of the note, but by its legal ascertainment in the manner prescribed by the judicial law of Kentucky. That law has been
*391] recognised by this court in the case of *Weisiger*, as *applicable to cases of this description. To decide now, that the plaintiffs could avail themselves of the insolvency of the maker, unaccompanied with the diligent use of all legal remedies; and in a case where we are of opinion, that the plaintiffs have not made use of the diligence which, under the circumstances of this case, it was incumbent on them to use, would be to disregard all the principles of Kentucky jurisprudence, as evidenced by the received opinion, general practice, and judicial decisions of that state. We think it is not an open question, whether these principles shall be respected by this court; and cannot feel authorized to depart from them, in a case to which their application cannot be questioned. The judgment of the circuit court is, therefore, 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 seventh circuit and district of Kentucky, 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 cause be and the same is hereby affirmed, with costs.

392] *Oliver Saunders, Plaintiff in error, *v.* Benjamin Gould.

Practice.

Where the whole cause, and not a point or points in the cause, has been adjourned from the circuit court to this court, the case will be remanded to the circuit court.

The case was admitted to be essentially the same with that of Gardner *v.* Collins, 2 Pet. 58; but the counsel for the plaintiff relied on evidence adduced to show a settled judicial construction of the act of the legislature of Rhode Island, relative to descents, different from that which had been made in this court: "The court is not convinced that the construction of the act which prevails in Rhode Island is opposed to that which was made by this court."

This case came before the court on a Certificate of a Division of opinion by the judges of the Circuit Court for the district of Rhode Island. It was

submitted, without argument, by *Coxe*, for the plaintiff in error; and *Whipple*, for the defendant.

Marshall, Ch. J., stated—When this case was brought before the court, it was admitted by the counsel to be essentially the same with *Gardner* v. *Collins*, reported in 2 Pet. 58; but he relied on certain evidence which he exhibited, of a settled judicial construction of the act on which the cause depended, different from that which had been made by this court. Had the court been satisfied on this point, that settled construction would undoubtedly have been respected. But the court was not convinced that the construction which prevails in Rhode Island is opposed to that which was made by this court. On communicating this decision to the bar, counsel declined arguing the cause; and a certificate, similar to that which was given in the former case, was about to be prepared; but on inspecting the record, it was perceived, that the judges of the circuit court, instead of dividing on one or more points, had divided on the whole cause; and had directed the whole case to be certified to this court. Considering this as irregular, the court directs the cause to be remanded to the circuit court; that further proceedings may be had therein according to law.

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*Sarah Spratt, Administratix of James Spratt, Appellant, *v.* Thomas Spratt, Respondent. [*393

Naturalization.—Descent to alien heirs.

The second section of the act of congress "to establish an uniform system of naturalization," passed in 1802, requires that every person desirous of being naturalized, shall make report of himself to the clerk of the district court of the district where he shall arrive, or some other court of record in the United States; which report is to be recorded, and a certificate of the same given to such alien; and "which certificate shall be exhibited to the court by every alien who may arrive in the United States, after the passing of the act, on his application to be naturalized, as evidence of the time of his arrival within the United States:" James Spratt arrived in the United States, after the passing of this act, and was under the obligation to report himself according to its provisions. The law does not require that the report shall have been made five years before the application for naturalization, the third condition of the first section of the law, which declares that the court admitting an alien to become a citizen "shall be satisfied that he has resided five years in the United States," &c., does not prescribe the evidence which shall be satisfactory; the report is required by the law to be exhibited on the application for naturalization, as evidence of the time of the arrival in the United States; the law does not say the report shall be the sole evidence; nor does it require that the alien shall report himself within any limited time after arrival; five years may intervene between the time of arrival and the report, and yet the report be valid; the report is undoubtedly conclusive evidence of the arrival; but it is not made by the law the only evidence of that fact. p. 406.

James Spratt was admitted a citizen of the United States, by the circuit court for the county of Washington, in the district of Columbia, and obtained a certificate of the same, in the usual form. The act of the court admitting James Spratt as a citizen, was a judgment of the circuit court; and this court cannot look behind it, and inquire on what testimony it was pronounced. p. 406.

The various acts on the subject of naturalization, submit the decision upon the right of aliens to courts of record; they are to receive testimony, to compare it with the law, and to judge on both law and fact; if their judgment be entered on record in legal form, it closes all inquiry and like any other judgment, is complete evidence of its own validity.[1] p. 408.

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[1] The Ocean, 2 Abb. U. S. 434; Ritchie v. Putnam, 13 Wend. 524; Banks v. Walker, 3 Barb. Ch. 438; McCarthy v. Marsh, 5 N. Y. 263; Commonwealth v. Leary, 1 Brewst. 27.

Spratt v. Spratt.

The act of the legislature of Maryland of 1791, which authorizes the descent to alien heirs, of lands held by aliens under "deed or will," in that part of the district of Columbia which was ceded to the United States by the state of Maryland, does not authorize the descent to such heirs of land, in that part of the district, which was purchased by an alien, at a sale made under an order of the court of chancery, and for which no deed was executed, before the purchaser became a citizen of the United States, or before his decease. p. 408.

Error to the Circuit Court of the district of Columbia, and county of Washington, on a case stated in that court. *The plaintiff, Thomas Spratt, instituted in the circuit court, an action of replevin; the defendant, as the administratrix of James Spratt, having levied a distress on the property of the plaintiff, for rent claimed to be due for a house occupied by him in the city of Washington, and to which he claimed title in himself, and in the brothers and sisters of James Spratt, deceased. It was agreed, by the counsel, that the title to the house and lot of ground upon which the same is erected, should be determined upon the following stated facts:

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Thomas Spratt, Andrew Spratt, Sarah Spratt and Catharine Spratt, are brothers and sisters of the whole blood of James Spratt, the intestate, and are natives of Ireland, and subjects of the king of Great Britain, and were not, before the institution of this suit, naturalized as citizens of the United States; and but one of them, Thomas Spratt, and the deceased, James Spratt, ever came to the United States. James Spratt was also a native of Ireland, and came to the United States, some time before the 18th of June 1812; from which time, he continued to reside in the United States, until March 1824, when he died without issue, leaving Sarah Spratt his widow, who became the administratrix to his estate.

James Spratt, on the 17th of May 1817, appeared in the circuit court of the district of Columbia, for the county of Washington, and before the court made the declaration on oath required by the first condition of the first section of the act to establish an uniform system of naturalization, &c., passed the 14th of April 1802; which proceeding was recorded in the minutes of the court's proceedings, and a certificate thereof, under the hand of the clerk and the seal of the court, on the same day, given to James Spratt; he having, on the 14th of April then next preceding, made report of himself to the clerk of the circuit court, as stated in the certificate; which report was recorded in the office of the said clerk, and the certificate of such report and registry, and of the declaration on oath, having been granted by the clerk to him. On the 11th of October 1821, James Spratt made application to the said circuit court to be admitted a citizen of the United States; and was, on the same day, admitted *by the court to become a citizen of the United States, as appears by the record of the proceedings of the court, upon the matter of the said application: a certificate whereof, under the hand of the clerk, and the seal of the court, was afterwards given by the clerk to him, and is part of the case.

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Sarah Spratt was also a native of Ireland, and a native-born subject of the king of England; she emigrated to the United States, before James Spratt, and had continually, from the time of her emigration, resided in the United States; and before his naturalization, was lawfully married to him, and lived with him as his lawful wife, from their marriage, till his death in March 1824, and was his wife, at and before the time of his said naturalization; but had not been naturalized as a citizen of the United States, pursuant

to the act of congress, unless so naturalized by the naturalization of her husband.

On the 9th of June 1825, the plaintiff and his brothers and sisters, claiming as heirs-at-law of James Spratt, brought their action of ejectment in this court, against Sarah Spratt, to recover possession of sundry of the lands and tenements whereof James Spratt died seised in fee, not including the messuage and tenement in this suit; in which suit (the same having been duly prosecuted and put to issue), such proceedings were had, that the title of Thomas Spratt was duly submitted to the consideration and judgment of the court, upon a case agreed and stated between the parties, to be taken and considered as a special verdict; upon which the court gave judgment for Sarah Spratt; whereupon, a writ of error was sued out to the supreme court of the United States, where the judgment was re-examined, as appears in 1 Pet. 343, which is part of the case.

In the matter of a suit in the circuit court of the county of Washington, by one of the creditors of Simon Meade, deceased, Joseph Forrest was appointed to make sale of certain real estate of Simon Meade, and after having set up the same for public sale, to return the sale to the court for confirmation; and having, on the 21st day of May 1821, set *up the [*396
estate, on terms specified, by which the purchase-money was to be paid in four instalments, at six, twelve, eighteen and twenty-four months, and that a conveyance of the property should be made to the purchaser, on the ratification of the sale by the court. The house and lot in question, in this case, were purchased by James Spratt; and on the 21st October 1821, the trustee returned the sale to the court. On the 24th of December 1822, an interlocutory order was made for the ratification of the report of the sale; and in January 1824, a final ratification of the sale was passed by the court.

James Spratt, after his naturalization, and not before, paid the purchase-money for the property, by the instalments, with interest; but no deed of conveyance of the same was ever executed to him, and he died invested with no other title to the premises in controversy, but what he acquired by the sale at auction, the written memorandum, report and ratification thereof, and the payment of the purchase-money.

In the statement of the case thus agreed, there was inserted the following memorandum; which was signed by the counsel for the parties in the cause.

"It is understood, however, that the plaintiff does not admit, but denies, that the proceeding and evidence touching the naturalization of James Spratt, or any part of the same, do purport to be, or to show, a due and legal naturalization of James Spratt as a citizen of the United States; and maintains, that the manner and process of such pretended naturalization appears from such proceedings and evidence, to have been irregular and void; unless such proceedings and evidence, or any part of the same, be held by the court to be conclusive in this case, that he was duly and legally naturalized as such citizen. While the defendant and avowant, on the other hand, maintains, that no defect or irregularity appears in the manner and process of such naturalization; that the manner and process of the same in its preliminary stages are not examinable in this case; but that the admission of James Spratt to become a citizen of the United States, as it appears in the record and certificate thereof, is, either substantively, or in connec-

tion with the other evidence *thereof, conclusive of his due naturalization as such citizen: all which matters are understood and agreed to be involved in the question of title, and to be accordingly reserved for the consideration and judgment of the court upon the premises."

The declaration for naturalization made by James Spratt, was in the following terms:

"James Spratt, a native of Ireland, aged about twenty-six years, bearing allegiance to the king of Great Britain and Ireland, who emigrated from Ireland, and arrived in the United States on the 1st of June 1812, and intends to reside within the jurisdiction and under the government of the United States, makes report of himself for naturalization, according to the acts of congress in that case made and provided, the 14th of April, Anno Domini 1817, in the clerk's office of the circuit court of the district of Columbia for the county of Washington; and on the 14th of May 1817, the said James Spratt personally appeared in open court, and declared on oath, that it is *bonâ fide* his intention to become a citizen of the United States, and to renounce all allegiance and fidelity to every foreign prince," &c.

W. Brent, Clerk.

The record of the proceedings of the circuit court on the naturalization of James Spratt, was in the following terms:

"At a circuit court of the district of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the first Monday of October, being the first day of the same month, in the year of our Lord 1821, and of the independence of the United States the forty-sixth, James Spratt, a native of Ireland, aged about thirty years, having heretofore, to wit, on the 14th of May 1817, declared, on oath, in open court, that it was *bonâ fide* his intention to become a citizen of the United States, and to renounce for ever all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the king of the united kingdom of Great Britain and Ireland. And it now appearing to the satis-
*398] faction of the court, by *the testimony of two witnesses, citizens of the United States, to wit, Samuel N. Smallwood and Jona han Prout, that the same James Spratt hath resided within the limits and under the jurisdiction of the United States for five years at least last past, and within the county of Washington one year at least last past, and that during the whole of that time, he hath behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same—the said James Spratt is thereupon admitted a citizen of the United States; having taken the oath 'that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly, to the king of the united kingdom of Great Britain and Ireland, to whom he was before a subject.' 11th of October 1821."

A certificate in due form, corresponding with this record, was given to James Spratt.

For the appellant, it was contended: 1. That the admission of said James Spratt to citizenship, as stated in the record, was legal. 2. That whether regular or not, it is conclusive as the judgment of a court upon a

subject within its jurisdiction. 3. That whether so or not, the parties are concluded by the admission in the former case stated. 4. That no deed or conveyance having ever passed to James Spratt, in his life, the appellees could not inherit under the act of Maryland. 5. That if the Maryland law would entitle the appellees to inherit any estate but one executed by an actual conveyance, and the time when he acquired a right to the estate should be thought material; then, it will be contended, that he acquired such a right, not at the time of bidding, but either on his paying the purchase-money, or on the ratification of the sale; both which events occurred after his naturalization.

**Key* and *Jones*, for the appellant, argued, that the naturalization of Thomas Spratt had been regular, according to the requirements of [*399 the act of congress. The law does not make the report made by the alien, and the register of his arrival, the only evidence of the period and fact of his arrival in the United States. Acts of congress, 22d of March 1816; July 30th, 1813. The court are to be satisfied of the facts, and are not excluded from receiving other evidence than the register. While it is admitted, that this is the best evidence, it does not follow, that it is the only evidence which can be received. The court are authorized to act on such evidence as will enable them to decide on the application for naturalization. One objection which is made is, that the place of the residence of Thomas Spratt is not stated in the proceedings. To this it is answered, that such proceedings are not to be examined critically. It would be dangerous to the property of numbers, if exceptions of this character were encouraged. But no part of the law makes the place of the residence of the alien material; except that he shall have resided for one year preceding the application, in the state where he shall apply to be naturalized.

The act of admission to citizenship, by a court authorized to admit to naturalization, is of itself sufficient evidence of citizenship, without looking behind it. It is a judicial act of a court of competent jurisdiction, and upon which it has adjudicated. If, in the proceedings of the court, in a matter necessarily judicial, in which testimony has been adduced, upon which it has been passed a judgment, and of which a record has been made by the proper officers, there has been anything erroneous, the court should itself correct it; but until this is done, it is binding on all the world. 7 Co. 420; 2 Pet. 157; 5 Cranch 174. But a fair and full examination of the different provisions of the laws relative to naturalization will show that the proceedings of the circuit court were entirely correct and legal.

The property in controversy, although purchased by Thomas Spratt before his naturalization, was not held by deed; no conveyance having been made to him of the same, even up to the time of his death. *The [*400 right of a foreigner thus to take lands, depends on the particular words of the statute; and the case must be one within its provisions, or it will not operate. The terms of it are, in reference to lands within that part of the district of Columbia which was ceded to the United States, held by aliens "under deed or will, hereafter to be made." Thus, the provisions are limited to lands acquired or held by one of this description of titles. The bid of Thomas Spratt acquired for him an equitable interest in the

property; and he became a trustee, not for his foreign heirs, but for his wife, who, by his subsequent naturalization, became a citizen. The law did not intend, that such an interest should go to his foreign heirs. There is good reason why the law of Maryland should confine the mode of taking to an actual, executed, legal title. Equitable interests in land are sources of infinite confusion. In Maryland, in 1793, they were not subject to execution for debt; and have been made so in 1810. Thus, a foreigner, under the construction claimed, would take an equitable title to land, having all the benefits of it, and it would not be subject to the claims of his creditors. As to the liability to execution of equitable interests in lands, they cited 3 Johns. Ch. 316; 1 Caines Cas. 46; 1 Murph. 383; 18 Johns. 94; 4 Har. & McHen. 533; 5 Johns. 335; 4 Ibid. 41; 7 Ibid. 206.

By the bid for the property, no absolute title was required. The whole proceedings of the trustee were subject to examination by the court, and required its confirmation. Thus, by the case, until 1824, when the sale was finally ratified, the title of the purchaser was not complete, and the deed, then to be executed according to the decree, would not relate back to the time of the sale.

Coxe, for the defendant.—Whether James Spratt was actually naturalized, depends upon a proper construction of the act of April 14th, 1802. It is contended, that the certificate is essentially defective, under the provisions
*401] of this law. *1. It does not ascertain the place of his intended settlement. 2. It was not made five years anterior to the 11th of October 1821. The act requires every person, being an alien, who may arrive in the United States, subsequent to its passage, to report such his arrival. The certificate is to be exhibited by such alien, on his application to be naturalized, as evidence of the time of his arrival within the United States. It is not required, that the certificate should set forth the period of his arrival; but the meaning of the act is, that the date of such certificate shall be considered as that of the arrival.

The act of 1790 contained no provision for a previous declaration of an intention to become a citizen. All that was to be done, was to be done at the time of naturalization. The act of 1795 required such a declaration; it was to be made three years before he could be naturalized, and must set forth a residence of five years. The act of 1798 required this declaration to be made five years before the admission, and that he should make an averment of fourteen years' residence, before his application. The act of 1802 is applicable to those who were then within the United States, and had taken the preliminary steps. This act has been much considered here, as well as elsewhere. In this district, after solemn argument, the point has been ruled in accordance with the present judgment of the court. The circuit court of Pennsylvania gave the same construction to the law. Pet. C. C. 457.

As to the argument, that the record is conclusive as to the right, it may be urged, that several of the acts of congress expressly negative this; if the pre-requisites of the statute are not complied with, the certificate is a nullity. There is a great danger in considering these certificates as conclusive, from the number of courts who are authorized under the law to issue them. If those who are to issue them may omit any one of these requisites, they may omit all. Persons who have never been in the United States may obtain

them. Persons may procure them, immediately on their arrival here. *This is not a judicial act, but one purely ministerial. 3 T. R. 126; [*402 Toller 128. The powers to admit to the rights of citizenship have been uniformly vested in, and exercised by state courts, under the authority of congress. But congress cannot vest any part of the judicial power of the United States in state tribunals. 1 Wheat. 304, 330; *Martin* v. *Hunter's Lessee*, 5 Ibid. 27. There are no parties; all is *ex parte*. No one can remove the proceedings by writ of error, *certiorari*, or in any other manner. No one can oppose the act of granting the evidence of naturalization. If ministerial, the proceedings must, on their face, show that they were correct. If the exercise of a judicial power, still it must appear that the court had jurisdiction, not only over the subject-matter, but over the party, in the circumstances in which he stood. This doctrine is fully laid down in *Rose* v. *Himely*, 4 Cranch 268; and the case of *Griffith* v. *Frazier*, 8 Ibid. 1, 22, 8; *Walker* v. *Turner*, 9 Wheat. 541. Also, 1 Paine 55.

The next objection is, that the plaintiff cannot recover, because this is a mere equitable estate. It cannot be questioned, but that, as well by the common law, as by the general statutes of descent of Maryland, equitable estates descend precisely as do legal. Is this equitable estate embraced within the sixth section of the act of Maryland of December 19th, 1791? (Burch's Dig. 221.) It provides, "that any foreigner may, by deed or will, hereafter to be made, take and hold lands," &c. The law recognises two modes of acquiring lands—descent and purchase. In general, the only modes of acquiring lands by purchase, are by deed or will. When an agreement of purchase is made, the party is considered in equity as the owner, because he is in equity entitled to a deed. Whether the deed be, or be not, in fact, executed, it is by and through the deed that the estate is his. A deed actually executed, under our law, passes no title, unless recorded within the time stipulated; but it confers upon the grantee a right to come into chancery to have it recorded; which, when obtained, *relates [*403 back, as between the parties, to the date of the agreement. Maryland Laws, 1766, c. 14, § 2; 1785, c. 72, § 12. In equity, James Spratt was entitled to a deed, from the moment the sale was made, provided it was ratified. Equity will consider that as done which ought to have been done. Sugd. 40, 353; 13 Ves. 517; 2 Cox 231.

Marshall, Ch. J., delivered the opinion of the court.—This case depends entirely on the title of the defendant in error to the premises in the avowry mentioned, who is one of the brothers and heirs of James Spratt, deceased.

James Spratt was a native of Ireland, who arrived in the United States, previous to the 18th of June 1812, and resided therein until his death. On the 14th of April, in the year 1817, he made report of himself to the clerk of the circuit court of the United States for the district of Columbia, in the county of Washington, which report was recorded; and on the 17th of May thereafter, he appeared in the same court, and made the declaration, on oath, required by the first condition of the first section of the act "to establish an uniform rule of naturalization," &c., passed the 14th of April 1802; which proceeding was recorded, and a certificate thereof granted in the following words:

"District of Columbia, to wit: James Spratt, a native of Ireland, aged

about twenty-six years, bearing allegiance to the king of Great Britain and Ireland, who emigrated from Ireland, and arrived in the United States on the 1st of June 1812, and intends to reside within the jurisdiction and under the government of the United States, makes report of himself for naturalization, according to the acts of congress in that case made and provided, the 14th of April, Anno Domini 1817, in the clerk's office of the circuit court of the district of Columbia, for the county of Washington; and on the 14th of May 1817, the said James Spratt personally appeared in open court, and declared, on oath, that it is his intention to become a citizen of the United
*404] States, and to *renounce all allegiance and fidelity to every foreign prince," &c.

This certificate was given under the hand and seal of the clerk. On the 11th of October 1821, James Spratt again appeared in open court, and took the oath required by law, and was admitted as a citizen. The certificate of his admission states that the three first conditions required by the act of the 14th of April 1802, had been complied with.

The said James Spratt intermarried with the plaintiff in error, Sarah Spratt, and departed this life in March 1824, without issue, and intestate. The plaintiff in replevin is a native-born subject of the king of Great Britain and Ireland, and was not naturalized at the time of the institution of this suit.

In the year 1791, the state of Maryland passed an act entitled "an act concerning the territory of Columbia and the city of Washington;" the sixth section of which provides, "that any foreigner may, by deed or will, to be hereafter made, take and hold lands within that part of the said territory which lies within this state, in the same manner as if he was a citizen of this state; and the same lands may be conveyed by him, and transmitted to, and be inherited by, his heirs or relations, as if he and they were citizens of this state." This act continues in force.

A decree was made by the circuit court, for the sale of the estate of Simon Meade, deceased, to satisfy his creditors, on certain conditions therein specified. In pursuance of this decree, Joseph Forrest, who was appointed to carry the same into execution, did, on the 21st of May 1821, offer the real estate of the said Simon Meade for sale, on the terms and conditions following, to wit: that the purchase-money should be paid in four equal instalments, at six, twelve, eighteen and twenty-four months, respectively, from the day of sale, with interest; and that a conveyance of the property in fee-simple should be made to the purchaser, upon the ratification of the sale by the court, and the payment of all the said instalments of the pur-
*405] chase-money, with interest. At this sale, the said *James Spratt became the purchaser of the lot in the avowry mentioned. On the 15th of October 1821, the said Joseph Forrest made his report to the court; and on the 24th of December 1822, an interlocutory decree was made for confirming the sale; and on the 26th of January 1824, the final decree of confirmation was passed. No deed was executed during the lifetime of the said James Spratt. The bidding at the sale was made while the said James Spratt was an alien; but before any other step was taken, he became a citizen.

Upon this state of facts, the circuit court gave judgment for the plaintiff in replevin; which judgment has been brought before this court by writ of error.

Spratt v. Spratt.

This cause has been argued very elaborately by counsel. It appears to the court to depend essentially on two questions. 1. Was James Spratt a citizen of the United States? 2. If he became a citizen, did the premises in the avowry mentioned pass to his alien relations, who are his next of kin?

1. The first question depends on the act of 1802, for establishing an uniform rule of naturalization. The act declares, that an alien may be admitted to become a citizen of the United States, "on the following conditions, and not otherwise." The act then prescribes four conditions, the three first of which were applicable to James Spratt, and were literally observed. The second section enacts, "that in addition to the directions aforesaid, all free white persons, being aliens, who may arrive in the United States, after the passing of this act, shall, in order to become citizens of the United States, make registry and obtain certificates, in the following manner, to wit: every person desirous of being naturalized, shall, if of the age of twenty-one years, make report of himself," &c. The law then directs what the contents of the report shall be; orders it to be recorded, and that a certificate thereof shall be granted to the person making the report, "which certificate shall be exhibited to the court by every alien who may arrive in the United States, after the passing of this act, on his *application to be naturalized, as evidence of the time of his arrival within the United States." [*406

As James Spratt arrived within the United States, after the passage of the act of 1802, he is embraced by the second section of that act, and was under the necessity of reporting himself to the clerk, as that section requires, Must this report be made five years before he can be admitted as a citizen? The law does not in terms require it. The third condition of the first section provides, "that the court admitting such alien shall be satisfied that he has resided within the United States five years at least," but does not prescribe the testimony which shall be satisfactory. This section was in force when James Spratt was admitted to become a citizen, and was applicable to his case. But the second section requires, in addition, that he shall report himself, in the manner prescribed by that section; and requires that such report shall be exhibited, "on his application to be naturalized, as evidence of the time of his arrival within the United States." The law does not say, that this report shall be the sole evidence, nor does it require, that the alien shall report himself within any limited time after his arrival. Five years may intervene between his arrival and report, and yet the report will be valid. The report is undoubtedly conclusive evidence of the arrival, and must be so received by the court; but if the law intended to make it the only admissible evidence, and to exclude the proof which had been held sufficient, that intention ought to have been expressed. Yet the inference is very strong, from the language of the act, that the time of arrival must be proved by this report; and that a court, about to admit an alien to the rights of citizenship, ought to require its production.

But is it anything more than evidence, which ought indeed to be required to satisfy the judgment of the court, but the want of which cannot annul that judgment? The judgment has been rendered in a form which is unexceptionable. Can we look behind it, and inquire on what testimony it was pronounced? *The act does not require that the report [*407

shall be mentioned in the judgment of the court, or shall form a part of the certificate of citizenship. The judgment and certificate are valid, though they do not allude to it. This furnishes reason for the opinion, that the act directed this report as evidence for the court; but did not mean, that the act of admitting the alien to become a citizen, should be subject to revision, at all times afterwards, and to be declared a nullity, if the report of arrival should not have been made five years previous to such admission.

The act of 1816, § 6, has, we think, considerable influence on this question. That act requires, that the certificates of report and registry, required as evidence of the time of arrival in the United States, and of the declaration of intention to become a citizen, "shall be exhibited by every alien, on his application to be admitted a citizen of the United States, who shall have arrived within the limits and under the jurisdiction of the United States, since the 18th day of June 1812; and shall each be recited at full length in the record of the court admitting such alien; and any pretended admission of an alien, who shall have arrived within the limits and under the jurisdiction of the United States, since the said 18th day of June 1812, to be a citizen, after the promulgation of this act, without such recital of each certificate at full length, shall be of no validity." James Spratt arrived within the United States previous to the 18th day of June 1812, and is, consequently, not within the provisions of the act of 1816.

This act is not extended to explain the act of 1802, but to add to its provisions. It prescribes that which the previous law did not require; and prescribes it for those aliens only, who arrive within the United States after the 18th day of June 1812. It annuls the certificates of citizenship which may be granted to such aliens, without the requisite recitals; consequently, without this act, such certificates would have been valid. The law did not require the insertion of these recitals in the certificate of James Spratt.

The various acts upon the subject, submit the decision on the right of aliens to admission as citizens to courts of *record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity.

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The inconvenience which might arise from this principle, has been pressed upon the court. But the inconvenience might be still greater, if the opposite opinion be established. It might be productive of great mischief, if, after the acquisition of property, on the faith of his certificate, an individual might be exposed to the disabilities of an alien, on account of an error in the court, not apparent on the record of his admission. We are all of opinion, that James Spratt became a citizen of the United States on the 11th of October 1821.

2. Did the property mentioned in the avowry descend to his alien relations? Since aliens are incapable of taking by descent, the answer to this question depends on the enabling act of the state of Maryland, in the year 1791. That act does not enable aliens who may come into the district of Columbia, to transmit all real estate, however acquired, to their alien relations, by descent; but such lands only as shall be thereafter required by deed or will. This is a qualification of the power, which cannot be disregarded. The words are not senseless; and would not, we must suppose,

have been inserted, had they not been intended to operate. They limit the capacity of an alien to inherit from his alien ancestor, residing within this district, to lands which he had taken by deed or will. It is not for us to weigh the reasons which induced the legislature to impose this limitation. It is enough for a court of justice to know, that the legislature has imposed it, and that it forms part of the law of the case. If any equivalent act might be substituted for a deed, no such equivalent act can be found in this case. The auction at which this property was sold certainly took place while James Spratt was an alien; but the sale was entirely conditional, and the purchase depended on the payment of *the instalments, on the confirmation of the court, and the final decree of the court. Before the first [*409 instalment became due, before even the report was returned to the court, James Spratt became a citizen. He did not, therefore, while an alien, hold this land by a deed, or by any title equivalent to a deed. In a controversy between the alien heirs of James Spratt and Sarah Spratt, 1 Pet. 343, this court determined, that land which James Spratt took and held under the enabling act of Maryland, descended to his alien heirs, but that land which he took and held as a citizen, did not pass to those heirs. The lot mentioned in the avowry comes, we think, within the last description; and did not descend to the plaintiff in replevin.

The judgment of the circuit court is reversed, and the cause remanded, with directions to enter judgment for the avowant.

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 ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with instructions to enter judgment in the said court for the avowant in said cause.

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*Hiram Craig, John Moore and Ephraim Moore *v.* State of [*410
Missouri.

Constitutional law.—Bills of credit.—Illegal contract.—Error to state court.

On the 27th day of June 1821, the legislature of the state of Missouri passed an act, entitled "an act for the establishment of loan-offices;" by the third section of which, the officers of the treasury of the state, under the direction of the governor, were required to issue certificates to the amount of $200,000, of denominations not exceeding ten dollars, nor less than fifty cents, in the following form: "This certificate shall be receivable at the treasury, or any of the loan-offices in the state of Missouri, in discharge of taxes or debts due to the state, for the sum of ——— dollars, with interest for the same, at the rate of two per centum per annum from this date." These certificates were to be receivable at the treasury, and by tax-gatherers and other public officers, in payment of taxes, or moneys due or to become due to the state, or to any town or county therein, and by all officers, civil and military, in the state, in discharge of salaries and fees of office; and in payment for salt made at the salt-springs owned by the state, and to be afterwards leased by the authority of the legislature; the 23d section of the act pledged certain property of the state for the redemption of these certificates; and the law authorized the governor to negotiate a loan of silver or gold for the same purpose. A provision was made in the law for the gradual withdrawal of the certificates from circulation; and

all the certificates had since been redeemed. The commissioners of the loan-offices were authorized to make loans of the certificates to citizens of the state, assigning to each district a proportion of the amount of the certificates, to be secured by mortgage or personal security; the loans to bear interest not exceeding six per cent. per annum, and the loans on personal property to be for less than $200: *Held*, that the certificates issued under the authority of the law of Missouri, were "bills of credit;" and that their emission was prohibited by the constitution of the United States, which declares that no state shall "emit bills of credit."[1]

A promissory note given for certificates issued at the loan-office of Chariton, in Missouri, payable to the state of Missouri, under the act of the legislature "establishing loan-offices," is void.

The action was *assumpsit* on a promissory note, and the record stated, "that neither party having required a jury, the cause was submitted to the court; and the court having seen and heard the evidence, the court found, that the defendants did assume as the plaintiff had declared; that the consideration for the note and the *assumpsit* was for loan-office certificates, loaned by the state of Missouri, at her loan-office in Chariton, which certificates were issued under "an act for establishing loan-offices," &c.: *Held*, that it could not be doubted, that the declaration was on a note given in pursuance of the act of Missouri; and that under the plea of *non assumpsit*, the defendants were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. The record, thus exhibiting the case, gives jurisdiction to this court over the case. *a writ of error prosecuted by the defendants to this court from the supreme court of Missouri, under the provisions of the 25th section of the judiciary act of 1789.

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Everything which disaffirms the contract; everything which shows it to be void; may be given in evidence on the general issue, in an action of *assumpsit*.[2] p. 426.

In its enlarged, and perhaps literal sense, the term, "bill of credit," may comprehend any instrument by which a state engages to pay money at a future day; thus including a certificate given for money borrowed; but the language of the constitution itself, and the mischief to be prevented, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a state binds itself to pay money at a future day, for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit," "To emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community, for its ordinary purposes, as money; which paper is redeemable at a future day; this is the sense in which the terms have always been understood. p. 431.

The constitution considers the emission of bills of credit, and the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed; both are forbidden. To sustain the one, because it is not also the other; to say, that bills of credit may be emitted, if they be not made a tender in payment of debts; is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. p. 434.

It has long been settled, that a promise made in consideration of an act which is forbidden by the law, is void; it will not be questioned, that an act forbidden by the constitution of the United States, which is the supreme law, is against law. p. 436.

Missouri *v.* Craig, 1 Mo. 502, reversed.

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[1] Re-affirmed in Byrne *v.* Missouri, 8 Pet. 40. To constitute a bill of credit, within the constitutional prohibition, it must be issued by a state, involve the faith of the state, and be designed to circulate as money, on the credit of the state, in the ordinary course of business. Briscoe *v.* Bank of Kentucky, 11 Pet. 257; Darrington *v.* Bank of Alabama, 13 How. 12. The facts that the state owns the entire capital stock of a bank, elects the directors, makes its bills receivable for public dues, and pledges its faith for their redemption, do not make the bills of such bank "bills of credit" in the constitutional sense. Darrington *v.* Bank of Alabama, *ut supra*. The constitution does not forbid states or counties from borrowing money, and giving proper securities therefor; these are not "bills of credit," within the meaning of the constitution. McCoy *v.* Washington County, 3 Wall. Jr. C. C. 381. See Pagaud *v.* State, 5 Sm. & Marsh. 491. The right of congress to issue bills of credit and to make them a legal tender for pre-existing debts, is settled by repeated decisions. Knox *v.* Lee, 12 Wall. 457; Railroad Co. *v.* Johnson, 15 Id. 457.

[2] See Von Storch *v.* Griffin, 77 Penn. St. 504; Scott *v.* Kittanning Coal Co., 89 Id. 231.

Craig v. Missouri.

ERROR to the Supreme Court of the State of Missouri. In 1823, an action of trespass on the case was instituted in the circuit court for the county of Chariton, in the state of Missouri, by the state of Missouri, against Hiram Craig and others. The declaration sets forth the cause of action in the following terms:

"For that, whereas, heretofore, on the 1st day of August, in the year of our Lord 1822, at the county of Chariton aforesaid, the said Craig, John Moore and Ephriam Moore, made their certain promissory note in writing, bearing date the day and year aforesaid, and now to the court here shown, and thereby, and then and there, for value received, jointly and severally, promised to pay to the state of Missouri, on the 1st day of November 1822, at the loan-office in Chariton, the sum of *$199.99, and the two per centum per annum, the interest accruing on the certificate [*412 borrowed, from the 1st day of October 1821: Nevertheless, the said Hiram Craig, John Moore and Ephraim Moore did not, on the 1st day of November, or at any time before or since, pay to the state of Missouri, at the loan-office in Chariton, the said sum of $199.99, or the two per centum per annum, the interest accruing on the certificates borrowed, from the 1st day of October 1821; but the same to pay, &c."

To this declaration, the defendants pleaded the general issue; and neither party requiring a trial by jury, the case was submitted to the court on the evidence, and the arguments of counsel. The record contained the following entry of the proceedings of the court:

"And afterwards, at a court began and held at Chariton, on Monday, the 1st day of November 1824, and on the 2d day of said court, in open court, the parties came into court, by their attorneys, and neither party requiring a jury, the cause is submitted to the court; therefore, all and singular the matters and things and evidences being seen and heard by the court, it is found by them, that the said defendants did assume upon themselves, in manner and form as the plaintiffs, by their counsel, allege; and the court also find, that the consideration for which the writing declared upon, and the *assumpsit* was made, was for the loan of loan-office certificates, loaned by the state, at her loan-office at Chariton; which certificates were issued, and the loan made, in the manner pointed out by an act of the legislature of the said state of Missouri, approved the 27th day of June 1821, entitled 'an act for the establishment of loan-offices,' and the acts amendatory and supplementary thereto. And the court do further find, that the plaintiff hath sustained damages by reason of the non-performance of the assumptions and undertakings of them, the said defendants, to the sum of $237.97; therefore, it is considered, &c."

The defendants in the circuit court of the county of Chariton appealed, in 1825, to the supreme court of the state of *Missouri, the highest tribunal in that state; where the judgment of the circuit court was [*413 affirmed. The defendants prosecuted this writ of error, under the 25th section of the judiciary act of 1789.

The act of the legislature of Missouri, under which the certificates were issued which formed the consideration of the note declared upon, was passed on the 27th of June 1821. It is entitled, "an act for the establishment of loan-offices, &c." The provisions of the 3d, 13th, 15th, 16th, 23d and 24th sections of the act, are all that have a connection with the questions in the case which were before the court.

"§ 3. That the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to, issue certificates, signed by the said auditor and treasurer, to the amount of $200,000, of denominations not exceeding ten dollars, nor less than fifty cents (to bear such devices as they may deem the most safe), in the following form, to wit: This certificate shall be receivable at the treasury, or any of the loan-offices, of the state of Missouri, in the discharge of taxes or debts due to the state, for the sum of $———, with interest for the same, at the rate of two per centum per annum from this date, the ——— day of —— 182–.

"§ 13. That the certificates of the said loan-office shall be receivable at the treasury of the state, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due, or to become due, to the state, or any county or town therein; and the said certificates shall also be received by all officers, civil and military, in the state, in discharge of salaries and fees of office.

"§ 15. That the commissioners of the said loan-offices shall have power to make loans of the said certificates to citizens of this state, residing within their respective districts only; and in each district, a proportion shall be loaned to the citizens of each county therein, according to the number thereof, secured by mortgage or personal security: Provided, that the sum *414] loaned on mortgage shall *never exceed one-half of the real unincumbered value of the estate so mortgaged: Provided also, that no loans shall ever be made for a longer period than one year, nor at a greater interest than at the rate of six per cent. per annum, which interest shall be always payable in advance; nor shall a loan in any case be renewed, unless the interest on such re-loan be also paid in advance: Provided also, that the commissioners aforesaid shall never make a call for the payment of any instalment, at a greater rate than ten per centum, for every six months; and that whenever any instalment to a greater amount than at the rate of ten per centum per annum be required, at least sixty days' previous notice shall be given to the person or persons thus required to pay: And provided also, that all and every person failing to make payment shall be deprived in future of credit in such office, and be liable to suit immediately, for the whole amount by him or them due.

"§ 16. That the said commissioners of each of the said offices are further authorized to make loans on personal securities, by them deemed good and sufficient, for sums less than $200; which securities shall be jointly and severally bound for the payment of the amount so loaned, with interest thereon, under the regulations contained in the preceding section of this act.

"§ 23. That the general assembly shall, as soon as may be, cause the salt-springs, and lands attached thereto, given by congress to this state, to be leased out, and it shall always be the fundamental condition in such leases, that the lessee or lessees shall receive the certificates hereby required to be issued, in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of the said salt-springs, the interest accruing to the state, and all estates purchased by officers of the several offices, under the provisions of this act, and all the debts now due, or hereafter to be due, to this state, are hereby pledged, and constituted a fund for the redemption of the certificates hereby required to be issued; and the faith of the state is hereby also pledged for the same purpose.

"§ 24. That it shall be the duty of the auditor and treasurer to withdraw, annually, from circulation *one-tenth part of the certificates which are hereby required to be issued, &c." [*415

The case was argued by *Sheffey*, for the plaintiffs in error; and by *Benton*, for the state of Missouri.

Sheffey, for the plaintiffs in error, contended: 1. That the record shows a proper case for the jurisdiction of this court, within the provisions of the 25th section of the judiciary act of 1789. 2. That the act of the legislature of Missouri, entitled "an act for the establishment of loan-offices," is unconstitutional and void; being repugnant to the provision of the constitution of the United States, which declares that no state shall emit bills of credit. 3. That the state of Missouri has no right to recover on the promissory note which is the foundation of this suit, because the consideration was illegal.

1. He argued, that this case comes fully within the purpose, spirit and letter of the 25th section of the judiciary act of 1789. The purpose of that section was, to place within the revising, controlling and correcting power of the supreme court of the United States, any violations of the constitution of the United States, or treaties, by state legislation. The harmony of the government, its equal operation, the preservation of its fundamental principles, the peace of the nation, rest securely upon the execution of this power of the supreme court. While this power would be cautiously used, it would be fearlessly asserted and employed, when it was required of the court, and enjoined on the judges. The government of the United States was one for the whole of "the people of the United States." It was formed for "the people;" and its solemn and impressive preamble contains the declaration, that, "we, the people of the United States, in order to form a more perfect union," "do ordain and establish this constitution of the United States." To keep the constitution perfect, and preserve it as a government for "the whole people," the 25th section of the judiciary law of 1789 was enacted. This law *brought into exercise the constitutional powers of the court, but it created no new powers. [*416

In the case of *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 330, this court have said, "the 25th section of the judiciary act of September 24th, 1799, is supported by the letter and spirit of the constitution." And in the same case (p. 324), they say, "the constitution of the United States was ordained and established," not by the United States in their sovereign capacities, but, as the preamble declares, "by the people of the United States." That a tribunal should exist, before which questions of a constitutional character may be brought, is not denied by any one; and the constitution itself has provided that which now entertains such questions. It has given to this court the powers which they exercise; great, extensive, superior and responsible as they are; that this court may stand forth as the guardians of the rights of the people, claimed and declared in the constitution, and that those rights may be protected from encroachment and destruction. To this court "the people" look for this protection; and when the invader of their rights is a sovereign state, they have not the less confidence and assurance, that the principles of the government will be preserved. This court know no parties to the cases which come before them for decision. It is the

principles which are to govern their decisions in those cases, to which the court look; and they leave to those from whom their powers are derived, to "the people of the United States," to decide, not upon their rightful and constitutional exercise of those powers, for, to the constitution they are answerable only for their exercise; but whether they shall continue so to use them. The whole people of the United States have given these powers; and they, only by a majority; and not a portion of them, less than this constitutional whole, can nullify those powers, or interrupt the exercise of any which are regularly applied under the constitution. The constitution must be changed by the whole people, before the exercise of this power of revision can cease.

This court have never been willing to employ its powers of inquiring into the constitutionality of laws, but where the *obligation was *417] imperative, and the case was one clearly within their duties. In the case of *Fletcher* v. *Peck*, 6 Cranch 128, the court declared, "the question, whether a law be void for its repugnancy to the constitution, is a question which ought seldom, if ever, to be decided, in a doubtful case. The opposition between the constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other."

To present the question in the case now before the court, no plea was necessary; the defence arises under the general issue. The record shows, that this was a case, in the courts of the state of Missouri, in which the constitutionality of a law of that state was brought into question. The cause of action is stated to be promissory notes given for certificates issued under the act of the legislature of Missouri establishing loan-offices; and the validity of these certificates must have been the whole subject of inquiry in the state courts. Their validity depended solely on the harmony of that act with the federal compact; and the courts of Missouri could only have affirmed their validity, by affirming the act under which they were issued, to be constitutional and valid; or in other terms, not repugnant to the constitution of the United States. This is not a new question. It has been frequently presented to this court; and has been uniformly decided according to the views of the plaintiffs in error. *Martin* v. *Hunter's Lessee*, 1 Wheat. 355; *Miller* v. *Nicholls*, 4 Ibid. 311; *Williams* v. *Norris*, 12 Ibid. 117. In *Wilson* v. *Black-bird Creek Marsh Company*, 2 Pet. 251, the court say: "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 or a treaty, has been misconstrued, or the decision could not be made."

2. The certificates issued by the state of Missouri under the law are "bills of credit;" and thus the law conflicts with the constitution of the United States. They are issued under the authority of the state, and put into circulation by the state, as the representative of money; as a substitute *for it; to perform the functions of money, by becoming the medium *418] of circulation. The prohibition of the constitution is in these terms; and every word in the clause is important and emphatic: "No state shall" "coin money," "emit bills of credit," "make anything but gold and silver coin a tender in payment of debts." What is the form and meaning of these bills? They purport to be receivable at the treasury, or any loan-office of the state, in discharge of taxes or debts due to the state. They are issued of different denominations, from ten dollars, to fifty cents, payable

to no particular person; they are, by the 23d section of the law, to be received for salt, by the lessees of the property of the state; by the officers of the state, in discharge of their salaries and fees of office. They pass, by delivery, with every characteristic of money. It is only necessary to state these, the purposes of their issue; the character and form of the certificates; the obligation imposed on the citizens of Missouri to receive them; to establish that they are "bills of credit;" "emitted" "by the state" of Missouri; or "coined" money; and that, not being "gold or silver," they are "a tender in payment of debts."

The sufferings of the people of the United States from the issues of paper money, or "bills of credit," during the revolution, were yet in full operation, when the constitution was formed. While it might be dangerous to deny that many of the means of the war were procured by the emission of that money; the exigencies of the country, struggling for existence, were the only safe apology for their use. When the confederated states were about to become a nation, which should owe its prosperity to sound and just and equal principles, the opportunity to reproduce the same state of things, the same wide and wasteful ruin, by the acts of any of the members of the confederacy, was at at once decisively and explicitly prohibited by those who formed the constitution. But if it be contended, that the certificates issued by the state of Missouri were not "bills of credit," because it is said, they are not declared by the act which directs their emission, to be "a legal tender;" it is asserted, *that if even they are not such, it is not essential to "a bill of credit" that it shall have that incident. Federalist, No. 44. Many of the bills issued by the states during the war were not made a legal tender; but they circulated widely, and with equally disastrous consequences. 9 Virginia Stat. at Large, 67, 147, 223, 480, &c. In relation to money as a circulating medium, the states are one. All and each have one and the same interest in a sound currency. These interests are a unit; not only from the neighborhood of the states to each other, the identity of their interests, and ther free and unrestrained intercourse; but because the regulations of the constitution embrace the whole subject of money as a circulating medium. To the existence of the government, certainly to its convenient fiscal operations, a uniform currency is important, if not essential; and if the principles which may be fairly drawn from a sound construction of the provision in the constitution under examination, extend to bring into doubt the legality of bank-notes circulated as money, under the charters granted to banks by state laws; these principles may not be the less true, nor their importance of the less magnitude. [*419

3. If the certificates for which promissory notes were given are void, and the act of the legislature of Missouri, on which they are founded, was against the constitution of the United States; the note upon which this action was brought in the circuit court of Missouri was without consideration, and void. The state cannot recover upon such notes.

Benton, for the defendant in error.—The state of Missouri has been "summoned" by a writ from this court, under a "penalty," to be and appear before this court. In the language of the writ, she is "commanded" and "enjoined" to appear. Language of this kind does not seem proper, when addressed to a sovereign state; nor are the terms fitting, even if the

only purpose of the process was to obtain the appearance of the state. They impute "a fault" in the state; they imply an omission or neglect by
*420] the state. *The language of "commanding and enjoining" would only be well employed, if these had occurred. The state of Missouri has done no act which was not within the full and ample powers she possesses as a free, sovereign and independent state. She has passed a law which she considers in the proper and beneficial exercise of her legislative functions; and which had for its object the promotion of the interests of her citizens.

Mr. Benton said, that he did not appear in this case for the state of Missouri, as in ordinary cases depending in this court; not as the advocate of the state; for her acts did not require the efforts of an advocate to vindicate them; he appeared rather as a "corps of observation," to watch what was going on. The state had passed a law authorizing the governor to employ counsel, and he had been called upon to represent the state. He had listened to what had been going on before the court; and he found a gentleman from another state, imputing to Missouri an act fraught with injustice and immorality. Such a course was not calculated to promote harmony, and to secure a continuance of the Union. If, in questions of this kind, or if, in any cases, the character of a sovereign state shall be made the subject of such imputation; this peaceful tribunal would not be enabled to procure the submission of the states to its jurisdiction; and contests about civil rights would be settled amid the din of arms, rather than in these halls of national justice.

The act of the legislature of Missouri, "establishing loan-offices," had no purposes to accomplish, by which injury could be sustained by any one. The deficiency of currency in the state, and the expenses which attended its new organization, made the arrangements proposed and authorized by the act convenient and beneficial to the citizens of the state. The state, when it directed that the certificates should be issued, made sufficient and certain provision for their redemption and payment. The permanent continuance of the circulation of the certificates was prohibited by an effective regula-
*421] tion in the bill; the 24th section *of the law provided for the extinction of the certificates, as they should come in; and power was given to the governor, by the 29th section of the law, to negotiate a loan of gold and silver for their redemption. Thus, the certificates were issued upon ample means for their discharge; and their discharge to their full value must soon take place. These certificates were not made a legal tender. They are not directed to pass as "money;" and while there is no obligation imposed by the law, that they shall be taken by the citizens of the state; it declares, that the state shall take them in payment for taxes, for salt, and for fees of office.

When examined, these certificates will be found to be nothing more than evidences of loans made to the state; and for the payment of which she has given specific and available pledges. It will not be contended, that the states have not power to borrow money; and what other form of certificate of a loan, than that which was adopted by the state of Missouri, can be devised, when this power is exercised. In every state of the Union, loans have been negotiable; and certificates of the amount due by the state to the individual lenders are issued. The certificates which were the consideration

of the note, were, therefore, not "bills of credit," in the constitutional acceptation of such instruments.

An examination of the legislation of the states in which such bills were issued, and the proceedings under those laws, will clearly show, that the condition of things in the view and recollection of the convention which formed the constitution, was different, in every essential feature, from that which was created by the law of Missouri. Massachusetts, in 1690, issued bills of credit, to pay taxes and other debts due to the state treasury; but the soldiers, to whom they were offered, would not receive them. 1 Hutchinson's Hist. 402, 404. In 1714 and 1716, other issues were made, and they were directed to pass as money, and made a tender. In 1749, the issuing of such bills was discontinued. During the revolution, the "bills of credit" which were *issued by the authority of the states, and by that of congress, were in most cases made a tender; and this was the objection- [*422
able feature in them. So long as no objection to receive them is imposed by the law which directs or authorizes their emission, they can injure no one. Free to refuse them, the citizen may protect himself from loss by their depreciation, by rejecting them.

The bills issued under the Missouri law have not this vice. That part of the law which obliges the officers of the state to receive them for salaries and fees, is not before the court. The notes in this suit were given voluntarily; and thus, in reference to the case of the plaintiffs in error, it cannot be said, that the certificate given for the note had the character of "a legal tender." In reference to the duty imposed on the lessees of the salt-springs owned by the state, it should be known to the court, that when the "act for the establishment of loan-offices" was passed, no leases had been given for those salt-springs. If it was to be made a condition of the lease, to which the lessee would consent, that these certificates should be received for salt; it cannot, therefore, be said, that any obligation was imposed on him, of which he could complain. While, therefore, in every aspect of this case, those who consented to take these certificates could not be affected, to their injury, by their depreciation, they might be benefited by it; they could pay them to the state for taxes, for fees of office, and for salt, at their nominal or par value.

An examination of the proceedings of the convention which formed the constitution of the United States, will show, that the prohibition which is now supposed to operate on the law of Missouri, was carried by a majority of one vote. Journal of the Convention 302. It should not be presumed, that this clause of the constitution was intended to extend to such issues as those authorized by the act of Missouri. The language of the constitution should be strictly construed; as it is a limitation on the sovereignty of a state. All bank-notes issued under state charters are equally within the constitutional prohibition, if the construction assumed by the counsel of the plaintiffs in error is correct. *The "wolf-scalp" certificates, by which [*423
the flocks and herds of the west are protected from the devastations of those destructive and numerous animals; the "crow certificates," the rewards of those who save the fields of the husbandman from the spoils of their worst enemies; are all receivable for taxes; and all are equally obnoxious to the exceptions taken to the certificates issued under the law of Missouri. The consideration for the note which is the subject of this suit was

a good and valuable consideration; and the note is binding on the parties to it, by the express terms of the 16th section of the law. The note furnished the parties with the means of paying their taxes, and was a benefit to them. All the certificates have been redeemed by the state.

Congress is not authorized to issue bills of credit. The states may do all that is not prohibited; while congress can do nothing which is not granted by the constitution. Congress had no express authority to issue treasury-notes, but they were issued. These notes were precisely like the Missouri certificates. The treasury-notes were not bills of credit; for they were not made, by the act under which they were issued, a legal tender. They were freely circulated throughout the United States, without objections; and they were most useful instruments in the financial operations of the government during the last war.

This court has not jurisdiction of the case. It is not within the requirements of the 25th section of the judiciary act. The validity of the state law was not drawn in question before the courts of Missouri; and no decision was made in those courts upon the validity of the objection now set up under the constitution of the United States. The pleadings do not show that the law was drawn in question; they only deny the promise charged in the declaration. Upon the matters thus presented, and on no others, did the courts of Missouri decide.

Sheffey, in reply.—The whole argument on the part of the state of Mis-
*424] souri is founded on the assumption, that *the certificates are not bills of credit, because they are not made a legal tender. The provision of the constitution was introduced to prevent a mischief; one of the most fatal effects on the property of the citizens of the United States; and thus considered, it is to be construed liberally. A strict construction, and particularly one which would render it inoperative, or feeble in its influence, would not be justifiable. The evils are the same; and the notes will circulate as freely and as extensively, whether they are made a tender or not. Whatever paper promise is circulated on the credit of the state, is a bill of credit; and is within the sense of the constitution. This provision in the constitution was introduced, to prevent the states from resorting to state necessity, as an apology for the issue of paper. The states are not allowed to "coin money;" and the object clearly was to prevent anything being made by the states which would serve as a circulating medium. The word "emit" is a peculiar expression. The states may borrow money, and give notes; but that is not coining money, nor is it emitting bills of credit; and so "wolf and crow scalp certificates" are only evidence that the counties in the states which authorize them owe so much money for meritorious and beneficial services.

It is denied, that the power of the United States to issue bills of credit is the same which has been claimed by the state of Missouri under this law. It does not follow, that because the United States may issue such bills, the states may do so. The states are specially prohibited such issues by the constitution. The proposition which was made in the convention to give to congress the power to issue bills or credit, may have been rejected, because that power had been already given in the power to coin money, and regulate its value. Congress has this power, as an incident; like the power to issue

debentures; which is exercised as an incident to the power to regulate commerce.

*Marshall, Ch. J., delivered the opinion of the court (Justices Thompson, Johnson and McLean dissenting).—This is a writ of error [*425 to a judgment rendered in the court of last resort, in the state of Missouri; affirming a judgment obtained by the state in one of its inferior courts against Hiram Craig and others, on a promissory note. The judgment is in these words: "And afterwards, at a court," &c., "the parties came into court by their attorneys, and neither party desiring a jury, the cause is submitted to the court; therefore, all and singular the matters and things being seen and heard by the court, it is found by them, that the said defendants did assume upon themselves, in manner and form, as the plaintiff by her counsel alleged. And the court also find, that the consideration for which the writing declared upon and the *assumpsit* was made, was for the loan of loan-office certificates, loaned by the state, at her loan-office at Chariton; which certificates were issued, and the loan made in the manner pointed out by an act of the legislature of the said state of Missouri, approved the 27th day of June 1821, entitled an act for the establishment of loan-offices, and the acts amendatory and supplementary thereto: and the court do further find, that the plaintiff has sustained damages by reason of the non-performance of the assumptions and undertakings of them, the said defendants, to the sum of $237.79, and do assess her damages to that sum; therefore, it is considered," &c.

I. The first inquiry is into the jurisdiction of the court. The 25th section of the judiciary act declares, "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 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." To give jusisdiction to this court, it must appear in the *record, 1. That the [*426 validity of a statute of the state of Missouri was drawn in question; on the ground of its being repugnant to the constitution of the United States. 2. That the decision was in favor of its validity.

1. To determine whether the validity of a statute of the state was drawn in question, it will be proper to inspect the pleadings in the cause, as well as the judgment of the court. The declaration is on a promissory note, dated on the 1st day of August 1822, promising to pay to the state of Missouri, on the 1st day of November 1822, at the loan-office in Chariton, the sum of $199.99, and the two per cent. per annum, the interest accruing on the certificates borrowed, from the 1st of October 1821. This note is obviously given for certificates loaned under the act, "for the establishment of loan-offices." That act directs, that loans on personal securities shall be made of sums less than $200; this note is for $199.99. The act directs, that the certificates issued by the state shall carry two per cent. interest from the date, which interest shall be calculated in the amount of the loan; the note promises to repay the sum, with the two per cent. interest accruing on the certificates borrowed, from the 1st day of October 1821. It cannot be doubted,

that the declaration is on a note given in pursuance of the act which has been mentioned.

Neither can it be doubted, that the plea of *non assumpsit* allowed the defendants to draw into question, at the trial, the validity of the consideration on which the note was given. Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue, in an action of *assumpsit*. The defendants, therefore, were a liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. Have they done so?

Had the cause been tried before a jury, the regular course would have been, to move the court to instruct the jury, that the act of assembly, in pursuance of which the note was given, was repugnant to the constitution of
*427] the United States; *and to except to the charge of the judges, if in favor of its validity; or a special verdict might have been found by the jury, stating the act of assembly, the execution of the note in payment of certificates loaned in pursuance of that act, and referring its validity to the court. The one course or the other would have shown that the validity of the act of assembly was drawn into question on the ground of its repugnancy to the constitution; and that the decision of the court was in favor of its validity. But the one course or the other, would have required both a court and jury; neither could be pursued, where the office of the jury was performed by the court. In such a case, the obvious substitute for an instruction to the jury, or a special verdict, is a statement by the court of the points in controversy, on which its judgment is founded. This may not be the usual mode of proceeding, but it is an obvious mode; and if the court of the state has adopted it, this court cannot give up substance for form. The arguments of counsel cannot be spread on the record; the points urged in argument cannot appear. But the motives stated by the court on the record, for its judgment, and which form a part of the judgment itself, must be considered as exhibiting the points to which those arguments were directed, and the judgment as showing the decision of the court upon those points. There was no jury to find the facts and refer the law to the court; but if the court, which was substituted for the jury, has found the facts on which its judgment was rendered, its finding must be equivalent to the finding of a jury. Has the court, then, substituting itself for a jury, placed facts upon the record, which, connected with the pleadings, show that the act in pursuance of which this note was executed, was drawn into question on the ground of its repugnancy to the constitution?

After finding that the defendants did assume upon themselves, &c., the court proceeds to find, "that the consideration for which the writing declared upon and the *assumpsit* was made, was the loan of loan-office certificates loaned by the state, at her loan-office at Chariton; which certificates were
*428] issued and the loan made, in the manner pointed out *by an act of the legislature of the said state of Missouri, approved the 27th of June 1821, entitled," &c. Why did not the court stop immediately after the usual finding that the defendants assumed upon themselves? Why proceed to find that the note was given for loan-office certificates issued under the act contended to be unconstitutional, and loaned in pursuance of that act; if the matter thus found was irrelevant to the question they were

to decide? Suppose, the statement made by the court to be contained in the verdict of a jury, which concludes with referring to the court the validity of the note thus taken in pursuance of the act; would not such a verdict bring the constitutionality of the act, as well as its construction, directly before the court? We think it would: such a verdict would find that the consideration of the note was loan-office certificates, issued and loaned in the manner prescribed by the act. What could be referred to the court by such a verdict, but the obligation of the law? It finds, that the certificates for which the note was given, were issued in pursuance of the act, and that the contract was made in conformity with it. Admit the obligation of the act, and the verdict is for the plaintiff; deny its obligation, and the verdict is for the defendant. On what ground can its obligation be contested, but its repugnancy to the constitution of the United States? No other is suggested. At any rate, it is open to that objection. If it be, in truth, repugnant to the constitution of the United States, that repugnancy might have been urged in the state, and may consequently be urged in this court; since it is presented by the facts in the record, which were found by the court that tried the cause.

It is impossible to doubt, that, in point of fact, the constitutionality of the act, under which the certificates were issued that formed the consideration of this note, constituted the only real question made by the parties, and the only real question decided by the court. But the record is to be inspected with judicial eyes; and as it does not state, in express terms, that this point was made, it has been contended, that this court cannot assume the fact that it was made or determined in the tribunal of the state. *The record shows distinctly that this point existed, and that no other did exist; the special statement of facts made by the court as [*429 exhibiting the foundation of its judgment contains this point and no other. The record shows clearly, that the cause did depend, and must depend, on this point alone. If, in such a case, the mere omission of the court of Missouri, to say, in terms, that the act of the legislature was constitutional, withdraws that point from the cause, or must close the judicial eyes of the appellate tribunal upon it; nothing can be more obvious, than that the provisions of the constitution, and of an act of congress, may be always evaded; and may be often, as we think they would be in this case, unintentionally defeated.

But this question has frequently occurred; and has, we think, been frequently decided in this court. *Smith* v. *State of Maryland*, 6 Cranch 286; *Martin* v. *Hunter's Lessee*, 1 Wheat. 355; *Miller* v. *Nicholls*, 4 Ibid. 311; *Williams* v. *Norris*, 12 Ibid. 117; *Wilson and others* v. *Black-bird Creek Marsh Company*, 2 Pet. 245; and *Harris* v. *Dennie*, in this term, are all, we think, expressly in point. There has been perfect uniformity in the construction given by this court to the 25th section of the judiciary act. That construction is, that it is not necessary to state, in terms, on the record, that the constitution, or a treaty or law, of the United States has been drawn in question, or the validity of a state law, on the ground of its repugnancy to the constitution. It is sufficient, if the record shows that the constitution, or a treaty or law, of the United States must have been construed, or that the constitutionality of a state law must have been questioned; and the decision has been in favor of the party claiming under such

law. We think, then, that the facts stated on the record presented the question of repugnancy between the constitution of the United States and the act of Missouri to the court for its decision. If it was presented, we are to inquire—

2. Was the decision of the court in favor of its validity? The judgment in favor of the plaintiff, is a decision in favor of the validity of the contract and consequently, of *the validity of the law by the authority of which the contract was made. The case is, we think, within the 25th section of the judiciary act, and consequently, within the jurisdiction of this court.

*430]

II. This brings us to the great question in the cause: Is the act of the legislature of Missouri repugnant to the constitution of the United States? The counsel for the plaintiffs in error maintain, that it is repugnant to the constitution, because its object is the emission of bills of credit, contrary to the express prohibition contained in the tenth section of the first article. The act under the authority of which the certificates loaned to the plaintiffs in error were issued, was passed on the 26th of June 1821, and is entitled "an act for the establishment of loan-offices." The provisions that are material to the present inquiry, are comprehended in the 3d, 13th, 15th, 16th, 23d and 24th sections of the act, which are in these words:

Section the 3d enacts, "that the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to, issue certificates, signed by the said auditor and treasurer, to the amount of $200,000, of denominations not exceeding ten dollars, nor less than fifty cents (to bear such devices as they may deem the most safe), in the following form, to wit: 'This certificate shall be receivable at the treasury, or any of the loan-offices of the state of Missouri, in the discharge of taxes or debts due to the state, for the sum of $ ———, with interest for the same, at the rate of two per centum per annum, from this date, the ——— day of ——— 182–.'"

The 13th section declares, "that the certificates of the said loan-office shall be receivable at the treasury of the state, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due to the state, or to any county or town therein, and the said certificates shall also be received by all officers, civil and military, in the state, in the discharge of salaries and fees of office."

The 15th section provides, "that the commissioners *of the said loan-offices shall have power to make loans of the said certificates, to citizens of this state, residing within their respective districts only, and in each district, a proportion shall be loaned to the citizens of each county therein, according to the number thereof," &c.

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Section 16th. "That the said commissioners of each of the said offices are further authorized to make loans on personal securities by them deemed good and sufficient, for sums less than two hundred dollars; which securities shall be jointly and severally bound for the payment of the amount so loaned with interest thereon," &c.

Section 23d. "That the general assembly shall, as soon as may be, cause the salt-springs, and lands attached thereto, given by congress to this state, to be leased out, and it shall always be the fundamental condition in such leases, that the lessee or lessees shall receive the certificates hereby required

to be issued, in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of the said salt-springs, the interest accruing to the state, and all estates purchased by officers of the said several offices, under the provisions of this act, and all the debts now due or hereafter to be due to this state, are hereby pledged and constituted a fund for the redemption of the certificates hereby required to be issued; and the faith of the state is hereby also pledged for the same purpose."

Section 24th. "That it shall he the duty of the said auditor and treasurer to withdraw annually from circulation, one-tenth part of the certificates which are hereby required to be issued," &c.

The clause in the constitution which this act is supposed to violate is in these words: "No state shall" "emit bills of credit." What is a bill of credit? What did the constitution mean to forbid? In its enlarged, and perhaps, its literal sense, the term "bill of credit" may comprehend any instrument by which a state engages to pay money at a future day; thus including a certificate given for money borrowed. But the *language of the constitution itself, and the mischief to be prevented, [*432 which we know from the history of our country, equally limit the interpretation of the terms. The word "emit," is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." To "emit bills of credit," conveys to the mind the idea of issuing paper, intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.

At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our revolution, we were driven to this expedient; and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning; and "bills of credit" signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all, the people declared in their constitution, that no state should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a state government, for the purpose of common circulation.

What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates signed by the auditor and treasurer of the state, are to be issued by those officers to the *amount of $200,000, of denominations not exceeding ten dollars, nor less than fifty cents. The paper purports on its face to be [*433 receivable at the treasury, or at any loan-office of the state of Missouri, in

discharge of taxes or debts due to the state. The law makes them receivable in discharge of all taxes, or debts due to the state, or any county or town therein; and of all salaries and fees of office, to all officers, civil and military, within the state; and for salt sold by the lessees of the public salt-works. It also pledges the faith and funds of the state for their redemption.

It seems impossible to doubt the intention of the legislature in passing this act, or to mistake the character of these certificates, or the office they were to perform. The denominations of the bills, from ten dollars to fifty cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes, and debts to the government and to corporations, and of salaries and fees, would give them currency. They were to be put into circulation, that is, emitted by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character; and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed "bills of credit," instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the constitution. And can this make any real difference? Is the proposition to be maintained, that the constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the constitution, in one of its most important provisions, may be openly evaded, by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act, are as entirely bills of credit, as if they had been so denominated in the act itself.

But it is contended, that though these certificates should be
*434] *deemed bills of credit, according to the common acceptation of the term, they are not so in the sense of the constitution; because they are not made a legal tender. The constitution itself furnishes no countenance to this distinction. The prohibition is general; it extends to all bills of credit, not to bills of a particular description. That tribunal must be bold, indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the constitution contains a substantive prohibition to the enactment of tender laws. The constitution, therefore, considers the emission of bills of credit, and the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed; both are forbidden. To sustain the one, because it is not also the other; to say, that bills of credit may be emitted, if they be not made a tender in payment of debts; is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. We are not at liberty to do this.

The history of paper money has been referred to, for the purpose of showing that its great mischief consists in being made a tender; and that, therefore, the general words of the constitution may be restrained to a particular intent. Was it even true, that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of a conjectured

intent to which we are not conducted by the language of any part of the instrument. But we do not think that the history of our country proves, either that being made a tender in payment of debts, is an essential quality of bills of credit, or the only mischief resulting from them. It may, indeed be the most pernicious; but that will not authorize a court to convert a general into a particular prohibition.

We learn from Hutchinson's History of Massachusetts, vol. 1, p. 402, that bills of credit were emitted for the first time in that colony, in 1690. An army returning unexpectedly from an expedition against Canada, which had proved as disastrous as the plan was magnificent, found the *government totally unprepared to meet their claims. Bills of credit were [*435 resorted to, for relief from this embarrassment. They do not appear to have been made a tender; but they were not on that account the less bills of credit, nor were they absolutely harmless. The emission, however, not being considerable, and the bills being soon redeemed, the experiment would have been productive of not such mischief, had it not been followed by repeated emissions to a much larger amount. The subsequent history of Massachusetts abounds with proofs of the evils with which paper money is fraught, whether it be or be not a legal tender.

Paper money was also issued in other colonies, both in the north and south; and whether made a tender or not, was productive of evils, in proportion to the quantity emitted. In the war which commenced in America in 1755, Virginia issued paper money, at several successive sessions, under the appellation of treasury-notes; this was made a tender. Emissions were afterwards made in 1769, in 1771 and in 1773. These were not made a tender; but they circulated together; were equally bills of credit; and were productive of the same effects. In 1775, a considerable emission was made for the purposes of the war. The bills were declared to be current, but were not made a tender. In 1776, an additional emission was made, and the bills were declared to be a tender. The bills of 1775 and 1776 circulated together; were equally bills of credit; and were productive of the same consequences.

Congress emitted bills of credit to a large amount, and did not, perhaps, could not, make them a legal tender; this power resided in the states. In May 1777, the legislature of Virginia passed an act, for the first time, making the bills of credit issued under the authority of congress a tender, so far as to extinguish interest. It was not until March 1781, that Virginia passed an act making all the bills of credit which had been emitted by congress, and all which had been emitted by the state, a legal tender in payment of debts. Yet they were, in every sense of the word, bills of credit, previous to that time; and were productive of all the consequences of paper money. We cannot then assent to the proposition, *that the history of our [*436 country furnishes any just argument in favor of that restricted construction of the constitution for which the counsel for the defendant in error contends.

The certificates for which this note was given, being in truth "bills of credit," in the sense of the constitution, we are brought to the inquiry: Is the note valid of which they form the consideration? It has been long settled, that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned, that an act forbidden by the constitution of the United States, which is the supreme law, is against law. Now,

the constitution forbids a state to "emit bills of credit." The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan-offices; but the issuing of them, the putting them into circulation, which is the act of emission—the act that is forbidden by the constitution. The consideration of this note is the emission of bills of credit by the state. The very act which constitutes the consideration, is the act of emitting bills of credit, in the mode prescribed by the law of Missouri; which act is prohibited by the constitution of the United States.

Cases which we cannot distinguish from this in principle, have been decided in state courts of great respectability; and in this court. In the case of the *Springfield Bank* v. *Merrick et al.*, 14 Mass. 322, a note was made payable in certain bills, the loaning or negotiating of which was prohibited by statute, inflicting a penalty for its violation; the note was held to be void. Had this note been made in consideration of these bills, instead of being made payable in them, it would not have been less repugnant to the statute; and would, consequently, have been equally void. In *Hunt* v. *Knickerbocker*, 5 Johns. 327, it was decided, that an agreement for the sale of tickets in a lottery not authorized by the legislature of the state, although instituted under the authority of the government of another state, is contrary to the spirit and policy of the law, and void. The consideration on which the agreement was founded being illegal, the agreement was void.

*437] The books, both of *Massachusetts and New York, abound with cases to the same effect. They turn upon the question, whether the particular case is within the principle, not on the principle itself. It has never been doubted, that a note given on a consideration which is prohibited by law, is void. Had the issuing or circulation of certificates of this or of any other description been prohibited by a statue of Missouri, could a suit have been sustained in the courts of that state, on a note given in consideration of the prohibited certificates? If it could not, are the prohibitions of the constitution to be held less sacred than those of a state law?

It had been determined, independently of the acts of congress on that subject, that sailing under the license of an enemy is illegal. *Patton* v. *Nicholson*, 3 Wheat. 204, was a suit brought in one of the courts of this district, on a note given by Nicholson to Patton, both citizens of the United States, for a British license. The United States were then at war with Great Britain; but the license was procured, without any intercourse with the enemy. The judgment of the circuit court was in favor of the defendant; and the plaintiff sued out a writ of error. The counsel for the defendant in error was stopped, the court declaring that the use of a license from the enemy being unlawful, one citizen had no right to purchase from or sell to another such a license, to be used on board an American vessel. The consideration for which the note was given being unlawful, it followed of course that the note was void.

A majority of the court feels constrained to say, that the consideration on which the note in this case was given, is against the highest law of the land, and that the note itself is utterly void. In rendering judgment for the plaintiff, the court for the state of Missouri decided in favor of the validity of a law which is repugnant to the constitution of the United States.

In the argument, we have been reminded by one side, of the dignity of

a sovereign state, of the humiliation of her submitting herself to this tribunal, of the dangers which may result from inflicting a wound on that dignity; by the other, of the still superior dignity of the people of the United States, *who have spoken their will, in terms which we cannot misunderstand. To these admonitions, we can only answer, that if the exercise [*438 of that jurisdiction which has been imposed upon us by the constitution and laws of the United States, shall be calculated to bring on those dangers which have been indicated; or if it shall be indispensable to the preservation of the Union, and consequently, of the independence and liberty of these states; these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law; and can tread only that path which is marked out by duty.

The judgment of the supreme court of the state of Missouri for the first judicial district is reversed; and the cause remanded, with directions to enter judgment for the defendants.

JOHNSON, Justice. (*Dissenting.*)—This is a case of a new impression, and intrinsic difficulty; and brings up questions of the most vital importance to the interests of this Union. The declaration is in the ordinary form; and the part of the record of the state court, which raises the questions before us, is expressed in these words: "at a court, &c., came the parties, &c., and neither party requiring a jury, the cause is submitted to the court; therefore, all and singular the matters and things, and evidences, being seen and heard by the court, it is found by them, that the said defendants did assume upon themselves, in the manner and form as the plaintiffs by their counsel allege; and the court also find, that the consideration for which the writing declared upon, and the *assumpsit* was made, was for the loan of loan-office certificates, loaned by the state, at her loan-office at Chariton; which certificates were issued, and the loan made, in the manner pointed out by an act of the legislature of Missouri, approved, &c. And the court do further find, that the plaintiff hath sustained damages by reason of the non-performance of the assumptions and undertakings aforesaid, of them the said *defendants, [*439 to the sum, &c.; and therefore, it is considered, that the plaintiff recover," &c.

In order to understand the case, it may be proper to premise, that the territory now occupied by the state of Missouri, having been subject to the Spanish government, was, at the time of its cession, governed by the civil law, as modified by the Spanish government; that it so continued, subject to certain modifications introduced by act of congress, until it became a state, when the people incorporated into their institutions as much of the civil law as they thought proper; and hence, their courts of justice now partake of a mixed character, perhaps combining all the advantages of the civil and common-law forms. By one of the provisions of this law, the trial by jury is forced upon no one; is yet open to all; and when not demanded, the court acts the double part of jury and judge. It is obvious, therefore, that the matter certified from the record of the state court before recited, is in nature of a special verdict, and the judgment of the court is upon that verdict; and in this light it shall be examined.

The purport of the finding is, that the note declared upon was given "for

a loan of loan-office certificates, loaned by the state, under certain state acts the caption of which is given." Some doubts were thrown out in the argument, whether we could take notice of the state laws thus found, without being set out at length; but of this there can be no question; whatever laws that court would take notice of, we must, of necessity, receive and consider, as if fully set out. By the acts of the state, designated by the court in their finding, the officers of the treasury department of the state were authorized to create certificates of small denominations, from ten dollars down to fifty cents, bearing interest at two per centum per annum, and to loan these certificates to individuals; taking in lieu thereof promissory notes, payable not exceeding one year from the date, with not more than six per cent. interest, and redeemable by instalments not exceeding ten per cent. every six months, giving mortgages of landed property for security.

*440] *These certificates were in this form: "This certificate shall be receivable at the treasury, or any of the loan-offices of the state of Missouri, in the discharge of taxes or debts due the state, for the sum of $———, with interest for the same, at the rate of two per centum per annum from this date, the ——— day of ——— 182–;" which form is set out in, and prescribed by, the act designated in the finding of the court.

This writ of error is sued out under the 25th section of the judiciary act; upon the supposition, that the state act is in violation of that provision in the constitution which prohibits the states from emitting bills of credit; and that the note declared on is void, as having been taken for an illegal consideration, or without consideration.

As a preliminary question, it has been argued, that the case is not within the provisions of the 25th section; because it does not appear from anything on the record, that this ground of defence was specially set up in the courts of the state. But this we consider no longer an open question; it has repeatedly been decided by this court, that if a special verdict, or the instruction of a court, involve such facts as that the judgment must necessarily affirm the validity of the state law, or invalidity of a right set up under the laws or constitution of the United States; the case is sufficiently brought within the provisions of the twenty-fifth section. The judgment of the court in this case affirms the validity of the contract on which the suit is instituted. And this could not have been affirmed, unless on the assumption that the act in which it had its origin was constitutional.

In the argument of counsel, the objections to this contract were presented in the form of objections to the consideration. But this was unnecessary to his argument; since even a valuable consideration will not make good a contract in itself illegal. These notes originate directly under the law of Missouri; they are taken in pursuance of its provisions; have their origin in it; and rest for their validity upon it; and if that law be

*441] void, must fall with it. Whether, therefore, *the bills for which they were given be void or valid, if the law be void, the notes would be so.

There are some difficulties on the subject of consideration, for which I would reserve myself, until they become unavoidable. But it is not one of those difficulties that, as a guide for the state, the power of the states over the law of contracts will legalize a contract made, under whatever law, or

for whatever consideration. The argument makes the act to justify itself; and is a direct recurrence to that exercise of sovereign power, which it was the leading principle of the constitution that each should renounce, so far as it was incompatible with the provisions of the constitution; the objects of which were the security of individual right, and the perpetuation of the Union. The instrument is a dead letter, unless its effect be to invalidate every act done by the states, in violation of the constitution ot the United States. And as the universal *modus operandi* by free states must be through their legislature, it follows, that the laws under which any act is done, importing a violation of the constitution, must be a dead letter. The language of the constitution is, "no state shall emit bills of credit;" and this, if it means anything, must mean that no state shall pass a law which has for its object an emission of bills of credit. It follows, that when the officers of a state undertake to act upon such a law, they act without authority; and that the contracts entered into, direct or incidental to such their illegal proceedings, are mere nullities.

This leads us to the main question: "Was this an emission of bills of credit, in the sense of the constitution?" And here the difficulty which presents itself is, to determine whether it was a loan, or an emission of paper money; or, perhaps, whether it was not an emission of paper money, under the disguise of a loan. There cannot be a doubt, that this latter view of the subject must always be examined; for that which it is not permitted to do directly, cannot be legalized by any change of names or forms. Acts done "*in fraudem legis*," are acts in violation of law. The great difficulty, as it is here, must ever be, to determine, *in each case, whether it be a loan, [*442
or an emission of bills of credit. That the states have an unlimited power to effect the one, and are divested of power to do the other, are propositions equally unquestionable; but where to draw the discriminating line is the great difficulty. I fear, it is an insuperable difficulty.

The terms, "bills of credit," are in themselves vague and general, and, at the present day, almost dismissed from our language. It is then only by resorting to the nomenclature of the day of the constitution, that we can hope to get at the idea which the framers of the constitution attached to it. The quotation from Hutchinson's History of Massachusetts, therefore, was a proper one for this purpose; inasmuch as the sense in which a word is used, by a distinguished historian, and a man in public life in our own country, not long before the revolution, furnishes a satisfactory criterion for a definition. It is there used as synonymous with paper money; and we will find it distinctly used in the same sense, by the first congress which met under the present constitution. The whole history and legislation of the time prove that, by bills of credit, the framers of the constitution meant paper money, with reference to that which had been used in the states from the commencement of the century, down to the time when it ceased to pass, before reduced to its innate worthlessness.

It was contended, in argument, for the defendant in error, that it was essential to the description of bills of credit, in the sense of the constitution, that they should be made a lawful tender. But his own quotations negative that idea; and the constitution does the same, in the general prohibition in the states to make any thing but gold or silver a legal tender. If, however

it were otherwise, it would hardly avail him here, since these certificates were, as to their officers' salaries, declared a legal tender.

The great end and object of this restriction on the power of the states, will furnish the best definition of the terms under consideration. The whole was intended to exclude everything from use, as a circulating medium, except gold and silver; and to give to the United States the exclusive *443] *control over the coining and valuing of the metallic medium. That the real dollar may represent property, and not the shadow of it. Now, if a state were to pass a law declaring that this representative of money shall be issued by its officers, this would be a palpable and tangible case; and we could not hesitate to declare such a law, and every contract entered into on the issue of such paper, purporting a promise to return the sum borrowed, to be a mere nullity. But suppose, a state enacts a law authorizing her officers to borrow $100,000, and to give in lieu thereof certificates of $100, each expressing an acknowledgment of the debt; it is presumed, there could be no objection to this. Then, suppose, that the next year she authorizes these certificates to be broken up into ten, five, and even one dollar bills. Where can be the objection to this? And if, at the institution of the loan, the individual had given for the script his note at twelve months, instead of paying the cash; it would be but doing in another form what was here done in Missouri; and what is often done, in principle, where the loan is not required to be paid immediately in cash.

Pursuing the scrutiny farther, and with a view to bringing it as close home to the present case as possible: a state having exhausted its treasury, proposes to anticipate its taxes for one, two or three years; its citizens, or others, being willing to aid it, give their notes, payable at sixty days, and receive the script of the state at a premium, for the advance of their credit, which enables the state, by discounting these notes, to realize the cash. There could be no objection to this negotiation; and their script being, by contract, to be receivable in taxes, nothing would be more natural than to break it up into small parcels, in order to adapt it to the payment of taxes. And if, in this state, it should be thrown into circulation, by passing into the hands of those who would want it to meet their taxes, I see nothing in this that could amount to a violation of the constitution. Thus far the transaction partakes of the distinctive features of a loan; and yet it cannot be denied, that its adaptation to the payment of taxes does give it one *444] characteristic of a circulating *medium. And another point of similitude, if not of identity, is the provision for forcing the receipt of it upon those to whom the state had incurred the obligation to pay money.

The result is, that these certificates are of a truly amphibious character; but what then should be the course of this court? My conclusion is, that, as it is a doubtful case, for that reason, we are bound to pronounce it innocent. It does, indeed, approach as near to a violation of the constitution as it can well go, without violating its prohibition; but it is in the exercise of an unquestionable right, although in rather a questionable form; and I am bound to believe, that it was done in good faith, until the contrary shall more clearly appear. Believing it, then, a candid exercise of the power of borrowing, I feel myself at liberty to go further, and briefly to suggest two points, on

which these bills vary from the distinctive features of the paper money of the revolution.

1. On the face of them, they bear an interest, and for that reason vary in value every moment of their existence; this disqualifies them for the uses and purposes of a circulating medium; which the universal consent of mankind declares should be of an uniform and unchanging value; otherwise, it must be the subject of exchange, and not the medium.

2. All the paper medium of the revolution consisted of promises to pay. This is a promise to receive, and to receive in payment of debts and taxes due the state. This is not an immaterial distinction; for the objection to a mere paper medium is, that its value depends upon mere national faith. But this certainly has a better dependence; the public debtor who purchases it may tender it in payment; and upon a suit brought to recover against him, the constitution contains another provision to which he may have recourse. So far as the feeble powers of this court extend, he would be secured (if he could ever need security) from a violation of his contracts. This approximates them to bills on a fund; and a fund not to be withdrawn by a law of the state.

Upon the whole, I am of opinion, that the judgment of the state court should be affirmed.

*Thompson, Justice. (*Dissenting.*)—This case comes up by writ of error from the state court of Missouri, on a judgment recovered against the plaintiffs in error, in the highest court in that state; and the first question that has been made here, is, whether this court has jurisdiction of the case, under the 25th section of the judiciary act of 1789? If the construction of this 25th section was now for the first time brought before this court, I should entertain very serious doubts, whether this case came within it. The fair, and as I think, the clear import of that section is, that some one of the cases therein stated, did, in point of fact, arise, and was drawn into question; and did receive the judgment and decision of the state court. It is not enough, that such question might have been made. A party may waive the right secured to him under this section. This would not in any manner affect the jurisdiction of the state court; and might, of course, be waived. In the present case, there is no doubt, but the facts which appeared before the state court presented a case which might properly fall within this section. The defendants might have insisted, that the state law was unconstitutional, and that the certificates issued in pursuance of its provisions, were void. And if the court had sustained the act, it would have been one of the cases within the 25th section. But the court was not bound to call upon the party to raise the objection, for the purpose of putting the cause in a situation to be brought here by writ of error. It cannot be doubted, but that there might have been an express waiver of this right; and I should think, an implied waiver would equally preclude a review of the case by this court; and that such waiver ought to be implied, in all cases where it does not appear that, in point of fact, the question was made, and received the judgment of the state court. But to entertain jurisdiction in this case, is, perhaps, not going further than this court has already gone, and I do not mean to call in question these decisions; [*445

but have barely noticed the question, for the purpose of stating the rule by which I think all cases under this section should be tested.

*446] *The more important question upon the merits of the case is, whether the constitution of the United States interposes any impediment to the plaintiff's right of recovery in this case. And this question has been presented at the bar under the following points: 1. Whether the certificates issued under the provisions of the law of the state of Missouri, are bills of credit, within the sense and meaning of the constitution? 2. If so, whether, as they formed the consideration of the note on which the judgment below was recovered, the note was rendered thereby void and irrecoverable?

The first is a very important question, and not free from difficulty, and one upon which I have entertained serious doubts; but looking at it, in all its bearings, and considering the consequences to which the rule established by a majority of the court will lead, when carried out to its full extent, I am compelled to dissent from the opinion pronounced in this case.

The limitations upon the powers of the state of Missouri, which is supposed to have been transcended, is contained in the tenth section of the first article of the constitution of the United States. "No state shall emit bills of credit." Are the certificates issued under the authority of the Missouri law, bills of credit, within this prohibition? The form of the certificate is prescribed in the third section of the act (act 27th of June 1821), as follows: "This certificate shall be receivable at the treasury, or any of the loan-offices, of the state of Missouri, in the discharge of taxes or debts due to the state, for the sum of $———, with interest for the same, at two per centum per annum, from this date," &c. And the 13th section declares, "that the certificates of the said loan-office shall be receivable at the treasury of the state, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due, or to become due to the state, or any county or town therein; and the said certificates shall also be received by all officers, civil and military, in the state, in the discharge of salaries and fees of office." It is proper here to notice, that if the latter branch of

*447] this section should be considered as *conflicting with that prohibition in the constitutiou, which declares that no state shall make anything but gold and silver coin a tender in payment of debts; no such question is involved in the case now before the court, and the law may be good in part, although bad in part.

The precise meaning and interpretation of the term, bills of credit, has nowhere been settled; or if it has, it has not fallen within my knowledge. As used in the constitution, it certainly cannot be applied to all obligations, or vouchers, given by, or under the authority of, a state, for the payment of money. The right of a state to borrow money cannot be questioned; and this necessarily implies the right of giving some voucher for the repayment: and it would seem to me difficult to maintain the proposition, that such voucher cannot legally and constitutionally assume a negotiable character; and as such, to a certain extent, pass as, or become a substitute for, money. The act does not profess to make these certificates a circulating medium, or substitute for money. They are (except as relates to public officers) made receivable only for taxes and debts due to the state, and for salt sold by the lessees of salt-springs belonging to the state. These are special and limited

objects ; and these certificates cannot answer the purpose of a circulating medium, to any considerable extent.

A simple promise to pay a sum of money, a bond or other security given for the payment of the same, cannot be considered a bill of credit, within the sense of the constitution. Such a construction would take from the states all power to borrow money, or execute any obligation for the repayment. The natural and literal meaning of the terms import a bill drawn on credit merely, and not bottomed upon any real or substantial fund for its redemption. There is a material and well-known distinction between a bill drawn upon a fund, and one drawn upon credit only. A bill of credit may, therefore, be considered a bill drawn and resting merely upon the credit of the drawer ; as contradistinguished from a fund constituted or pledged for the payment of the bill. Thus, the constitution vests in congress the power to borrow money on the credit of the United States. A bill drawn *under such authority would be a bill of credit. And this idea is more fully expressed in the old confederation (art. 9) : "Congress [*448 shall have power to borrow money or emit bills on the credit of the United States." Can the certificates issued under the Missouri law, according to the fair and reasonable construction of the act, be said to rest on the credit of the state? Although the securities taken for the certificates loaned are not in terms pledged for their redemption, yet these securities constitute a fund amply sufficient for that purpose, and may well be considered a fund provided for that purpose. The certificates are a mere loan upon security, in double the amount loaned. And in addition thereto (§ 29), provision is made expressly for constituting a fund for the redemption of these certificates. These are guards and checks against their depreciation, by insuring their ultimate redemption.

The emissions of paper money by the states, previous to the adoption of the constitution, were, properly speaking, bills of credit ; not being bottomed upon any fund constituted for their redemption, but resting solely for that purpose upon the credit of the state issuing the same. There was no check, therefore, upon excessive issues ; and a great depreciation and loss to holders of such bills followed, as a matter of course. But when a fund is pledged, or ample provision made, for the redemption of a bill or voucher, whatever it may be called, there is but little danger of a depreciation or loss.

But should these certificates be considered bills of credit, under an enlarged sense of such an instrument ; it does not necessarily follow, that they are bills of credit, within the sense and meaning of the constitution. As no precise and technical meaning or interpretation of a bill of credit has been shown, we may with propriety look to the state of things, at the adoption of the constitution, to ascertain what was probably the understanding of the convention, by this limitation on the power of the states. The state emissions of paper money had been excessive, and productive of great mischief. In some states, and at some times, such emissions were, by law, made a tender in payment of private debts, in others, not so. But the great evil that existed was, that *creditors were compelled to take such a [*449 depreciated currency, and articles of property, in payment of their debts. This being the mischief, is it an unfair construction of the constitution, to restrict the intended remedy to the acknowledged and real mischief?

The language of the constitution may, perhaps, be too broad to admit of this restricted application. But to consider the certificates in question bills of credit, within the constitution, is, in my judgment, a construction of that instrument which will lead to serious embarrassment with state legislation; as existing in almost every member of the Union.

If these certificates are bills of credit, inhibited by the constitution, it appears to me difficult to escape the conclusion, that all bank-notes, issued either by the states, or under their authority and permission, are bills of credit, falling within the prohibition. They are, certainly, in point of form, as much bills of credit; and if being used as a circulating medium, or substitute for money, makes these certificates bills of credit, bank-notes are more emphatically such. And not only the notes of banks, directly under the management and control of a state, of which description of banks there are several in the United States; but all notes of banks established under the authority of a state, must fall within the prohibition. For the states cannot certainly do that indirectly, which they cannot do directly. And, if they cannot issue bank-notes, because they are bills of credit, they cannot authorize others to do it. If this circuitous mode of doing the business would take the case out of the prohibition, it would equally apply to the Missouri certificates; for they were issued by persons acting under the authority of the state, and indeed, could be issued in no other way.

This prohibition in the constitution could not have been intended to take from the states all power whatever over a local circulating medium, and to suppress all paper currency of every description. The power is given to congress to coin money; and the states are prohibited from coining money. But to construe this, as embracing a paper circulating medium of every
*450] description, and thereby render illegal the *issuing of all bank-notes by or under the authority of the states, will not, I presume, be contended for by any one. And I am unable to discover any sound and substantial reason why the prohibition does not reach all such bank-notes, if it extends to the certificates in question.

The conclusion to which I have come on this point, renders it unnecessary for me to examine the second question made at the argument. I am of opinion, that the jugment of the state court ought to be affirmed.

McLean, Justice. (*Dissenting.*)—Several cases, depending upon the same principles, were brought into this court, from the supreme court of the state of Missouri, by writs of error. In the case of Hiram Craig and others, the declaration sets forth the cause of action in the following terms, viz: "For that, whereas, heretofore, on the 1st day of August, in the year of our Lord 1822, at the county, &c., the said Craig, John Moore and Ephraim Moore made their certain promissory notes in writing, bearing date, &c., and then and there, for value received, jointly and severally, promised to pay to the state of Missouri, on the 1st day of November 1822, at the loan-office in Chariton, the sum of $199.99, and the two per centum per annum, the interest accruing on the certificates borrowed, from the 1st day of October 1821; nevertheless," &c.

The general issue of *non assumpsit* having been pleaded in each case, the circuit court of Chariton, in which the suits were commenced, rendered judgments in favor of the plaintiff. The following entry, in the case of

Craig and others, was made on the record: "And afterwards, at a court begun and held at Chariton, on Monday, the 1st of November 1824, and on the second day of said court, the parties, by their attorneys, appeared, and neither party requiring a jury, the cause is submitted to the court; therefore, all and singular the matters and things and evidences being seen and heard by the court, it is found by them, that the said defendants did assume upon themselves, in manner and form as the plaintiff's counsel *allege: and the court also find, that the consideration for which the writing [*451 declared upon and the *assumpsit* was made, was the loan of loan-office certificates, loaned by the state, at her loan-office at Chariton; which certificates were issued, and the loan made, in the manner pointed out by an act of the legislature of the state of Missouri, approved the 27th day of June 1821; entitled 'an act for the establishment of loan-offices,' and the acts amendatory and supplementary thereto. And the court do further find, that the plaintiff hath sustained damages, by reason of the non-performance of the assumption and undertakings of the said defendants, to the sum of $237.79; therefore, it is considered," &c. An appeal was taken to the supreme court of Missouri, in which this judgment and the others were affirmed.

The first question which this case presents for consideration, arises under the 25th section of the judiciary act of 1789, which provides, "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 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, upon a writ of error. Had not the point been settled by several adjudications in similar cases, I should entertain strong doubts, whether it sufficiently appeared on the record, that the validity of the statute of Missouri was drawn in question, on account of its repugnance to the constitution. In the finding of the Chariton circuit court, the act is referred to, and the consideration of the note is stated; but it nowhere appears in the record, that the validity of the statute was contested. And as this is the only ground on which this court can take jurisdiction of the case, it would seem to me, that it should not be left to inference, but be clearly stated in the proceeding. In the supreme court of Missouri, the judgment of the circuit court was affirmed; but it does not appear what *objections [*452 to the affirmance were urged before the court. This question, however, seems not to be open, and I yield to the force of prior adjudications.

Two points must necessarily be considered in the investigation of the merits of this case. 1. Are the certificates authorized to be issued by the law of Missouri, bills of credit, within the meaning of the constitution? 2. If they are bills of credit, is the note on which this suit was brought void?

It is contended by the counsel for the plaintiffs in error, that any paper issued by a state, that contains a promise to pay a certain sum, and is intended to be used as a medium of circulation, is a bill of credit, and comes within the mischief against which the constitution intended to guard. In

illustration of this position, a reference is made to the depreciated currency of the revolution. During that most eventful period of our history, bills of credit formed the currency of the country, and everything of greater value was excluded from circulation. These bills were so multiplied by the different states and by congress, that their value was greatly impaired. This loss was attempted to be covered, and the growing wants of the government supplied, by increased emissions. These caused a still more rapid depreciation, until the credit of the bills sunk so low as not to be current at any price. Various statutes were passed to force their circulation, and sustain their value; but they proved ineffectual. For a time, creditors were compelled to receive these bills, under the penalty of forfeiting their debt, losing the interest, being denounced as enemies to the country, or some other penalty. These laws destroyed. all just relations between creditor and debtor; and so debased a currency produced the most serious evils, in almost all the relations of society. Nothing but the ardor of the most elevated patriotism could overcome the difficulties and embarrassments growing out of this state of things.

It will be found somewhat difficult to give a satisfactory definition of a bill of credit. In what sense, it was used in the constitution, is the object of inquiry? *Different nations of Europe have emitted, on various *453] emergencies, three descriptions of paper money: 1. Notes, stamped with a certain value, which contained no promise of payment, but were to pass as money. 2. Notes, receivable in payment of public dues, with or without interest. 3. Notes, which the government promised to pay at a future period specified, with or without interest, and which were made receivable in payment of taxes and all debts to the public. Bills of the last class were issued during the revolution; and in some of the colonies, they had been emitted long before that time. In 1690, bills of credit were for the first time issued, as a substitute for money, in the colony of Massachusetts Bay, as stated in Hutchinson's history. In 1716, a large emission was made and lent to the inhabitants, to be paid at a certain period; and in the meantime to pass as money. For forty years, the historian says, the currency was in much the same state as if 100,000*l.* sterling had been stamped on pieces of leather or paper of various denominations, and declared to be the money of the government, without any other sanction than this, that when there should be taxes to pay, the treasury would receive this sort of money; and that every creditor should be obliged to receive it from his debtor. The bills issued during the revolution were denominated bills of credit. In 1780, the United States guarantied the payment of bills emitted by the states. They all contained a promise of payment at a future day; and where they were not made a legal tender, creditors were often compelled to receive them in payment of debts, or subject themselves to great inconvenience and peril.

The character of these bills, and the evils which resulted from their circulation, give the true definition of a bill of credit, within the meaning of the constitution; and of the mischiefs against which the constitution provides. The following is the form of the bills emitted in 1780, under the guarantee of congress. "The possessor of this bill shall be paid ——— Spanish milled dollars, by the 31st day of December 1786, with interest, in

like money, at the *rate of five per cent. per annum, by the state of ——— according to an act," &c.

Bills of credit were denominated current money; and were often referred to in the proceedings of congress by that title, in contradistinction to loan-office certificates. It is reasonable to suppose, that in using the term "bills of credit" in the constitution, such bills were meant as were known at the time by that denomination. If the term be susceptible of a broader signification, it would not be safe so to construe it; as it would extend the provision beyond the evil intended to be prevented, and instead of operating as a salutary restraint, might be productive of serious mischief. The words of the constitution must always be construed according to their plain import, looking at their connection and the object in view. Under this rule of construction, I have come to the conclusion, that to constitute a bill of credit, within the meaning of the constitution, it must be issued by a state, and its circulating as money enforced by statutory provisions. It must contain a promise of payment by the state, generally, when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the state; not that it will be paid on presentation, but that the state, at some future period, on a time fixed, or resting in its own discretion, will provide for the payment.

If a more extended definition than this were given to the term, it would produce the most serious embarrassments to the fiscal operations of a state. Every state, in the transactions of its moneyed concerns, has one department to investigate and pass accounts, and another to pay them. Where a warrant is issued for the amount due to a claimant, which is to be paid on presentation to the treasurer, can it be denominated a bill of credit? And may not this warrant be negotiated, and pass in ordinary transactions, as money? This is very common in some of the states; and yet it has not been supposed to be an infraction of the constitution. Audited bills are often found in circulation; in which the state promises to pay a certain sum, at some future day specified. If these are inhibited by the constitution, can a state make loans of money? Can there be any difference between *borrowing money from a creditor, and any other person who does not stand in that relation? The amount cannot alter the principle. [*455
If a state may borrow $100,000, she may borrow a less sum: and if an obligation to pay, with or without interest, may be given in the one case, it may in the other. Where money is borrowed by a state, it issues script, which contains a promise to pay, according to the terms of the contract. If the lender, for his own convenience, prefers this script in small denominations, may not the state accommodate him? This may be made a condition of the loan. If a state shall think proper to borrow money of its own citizens, in sums of five, ten or twenty dollars, may it not do so? If it be unable to meet the claims of its creditors, shall it be prohibited from acknowledging the claims, and promising payment, with interest, at a future day? The principles of justice and sound policy alike require this; and unless the right of the state to do so be clearly inhibited, it must be admitted.

In the adjustment of claims against a county, orders are issued on the county treasury; and it is common for these to circulate, by delivery or assignment, as bank-notes or bills of exchange. May a state do, indirectly,

that which the constitution prohibits it from doing directly? If it cannot issue a bill or note, which may be put into circulation as a substitute for money, can it, by an act of incorporation, authorize a company to issue bank-bills on the capital of the state? It will thus be seen, that if an extended construction be given to the term "bills of credit," as used in the constitution, it may be made to embrace almost every description of paper issued by a state.

The words of the constitution are, that "no state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts; or grant any title of nobil-
*456] ity." *Under the statute of Missouri, certificates in the following form were issued: "This certificate shall be receivable at the treasury, or any of the loan-offices, of the state of Missouri, in the discharge of taxes or debts due to the state, for the sum of ——— dollars, with interest for the same, at the rate of two per centum per annum, from this date, the ——— day of ——— 182–." It appears by the third section of the act, that $200,000 were authorized to be issued, of the above certificates, each not exceeding ten dollars, nor less than fifty cents. By the 13th section, these certificates were made receivable at the state treasury by tax-gatherers and other public officers, in payment of taxes or moneys due to the state, or any county or town therein; and they were made receivable by all officers in payment of salaries and fees of office. Under the 15th section, commissioners were authorized to loan these certificates to the citizens in the state; apportioning the amount among the several counties, according to the population, on mortgages or personal security. The act provides the means by which these certificates shall be paid, and the fact is admitted, that at this time they are all redeemed by the state.

The design, in issuing these certificates, seems to have been, to furnish the citizens of Missouri with the means of paying to the state the taxes which it imposed, and other debts due to it. It was in effect giving a credit to the debtors of the state, provided they would give good real or personal security. Had the arrangement been confined to those who owed the state; and had certificates been required of them, promising to pay the amount, with interest, no objection could have been urged to the legality of the transaction. And even if the state, in the discharge of its debts, had paid such certificates, the act would not have been illegal.

The state of Missouri adopted no measures to force the circulation of the above certificates. No creditor was under any obligation to receive them. By refusing them, his debt was not postponed, nor the interest upon it sus-
*457] pended. The *object was a benign one, to relieve the citizens from an extraordinary pressure, produced by the failure of local banks, and the utter worthlessness of the currency. Without aid from the government, the citizens of Missouri could not have paid the taxes or debts which they owed to the state, in a medium of any value. At such a crisis, the law was enacted; and, as contemplated in its passage, so soon as the necessary relief was afforded, the paper was withdrawn from circulation. The measure was only felt in the benefits it conferred. No loss was sustained by the

public or by individuals; unless, indeed, the state shall lose by the unconscionable defence set up to these actions.

It is admitted, that the expediency or inexpediency of a measure cannot be considered, in giving a construction to the constitution. But when, in giving a construction to that instrument, it becomes necessary, as it does in some instances, to look into the mischiefs provided against, and the application becomes, to some extent, a matter of inference, the question of expediency must be considered. If the act of Missouri conferred benefits upon the people of the state, and was so guarded in its provisions as to protect them from all possible evil, no court would feel inclined to declare it to be unconstitutional and void, unless it was directly opposed to the letter and spirit of the constitution. As the spirit of that provision was to protect the citizens of the states against the evils of a debased currency; and as the act under consideration, so far as it operated upon the people of Missouri, had no tendency to produce this evil, but to relieve against it; the spirit of the constitution was not violated. Was the act of Missouri against its letter? Were the certificates issued by the state "bills of credit?" They were not, if the definition of a bill of credit, as now given, be correct. Their circulation was not forced by statutory provision, in any form; there was no promise on their face to pay at any future day; in their form and substance, they bore little or no resemblance to the continental bills. They were calculated, from the manner in which they were created and circulated, to introduce none of the evils so deeply felt from the currency of the revolution.

*Suppose, the state of Missouri had stamped certificates with a certain value, and provided, that they should be received as money, according to the denominations given them, could they have been called bills of credit? Certainly not; for they contained no promise of payment, to which the holder could give credit. Such an act, by a state, would most clearly be void; but not under the provision of the constitution, which prohibits a state from issuing "bills of credit." Can any certificate or bill be considered a bill of credit, within the meaning of the constitution, to which the receiver must not give credit to the promise of the state? Must it not, literally, be a "bill of credit?" Not a bill which will be received in payment of public dues, when presented, but which the state promises to redeem at a future day. A substitution of the credit of the state for money, may be considered as an essential ingredient to constitute a "bill of credit." When this is wanting, whatever other designation may be given to the thing—whether it be called paper money, or a state bill, it cannot be called a "bill of credit." The credit refers to a future time of payment; and not to the confidence we feel in the punctuality of the state, in paying the bill when presented. A bill, therefore, which is payable on presentation, is not a bill of credit, within the meaning of the constitution; nor is a bill which contains no promise to pay at a future day, but a simple declaration, that it will be received in payment of public dues. [*458

If this course of argument appears somewhat technical, it must be recollected, that the question under consideration involves the validity of an act of a state; which is sovereign in all matters, except where restrictions are imposed, and an express delegation of power is made to the federal government. The solemn act of a state, which has been sanctioned by all the

branches of its power, cannot, under any circumstances, be lightly regarded. The act of Missouri having received the sanction of the legislative, executive and judicial departments of the government, cannot be set aside and disregarded, under a doubtful construction of the constitution.

*459] Doubts should lead to an *acquiescence in the act. The power which declares it null and void, should be exercised only where the right to do so is perfectly clear.

That such a power is vested in this tribunal by the constitution, which received the sanction of all the states, can only be doubted by those who are incapable of comprehending the plainest principle in constitutional law. It is a question arising under the constitution, and all such questions of power, whether in the general or state governments, belong to this tribunal. The policy of this investiture of power may be questioned; but the fact of its existence cannot be. Believing, that in every point of view in which the paper issued by the state of Missouri may be considered, it is at least doubtful, whether it comes within the meaning of a "bill of credit," prohibited by the constitution, I am inclined to affirm the judgment of the state court.

But if this ground of the defence be admitted, does it follow, that the judgment must be reversed? This presents for consideration the second proposition stated. If the certificates under consideration were "bills of credit," within the meaning of the constitution, is the note on which this suit is brought, void? The position assumed in the argument, that no contract can be valid, that is founded upon a consideration which is contrary to good morals, against the policy of the law, or a positive statute, cannot be sustained to the extent as urged. The ground is admitted to be correct, generally; but there are exceptions which it becomes important to notice. In the state of Pennsylvania, usury is prohibited under the sanction of certain penalties, but usury does not render the contract void; a recovery may be had upon it, with the legal rate of interest. It is competent for a state to prohibit gambling, by a severe penalty; and yet to provide that an obligation given for money lost at gambling shall be valid. It may declare, by law, that all instruments for the payment of money, signed by the party, shall be held valid, without reference to the consideration. The legislative power of a state over contracts is without restriction by the con-

*460] stitution of the United States; except that their obligation *cannot be impaired. With this single exception, a state legislature may regulate contracts, both as to their form and substance, as may be thought advisable.

Suppose, the constitution of Missouri had prohibited the emission of bills of credit, without going further; might not the legislature provide by law, that obligations given on a loan of such bills should be valid? There would be no more inconsistency in this, than in the law of Pennsylvania which forbids usury, and yet holds the instrument valid. If the constitution of the United States had provided, that all obligations given for bills of credit, or where they formed a part of the consideration, should be void, there could have existed no doubt on the subject. But there is no such provision; and if the obligation be held void, its invalidity is a matter of inference, arising from the supposed illegality of the consideration. The constitution prohibits a state from "emitting bills of credit." The law of Missouri declares, substantially, that obligations given, where these bills

form the consideration, shall be held valid. Is there an incompatibility in these provisions? Does the latter destroy the former, or render it ineffectual?

Suppose, a state should coin money, would such money not constitute a valuable consideration for a promissory note? Would not the intrinsic value of the silver, as bullion, be a sufficient consideration? Would such a construction conflict with the constitution? A state is prohibited from coining money; consequently, the money which it may coin cannot be circulated as such. A creditor will be under no obligation to receive it in discharge of his debt. If any statutory provision of the state should be formed, with a view of forcing the circulation of such coin, by suspending the interest or postponing the debt of a creditor where it was refused, such statute would be void, because it would act on the thing prohibited, and come directly in conflict with the constitution. Such would not be the case in reference to the obligation given for this coin. In the first place, the act would be voluntary on the part of the purchaser; and in the second, the consideration would be a valuable one. The statute sanctions not the coin, but *the obligation which was given for it. The act of creating the consideration may be denounced and punished, as in the case of usury in [*461 Pennsylvania, and yet the obligation held good. Would this construction render ineffectual the prohibition of the constitution? This may be answered, by considering how ineffectual this provision must be, if its efficacy depend on making void the contract. The loaning of this coin is only one of many modes which a state might adopt to circulate it. In the payment of its creditors, and in work of improvement, the state could always find the most ample means of circulation.

Effect is given to this provision of the constitution, by limiting it to the thing prohibited. If a state emit bills of credit, or coin money, neither can pass as money, whatever may be the regulation on the subject. No penalties have been provided to prevent such a circulation; no sanctions to enforce it, would be valid.

But it is contended, that the offence consists in circulating the bills; that being the meaning of the word "emit." Congress may issue bills of credit, and perhaps, have done so, in the emissions of treasury-notes: is a state prohibited from circulating them? If not, it must be admitted, the violation of the constitution consists, not in the circulation of such bills, but in their creation. The prohibition of the constitution was intended to act on the sovereignty of a state, in its legislative capacity. But there is no power in the federal government which can act upon this sovereignty. It is only when its inhibited acts affect the rights of individuals, that the judicial power of the Union can be interposed. If a state legislature pass an *ex post facto* law, or a law impairing the obligation of contracts; it remains a harmless enactment on the statute book, until it is brought to bear, injuriously, on individual rights. So, if a state coin money, or emit bills of credit, the question of right must be raised before this tribunal, in the same manner.

The law of Missouri expressly sanctions the obligations given on a loan of these certificates. Had not this been done, and if the certificates were bills of credit, within the *meaning of the constitution, the obligations [*462 might have been considered void, as against the policy of the supreme law of the land. There is no pretence, that there has been a failure of

consideration for which the notes in controversy were given. The certificates have long since been received by the state as money, and the promisors have realized their full value. If they can avoid the payment of their notes, as they wish to do by the defence set up, it must be alone on the ground of the illegality of the consideration. Suppose, the notes had been given, under the same circumstances, payable to an individual, from whom the consideration had been received; could the defence be sustained? In such a case, there could be no allegation of a failure of consideration. The constitution prohibits the state from issuing the certificates; but the law of Missouri declares, that obligations given for these certificates shall be valid. These notes, being given for a valuable consideration, may be enforced, unless the constitution makes them void. This it does not do, by express provision; and can they be avoided by inference? An inference which does not necessarily follow, as has been shown, from the prohibition; because such a consequence is prevented by the act of Missouri. This act may be void, as to the emission of the bills; but it does not follow, that the part which relates to the notes must also be void. It would seem, therefore, that effect may be given to the provision of the constitution, so as to prevent the mischief, by operating upon the circulating of the bills, without extending the consequence, so as to make void the contract expressly sanctioned by the law of Missouri. And if such a construction may be given, will not the court incline to give it; in order that both laws may be carried into full effect, where their provisions do not come directly in conflict?

The passing of counterfeit money is prohibited under severe penalties, by the laws of every state; and is it not in the power of a state to provide by law, that every obligation given for counterfeit paper, known to be such
*463] by both parties, shall be valid? this will scarcely be denied. And if *a state may do this, under its sovereign power to regulate contracts; may it not give validity to the notes under consideration? Had not the state of Missouri a right to provide, that every citizen who should voluntarily execute an obligation for the payment of money to the state, should be held bound to pay it, although given without consideration? If this do not come within the province of legislation in a sovereign state, I know not where its powers may not be restricted. And if this may be done, can the notes under consideration be held void? If the certificates were illegally created, they were of value, and under the law of Missouri constituted a valuable consideration for the notes given. In any view, the notes which were executed being sanctioned by law, and consequently valid, even without consideration, cannot be less so, when given for the certificates. I am, therefore, inclined to say, not without great hesitation, as I differ with the majority of the court, that the judgment should be affirmed on this ground.

In the first place, then, from the consideration which I have been able to give this case, I am not convinced, that the certificates issued by the state of Missouri were bills of credit, within the meaning of the constitution. And unless my conviction was clear on this point, my duty and inclination unite to sustain the judgment of the supreme court of Missouri. And secondly, as has been shown, it appears to me, that the contract on which this action is founded is not void, even admitting that the certificates were bills of credit.

All questions of power, arising under the constitution of the United

States, whether they relate to the federal or a state government, must be considered of great importance. The federal government being formed for certain purposes, is limited in its powers, and can in no case exercise authority, where the power has not been delegated. The states are sovereign, with the exception of certain powers, which have been invested in the general government, and inhibited to the states. No state can coin money, emit bills of credit, pass *ex post facto* laws, or laws impairing the obligation of contracts, &c. If any state violate a provision of the constitution, or be charged with such violation, to the injury of *private rights, the question is made before this tribunal; to whom all such questions, under [*464 the constitution, of right belong. In such a case, this court is to the state, what its own supreme court would be, where the constitutionality of a law was questioned, under the constitution of the state. And within the delegation of power, the decision of this court is as final and conclusive on the state, as would be the decision of its own court, in the case stated.

That distinct sovereignties could exist under one government, emanating from the same people, was a phenomenon in the political world, which the wisest statesmen in Europe could not comprehend; and of its practicability, many in our own country entertained the most serious doubts. Thus far the friends of liberty have had great cause of triumph, in the success of the principles upon which our government rests. But all must admit, that the purity and permanency of this system depend on its faithful administration. The states and the federal government have their respective orbits, within which each must revolve. If either cross the sphere of the other, the harmony of the system is destroyed, and its strength is impaired. It would be as gross usurpation on the part of the federal government, to interfere with state rights, by an exercise of powers not delegated; as it would be for a state to interpose its authority against a law of the Union.

The judiciary of a state, in all cases brought before them, have a right to decide, whether or not an act of the federal government be constitutional, the same as they have a right to determine on the constitutionality of an act under the state constitution; but in all such cases, this tribunal may supervise the decisions. It is often a difficult matter to define the limitations of the legislative, the executive and the judicial powers of a state; and this difficulty is greater in defining the limitations of the federal government. In both cases, the respective constitutions must be looked to as the source of power; but in the latter, it is often necessary to determine, not only whether the power be vested, but whether it is inhibited to the state. Some powers in the general government are exclusive; others, concurrent with the states. The experience of many years may be necessary to *establish, by practical [*465 illustrations, the exact boundaries of these powers, if, indeed, they can ever be clearly and satisfactorily defined. Like the colors of the rainbow, they seem to intermix, so as to render a separation extremely difficult, if not impracticable. By the exercise of a spirit of mutual forbearance, the line may be ascertained with sufficient precision for all practical purposes. In a state, where doubts exist as to the investiture of power, it should not be exercised, but referred to the people; in the general government, should similar doubts arise, the powers should be referred to the states and the people.

This cause came on to be heard, on the transcript of the record from the supreme court of the state of Missouri, for the first judicial district, and was argued by counsel: On consideration whereof, this court is of opinion, that there is error in the rendition of the judgment of the said court in this, that in affirming the judgment rendered by the circuit court for the county of Chariton, that court has given an opinion in favor of the validity of the act of the legislature of Missouri, passed on the 27th of June 1821, entitled "an act for the establishment of loan-offices," which act is, in the opinion of this court, repugnant to the constitution of the United States; whereupon, it is considered by the court, that the said judgment of the said supreme court of the state of Missouri for the first judicial district, ought to be reversed and annulled; and the same is hereby reversed and annulled; and the cause remanded to that court, with directions to enter judgment in favor of the defendant to the original action.

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*466] *Henry Hollingsworth, Heir of Levi Hollingsworth, Appellant, *v.* Philip Barbour and others.

Land-law of Kentucky.—Proceedings against absent defendants.

H. entered with the proper surveyor for the district of Kentucky, 45,000 acres of land, in the county of Washington, in that state, by virtue of treasury-warrants; a survey was made thereon, in 1786, and a patent for the land issued to H., in 1797; the warrants were purchased by the ancestor of the complainant, by a parol agreement with H., previous to their entry; before this agreement, H., in connection with a person who owned other warrants, had made an agreement with S., to locate their respective warrants, which agreement was ratified by the complainant, who paid a sum of money to S., for fees of patenting, and agreed to make S. a liberal compensation for his services; and S. located and surveyed under the warrants, 45,000 acres, returned the surveys to the office, and paid the fees of office; the locating and surveying of the warrants, and all the necessary steps for completing the title, were done by S., who was employed, first by H., and afterwards by the complainant, who paid in money for the same; H. being deceased, and having made no conveyance of the legal title to the lands, the complainant filed a bill in the county of Washington, "against the unknown heirs of H.," and in 1815, a decree was made by that court, for a conveyance of the lands by the unknown heirs, or, in their default, by a commissioner, appointed in the decree to make the same: *Held*, that the conveyance was not authorized by the laws of Kentucky, in force at the time of the decree.[1]

By the general law of the land, no court is authorized to render a judgment or decree against any one, or his estate, until after due notice, by service of process, to appear and defend.[2] p. 472.

The acts of the assembly of Kentucky authorizing proceedings against absent defendants referred to and examined. p. 472.

The statute under which the proceedings of the complainants in this case were instituted, authorized the court to make a decree for a conveyance, in a suit for such a conveyance, only in the case in which the complainant claims the land as locator, or by bond or other instrument in writing. p. 473.

The claim of a "locator" is peculiar to Kentucky, and has been universally understood by the people of the country to signify that compensation, of a portion of the land located, agreed to be given by the owner of the warrant, to the locator of it, for his services. p. 473.

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[1] See Harris *v.* Hardeman, 14 How. 334; Nations *v.* Johnson, 24 Id. 205; Galpin *v.* Page, 18 Wall. 351; Earle *v.* McVeigh, 91 U. S. 508.

[2] A decree made without such service, or a statutory substitution for it, is merely void. Walden *v.* Craig's Heirs, 14 Pet. 147; Boswell *v.* Otis, 9 How. 336; Webster *v.* Reid, 11 Id. 437; Bradstreet *v.* Neptune Ins. Co., 3 Sumn. 600; Warner Manufacturing Co. *v.* Etna Ins. Co., 2 Paine 502; Lincolm *v.* Tower, 2 McLean 473; Westervelt *v.* Lewis, Id. 511; Thompson *v.* Emmert, 4 Id. 96.

Hollingsworth v. Barbour.

The record of proceedings against "unknown heirs," is no evidence that any such heirs existed; and the decree and deed made in pursuance of it, cannot avail to pass any title, without some evidence that there were some heirs. p. 477.

APPEAL from the Circuit Court of Kentucky. The case is fully stated in the opinion of the court.

The cause was argued by *Sheffey*, for the appellants; and by *Wickliffe*, for the appellees.

*BALDWIN, Justice, delivered the opinion of the court.—This was a bill, filed on the equity side of the court, by the appellants, setting [*467 forth, that on the 21st of February 1784, a certain John Abel Hamlin entered, with the proper surveyor for the district of Kentucky, 45,000 acres of land, lying in the county of Washington, by virtue of sundry treasury-warrants, issued by the state of Virginia. That a survey was made thereon, on the 13th of April 1786; and a patent issued, the 8th of June 1798, to the said John Abel Hamlin. That previous to the date of such entry, the complainant had purchased from the said Hamlin, the warrants on which the entry and surveys had been made, for the sum of $3700; which he paid. That although the entries, survey and patent were in the name of said Hamlin, they were for the benefit of the complainant; who alleged the equitable title thereto as belonging to him. That Hamlin being dead, without having made a conveyance, the complainant, in 1814, exhibited his bill in chancery, in the circuit court for the county of Washington, against the unknown heirs of said Hamlin; and obtained a decree of said court, ordering them to convey to him the legal title of said lands, by a day named in said decree; in default whereof, the court appointed a commissioner for that purpose, who, by deed, approved by the court, conveyed the same to the complainant, on the 15th of August 1815; by virtue of which decree and conveyance, he became vested with the right, title and interest of said Hamlin to all the lands embraced in the patent of the commonwealth to him. The bill then sets forth, that the defendants, sixty-six in number, had obtained grants of various portions of the land patented to Hamlin, and were in possession of the same, by virtue of warrants, entries and surveys adverse to his; and concludes with a prayer against the appellees, the respondents below, that they may be compelled to convey to the complainant the land claimed by them, respectively, under their patents, which were elder than the one to Hamlin.

In support of the allegations of his bill, the complainant produced the entries, survey and patent before mentioned, but offered no evidence of any contract, written or parol, *between him and Hamlin, for the sale of [*468 these lands; and did not attempt to rest his claim to hold the title of Hamlin on any other authority than the decree of the circuit court of Washington county, and the deed of the commissioner appointed to execute the conveyance to him, of the lands included in the patent. In the court below, the defendants, in their answers, made various objections to the entries on Hamlin's warrants; set up title in themselves, by the patents under which they claimed; and their long possession of the lands within their respective surveys, for a period, in many of the cases, exceeding, and in few falling short of, the period prescribed by the act of limitation.

If this court entertained a doubt of the validity of the decree rendered by the circuit court of the county of Washington, ordering a conveyance of the title of Hamlin in the lands in question, to Hollingsworth, we should feel it our duty to enter into the consideration of all the questions arising on the bill, answer and exhibits in this case.

When the case was first reached on the calendar, no counsel appeared on the part of the appellants. The counsel of the appellees brought the case before the court, and presented the various points which arose at the hearing in the circuit court; beginning with the first in order, the right of Hollingsworth to put himself in place of Hamlin, as to a remedy against the appellants. He was informed by the court, that, as then advised, they did not wish to hear him on the other points. Counsel afterwards appearing for the appellants, and requesting to be heard, the court directed an argument on what then appeared to them the turning question on the whole case. We have carefully weighed the reasons urged for a reversal of the decree of the court below, on that ground, and still retain the opinion formed on the *ex parte* argument; that the decree in the case of Hollingsworth against the unknown heirs of Hamlin, and the deed executed by the commissioners pursuant thereto, was void, and wholly inoperative to transfer any title; and that Hollingsworth, or his heir, had no right to call on the appellees to transfer their prior legal title to him, as representing Hamlin
*469] or his heirs. That be the title of the *appellees good or bad, the complainant had no equity against them. Being a stranger to Hamlin's title, he had no right to any conveyance to himself, or any relief sought for by the bill now under the consideration of the court.

The original bill against the unknown heirs of Hamlin, thus deduces the complainant's right to the decree for the conveyance of the legal title vested in Hamlin or his heirs by the entries, survey and patent before referred to:—That Hamlin was indebted to the complainant in the sum of about $4000 by book-account; that he had absconded, and complainant took a writ of attachment against his effects, out of the court of common pleas of the county of Philadelphia, of September term 1784; that in execution of that writ, the sheriff broke open the counting-house of Hamlin, but found no property therein except thirty-nine Virginia warrants for 90,000 acres of land, of which he took possession, but made no return of them on the writ; that Hamlin, some time afterwards, returned to Philadelphia, being wholly insolvent, and proposed to complainant that he should take the warrants for the sum of $3700, to which he assented, and gave Hamlin a credit to that amount on the account; that the warrants were accordingly delivered to the complainant, but without any transfer or assignment in writing. That before the circumstances of Hamlin became desperate, he had, in co-operation with a person who owned some Virginia warrants, made an agreement with Benjamin Stevens, of New Jersey, to locate their respective warrants; which agreement was ratified by the complainant, who paid to Stevens 123*l.* 8*s.* 9*d.*, Pennsylvania currency, for fees of patenting, &c., and further agreed to make Stevens a liberal compensation for his personal labor; and he then commenced the business of locating, surveying, &c.; that Stevens made entries and executed surveys of 4500 acres (the lands in controversy); returned the plats and certificates of survey to the register's office, and paid the fees of office.

It thus appearing from the complainant's allegations in *his bill, that the locating and surveying of the warrants, and all the steps necessary to the completion of the title were done by Stevens, who was employed for that purpose, first by Hamlin, and afterwards by himself, and that his services were compensated by money; it becomes unnecessary to consider the other matters set forth by the complainant. Not being a "locator" of these lands, and showing the location to have been made by another, he excluded himself from all pretence of claiming a right to proceed as such against the unknown heirs of Hamlin.

The circuit court of Washington county could take cognisance of the case presented to them by the complainant, by no principle of the common law, or rule of a court of equity. Their powers to do so must be conferred by some law of Kentucky, within which the complainant must have brought himself, or the proceedings would be void for want of jurisdiction in the court. As this court fully concurs with the views taken of this course by the late learned and lamented Mr. Justice TRIMBLE, who pronounced the decree of the circuit court in a very lucid and elaborate opinion, returned with the record; we deem it wholly unnecessary to do more than to refer to it as containing the reasons of the decree, which we unanimously approve.

TRIMBLE, Justice.—"This is a controversy for land, under conflicting adverse titles. The complainant claims the land, by virtue of two entries, made with the surveyor of Washington county, on the 23d of February 1784, in the name of John Abel Hamlin; an inclusive survey of these entries, made on the 12th day of April 1786; a grant issued thereon to John Abel Hamlin, on the 8th day of June 1797; and a deed of conveyance made by a commissioner, on behalf of the unknown heirs of John Abel Hamlin, to the complainant, in obedience to and in pursuance of a decree of the circuit court for the county of Washington. The defendants claimed the land, under and by virtue of sundry entries, surveys and grants, elder than the grant to John Abel Hamlin. The defendants, in their answers, controvert the validity of John Abel Hamlin's entries; insist, that John Abel Hamlin and his heirs, if he left any, were aliens, incapable of taking, holding or conveying *real estate; deny that John Abel Hamlin left any heirs to inherit his title; and deny that the complainant has any interest [*471 in or title to the estate of John Abel Hamlin in the premises. They further rely on their elder legal titles; insist upon the validity and superiority of the several entries under which they hold; and in bar of the relief sought by the bill, allege they have had upwards of twenty years adverse possession of the land in controversy, prior to the institution of this suit.

"It is argued for the defendants, that the decree of the Washington circuit court is void; and that no title passed by it, and the commissioner's deed made in pursuance of it, to the complainant. It must be conceded, that if the decree is void, the commissioner's deed, made by its authority, can pass nothing to the complainant. This court disclaims all authority to revise or correct the decree, on the ground of supposed error in the court who pronounced the decree. The principle is too well settled, and too plain to be controverted, that a judgment of decree, pronounced by a competent tribunal, against a party having actual or constructive notice of the pendency of the suit, is to be regarded by every other co-ordinate tribunal; and

that if the judgment or decree be erroneous, the error can be corrected only by a superior appellate tribunal. The leading distinction is between judgments and decrees merely void, and such as are voidable only; the former are binding nowhere; the latter everywhere, until reversed by a superior authority. Upon general principles, the decree of the Washington circuit court must have the same force and effect, and none other, in this court, than it would or ought to have in any circuit court of the state. Although these principles are unquestionable, the correct application of them to this case is attended with no little difficulty.

"The suit and decree is against the unknown heirs of John Abel Hamlin. Instead of personal service of process upon the defendants in the suit, an order of publication was made against them; and upon a certificate of the *472] publication *of this order, for eight weeks successively, in an authorized newspaper, being produced and filed in the cause, the bill was taken *pro confesso;* and at the next succeeding term, the final decree was entered, directing the conveyance of the land to the complainant. The counsel for the defendants in this cause have suggested several irregularities in the proceedings in that cause; and insist, the court had no legal authority to pronounce any decree therein. The complainant's counsel contend, that the proceedings were had in pursuance of the several acts of assembly concerning absent defendants: and that if any irregularities have intervened in the progress of the suit, the proceedings and decree are, at most, only erroneous; but that the court having jurisdiction and authority, by the laws of the state, to pronounce a decree for a conveyance of land lying within the county, the decree, however irregular it may be, is not void. This argument renders it necessary to examine the several acts of assembly authorizing proceedings against absent defendants; for, by the general law of the land, no court is authorized to render a judgment or decree against any one, or his estate, until after due notice, by service of process, to appear and defend. This principle is dictated by natural justice; and is only to be departed from, in cases expressly warranted by law, and excepted out of the general rule.

"The first act of assembly is the act of the 19th of December 1786, copied from the pre-existing laws of Virginia. That act provides for the case where a suit in chancery is commenced 'against any defendant or defendants, who are out of this commonwealth, and others within the same having in their hands effects of, or otherwise indebted to, the absent defendant,' &c.; and the second section authorizes the court, in such cases, to have publication made, two months successively, in an authorized newspaper, and if the absentee still fails to appear, to proceed to decree, &c. This act manifestly applies only to cases of debt or duties personal; for the satisfaction of which, the debts or effects of the absent debtor are attached, or enjoined in the hands of the resident party. The next act of assembly, in *473] order of time, is *the act of the 16th of December 1802. The third section of this act provides, that 'where any person or persons, their heirs or assigns, claim land, as locator, or by bond of other instrument in writing, they may institute a suit in equity, having jurisdiction in such cases; and where the party having died, and the legal title descended to his heirs, the complainant may proceed to obtain a decree for the land. though the particular names of the heirs be unknown, and not particularly

named in the suit, although they may be residents of this commonwealth or not; but in such cases, it shall be advertised eight weeks in one of the gazettes of this state, requiring such heirs or representatives to appear and make defence.' This statute authorizes the court to proceed to decree, after publication, only in the cases in which the complainant claims the land sued for in his bill, as locator only, or by bond or other instrument in writing.

"We must then look into the bill of Hollingsworth against the unknown heirs of John Abel Hamlin, to see if the complainant in that case claimed the land as locator, or by bond or other instrument in writing. Upon an inspection of the bill, it is manifest, that the complainant in that case did not claim the land by bond or other instrument in writing. The bill does not pretend, that the complainant held, or ever did hold, any instrument of writing; on the contrary, he shows, negatively, that he did not. He alleges, that he made a parol agreement with Hamlin for the warrants, after the return of his attachment against Hamlin to the court in Philadelphia, in 1784; and that the warrants were afterwards delivered to him, in pursuance of that agreement, by the sheriff, who had seized them at the time he levied the attachment on some of Hamlin's effects; but that the warrants were not returned as levied on. The bill shows he did not claim as locator, in the sense of the term. The claim as locator, and the terms in which it is expressed, are peculiar terms in Kentucky. In early times, many contracts were made between warrant-holders and others, by which those others agreed to locate the warrants, for a portion of the land secured by location; and in many other cases, one man located the warrants of another, without any special agreement as to compensation, *but with an expectation of receiving as compensation the portion of land usually given for such services. The phrase 'claim as locator,' grew out of this state of things; and has been universally understood by the people of the country, to signify the compensation of a portion of the land located, agreed to be given by the owner of the warrant to the locator of it, for his services. The term is believed never to have been used in any other sense, or as signifying the acquisition of property by any other species of contract, than a contract to locate for a portion of the land. According to well-settled rules of construction, the language of the statute must be understood in this its popular acceptation. [*474

"The order of publication, in the case of Levi Hollingsworth, against the unknown heirs of John Abel Hamlin, was made at the November term of the Washington circuit court, in the year 1813; proof of the publication of the order, eight weeks successively, in the Bardstown Repository, was made on the 4th of April 1814; and at the August term, in the year 1814, the final decree was rendered in the cause. These dates are important, because they show, that the only remaining act upon which reliance was placed, and which passed on the 6th of February 1815, is subsequent to the decree, and cannot apply to the case. The acts of 1796 and of 1802, already noticed, were the only statutes existing at the time of the proceedings and decree, in the suit of Hollingsworth against the unknown heirs of John Abel Hamlin; which authorized the courts of the state to proceed, upon orders of publication, to decree against absent defendants. It appears clear to my mind, that the case was not within the provisions of either of the statutes; and that the order of publication, and the proceedings and decree there-

upon, were wholly unauthorized, and unwarranted by the law of the land. The question is, is the decree, therefore, erroneous only, or is it simply void?

"It seems difficult to escape from the conclusion, that if the order of publication was wholly unwarranted by law, the publication is as if it had never been made. Even in cases expressly authorized by the statute, a publication is only a constructive notice to the party; but if the publica-
*475] tion in *the particular case be unauthorized, no principle is perceived upon which it can be regarded as constructive notice. It is an acknowledged general principle, that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded in the immutable principle of natural justice, that no man's right should be prejudiced by the judgment or decree of a court, without an opportunity of defending the right. This opportunity is afforded, or supposed in law to be afforded, by a citation or notice to appear, actually served; or constructively, by pursuing such means as the law may, in special cases, regard as equivalent to personal service. The course of proceeding in admiralty causes, and some other cases where the proceeding is strictly *in rem*, may be supposed to be exceptions to this rule. They are not properly exceptions: the law regards the seizure of the thing as constructive notice to the whole world; and all persons concerned in interest are considered as affected by this constructive notice. But if these cases do form an exception, the exception is confined to cases of the class already noticed, where the proceeding is strictly and properly *in rem*, and in which the thing condemned is first seized and taken into the custody of the court. The case under consideration is not properly a proceeding *in rem*; and a decree in chancery for the conveyance of land, has never yet, within my knowledge, been held to come within the principle of proceedings *in rem*, so far as to dispense with the service of process on the party. There is no seizure, nor taking into the custody of the court, of the land, so as to operate as constructive notice. Constructive notice, therefore, can only exist in the cases coming fairly within the provisions of the statutes authorizing the courts to make orders of publication, and providing that the publication, when made, shall authorize the courts to decree. It has been already shown, that this case is not within the provisions of any statute.

"It would seem to follow, that the court acted without authority; and that the decree is void for want of jurisdiction in the court. But if not void, as being *coram non judice*, it is void and wholly ineffectual to bind or
*476] prejudice the *rights of Hamlin's heirs, against whom the decree was rendered; because they had no notice, either actual or constructive. The principle of the rule, that decrees and judgments, bind only parties and privies, applies to the case; for though the unknown heirs of Hamlin are affected to be made parties in the bill, there was no service of process, nor any equivalent, to bring them before the court; so as to make them, in the eye of law and justice, parties to the suit.

"The case of *Hynes* v. *Oldham*, 3 T. B. Monr., was cited to prove that the proceedings in the case of *Hollingsworth* v. *Hamlin's Heirs*, were regular; but if not so, that they were at most only erroneous and not void. The cases appear to me to be essentially different. That was a case within the jurisdiction of the statutes authorizing publication; the publication had

been made, and the only objection was, that it did not appear that an affidavit had been filed by the complainant, that the particular names of the heirs were unknown to him before making the order of publication. It was decided, that that omission might have been a cause of revision, or of reversal upon appeal to the appellate court; but that the decree was not therefore void. In the case under consideration, the law did not authorize publication at all. It is a case in which the court had no authority to pronounce any decree, until the party was served with process. It is not a case, like the one cited, where there is an irregularity merely in the manner of issuing or awarding the notice by publication; but a case in which notice by publication is wholly unauthorized. In the case cited, the court of appeals admit, that a judgment or decree rendered against a party, without notice, is void, and an unauthorized publication cannot be regarded as notice; and the case under consideration is as if no attempt to give notice had been made. There is an obvious distinction, in reason, between this case and the case where there has been personal service of irregular or erroneous process. In that case, the party has notice in part, and may, if he will, appear and object to, or waive, the irregularity; in this, the publication, being unauthorized, *is not even constructive notice; and unless the proceedings are considered as void, the injured party may be remediless. [*477

"There is another ground, on which it may well be questioned, whether the complainant has made out such a case as will enable him to set up and assert the entries, survey and patent of John Abel Hamlin against the defendants. The act of assembly of 1802 authorizes a decree upon an order of publication against heirs, where the particular names of the heirs are unknown. But the acts of assembly do not declare, that it shall be taken for granted, that there were heirs, and that the title passed by descent to them; and by the decree and commissioner's deed should pass to the complainant, whether any such heirs existed or not. The manifest object of the statute was, to dispense with the necessity of inserting the particular names in the proceedings, and to substitute in the stead of the particular names, their characteristic description of heirs of the decedent. But it is apprehended, the record of the proceedings against the unknown heirs, &c., is no evidence that any such heirs existed, and that the decree and deed, made in pursuance of it, cannot avail to pass any title to the complainant, without some evidence that John Abel Hamlin left heirs, upon whom his estate descended, and from whom it could pass by the commissioner's deed to the complainant. There is no evidence in this case, conducing, in the slightest degree, to show that John Abel Hamlin left any heirs, capable of inheriting his estate. There is nothing for the complainant to rest upon but presumption. Although it may sometimes be presumed, that a decedent left heirs, rather than that he left none; it is not clear to my mind, that the presumption should be indulged in a case like this, so far as to uphold the title of the complainant. It is but a presumption of fact, in any case, and like other presumptions, may be repelled, by countervailing facts and presumptions.

"It appears, that John Abel Hamlin was a foreigner from France, and died in the city of Philadelphia, about the year 1788. The complainants' own bill against the unknown heirs of John Abel Hamlin, contains no allegation, in terms, that he left any heir capable of inheriting: on the

*contrary, it expressly alleges, that he left neither wife nor child; and that after much inquiry, no person could be found who could give any account of his heirs. Twenty-five years intervened between the death of John A. Hamlin and the exhibition of the complainants' bill against his unknown heirs, in the Washington circuit court; and although it appears, that he, until his death, and the complainant, resided in the city of Philadelphia, and were personally known to each other, no heir ever appeared to claim his estate, ner did Hollingsworth ever ascertain the existence of any such heir. Nearly forty years have transpired since the death of Hamlin, and no heir has yet been heard of. Under such circumstances, if the presumption that Hamlin left heirs is not absolutely repelled, I think it so weakened, that the court ought not to rest upon it as sufficient to sustain the complainants' title against the defendants, who have the legal title, and have been long in the possession and enjoyment of it. Even the indulgence of a general presumption, that Hamlin left kindred, who, if citizens of the United States, or of France, could inherit his estate, would not avail the complainant, without going the full length of presuming also that such kindred were in fact citizens or Frenchmen. The presumption that Hamlin left any kindred, citizens of the United States, is strongly repelled by the statements of Hollingsworth's bill, in the Washington circuit court; and by all the circumstances of the case. There is nothing to found the presumption upon, that he left heirs, who were French citizens, in 1788, when he died, but the circumstance that he had emigrated from Brittany about, or previous to 1779; a circumstance too feeble to justify this court in finding the fact to be so.

"If Hamlin left kindred, who were aliens, and belonging to any other nation, they could take nothing by descent, and nothing could pass from them to the complainant. The objection of the alienage of Hamlin and his heirs, regarding him and them as French citizens or subjects, has not been considered, deeming it unnecessary to express any opinion on that point. Entertaining the opinion, as the foregoing observations have shown, that the complainant has failed to show himself legally invested with the claim
*479] and *title of John Abel Hamlin, or of his heirs, if he left any, so as to enable him to set up the entries, surveys and patent, in the name of John A. Hamlin, against the legal title and long possession of the defendants; all investigation of the relative merits of the original claims is necessarily superseded."

The decree of the circuit court, dismissing the bill of the complainant, 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 ordered, adjudged 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.

*Society for the Propagation of the Gospel in Foreign parts, Plaintiffs, *v.* Town of Pawlet and Ozias Clarke.

Foreign corporation.—Corporate capacity.—Statute of limitations.—Mesne profits.

Ejectment to recover a lot of land, being the first division lot laid out to the right of the Society in the Town of Pawlet. The plaintiffs were described in the writ as "The Society for the Propagation of the Gospel in Foreign parts, a corporation duly established in England, within the dominions of the king of the United Kingdom of Great Britain and Ireland, the members of which society are aliens, and subjects of the said king;" the defendants pleaded the general issue of not guilty. The general issue admits the competency of the plaintiffs to sue, in the corporate capacity in which they have sued.[1]

If the defendants meant to insist on the want of a corporate capacity in the plaintiffs to sue, it should have been insisted upon, by a special plea in abatement or bar; pleading to the merits, has been held by this court to be an admission of the capacity of the plaintiffs to sue; the general issue admits, not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring.

In the record, there is abundant evidence to establish the right of the corporation to hold the land in controversy; it is given to them by the royal charter of 1761, which created the Town of Pawlet; the society is named among the grantees, as "The Society for Propagating the Gospel in Foreign parts," to whom one share is given. This is a plain recognition by the crown of the existence of the corporation, and of its capacity to take; it would confer the power to take the land, even if it had not previously existed.

The statutes of limitation of Vermont interpose no bar to the institution, by the Society for the Propagation of the Gospel, &c., of an action for the recovery of the land in controversy.

The plaintiffs are a foreign corporation, the members of which are averred to be aliens, and British subjects; and the natural presumption is, that they are residents abroad.

The act of the legislature of Vermont, which prohibits the recovery of mesne profits in certain cases, applies to the claim to such profits by the plaintiffs in this suit; and the provisions of the treaty of peace of 1783, and those of the treaty with Great Britain in 1794, do not interfere with the provisions of that act. The law has prescribed the restrictions under which mesne profits shall be recovered; and these restrictions are obligatory on the citizens of the state; the plaintiffs take the benefit of the statute remedy, to recover their right to the land; and they must take the remedy, with all the statute restrictions.

This cause was certified to this court from the Circuit Court of the United States for the district of Vermont; the judges of that court being opposed in opinion on certain questions of law which arose at the trial.

The action was an ejectment, brought to recover "the *first division [*481
lot laid out to the right of said Society in Pawlet, containing fifty acres." The cause was tried at October term 1828; and after the testimony on both sides was closed, the jury were discharged, upon the disagreement of the judges of the court, on the several points herein stated, arising upon the facts agreed in the case, and stated by the counsel for the parties. The facts agreed were—

On the 26th day of August 1761, George III., then king of Great Britain, by Benning Wentworth, Esq., governor of the then province of New Hampshire, made the grant or charter to the Town of Pawlet aforesaid, particularly describing the boundaries thereof, to the grantees, whose names are entered on said grant, their heirs and assigns for ever; to be divided to and among

[1] United States *v.* Insurance Companies, 22 Wall. 100–1; Pullman *v.* Upton, 96 U. S. 328; Dental Vulcanite Co. *v.* Wetherbee, 2 Cliff. 555; Lehigh Bridge Co. *v.* Lehigh Coal and Navigation Co., 4 Rawle 9; Zion Church *v.* St. Peter's Church, 5 W. & S. 215; Fritz *v.* Commissioners of Montgomery, 17 Penn. St. 130; Rheem *v.* Naugatuck Wheel Co., 33 Id. 358.

them, into sixty-eight shares. Among the grantees whose names are entered in the said charter, is "one whole share for the Society for the Propagation of the Gospel in Foreign parts." A copy of the charter was filed among the proceedings. And afterwards, on the 16th of April 1795, Ozias Clarke executed the counterpart of a lease to the selectmen of the Town of Pawlet, for the time being, for and on behalf of said town, his heirs, executors, administrators and assigns, of the tract of land mentioned in the plaintiffs' declaration, described as follows, to wit: All that tract of land, situate, lying and being in Pawlet aforesaid, known and distinguished by being the first division fifty acre lot, laid out to the right known by the name of the Society or Propagation right, to have and to hold the demised premises, with the privileges and appurtenances thereto belonging, &c., from the 16th of April 1795, and onwards as long as trees grow and water runs—his yielding and paying yearly, and at the end of every year, the sum of seven pounds, lawful money, &c. A copy of the lease was annexed, and made part of this case. And thereupon, Ozias Clarke entered into the immediate possession and occupancy of the said lot of land, and has been ever since in the possession and occupancy of the same; and has paid the rent aforesaid to the Town of Pawlet, yearly and every year since, at the rate of seven
*482] *pounds, equal to $23.34, for each year; and the Town of Pawlet have received the said sum, as rent, yearly, from Ozias Clarke, and have applied the same for the benefit of schools in the Town of Pawlet. And Edward Clarke, the father of Ozias Clarke, went into the possession of the lot, in the spring of the year 1780 (it not appearing that he had purchased any title thereto), and so continued in the possession thereof, till the defendant entered.

The case agreed contained extracts from the minutes of the society, stating the proceedings thereof, at their meetings in London, relative to the land in Vermont, granted by Governor Wentworth to the society. The first meeting was held on the 16th of July 1762, and these minutes show the measures adopted by the society relative to the lands, from that period down to 1810. The proceedings on the 16th of July 1762, and the 17th of March 1764, show an acceptance of the donation; and a resolution that agents be appointed to take charge of the patents and warrants for the land, and for such other purposes as the interests of the society may require. At a meeting of the society, held December 17th, 1773, the society agreed, that it be recommended to the society, to empower Mr. Cossitt to see that justice be done to the society, in the allotment of glebes, &c., in New Hampshire. The society resolved to agree that a letter of attorney be sent to the governor of New Hampshire, empowering Mr. Cossitt to act in behalf of the society, with regard to these lands, and leaving blanks for other persons whom the governor might think proper to insert. On the 20th of May 1785, a report was made to the society, relative to their lands, and the meeting resolved, that the secretary do write to some one or more members of the church of England, in each of the states of America, in which the society has any property, to take all proper care in securing said property; and further, to inform such persons, that it is the intention of the society to make over all such property to the use of the Episcopal Church in that country, in whatever manner and form,
*483] after communication with the *several governments, shall appear to be most effectual for that purpose.

On the 16th of May 1794, an application was made to the Society, through the Bishop of New York, by the episcopal convention of Vermont, requesting the society to convey, for the support of the episcopal church of that diocese, the land held by the society in Vermont, under grants from New Hampshire. The committee of the society made a report as follows:

The committee agreed in opinion, that the Bishop of New York be assured of the society's readiness to concur in any measures which can forward the establishment of an episcopal church. But having considered, that former applications have been made from the state of Vermont, differing in their intentions from the present, which were rejected by the society, in May 1790; and at the same time, Mr. Parker, of Boston, when he obtained a deed from the society for the conveyance of their lands in New Hampshire, had signified that he should not trouble them respecting Vermont, till he should know the operation of that deed; and having never since heard from Mr. Parker on that subject, are of the opinion, that there is not sufficient ground for the society to execute the present deed.

At a meeting of the society, on the 16th of November 1810, the secretary of the society was directed to obtain the fullest and most particular information respecting the nature and value of the rights of the society to the lands in Vermont, with the best means of recovering and rendering the same available. In consequence of certain votes of the society, expressive of their intention to appropriate the avails of their lands in the state of Vermont for the use of the Protestant Episcopal church in that state, the convention of the church in that state made application to the society for the power of attorney; and the said society executed to the Right Rev. Alexander V. Griswold, bishop of the eastern diocese, and the other agents therein named, the power of attorney, dated December 5th, 1816; a copy of which was annexed to the case.

*The act of the legislature of Vermont, passed October 27th, 1785, [*484
entitled an act for settling disputes respecting landed property; an act entitled an act for the purpose of regulating suits respecting landed property, and directing the mode of proceeding therein, passed November 5th, 1800; also, the several acts to keep the acts last aforesaid in force, for later periods than those contained in said act; an act passed November 15th, 1820, entitled an act for the purpose of regulating suits respecting landed property, and directing the mode of proceeding therein; and all the statutes ever passed in Vermont, for the limitation of actions, and all the additions thereto, as found in the several statute books, including the act passed November 16th, 1819, entitled an act repealing parts of certain acts therein mentioned; an act passed October 26th, 1787, authorizing the selectmen of the several towns to improve the glebe and society's lands, and an act in addition thereto, passed October 26th, 1789; an act passed October 30th, 1794, entitled an act directing the appropriation of the lands in the state, heretofore granted by the British government to the Society for the Propagation of the Gospel in Foreign parts; and all other statutes of said state, that either party considers applicable to this case, are to be considered as a part of this case.

Upon the foregoing case, the opinions of the judges of the circuit court were opposed upon the following points: 1. Whether the plaintiffs have shown that they have any right to hold lands? 2. Whether the plaintiffs

are barred by the three years' limitation in the act of the 27th of October 1785, or any other of the statutes of limitation? 3. Whether, under the laws of Vermont, the plaintiffs are entitled to recover mesne profits? and if so, for what length of time?

The case was argued by *Webster*, for the plaintiffs; and by *Doddridge*, for the defendants. *Doddridge* also presented the written argument of *J. C. Wright*, for the defendants; as did *Webster*, an argument for the
*485] *plaintiffs, prepared by the counsel in the circuit court of Vermont.

For the *plaintiffs*, it was argued, that it was not a point in issue, or on which the court divided in opinion, whether the plaintiffs were a corporation capable of suing in this form; that being admitted by the plea of the general issue. 10 Mod. 207; 1 Bos. & Pul. 10; 10 Co. 122, 126; 1 Saund. 340, 342; *Atlantic Insurance Company* v. *Conard*, 1 Pet. 395, 408, 560. 1. The plaintiffs contend, that if they are a corporation capable of suing, they must be capable of taking and holding land. 2. That the right to take and hold lands is incident to a corporation. Com. Dig. 258, F. 18, 260; F. 18, 19; Co. Litt. 2 *a*, 2 *b*; Sid. 162; 1 Co. 30–6; W. Jones 168. 3. That the corporation existed at and prior to the date of the charter of Pawlet, 1761. It being admitted by the pleadings, that the plaintiffs are a corporation, there is no presumption against its prior existence, at any period within the time whereof the memory of man runneth, &c. Its prior existence is matter of general history, of which the court will take notice as matter of law. The extracts from the records prove the existence of the corporation in 1762, by acts which refer back to the New Hampshire charters, as grants made to the corporation then existing. The preamble of the act of 1794, under which the defendants claim, recognises all grants made to the society, as made to an existing corporation. "Whereas, the Society for the Propagation of the Gospel in Foreign Parts, is a corporation, created by, and existing within, a foreign jurisdiction, to which they alone are amenable; by reason whereof, at the time of the late revolution of this and of the United States from the jurisdiction of Great Britain, all lands in this state granted to the Society for the Propagation of the Gospel in Foreign Parts, became vested in this state," &c. The lease of the tenant admits, that the land in question was
*486] granted by said charter to the society. *The New Hampshire charter of the town, of 1761, recognises the plaintiffs as then being an existing corporation. That charter, being a royal grant, by granting the lands to the plaintiffs, made them a corporation capable of taking and holding the lands thus granted, if they were not so before. Dyer 100, pl. 70; *Aldermen of Chesterfield's Case*, Cro. Eliz. 35; 10 Mod. 207–8. By the act of 1794, all grants of land to the society are recognised as grants originally valid, and so continuing until the revolution; by reason of which, the act declares the lands became vested in this state. The state claims the right of the society, as forfeited to the state, and grants the right to the town; and the tenant, in 1795, acknowledges the right of the town, by his lease, &c., and both are in under the act. The plaintiffs contend, that the defendants have admitted the right of the plaintiffs. See *Atlantic Insurance Company* v. *Conard*, 1 Pet. 450. And are estopped from denying the

original right of the plaintiffs, at any time prior to the revolution. 10 Johns. 353, 358, 292, 223 ; 12 Ibid. 182 ; 3 Caines 188 ; 2 Sch. & Lef. 73, 109.

The plaintiffs are not barred by the act of limitation of 27th October 1785. 1. The plaintiffs contend that the statute gives no title ; that it bars only the action, and not the right of entry ; and that the bar has been avoided by entry of the town, and the leases between the defendants. Clarke, the father of the defendant, entered, before the 1st of October 1780, without color of title, and (without considering the exception to the clause) the action was barred in 1788. In 1795, Clarke permitted the town to enter (which the execution of the lease supposes), accepted a lease from the town (this he acknowledges in the counterpart executed by him, and by the payment of rent), and thereby acknowledged the right of the town. The statute bars only the remedy therein named. Bal. on Lim. 59 ; 2 Salk. 422 ; Bro. P. C. 67 ; Ld. Raym. 741. 2. The defendants are estopped by their leases, from *setting up this defence under this statute. The tenant, by accepting a lease, acknowledges the title of the landlord, and disclaims his own ; and the town enter and lease expressly in virtue of their title under the act of 1794 ; both parties recognise that as the only existing title. The case must now rest on the title of the landlord ; and he cannot set up this title, as it would show title out of the landlord and in the tenant, which would be repugnant to the effect of the lease. And the tenant can set up no title against his landlord, on the ground that he can have no such title. *Blight's Lessee* v. *Rochester*, 7 Wheat. 547 ; 6 Johns. 34 ; 1 Caines 444 ; 2 Ibid. 215 ; 3 Ibid. 188 ; 2 Camp. 12, and notes. The plaintiffs' rights are saved by the ninth section of the act : "provided always, and it is hereby further enacted by the authority aforesaid, that this act shall not extend to any person or persons settled on lands granted or sequestered for public, pious or charitable uses." [*487

1. The plaintiffs contend, that the words "this act," *ex vi termini*, extend to the whole act. 2. That the proviso can only be limited by construction ; and that statutes of limitations are construed strictly to save the rights of the legal owner, especially, an act limiting actions to two years and eight months, without any saving clause in favor of persons beyond seas. The statute 12 Hen. VIII., c. 2, enacted, that formedons in remainder and reverter should be brought within fifty years. It was holden not to extend to formedons in descender. Co. Litt. 115, Harg. Notes 148. 3. The restrictive construction would be unreasonable. The effect would be, to give the settler no improvements, if sued for public lands, on the 30th of June, but would give him the land, together with the improvements, if sued the next day. 4. No inference can be drawn from the location of this section ; for if it were conceded, that the proviso of the fourth section extended only to the parts of the act relating to improvements, it would furnish no reason why a subsequent section of provisos should not extend to the whole act. The fourth section is placed in the middle of those respecting improvements, and therefore, must apply to what follows, *as well as what precedes it. Besides, it will be found that this section applies to the clause of limitation also. [*488

The counsel then went into a particular examination of the statutes of Vermont, on the subject of limitations ; and contended, that the construction of the whole act of the 27th of October 1785 is—that when a person

entered into possession of lands of another, to which he had purchased a title, supposing, at the time of the purchase, such title to be good, in fee, he shall be entitled to recover of the owner the value of the improvements and one-half of what said lands are risen in value; and shall be quieted in possession of the lands, if he remains till after the first of July 1788, without suit against him. That if he entered, without a supposed title, he shall be entitled to recover the value of his improvements; but he shall have no allowance for the rise of the land. But if, by the proviso in the fourth section, he entered after the 1st day of October 1780, he shall not be entitled to recover for his improvements; nor be protected by the clause of limitation. And if he entered after the 1st day of July, without legal title, he could not recover improvements; nor be protected by the clause of limitation. And if he had gotten possession at any time, by actual ouster of the legal owner, according to the fourth section, or had "settled on lands granted or sequestered for public, pious or charitable uses," or had gotten the possession of lands, by virtue of any contract with the legal owner, according to the ninth section; he could not recover for improvements, nor be protected by the clause of limitation.

He denied that the construction contended for by the defendant was correct. 1. From the history of the act. 2. That it is contrary to the intention of the legislature, as shown by a particular examination of the laws relative to limitation. 3. From the acts of the legislature, exemping the public rights from the grand list of the state, from which all annual taxes are made up for the support of government, schools, highways, the poor, &c.

*489] *The defendants are not protected by the general statute of limitations passed the 10th of March 1787. This statute has no operation upon any case, where the cause of action has accrued before the passing thereof. The words of the statute are, "no act of ejectment, &c., shall hereafter be sued, &c., for the recovery of any lands, &c., where the cause of action shall accrue after the passing of this act; but within fifteen years next after the cause of action shall accrue to the plaintiff or demandant, &c. Has. Ed. of the Stat. 100–1.

But what is very decisive of this question is, that both the general statutes of limitation above referred to, contain a proviso in favor of infants, &c., and persons beyond seas. The statutes, therefore, have never commenced running against the plaintiffs in this case, they having always been beyond seas.

The plaintiffs then contend, that they are entitled to recover the seisin and possession of the lands, because: 1. The cause of action had accrued before either of the statutes of limitation had passed, and is, therefore, not with the enacting clauses. 2. If it was, still the right of the plaintiffs is saved under the proviso to protect the lands granted for public, pious or charitable uses. 3. Because the plaintiffs always have been, and still are, beyond seas.

The plaintiffs are entitled to recover for mesne profits. At common law, an action of trespass, after recovery in ejectment, was the proper action to recover the mesne profits, and such other damages as the plaintiffs had sustained. Run. on Eject. 156–7; Bull. N. P. 87; 3 Wils. 121. An action for the mesne profits was consequential to the recovery in ejectment. *Aslin* v. *Parkin*, 2 Burr. 668. The common law of England was adopted

by statute, so far as is not repugnant to the constitution, or to any act of the legislature. (See Has. Ed. 28.) The form of the English action was adopted by statute; and was the only form used till the statute of 1797. (Has. Ed. p. 196.) And upon a recovery, the action of trespass was the only action used to recover mesne profits and any other damages; for in the action of trespass, the plaintiff *was not confined to the mesne profits only; he was entitled to recover for any damages which the defend- [*490 ant had done to the premises; such as cutting timber, or injuring or pulling down buildings, or removing fixtures, &c. Costs in ejectment were recovered as damages in the action of trespass. 2 Burr. 665. The court say that damages may be recovered to four times the amount of the mesne profits. 3 Wils. 121.

It remains to inquire, for what length of time we are entitled to recover?

1. We contend, that as the action itself is within provisos protecting the plaintiffs from the operation of the statutes of limitation, it extends to all the incidents of the action in which the land itself is recovered, and consequently, will go back to the first entry of the defendant. 2. If not, the plaintiffs are entitled for fifteen years before the commencement of the suit. The action of ejectment generally is limited to fifteen years; and that time, in all cases, would regulate the other incidents of the action.

The reason why, that at common law, there could be no recovery beyond six years, is, because the damages must be recovered in an action of trespass, and that action was limited to six years. The statute of 1797 merely changed the remedy to the form now used. Comp. L. 84; Toll. Ed. 90, 91. By this statute, the plaintiff is entitled to recover as well his damages, as the seisin and possession of the premises. Under this statute, the plaintiff is entitled to recover for the same injuries, and to the same amount, as before the alteration he was entitled to recover in the action of trespass. The first restriction upon such recovery was introduced by a statute passed November 5th, 1800 (Toll. Ed. 211; Comp. L. 176); by the third section of which, it is enacted, "that in all actions of ejectment, which now are, or hereafter may be, brought, the plaintiff, &c., shall recover nothing for the mesne profits, except upon such part of said improvements as were made by the plaintiff or plaintiffs, or such person or persons, under whom he, she or they hold." By the fifth section, it is provided, "that this act shall not extend to any person or persons in possession of any lands granted for *public or pious uses;" and by the [*491 eighth section, "this act shall not extent to any person or persons, who shall enter upon and take possession of lands, after the passing of this act."

It follows, therefore, that as the defendants are upon lands appropriated to public, pious and charitable uses, that they are not entitled to the benefit of this provision of the act. It follows also, that, as this provision of the act can operate only upon cases that had taken place before the passing of the act, it is wholly retrospective and void. See 2 Gallis. 139; 7 Johns. 477.

Doddridge, for the defendants, argued: 1. The plaintiffs have shown no capacity to recover these lands, or to hold them. They have offered no evidence of a charter of incorporation, constituting them a body politic; or any act of incorporation authorizing them to institute this suit. This is

essential to the commencement of the suit; and the plaintiffs, for want of such proof of their existence as a corporation, have failed *in limine*. The rule of law is, that every person, natural or artificial, who would avail himself of a deed, or take any benefit by it, must produce the deed itself. 10 Co. 92 *a*, *b*. And this rule prevails, without exception, in relation to charters or other acts erecting bodies politic. Without such a charter they can have no legal existence. *Page's Case*, 1 Co. 52; *Rex* v. *Passmore*, 3 T. R. 247; 8 Co. 8; Co. Litt. 225; 8 Johns. 295; 2 Ld. Raym. 1535; Kyd on Corp. 292; Bull. N. P. 107. Before any corporate act can be given in evidence, its charter must be produced. *United States* v. *Johns*, 4 Dall. 412.

It has been supposed, that the existence of the society having become matter of history, it is unnecessary to show the court its corporate character and capacity, by producing the act of incorporation. The distinction between such facts as may or may not be proved by history, is well settled. *492] Those which are of *general concern, which affect nations, as the revolutions of governments and the succession of princes, may be proved by history. But the evidence of a private right, as a custom; or of a corporation, which is of much less notoriety than a custom, cannot be so proved. 1 Salk. 281.

Is it assumed by the plaintiff, that the existence of this society as a corporation, is acknowledged by the royal grant of the Town of Pawlet, made by Governor Wentworth, in 1761? Is it true, that a royal grant of land to an indefinite number of individuals, by a general description, is of itself to be received against strangers as evidence of the corporate capacity of the individuals? This court, in *Pawlet* v. *Clark et al.*, 9 Cranch 292, determined such a grant to be void. The doctrine urged by the plaintiff is conceived to be without authority, and contrary to the whole theory of "king's grants." The king's grants shall not inure to any other intent than that which is precisely expressed in the grant. 2 Bl. Com. 347.

Is it true, that the right to hold lands is legally incident to a corporation? This is denied. A corporation can only act up to the end or design, whatever that may be, for which it was created by the founder. 1 Bl. Com. 480. Corporations cannot be seised of lands for the use of another. Bacon on Uses 347; 1 Bl. Com. 477. The cases cited for the plaintiffs, of the effect of a grant of lands by the king to a corporation, do not sustain the principle.

It is alleged, that the general assembly of Vermont, by several legislative acts, have recognised all grants made to the society, as made to an existing corporation. None of the acts of the legislature recognise the right of any foreign company to take or hold land. The interference of the assembly was for purposes entirely distinct, if not adverse to such recognition. The acts of Vermont are founded on the supposition that these lands are vacant, and in default of ownership, needed the care of the legislature. Even the last act, which grants the lands to the towns in which they lie, for the use of schools, although it mentions them as having been *493] granted to "the *Society for Propagating the Gospel in Foreign parts," does not recite, affirm or admit the fact of the incorporation of such society; much less, its capacity to hold lands in perpetual succession. But if it had done so, it would have left the question, for every prac-

tical purpose, where it found it. The state has no power over any foreign society or body whatsoever.

It is denied, that an express declaration by the legislature, that the plaintiffs are a corporation and competent to sue, would have any operation. It has been settled, in Vermont, on solid grounds, that it is not competent for the legislature to supply evidence to a party in a particular case. 1 Chipm. 237. What is legal or pertinent evidence, is a question exclusively for the court to determine. The legislature has power to create a corporation ; but it has no power to create one within the realm of Great Britain. Neither the people of Vermont, nor the defendants, have ever known anything of the society but its name. Nearly seventy years ago, the charter of this town of Pawlet, containing the lands sued for, was issued in the name of the king. The town has been divided among the grantees. The forest has been felled, and the soil made fruitful by its owners. For fifty years, the defendant and his ancestors have peaceably possessed this land ; now claimed by a supposed body of men of whom nothing is known. Men who have never attempted to locate the lands, who never improved it, possessed it, nor ever claimed to possess it. Recently, certain persons in this county, not pretending to be of the society, have required the occupant of the soil, who has so long cultivated and improved the lands, to yield them to a foreign corporation ; of whose capacity or right they know nothing, and of which they pertinaciously refuse to exhibit any evidence. May not the validity of a claim so circumstanced be well doubted? Does not the legal suspicion attach to the withholding of the charter ; that if it was exhibited, it would develope circumstances fatal to the claim of the society ?

Again, it is insisted, that the defendants cannot require *the production of this charter, because the Town of Pawlet has taken possession of this property, as having been the property of the society, and so continued until the revolution ; described it as known by the name of "the society right ;" and now claim it as forfeited by the revolution. Where a party resorts to the admissions of his adversary, the whole admission must be taken together ; adopt this rule, and the title of the defendants is indisputable. If it is admitted, that the land once belonged to a body corporate ; the same statement asserts that it no longer belongs to it, but has been forfeited. As to a legislative recognition, it cannot avail, if to enact facts for a particular case, is contrary to law, and this is certainly so. [*494

If it be said, that if the lands were not the property of the society, there would be nothing for the statute of Vermont to operate on ; the answer is, that the words of the statute, which refer to " the society land " are descriptive, and no more. It is not well supposed, that the defendants hold or claim to hold under a grant from Vermont. They are in peaceable possession of the land, and have held it for nearly half a century, under a legal and a fair title, as they believed : and on this they have a right to rest, until a better right shall be made to appear by legal, competent and appropriate testimony. It is an indispensable rule in ejectment, that the plaintiff must entitle himself to recover by the force of his own legal title ; and he can derive no support from the weakness of his adversaries'. Evidence of title consists, 1. In showing possession and acts of ownership, from which the legal title may be presumed. 2. In proving a particular title. 2 Stark. Evid. 514. He who claims as heir, must prove the seisin of his ancestor ;

and afterwards, that he is heir. A guardian in socage, who has an interest in the land, must, in ejectment, prove that his ward is heir; that he is guardian; that his ward is then under the age of fourteen. 2 Stark. Evid. 521. These *authorities show the error of the assumption, that the *495] defendants, having pleaded the general issue, admitted the right of the plaintiffs to sue as a corporation. "The general issue," says Sir William Blackstone, "is what traverses and denies at once the whole declaration." 3 Bl. Com. 306. How the denial of the whole can be construed an admission of a part, or any part of the right of the party, is not perceived. It is agreed, that temporary disabilities, which delay the suit only, cannot be relied upon, under the general issue. It is only an admission that the party named may sue, not that he has a right to recover what he sues for; either in the way he sues, or in any other. His title to recover, in all such cases, depends on his proof. The non-joinder of all the parties in interest in a suit, is fatal; and yet the principle which is claimed for the plaintiff negatives this well-established and proper rule. It is not an answer, on the trial, to the objection of want of parties, when the evidence of the plaintiff is given, showing that he is not the only party who can claim to recover, that the general issue has been pleaded, and that all such objections have been waived. The spirit of the rule which is claimed in this case should go further to protect a plaintiff showing some right, although not the whole right, than to maintain that one can sue who has shown no right all.

The case of *Conard* v. *Atlantic Insurance Company*, 1 Pet. 450, when examined, asserts nothing contrary to the principles which are now stated. In that case, it is said by the distinguished and lamented judge who tried the case at the circuit court of Pennsylvania, Judge Washington, that the object of the suit, "was to try the merits of the case;" and a technical objection taken to defeat the declared purpose of the parties, came in under no favor. If one sues as guardian, executor, or in any fiduciary character, the general issue does not confess his character, and he must prove it. So, if an assignee sue, he must, on the general issue, prove the assignment. In this case, the plea does not question the right of the plaintiff to sue; but as the plea *496] denies every material allegation in the declaration, it *cannot admit they have title to the thing demanded; or capacity to acquire it; or any matter or thing touching the title.

It is urged, that the defendants are estopped by the lease from disputing the capacity of the plaintiffs to take the land. A tenant, it is well said, is estopped to deny the title of his landlord; but the defendants are not tenants to the society. They have shown no title but possession, nor are they bound to exhibit any other, until some title is exhibited by the plaintiffs. There is no privity of contract, action or interest, or relation, between the plaintiffs and the defendant; and the doctrine of estoppel applies to such cases. What privity or relationship exists between the defendants and the pretended corporation? The very fact of capacity, which it is the object of the reasoning of the plaintiff's counsel to infer or assume, should be proved by proper evidence, before any foundation is laid for inferences. It is required first to assume the corporate capacity of the plaintiff; then the relationship of the defendants to it, to estop the defendants' denial. Such assumptions are not warranted by the law, nor by the facts of the case.

If the facts were as the plaintiffs assume, they do not form a legal estoppel, and prevent the defendant from a denial of the capacity of the plaintiffs to sue for these lands, or to hold them. Every estoppel ought to be reciprocal: that is, to bind both parties. 3 Co. 352. The name given to the land in the lease "known by the name of the society or propagation right," is not the name in which the plaintiffs declare; it may be as well appropriated to one society as to another.

Upon the statutes of limitation, it is contended, that the plaintiffs are barred of their right of action, should the court consider that they have established a capacity to maintain their suit. Under the provisions of the act of 1785, the defendant is fully protected. The record shows, that the father of the defendant entered on the land, in the spring of 1780, and *continued in possession until April 1795, when his son entered, and has ever since continued in the possession of the land. It is fairly to [*497 be inferred, that Ozias Clarke came into possession under his father. And thus, a possession of upwards of forty years is made out; a length of possession undisturbed, which entitles the party to the most favorable consideration. On the 10th March 1787, the legislature passed the quieting act; which, it is admitted, does not embrace this case; but it is referred to, in order to show the existence of a general disposition in the legislature to impose limitations on all titles derived from the mother country. It was doubtless the intention of the legislature, that the alarm as to titles growing out of the revolutionary struggle should be allayed, and that the holders and occupants of lands, so situated, should be speedily quieted in their titles; and their titles made complete, under the special legislation growing out of the exigencies of the times. The rights of these parties, we, therefore, contend, vested under these laws, and no subsequent laws can divest them. The laws thus made constituted a contract on the part of the state; so far, at least, as that the title vested under the laws should not be divested by a repeal or change of the law of limitations.

The plaintiffs contend, that the last proviso, save one, in the quieting act, exempts the society from the limitations of the last section. On the part of the defendants, it is urged, that this proviso applies only to the previous part of the law; and by its position, as well as its purposes, is so restricted. Should it have the operation claimed for it by the plaintiffs, it will entirely defeat the purposes of the statute. The act of 1785 consists of two distinct and independent parts, the subjects of which bear to each other no affinity or connection; no more than if the legislation upon them was in two distinct laws. A particular examination of the sections of the law fully supports this position. Sound principles of construction, and the requirements of justice determine, in order to attain the intention of the legislature, that the two parts of the statute be treated as separate *and distinct; as much so as if contained in two statutes. Separate stat- [*498 utes, or several statutes upon the same subject, are to be considered as one subject, for the purpose of interpretation. 1 Burr. 447. So, if two distinct matters be embraced in one statute, they shall be considered as two acts. 7 Bac. Abr. 551; Hob. 226; Perk. 13, 14.

The act of limitations of 1785, it is contended, is the only one applicable to the case; and it has no exception in favor of persons "beyond sea." Those words in the law of 1787 have nothing to do with this controversy.

But if they had, this is in the nature of an exception to the statute, and it is to be proved by him who would take advantage of it. That these corporations were beyond sea, is not proved; and it is not to be presumed. This court has determined, that to give the court jurisdiction, you may look back of the corporation, and must find, in case the jurisdiction is claimed between citizens of different states, that none of the corporators are citizens of the same state with that of the adverse party. It is contended, that the statute of limitations does not apply, because the entry of the defendants, and those under whom they claim, was upon a supposed title. This is denied. The defendant, Clarke, is in possession; and this is all that can be required of him, until the plaintiffs have shown their title. The terms of the act clearly embrace the case of the defendants; and the plaintiffs have made out no case of exception. It is understood, that the decisions of the courts of Vermont on this statute have always been according to the literal meaning of the law.

It is denied, that the act of 1801, by excepting lands of the description of those claimed by the plaintiffs, reserves the remedy for the recovery of these lands. The argument, that no subsequent statute could affect rights acquired under a precedent law, has already been submitted; and it is also said with confidence, that the court will not admit, that a repeal of the prior law was intended by implication. The act of 1805 is considered as in full force in Vermont, and many titles depend upon it.

*499] *Are the plaintiffs entitled to recover mesne profits, and for what time? There is a strong analogy between the limitation of actions for the recovery of the land, and for the recovery of mesne profits. At common law, there could be a recovery for a longer period than six years.

In England, where the right to recover for mesne profits was first established, the defendants had probably been, in all the cases, occupants of improved land. In this case, the claim of the plaintiffs is for the mesne profits of land which when first possessed was in a state of nature, and which has been made productive by the industrious improver. Every principle of justice would require, that a claimant under a long dormant title, should not have a compensation for an occupancy which had conferred upon the property such additional value. In accordance with these principles, the legislature of Vermont acted; and while, on the one hand, they have secured to the occupant the value of his improvements, on the other, they have denied to the successful claimant any supposed profits of lands, unimproved when the occupation of the defendant commenced. Act of the legislature of Vermont, 15th November 1820.

This action was commenced in 1824, and is clearly within the provisions of this act; and there is nothing in the distinction as to the title under which the defendants held. It would seem to have been the manifest intention of the legislature of Vermont, while it denied the occupants without supposed title the value of their improvements, to relieve them from liability for mesne profits; to which, being benefited by the improvements which the party recovering the land takes without compensation, he could have no just claim.

Webster, in reply.—As to the capacity of the plaintiffs to take and hold the lands: The capacity in which they act, is admitted in the pleadings; they sue as a corporation, and they are by the plea of the general issue

admitted to be such, and so to be *taken. The capacity of the corporation to hold lands is sufficiently proved, by producing a grant of lands to it by the king himself. The difference between this case and that of the *Town of Pawlet* v. *Clarke*, in 9 Cranch. 292, is, that the grant was there to the church of England, and not to a corporation. The defendants claim under the act of 1794, which act admits the existence of the corporation, and of their capacity to take the lands. The lease to the defendant from the Town of Pawlet shows that he claims under the crown. The town claims under the state, and the state claims under the society, and the society hold under the crown. The state assert their right as successors to the society, on the occurence of the revolution. Thus, all parties claim under the crown, and all are bound by their acts.

As to the statute of limitations, he said, that the act only barred the action, not the entry; and in 1794, the Town of Pawlet actually entered in this very right. They entered as having acquired the right of the society, and holding under it.

The defendant, Clarke, admitted this right; he now holds the lands under it; and he cannot dispute the right; although he may deny that the right belongs to the plaintiffs, and may contend that it has passed to the town. The defendant cannot set up any title but that under which he entered; and having entered under the town, that title and that alone can he set up; on that title only can he stand.

STORY, Justice, delivered the opinion of the court. (Mr. Justice BALDWIN dissenting on the first point.)—This cause is certified to this court, from the circuit court for the district of Vermont, upon certain points upon which the judges of that court were opposed in opinion.

The original action was an ejectment, in the nature of a real action, according to the local practice, in which no fictitious persons intervene; and it was brought in May 1824, to recover a certain lot of land, being the first division lot *laid out to the right of a society in the Town of Pawlet. The plaintiffs are described in the writ as "The Society for [*501 the Propagation of the Gospel in Foreign Parts, a corporation duly established in England, within the dominions of the king of the united kingdom of Great Britain and Ireland, the members of which society are aliens and subjects of the said king." The defendants pleaded the general issue, not guilty, which was joined; and the cause was submitted to a jury for trial. By agreement of the parties, at the trial, the jury were discharged from giving any verdict, upon the disagreement of the judges upon the points growing out of the facts stated in the record. Those points have been argued before us; and it remains for me to pronounce the decision of the court.

The first point is, whether the plaintiffs have shown, that they have any right to hold lands? In considering this point, it is material to observe, that no plea in abatement has been filed, denying the capacity of the plaintiffs to sue; and no special plea in abatement, or bar, that there is no such corporation as stated in the writ. Comyn's Dig. Abatement, E. 16; *Mayor* of *Stafford* v. *Bolton*, 1 Bos. & Pul. 40; 1 Saund. 340, Williams's notes; 6 Taunt. 467; 7 Ibid. 546. The general issue is pleaded, which admits the competency of the plaintiffs to sue in the corporate capacity in which they have sued. If

the defendants meant to have insisted upon the want of a corporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar. Pleading to the merits has been held by this court to be an admission of the capacity of the plaintiffs to sue. *Conard* v. *Atlantic Insurance Company*, 1 Pet. 386, 450. (See the *Case of Sutton Hospital*, 10 Co. 30 *b*; Com. Dig. Franchise, F. 6, 10, 11, 15; Capacity, A. 2. See also, *Proprietors of Kennebeck Purchase* v. *Call*, 1 Mass. 482, 484; *Mayor of Stafford* v. *Bolton*, 1 Bos. & Pul. 40; 1 Saund. 340, note by Williams.)

But the point here raised is not so much, whether the plaintiffs are entitled to sue generally as a corporation, as whether they have shown a right to hold lands. The general issue admits not only the competency of the
*502] plaintiffs to sue, *but to sue in the particular action which they bring. But in the present case, we think, there is abundant evidence in the record, to establish the right of the corporation to hold the lands in controversy. In the first place, it is given to them by the royal charter of 1761, which created the Town of Pawlet. Among the grantees therein named, is "the Society for the Propagation of the Gospel in Foreign parts," to whom one share in the township is given. This is a plain recognition, by the crown, of the existence of the corporation, and of its capacity to take. It would confer the power to take the lands, even if it had not previously existed. And the other proceedings stated on the record, establish the fact, that the society had received various other donations from the crown, of the same nature, and had accepted them. Besides, the act of 1704, under which the Town of Pawlet claims the lands, distinctly admits the existence of the corporation, and its capacity to take the very land in controversy.

"Whereas," says the act, "the Society for the Propagation of the Gospel in Foreign parts is a corporation created by and existing within a foreign jurisdiction, to which they alone are amenable; by reason whereof, at the time of the late revolution of this and of the United States from the jurisdiction of Great Britain, all lands in this state, granted to the Society for the Propagation of the Gospel in Foreign parts, became vested in this state, &c." And the act then proceeds to grant the right of the state, so vested in them, to the various towns in which they are situated. So that the title set up by the state is under the society, as a corporation originally capable to take the lands, and actually taking them, and their title being divested, and vesting in the state by the revolution. In the latter particular, the legislature were mistaken in point of law. This court had occasion to decide that question, in the *Society for the Propagation of the Gospel in Foreign parts* v. *Town of New Haven*, 8 Wheat. 464, where it was held, that the revolution did not divest the title of the society, although it was a foreign corporation. That case came before us upon a special verdict, which found the original charter of the society granted by William III., and
*503] *its power to hold lands, &c. We do not, however, rely on that finding, as it is not incorporated into the present case. But we think the other circumstances sufficient, *primâ facie*, to establish the right of the society, as a corporation, to hold lands; and particularly the lands in question. In *Conard* v. *Atlantic Insurance Company*, 1 Pet. 386, 450, the court held evidence, far less direct and satisfactory, *primâ facie* evidence of

the corporate character of the plaintiffs. A certificate ought accordingly to be sent to the circuit court in answer to the first question, that the plaintiffs have shown that they have a right to hold the lands in controversy.

The second point is, whether the plaintiffs are barred by the three years' limitation in the act of the 27th of October 1783, or any other statute of limitations of Vermont? The act of 1785 recites, in the preamble, that many persons have purchased supposed titles to lands within the state, and have taken possession and made large improvements, &c. It then proceeds to provide, in the first eight sections, for the allowance of improvements, &c., to the tenants, in case of eviction under superior titles. There is a proviso, which prevents these sections from extending to anything future. The ninth section is as follows: "provided always, and it is hereby further enacted by the authority aforesaid, that this act shall not extend to any person or persons settled on lands granted or sequestered for public, pious or charitable uses; nor to any person, who has got possession of lands, by virtue of any contract made between him and the legal owner or owners thereof." The tenth section provides, that nothing in the act shall be construed to deprive any person of his remedy at law against his voucher. The eleventh and last section is as follows: "That no writ of right or other real action, no action of ejectment or other possessory action, of any name or nature soever, shall be sued, prosecuted or maintained for the recovery of any lands, tenements or hereditaments, where the cause of action has accrued before the passing of this act, unless such action be commenced within three years next after the 1st of July, in the present year of our Lord 1788."

*Now, in order to avail themselves of the statute bar, under this last section, it is necessary for the defendants to show, that the cause [*504 of action of the plaintiffs accrued before the passing of that act. To establish that, it is necessary to show, that there had been an actual ouster of the plaintiffs, by some person entering into possession adversely to the plaintiffs. No such ouster is shown upon the facts. It is, indeed, stated, "that Edward Clarke, the father of the said Ozias Clarke, went into possession of the said lot, in the spring of the year 1780, it not appearing that he had purchased any title thereto; and so continued in possession thereof, until the said defendant entered as aforesaid;" that is, under the lease of the town. Edward Clarke is, therefore, to be treated as a mere intruder, without title; and no ouster can be presumed in favor of such a naked possession. And it is not unworthy of notice, that the fourth section of the act of 1785 provided, "that no person, who hath ousted the rightful owner, or got possession of any improved estate by ouster, otherwise than by legal process, shall take any advantage or benefit by this act." So that a plain intention appears on the part of the legislature, not to give its protection to mere intruders, who designedly ousted the rightful owners.

It is also to be considered, that the defendants do not assert any claim of title under him or in connection with him; and the other circumstances of the case lead to the presumption, that he never set up any possession, adverse to the society's rights; for the possession was yielded, without objection, to the town, when the act of 1794 enabled the town to assert a title to it. The act of 1785 being, then, in terms, applicable only to cases,

where the cause of action accrued before the passing of that act, cannot govern this case, where no such cause existed.

There is, moreover, another difficulty in setting it up as a bar, if the proviso of the ninth section extends, as we think it does, to every section of the act. It has been argued by the counsel for the defendants, that the ninth section ought to restricted in its operation to the eight preceding sections. But we see no sufficient reason for this. The words are, "that this act shall not extend," &c.; not that *the prior sections of this act shall not extend, &c. It would be would be strange, indeed, if the legislature should interfere to prevent any improvements being paid for, in cases of lands granted or sequestered for public, pious or charitable uses; and yet should allow so short a period as three years to bar for ever the right of the grantees for charity. There are good grounds, why statutes of limitation should not be applied against grants for public, pious and charitable uses, when they may well be applied against mere private rights. The public have a deep and permanent interest in such charities; and that interest far outweighs all considerations of mere private convenience. The legislature of Vermont has thought so; for we shall find, in its subsequent legislation, that it has, by a similar provision, excepted from the operation of all the subsequent statutes of limitation, grants to such uses. There is, then, no reason, why the court should construe the words of the ninth section as less extensive than their literal import. The case ought to be very strong, which would justify any court to depart from the terms of an act; and especially, to adopt a restrictive construction, which is subversive of public rights, and justified by no known policy of the legislature. We feel compelled, therefore, to construe the words, that "this act shall not extend, &c.," as embracing the whole act, and carving an exception out of the operation of the eleventh section of it.

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Let us, then, see, how far any subsequent statute of limitations of the state applies to the case. The next statute in the order of time, is the act of the 10th of March 1787, which provided as follows: "That no writ of right, or other real action, no action of ejectment, &c., shall hereafter be sued, &c., for the recovery of any lands, &c., where the cause of action shall accrue after the passing of this act, but within fifteen years next after the cause of action shall accrue to the plaintiff or demandant, and those under whom he or they may claim. And that no person having a right of entry into any lands, &c., shall hereafter thereinto enter, but within fifteen years after such right of entry shall accrue." This act contained no provision excepting grants for public, pious or charitable uses from its operation. But it contained *a proviso, that the act should not extend to bar any infant, person imprisoned, or beyond seas, without any of the United States. The act was prospective, and applied only where the cause of action accrued after the passing of it. This act was superseded and repealed by another act of the 10th of November 1797, which constitutes the present governing statute of limitations of the state. It contains, however, a proviso (§ 13), that the act shall not be construed to extend to or affect any right or rights, action or actions, remedies, fines, forfeitures, privileges or advantages, accruing under any former act or acts, clause or clauses of acts, falling within the construction of that act, in any manner whatsoever; but that all proceedings may be had, and advantages

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taken thereon, in the same manner as though that act had not been passed; and that the former act or acts of limitation, clause or clauses of acts, which are or were in force at the time of passing the act, shall, for all such purposes, be and remain in full force. This proviso preserved the operation and force of the act of 1787, as to causes of action accruing in the intermediate period between the act of 1787 and the act of 1797.

In this view of the matter, it is important to consider the entry of the defendant, under the lease of the town, on the 16th of April 1795. If that entry was adverse to the title of the plaintiffs, then the act of 1787 began to run upon it from that period; for the cause of action of the plaintiffs then accrued to them by the ouster. It has been contended by the plaintiffs' counsel, that the entry of Clarke, under the lease in 1795, was an entry for the plaintiffs, and in virtue of their title, and not adverse to it. We do not think so. The Town of Pawlet claimed the right to the property, not as tenants to, or subordinate to the right of, the plaintiffs; but as grantees under the state. Their title, though derivative from, and consistent with, the original title of the plaintiffs, was a present claim in exclusion of, and adverse to, the plaintiffs. They claimed the possession, as their own, in fee-simple; and not as the possession of the plaintiffs. A vendee in fee derives his title from the vendor; but his title, though derivative, is adverse to *that of the vendor; he enters and holds possession for himself, and not for the vendor. Such was the doctrine [*507 of this court in *Blight's Lessee* v. *Rochester*, 7 Wheat. 535, 547, 548. The lessee, in the present case, did not enter to maintain the right of the plaintiffs, but of the town. He was not the lessee of the plaintiffs, and acquired no possession by their consent, or with their privity. This entry then was adverse to any subsisting title in them, and with an intention to exclude it. It was, therefore, in every just sense, an entry adverse to, and not under, the plaintiffs.

The case, then, falls within the act of 1787; and unless the plaintiffs are "beyond seas," within the proviso of that act, they would, upon the mere terms of that act, be barred. The facts, stated upon the record, do not enable us to say, whether there is absolute proof to that effect. The plaintiffs are a foreign corporation, the members of which are averred to be aliens and British subjects; and the natural presumption is, that they are resident abroad. If so, there cannot be a doubt, that they are within the exception. If any of the corporators were resident in the United States, then a nicer question might arise, as to the effect of the proviso, whether it applied to the corporation itself, or to the corporators, as representing the corporation. But this it is unnecessary to decide; and on this we give no opinion. There is the less reason for it, because, by a subsequent act, passed on the 11th of November 1802 (long before the fifteen years under the act of 1787 had run), it was provided," "That nothing contained in any statute of limitations heretofore passed shall be construed to extend to any lands granted, given, sequestered or appropriated to any public, pious or charitable uses; or to any lands belonging to this state. And any proper action of ejectment, or other possessory action, may be commenced, prosecuted, or defended, for the recovery of any such land or lands, anything in any act or statute of limitations heretofore passed to the contrary notwithstanding." This act, of course, suspended the act of 1787, as to all cases within its pur-

view. That the grants to the Society for the Propagation of the Gospel were deemed to be grants for pious and charitable uses within it, is
*508] *apparent from the subsequent legislation of the state, as well as from the objects of the institution. In November 1819, the legislature passed an act repealing this exception, so far as related to the rights "of lands in the state, granted to the Society for the Propagation of the Gospel in Foreign Parts," thus plainly declaring that they were previously protected by it. This repeal cannot have any retrospective operation, as to let in the general operation of the statute of limitations, in the intermediate period between 1802 and 1819; but must, upon principle, be held to revive the statute only in future. The present suit was brought in 1824, and the statute period of fifteen years had not then run against the plaintiffs.

It is unnecessary to enter upon the consideration of the statute of limitations of 1797, which contains similar provisions as to this subject with that of 1787, and the exception of persons "beyond seas." Charitable and pious grants were not excepted from its operation; but that defect was cured by an act passed on the 26th of October 1801, in terms similar in substance to those of the act of 1802, already referred to. The act of 1797 applies in terms only to future causes of action, to causes of action accruing after the passing of the act, and limits the action to the period of fifteen years. If it had applied to the present case, it would have been open to the same reasoning, upon the exceptions which have been already suggested in reference to the act of 1787. Upon this second question, our opinion is, that a certificate ought to be sent to the circuit court, that the plaintiffs are not barred by the three years' limitation, in the act of the 27th of October 1785, nor by any other of the statutes of limitation of Vermont.

The next point is, whether, under the laws of Vermont, the plaintiffs are entitled to recover mesne profits; and if so, for what length of time? Previous to the year 1797, the English action of ejectment was in use in Vermont, and the common law applicable to it, as well as to the action for mesne profits, consequential upon recovery in ejectment. By an act passed
*509] on the 2d of March 1797, the mode of proceeding was altered. *The suit was required to be brought directly between the real parties, and against both landlords and tenants; and by that and a subsequent act, the judgment was made conclusive between the parties. It was further provided, that in every such action, if judgment should be rendered for the plaintiff, he should recover, as well his damages, as the seisin and possession of the premises. This provision has ever since remained in full force, and has superseded in such cases the action for mesne profits. In November 1800, an act was passed, declaring, "that in all actions of ejectment which now are, or hereafter may be, brought, the plaintiff shall recover nothing for the mesne profits, except upon such part of said improvements as were made by the plaintiff or plaintiffs, or such person or persons under whom he, she or they hold." The act contained a proviso, that it should not extend to any person or persons in possession of any lands granted for public or pious uses. This act continued in force until November 1820, when an act passed containing the same general provision as to the mesne profits; but the proviso in favor of lands granted to pious and charitable uses was silently dropped, and must be deemed to be repealed by the implication.

The question, then, is, whether the act of 1820 does not take away the

right to mesne profits in this case; for the state of facts does not show, that any improvements have ever been made by the plaintiffs. The treaty of peace of 1787, the British treaty of 1794, do not apply to the case. The right of action, if any, of the plaintiffs, did not accrue until the year 1795. The entry then made by the defendants was the first ouster: and at that time, in the action of ejectment, the plaintiffs could not have recovered any damages; but would have been driven to an action of trespass for mesne profits. The legislature was competent to regulate the remedy by ejectment, and to limit its operation. It has so limited it. It has taken away, by implication, the right to recover mesne profits, as consequential upon the recovery in ejectment, and given the party his damages in the latter action. It has prescribed the restrictions under which mesne profits shall be recovered; and these restrictions are *obligatory upon the citizens of the state. The plaintiffs have not, in this particular, any privileges [*510 by treaty beyond those of citizens. They take the benefit of the statute remedy to recover their right to the lands; and they must take the remedy, with all the statute restrictions.

Upon this last question, our opinion is, that it ought to be certified to the circuit court, that under the laws of Vermont, the plaintiffs are not entitled to recover any mesne profits; unless so far as they can bring their case within the provisions of the third section of the act of the 15th of November 1820.

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 Vermont, and on the points or questions on which the judges of the said circuit court were opposed in opinion, and which points or questions were certified to this court for its opinion, in pursuance of the act of congress for that purpose made and provided, and was argued by counsel: On consideration whereof, it is ordered by this court, that it be certified to the said circuit court, on the points aforesaid, that this court is of opinion: 1. That the plaintiffs have shown that they have a right to hold lands, and especially the lands in controversy. 2. That the plaintiffs are not barred by the three years' limitation in the act of the 27th of October 1785, nor by any other of the statutes of limitation of Vermont. 3. That under the laws of Vermont, the plaintiffs are not entitled to recover any mesne profits, unless so far as they can bring their case within the provisions of the third section of the act of Vermont, of the 15th of November 1820. All of which is accordingly hereby certified to the circuit court of the United States for the district of Vermont.

*Julie Soulard, Widow, and others, Appellants, *v.* United States.

John T. Smith, Appellant, *v.* United States.

Inhabitants of ceded territory.

In the treaty by which Louisiana was acquired, the United States stipulated, that the inhabitants of the ceded territory should be protected in the free enjoyment of their property; the United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract.[1]

The term "property," as applied to lands, comprehends every species of title, inchoate or complete; it is supposed to embrace those rights which lie in contract; those which are executory; as well as those which are executed. In this respect, the relations of the inhabitants of Louisiana to their government is not changed; the new government takes the place of that which has passed away.

These cases came before the court on Appeals from the District Court of the United States for the district of Missouri.

In the district court of Missouri, the appellants, under the act of congress of the 26th of May 1824, instituted proceedings to try the validity of their claims to certain lands in Missouri; the titles to which they claimed to derive under the former Spanish government. The district court gave a decree against the claimants.

The cases were argued by *Benton*, for the appellants; and by *Wirt*, for the United States. The facts of the cases, and the arguments of the counsel, are not reported, as the court held the causes under advisement.

Marshall, Ch. J., stated:—The court have held the two cases of Soulard and John T. Smith against the United States under advisement. After bestowing upon them the most deliberate attention, we are unable to form a judgment which would be satisfactory to ourselves, or which ought to satisfy the public.

*512] In the treaty by which Louisiana was acquired, the United *States stipulated, that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract. The term "property," as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory; as well as those which are executed. In this respect, the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away.

In the full confidence that this is the sentiment by which the government of the United States is animated, and which has been infused into its legislation, the court have sought sedulously for that information which would enable it to discern the actual rights of the parties; and to distinguish between claims founded on legitimate contracts with those authorized to make them on the part of the crown, or its immediate agents, and such as

[1] Delassus *v.* United States, 9 Pet. 117; Mitchell *v.* United States, Id. 711; Smith *v.* United States, 10 Id. 326.

were entirely dependent on the mere pleasure of those who might be in power; such as might be rejected without giving just cause of imputation against the faith of those in office. The search has been unavailing.

When Louisiana was transferred to the United States, very few titles to lands, in the upper part of that province especially, were complete. The practice seems to have prevailed, for the deputy-governor, sometimes the commandants of posts, to place individuals in possession of small tracts, and to protect that possession, without further proceeding. Any intrusion on this possession produced a complaint to the immediate supervising officer of the district or post, who inquired into it, and adjusted the dispute. The people seem to have remained contented with this condition. The colonial government, for some time previous to the cession, appears to have been without funds, and to have been in the habit of remunerating services with land instead of money. Many of these concessions remained incomplete.

*If the duty of deciding on these various titles is transferred by the government to the judicial department, the laws and principles on which they depend ought to be supplied. The edicts of the preceding governments in relation to the ceded territory; the powers given to the governors, whether expressed in their commissions, or in special instruction; and the powers conferred on and exercised by the deputy-governors, and other inferior officers, who may have been authorized to allow the inception of title; are all material to a correct decision of the cases now before the court, and which may come before it. We cannot doubt the disposition of the government to furnish this information, if it be attainable. We are far from being confident that it is attainable; but have determined to hold the cases which have been argued under advisement, until the next term, in the hope that, in the meantime, we may be relieved from the necessity of deciding conjecturally on interests of great importance. [*513

The chief justice added, since the determination which has been communicated, had been agreed upon, the court has been informed, that the edict of August the 24th, 1770, is in the office of the secretary of state. Had that edict been sufficient for the decision of the court, they would have disposed of the cases at this term. But other information is required, which has been referred to in the opinion. It is, therefore, considered proper, to hold the cases under advisement.

*The Providence Bank, Plaintiff in error, *v.* Alpheus Billings and Thomas G. Pittman.

Constitutional law.—Power of taxation

In 1791, the legislature of Rhode Island granted a charter of incorporation to certain individuals who had associated for the purpose of banking; they were incorporated by the name of the president, directors and company of the Providence Bank, with the ordinary powers of such associations; in 1822, the legislature passed an act, imposing a tax on every bank in the state, except the Bank of the United States; the Providence Bank refused the payment of the tax, alleging that the act which imposed it was repugnant to the constitution of the United States, as it impaired the obligation of the contract created by the charter of incorporation: *Held*, that the act of the legislature of Rhode Island, imposing a tax, which, under the law, was assessed on the Providence Bank, did not impair the obligation of the contract created by the charter granted to the bank.[1]

It has been settled, that a contract entered into between a state and an individual, is as fully protected by the prohibitions contained in the tenth section, first article, of the constitution, as a contract between two individuals; and it is not denied, that a charter incorporating a bank is a contract.[2]

The power of taxing moneyed corporations has been frequently exercised; and has never before, so far as is known, been resisted; its novelty, however, furnishes no conclusive argument against it.

That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to re-affirm; they are acknowledged and asserted by all. It would seem, that the relinquishment of such a power is never to be assumed; we will not say, that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist, that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear.

The great object of an incorporation is, to bestow the character and property of individuality on a collected and changing body of men; any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist.

The power of legislation, and consequently, of taxation, operates on all the persons and property belonging to the body politic; this is an original principle, which has its foundation in society itself; it is granted by all, for the benefit of all; it resides in government, as a part of itself; and need not be reserved, where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies.

However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burdens, and that portion must be determined by the legislature; this vital power may be abused; but the constitution of the United States was not
*515] intended to furnish the *correction of every abuse of power which may be committed to the

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[1] It is well settled, that a state law, taxing the capital stock of a bank, where charter contains no stipulation on the subject of taxation, is not unconstitutional. Nathan *v.* Louisiana, 8 How. 73. A relinquishment of the power of taxation, is not to be presumed, Philadelphia and Wilmington Railroad Co. *v.* Maryland, 10 How. 376. It can only be made by clear and unmistakable language. Jefferson Branch Bank *v.* Skelly, 1 Black 436; Gilman *v.* Sheboygan, 2 Id. 510; Erie Railroad Co. *v.* Pennsylvania, 21 Wall. 492. A state legislature may, however, by contract, founded on a valuable consideration, surrender the right of taxation, as to the property of a corporation, and a succeeding legislature has not the power to pass a law impairing the obligation of such contract. State Bank *v.* Knoop, 16 How. 369; Ohio Life Ins. Co. *v.* Debolt, Id. 416; Dodge *v.* Woolsey, 18 Id. 331; Mechanics' & Traders' Bank *v.* Debolt, Id. 380; Mechanics' and Traders' Bank *v.* Thomas, Id. 384; Franklin Bank *v.* Ohio, 1 Black 474; Wright *v.* Sill, 2 Id. 544; McGee *v.* Mosher, 4 Wall. 143; Farrington v. Tennessee, 95 U. S. 679. If, however, the promised exemption from taxation, be a mere gratuity, without consideration, it is a nude fact, not within the protection of the constitution. Tucker *v.* Ferguson, 22 Wall. 528; West Wisconsin Railway Co. *v.* Supervisors, 93 U. S. 595; Fertilizing Co. *v.* Hyde Park, 97 Id. 666.

[2] Louisiana *v.* Jumel, 107 U. S. 750, 803.

state governments; the intrinsic wisdom and justice of the representative body, and its relations with its constitutents, furnish the only security where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally.[1]

Error to the Supreme Judicial Court of the state of Rhode Island. The question which was presented for the consideration of the court, was the constitutionality of an act passed by the legislature of the state of Rhode Island, in January 1822, entitled "an act imposing a duty upon licensed persons and others, and bodies corporate within this state;" alleged to be a violation of the contract contained in the charter of the bank.

Under the provisions of this act, and in conformity with them, a tax was imposed on the Providence Bank; and the bank having refused payment thereof, a seizure was made for the amount of the tax, in the banking-house, by Alpheus Billings, the sheriff of the county of Providence, and by Mr. Pittman, the general treasurer of the state of Rhode Island. The bank instituted an action of trespass for this taking, against the sheriff and the treasurer, in the court of common pleas of the county of Providence; to which action, the defendants pleaded in their defence, the act imposing the tax, and the amendments thereto; and that in pursuance of the provisions of the same, a warrant was issued, and the proceedings which were the subject of the action were done. To this plea, the bank filed a general and a special demurrer. Among the causes of demurrer, the repugnancy of the acts of the general assembly imposing the tax to the constitution of the United States, inasmuch as they violate the contract set forth in the declaration, the act incorporating the bank, and inasmuch as they authorize private property to be taken for public purposes, without providing any compensation, were distinctly stated. A judgment against them was submitted to by the bank, in the court of common pleas; and they appealed to the supreme judicial court, where the judgment of the inferior court was confirmed, by submission on the part of the bank; *and they prosecuted this writ [*516
of error, under the 25th section of the judiciary act of 1789.

The Providence Bank was chartered by the legislature of Rhode Island, in October 1791. The preamble of the act states: "Whereas, the president and directors of a bank established at Providence, on the 3d of October last, have petitioned this general assembly for an act to incorporate the stockholders in said bank, and whereas, well-regulated banks have proved very beneficial in several of the United States, as well as in Europe: therefore, be it enacted by the general assembly, and by the authority thereof, it is hereby enacted; that the stockholders in said bank, their successors and assigns, shall be, and are hereby created and made a corporation and body politic, by the name and style of the president, directors and company of the Providence Bank, and by that name shall be, and are hereby made, able and capable in law, to have, purchase, receive, possess, enjoy and retain to them and their successors, rents, tenements, hereditaments, goods, chattels and effects of what kind or nature soever, and the same to sell, grant, devise, alien or dispose of, to sue and be sued, plead and be impleaded,

[1] The supreme court can afford a citizen of a state no relief from the enforcement of her laws prescribing the mode and subjects of taxation, if they neither trench upon federal authority, nor violate any right recognised or secured by the constitution of the United States. Kirkland *v.* Hotchkiss, 100 U. S. 491.

answer and be answered, defend and be defended, in courts of record, or any other place whatsoever ; and also to make, have and use a common seal, and the same to break, alter and renew at their pleasure, and also to ordain, establish and put in execution such by-laws, ordinances and regulations, as shall seem necessary and convenient for the government of the said corporation, not being contrary to law, or the constitution of said bank ; and generally to do and execute all and singular acts, matters and things, which to them it shall or may appertain to do. And whereas, the stockholders, on the said 3d day of October, formed and adopted a constitution for said bank, in the words following, viz : "Taught by the experience of Europe and America, that well-regulated banks are highly useful to society, by promoting punctuality in the performance of contracts, increasing the medium of trade, facilitating the payment of taxes, *preventing the exportation of specie, furnishing for it a safe deposit, and by discounts, rendering easy and expeditious, the anticipations of funds on lawful interest, advancing, at the same time, the interest of the proprietors ; we, the subscribers, desirous of promoting such an institution, do hereby engage to take the number of shares set against our names, respectively, in a bank to be established in Providence, in the state of Rhode Island, on the following plan," &c. The plan of the association was set forth in the act, and made a part of the charter. It provided for the opening of subscriptions for the stock of the bank, to consist of 625 shares, of $400 each, making a capital of $250,000 ; and for the organization of the bank. The act gave to the corporation the usual powers necessary to carry into effect the objects of its formation, and made provision for the transaction of the business of the company. Amendments to this act were afterwards passed by the legislature.

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The case was argued by *Whipple*, for the plaintiffs in error ; and by *Hazzard* and *Jones*, for the defendants.

Whipple, for the plaintiff in error, said : As this case involves constitutional principles of great delicacy and importance, it may not be useless to advert to the principles established by this court. At no period in the political or civil history of England, or of this country, has it been admitted, that the legislature possessed unlimited or absolute power. Under the British government, the rights of private property were respected, long antecedent to emigration to this country ; although violence to the political rights of the subjects of the crown are frequently recorded in history. The immunities of private property, and the inviolability of vested rights, have been asserted by political and legal writers, and established by judicial decisions, for three centuries past. The assertion of a limit to legislative authority was constant, during the colonial existence of this country ; and the principle was afterwards inserted in the bills of rights, and in the constitutions, of states. At a very early period *after the establishment of the government of the United States, it became necessary to give to these received opinions the sanction of judicial authority ; and this was done by this court, in 1798, in the case of *Calder* v. *Bull*, 3 Dall. 386. The principles of that case, so far as they declare the obligation of a contract to to be superior to the power of the legislature, were re-asserted in *Fletcher* v. *Peck*, 6 Cranch 88. Again, these principles were maintained in the cases

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of the *State of New Jersey* v. *Wilson*, 7 Cranch 164 ; *Terrett* v. *Taylor*, 9 Ibid. 43 ; *Town of Pawlet* v. *Clarke*, Ibid. 202 ; *Sturges* v. *Crowninshield*, 4 Wheat. 122 ; *McCulloch* v. *Maryland*, Ibid. 316 ; *Dartmouth College* v. *Woodward*, Ibid. 518 ; *Weston* v. *City Council of Charleston*, 2 Pet. 450.

The cases which have the strongest bearing, and which are thought to decide the present case, are *Fletcher* v. *Peck*, *McCulloch's Case*, the *Dartmouth College Case*, and the case of the *City Council of Charleston*. *Fletcher* v. *Peck* establishes the principle, that a state cannot invalidate its own grant ; that in making a grant, it acts as a party, and is bound as a party. "Every grant (say the court) is, in its own nature, an extinguishment of the right of the grantor ; and implies an obligation not to re-assert that right." The *Dartmouth College Case* puts an end to all discussion of the question, whether a charter is a contract, and whether the public benefit derived from them is not a sufficient consideration? The language of the court is so full and clear upon those points, that it is believed that no doubt will be entertained upon them.

Mr. Whipple then went into a particular examination of the case. He said, the bank was incorporated in 1791, with the usual powers of a corporation. The motives of the legislature in granting the charter, which was the legal consideration of the grant, are declared in these terms : "Taught by the experience of Europe and America, that well-regulated banks are highly useful to society, by promoting punctuality in the performance of contracts, increasing the medium of trade, facilitating the payment of taxes, preventing the exportation of specie, furnishing for it a safe deposit, and by discounts, rendering easy and expeditious the anticipations [*519 of funds on lawful interest, advancing at the same time the interest of the proprietors," &c. The first and seventh sections of the charter evidently contemplate the ownership of property by the bank, in its corporate capacity. The real estate and the profits of the capital stock, previous to a dividend, may be considered as belonging to the bank. But the capital stock itself is as much the property of a stranger as of the bank. There cannot well be two entire owners to the same property. The stockholders have the property, and the corporation the management of it. The corporation is not even the trustee ; for it has not the legal estate, and no power to sell. It has merely the naked possession, with the perpetual legal right of using the funds for the benefit of the legal and equitable owners. The stock was subscribed for, at a very early period, and the bank went into successful operation. The capital was subsequently increased to $500,000. For many years past, the shares have sold from fifteen to twenty-five per cent. advance, owing, in part, to the belief that the charter was perpetual, and that the legislature had no power over it. No power to repeal or to modify, by subsequent law, was reserved ; and none was believed to exist, until January 1822. Most of the present owners purchased their stock at an advance, a part of which will be lost to them, if the power recently claimed by the legislature has a legal and a constitutional existence. The charter of the Providence Bank was the first that was granted by the legislature of Rhode Island. For several years, it was the only bank in the state. Between the date of its charter, however, and June 1822, several charters were granted, substantially like it. In June 1822, the time when the act imposing a tax on banks went into operation, the charter of the

Mount Hope Bank, in Warren, was granted. The eighth section provides, "that this act of incorporation be, and the same is hereby declared to be, *520] subject to all *acts which may be passed by the general assembly, in amendment or repeal thereof, or in any way affecting the same." The power of the legislature to tax the banks had been previously denied; and the argument against that power was delivered but a few days before the granting the charter of the Mount Hope Bank. All the charters since contain a similar reservation.

From the earliest period, down to the act of 1822, taxes in Rhode Island had been uniform. The proportion which each town was bound to contribute, was settled by an act passed in 1747. By the act of 1747, the proportion which the town of Providence paid towards the expenses of the state was one-ninth. A new apportionment among the several towns in the state was made in 1796, by which the town of Providence was required to pay one-fifth. In 1824, another apportionment fixed nearly one-third upon that town. Only one tax, however, has ever been ordered under that estimate. The mode of collecting taxes under these various laws produced great uniformity as to individuals. The treasurer of the state issued his warrant to the treasurers of the several towns, requiring them to collect from the inhabitants, each town's proportion of the sum to be raised. The proportion of each town was assessed upon individuals, according to the supposed value of their real and personal estate. This has been the usage from the earliest settlement of the state, with very slight variations, down to the act of 1822. With the exception of one tax of $15,000, ordered by an act of May 1824, the whole expenses of the state have been paid under the act of 1822. The whole amount collected under the license of act of 1822, from its commencement to the end of the year 1827, is $35,921.12. Of that amount, $26,380.86 was paid by the town of Providence, and $12,818 by the banks. The largest proportion of the bank capital is in that town, and the *521] effect of the license act has *been, to burden it with more than two-thirds of the taxes of the state. The amount paid under the act, in 1828 and 1829, by the town of Providence, was three-fourths of the whole. The proportion has been increasing against the town, from 1822 to the present time, as will be seen by an examination of the accounts of the treasury. The whole real estate, and all other property in the state, is exempted from taxation; and the paying part of the business of government thrown principally upon one town.

The question for the consideration of the court is, whether such a tax, so far as regards the banks, whose charters were granted previous to 1822, and without any reservation of authority over them, is a constitutional tax? It will be kept in mind, that the charters of all banks established since May 1822, contain ample reservations of power.

The charter of the Providence Bank was granted in November 1791; and until 1797, it was the only bank in the state. Its capital, at first, was fixed at $250,000, but it was subsequently increased to $500,000. Although no *bonus* was paid to the state, yet the advantages expected by the public, are fully stated in the charter, and constitute the consideration of the contract. The contract was, that the stockholders should be entitled to all the advantages of employing their money in banking business, through the agency of a corporation; and the state to all the benefit of a "well-regulated

bank." These advantages were expected by the parties, for they are expressly stated in the charter, and constitute reciprocal rights and obligations. Whenever the business of the corporation is so managed as to injure, instead of benefiting, the public; whenever an undue amount of bills is issued; specie payments refused, and the currency depreciated; then is there a violation of the contract on the part of the stockholders, and the sovereign may interfere, for they contracted to maintain a "well-regulated bank." The state has a right to see this object accomplished, and to pass all laws necessary for the purpose. The admission, which we most freely make, of a power in the state, so to regulate the conduct of corporations as to attain the objects of their *formation, may appear to conflict with a proposition, which we shall endeavor to sustain; which is this, that [*522 the state, by becoming a party to the contract, was as much bound to respect the rights of the other party, as if the state had been an individual. There is, however, in reality, no hostility between the admission and the proposition. All the legislative power which the state has a right to exert, is remedial in its character, furnishing remedies for or against the corporations, and imposing penalties for violations of their contract. The same power might have been exercised over the Dartmouth College, and the same authority is constantly exercised in all the states, over corporations of their own creation. The proceedings of the legislatures of some of the states are of a mixed character, partly legislative and partly judicial. So far as they are legislative, they are clearly remedial; so far as they are judicial, they annex penalties for doing what, under a more regular system of jurisprudence, they would be adjudged to have forfeited their charter for doing.

In the examination of this case, it will be necessary to consider: 1. The contract, the rights which it confers on one party, and the obligations it imposes on the other. 2. The act of 1822, and the effect which that act has upon the rights conferred by the contract. 3. The provision in the constitution of the United States, against impairing the obligation of contracts.

I. What was the contract? This general question involves an inquiry into the elements which usually constitute what the law terms a contract. The usual ingredients are: a consideration, parties, and a subject-matter. What is called the obligation of a contract, is the duty which the law imposes upon a party, not to disturb any of the legal rights conferred upon the other party. The extent of the rights of one party, therefore, is the measure of the obligation of the other.

In the first place, there was a full and an ample consideration; not a consideration implied, but expressly stated. The risk of advancing $250,000, in 1791, to be employed in banking business, was very *great. The constitution of the United States was not ratified in Rhode Island, [*523 we think, until the year 1790. Although, at that period, the people of that state had been "taught, by the experience of Europe and America, that well-regulated banks were highly useful to society," yet they had not been taught, that they were very profitable to the stockholders. The times were still very feverish; the shock occasioned by paper money had not entirely subsided. The effect of the constitution of the general government had not been ascertained. Money was very scarce, credit very low, and punctuality out of the question; indeed, it is stated in the charter, that one of the effects beneficial to the public, expected from the

bank, was to promote punctuality in payments. The wonderful activity given to trade, a short time after, by the war in Europe, was then unlooked for. Under these circumstances, it required all the influence of the leading men in the town of Providence, to obtain money sufficient for so hazardous and doubtful an enterprise. So uncertain was the experiment, that a subscription could not be obtained, without providing in the charter a remedy for the collection of debts due to the bank, which was withheld from all individuals. This remedy consisted in the power of attaching the real and personal estate of the debtor, on mesne process. In practice, this amounted to a priority of payment. The state willingly granted this, in consideration of the value of the institution to the public, and the hazard to the stockholders. The same remedy has been granted to all banks since, in order that one may have no advantage over the other. Notwithstanding these inducements, a period of six years elapsed, before another bank went into operation. The first meeting of the stockholders of the Bank of Rhode Island was at Newport, in January 1797.

The consideration, then, was ample. The stockholders purchased the privilege of banking. They paid for it a high price, and the case will result in a question, whether they are to pay for it again. The parties to the contract were the stockholders, in their individual capacity, on one side; and the state, in its sovereign character, on the other. It was not a con-
*524] tract between *the state and the corporation; the corporation had no existence, until the contract was completed. The corporation, instead of being a party, was the subject of the contract; it was the thing granted, and not the person to whom the grant was made. The other party was a state, possessing various and extensive sovereign powers. In making this contract, it acted in its sovereign character; for it had no other character in which it could act. It meant to bind itself in its sovereign character; for there was no other character which it could bind. It was well known, that the principal strength of sovereignty consisted in its power of making laws, and that the only effectual mode of binding sovereignty was to restrain its law-making power; and that, to restrain its law-making power upon all subjects but one, and leave it free upon that, was tantamount to no restraint at all. If, therefore, the state was a party to a contract, it intended to bind its law-making power. The law presumes that a party understands the legal effect of a contract, and that he intends that legal effect. The legal effect of a contract is to bind the parties to all its stipulations; to bind them in the capacity in which they contracted, and to bind them equally. It was intended, then, that both the parties should be bound, and that, consequently, neither should possess the power to liberate itself, without the consent of the other. It, therefore, results from the fact, that the charter is a contract, that the state meant to bind itself in its sovereign capacity, and to restrain the exercise of all its law-making powers, so that it should not be able to resume the grant, or to render the subject of the grant of no value, or to make its value dependent on its own will, instead of being dependent upon the terms of the contract, and the law of the land.

But further, the fact of the state's having become a party to a contract, is not only conclusive evidence that it intended to bind itself, and to restrain all its law-making powers, but it is evidence of the extent to which it meant

to impose that restraint. The object of binding the state at all, was to secure the rights of the other party; consequently, the degree of restraint must be such as will afford that security. *There is an absurdity in saying, that the state meant to bind itself, in order to secure the [*525 rights of the other party, and saying, at the same time, it intended a less degree of restraint than was sufficient for the purpose. If the state intended to be bound at all, it intended to be bound to the same extent as though it had been an individual, and not a sovereign state. A contract, in its very nature, imports reciprocity of rights and obligations. One party is not to be bound to a greater extent than the other, unless it be so expressed, or unless it is implied from necessity.

Having briefly considered what was the consideration of the contract, and who were the parties, a more important object presents itself, which is, to ascertain its obligation. This can be done in no other way than by resorting to its subject-matter. Rights and obligations are correlative terms. The extent of the rights of one party, is the exact measure of the obligation of the other; for, in the language of this court, "every grant implies an obligation not to re-assert the right granted." 1. There was granted to the stockholders, and to their successors, a perpetual right to the powers and capacities of a corporation, denominated "the President, Directors and Company of the Providence Bank." 2. There was also granted a perpetual right to employ $500,000 in banking business.

It would be absurd, to say that the stockholders obtained an act of incorporation, for the sake of an act of incorporation; that they obtained a grant of the right of doing banking business, for the sake of banking business; but both were granted for the profit that might arise from them. Is is not fairly to be implied, that the amount of that profit should be all that could be made by banking business under the general laws of the land? The corporation, and the right to transact banking business, were granted as mere means; the end was the expected profit.

It must be agreed, that the charter was to be perpetual, and that the stockholders cannot be deprived of it. It must *be agreed, that the right to transact banking business was to be perpetual, and that the [*526 stockholders cannot be deprived of it. Must it not, then, be agreed, that the right to all the profits was to be perpetual, and that the stockholders cannot be deprived of it? If the right to the means was intended to be legal rights, was not the right to the end to be of the same character? Can it be believed, that perpetual means would be granted, to obtain a doubtful and uncertain end? That the subordinate parts of the contract should be held as rights, subject only to the law of the land; but that the main object should be possessed only as a legislative indulgence? The presumption of law is, that all the rights between the same parties, and conferred by the same grant, are to be of the same character, subject to the same tenure, and to continue during the same time. Nothing but strong language to the contrary will create a difference. The act of incorporation is a legal right, subject to no partial or direct legislation. The right to banking business is a legal right, subject to no partial or direct legislation. Why, then, is not a perpetual right to all the profits a legal right, and subject to no partial legislation? Why should the control of the state over one of these rights be greater than over the other?

We will now examine the act of 1822, with a view to ascertain whether it involves the power to destroy the rights granted by the contract. The very title of the act is significant. It is "an act, imposing a duty on licensed persons and others, and bodies corporate, within the state." It classes the banks with licensed persons. It considers them, not as exercising their legal rights, under their contract, but as enjoying privileges by the license and permission of the state. It enacts, that there shall be, hereafter, annually paid by the persons and bodies corporate within this state, herein named, the following sums, to wit: "By each and every person licensed by the town councils of the several towns, the sum of two dollars, to be paid to the town councils, before granting the license, and by them to be paid over to the general treasurer. *By each and every money-broker, *527] or money-changer, and each and every vendor of foreign lottery-tickets, the sum of one hundred dollars, to be paid to the town councils at the time of granting licenses to those persons. By each and every bank within this state (except the Bank of the United States), the sum of fifty cents on each and every thousand dollars of the capital stock actually paid in."

It is too apparent to be denied, that the legislature considered the charter of the banks as mere licenses. Even on that ground, it would have been no more than equal justice, to have required the fee when the license was granted, as is provided in relation to all the other licensed persons, mentioned in the act. It is a requisition—a duty. It lays no claim to the character of a tax. A tax implies proportion. 5 Co. 53. It is a specific duty upon the privilege of the bank; upon the franchise granted and paid for. Its advocates do not deny that this is its character; on the contrary, they assert it, and justify it. They are driven to this by necessity, for there is no other character that can attach to it.

No one pretends, that it is a tax upon the property of the banks. The act provides, "that, hereafter, there shall be annully paid by the persons and bodies corporate, within this state, herein named, to and for the use of the state, the following sums, to wit, by each and every bank one dollar twenty-five cents on each and every thousand dollars of the capital stock actually paid in." The capital stock is referred to, in order to equalize the duty among the banks themselves. The duty is not upon the capital stock, but upon the banks. In relation to each other, it is a duty in proportion to the capital stock. In relation to all other persons, it is a direct and arbitrary requisition, not based upon property, not controlled by any usage, and depending for its amount entirely upon the will and caprice of one of the parties to the contract.

There are but three views that can be taken of this act. It is, first, either a tax upon the persons or polls of the corporations, which subjects it to the objection, that it does not, at the same time, tax the persons of other corporations or *individuals; or, second, it is a tax upon the franchise *528] of the bank, which was purchased by the stockholders; or, third, it is a tax upon the capital stock of the bank, which is a new species of property, and one of the fruits of the contract. The intention was to tax the franchise; to consider the banks as licensed persons; and, in common with other licensed persons, to compel them to pay an annual stipend for the privileges they enjoy. Suppose, the Providence Bank had paid $50,000

for these privileges, at the time of receiving their charter, could it be compelled to pay for them again? How does it alter the case, that the payment was in benefits of another kind, which the state acknowledge to have received? Go further, suppose this franchise to have been a free gift, can payment be subsequently demanded?

But whether the act of 1822 is a tax upon the privileges of the banks, or upon their property, or a duty or a requisition upon them, as licensed persons, will not essentially vary the question; inasmuch as it must be conceded, on all hands, that it involves the power to destroy all their beneficial rights. This was one of the points expressly decided in *McCulloch's Case*. If the state has jurisdiction over the subject-matter; if it can select its own contract, or the privileges or property conferred by its own contract, and impose a specific duty upon them, and them alone; it can destroy those privileges, because it must necessarily be the sole judge of the amount. Although, at present, the expenses of the state are small, yet, in cases of war, internal commotions, or the happening of any other causes which would increase our expenditures, it will probably be thought expedient and just, that the banks should contribute the same proportion then as now. If it is deemed legal and honest, to load them with one-third of all the burdens of government now; why will it not be legal and just then? Nay, why not one-half, or three-quarters, or the whole? If this court decide this tax to be constitutional, must it not decide that a requisition of one-half of the income of the capital stock, will be constitutional? In whatever point of view, therefore, this act is considered, it involves the power, and, as we shall directly show, the legal power, *the legal right, to destroy the [*529 contract to which the state is a party.

An examination of the constitution of the United States will show that this is the necessary result. The clause belonging to this subject is, "that no state shall pass any law impairing the obligation of contracts."

"No state shall pass any law!" It intended to exclude all laws having that effect. It made no exception in favor of laws imposing taxes; but it intended, that the taxing power, like all other powers, should be so exercised, as not to impair the obligation of contracts. What use would there have been in the prohibition, if it had left the state free as to one of its powers? Would not such freedom have destroyed the whole effect of the provision?

But further, no state shall pass any law "impairing the obligation of contracts." It does not confine itself to the direct and express, but extends to all the implied obligations. It also extends to all contracts; those to which a state is a party, as well as the contracts of individuals.

"No state shall pass any law impairing the obligation of contracts!" Does this prohibit the power of impairing contracts, or the exercise of that power? It must be remembered, that this, and all the other prohibitions against the states, are addressed, not to natural persons, possessing physical powers, but to artificial persons, possessing legal powers. A prohibition not to steal, leaves the natural person with the physical power of violating the injunction; but does it not destroy the legal power? The powers of the states are all legal powers. They have no physical or natural powers. A prohibition, therefore, against the exercise of a legal power, is an annihilation of the power itself; and any law so dependent upon the existence of

such a power, or so closely connected with it, as to render it practically impossible to sustain the law, without submitting to the exercise of the power, must be an unconstitutional law.

Apply this principle to the present case. The state has no power to impair its own contract. It cannot resume the charter; it cannot prohibit banking business; it cannot take all the income of the capital. It will be *530] agreed, that no such *power can be exercised. How then can it exist? How can a legal power exist, which it is unlawful to use, or a legal right, which cannot be exercised? Physical powers may exist, the action of which is prohibited; but legal powers exist only in action. They are contemplated only with a view to their exercise. A legal power is a right to do certain things. A power to destroy the rights of the banks is, therefore, equivalent to the actual destruction of them; because a power to destroy is a legal right to destroy. Considered in relation to its citizens, all the powers of sovereignty are legal rights.

We say, that if it be admitted, that the charter is a contract, the whole controversy is admitted; because every contract necessarily excludes all power in either of the parties to destroy the rights which vest under it. A tax upon the franchise is a tax upon the contract itself. The law implies a right in the states to tax the banks; that is, the property of the banks; but it does not imply a right to destroy. The state of Rhode Island has contracted not to tax the Blackstone canal. The state of New Jersey contracted, in the case of *New Jersey* v. *Wilson*, not to tax certain lands. The exemption of that canal and those lands is a privilege or franchise. Would a tax upon that privilege be valid? Would it not violate the spirit of the contract? Would it not be mere evasion? The terms of the contract exempted the lands from taxation; but would not that contract have been rendered of no value, if, instead of taxing the lands, they had taxed the privilege or exemption conferred by that contract?

We contend, then, that the power in question is necessarily excluded; because it is inconsistent with the main and leading intention of the parties, which was to make a contract, and to bind themselves by it. How can that be constitutional, which necessarily entails consequences that are prohibited by the constitution? How can a law which, beyond all human control, arms the legislature with the legal right of doing what the constitution prohibits their doing, be constitutional? Nay, worse—which puts them in *531] the actual possession of a power, the very *existence of which is a violation of the contract. How can the legislature legislate themselves into the possession of a power, not only not granted, but expressly withheld by the people?

But a law involving the power to destroy, is equivalent to a law which actually does destroy, for another reason. The constitution intended not only that a law which actually impairs a contract should be void, but it also intended, that this court should possess and exercise the power of declaring it void. The act of 1822, if admitted to be valid, will deprive this court of that power. If the subject and the mode of taxation are admitted to be constitutional, the amount rests in the discretion of the legislature; the court must submit to any any amount that may be imposed. Their power to protect the rights of the individual is at an end, the moment this law is declared to be valid. That power constitutes the remedy of the banks. This law

takes from the banks all right to appeal to this court for relief, and all power in the court to extend that relief. Can this court surrender that power? Are not all its legal powers, legal duties? Is this court to obey the constitution, and retain the power of declaring void a law which the state may pass, destroying the banks; or to obey the act of 1822, which deprives them of that power? Is it to rest with the legislature of Rhode Island, to say, whether an individual shall retain a constitutional remedy, and this court a constitutional power? Is it for the state, against whom this remedy and this power were provided, to legislate the other party out of them? This remedy and this power are the constitutional barriers for the protection of private rights; and an attack upon the outposts is as undisguised war as upon the constitution itself.

An important question in the case remains yet to be considered. Does not the contract of 1791 afford a necessary implication of an exemption from all modes of taxation which involve the power to destroy? That may be said to be implied, which, from a fair construction of all parts of an instrument, appears to have been the probable intention of *the parties. [*532
That is necessarily implied, without which the obvious and main intention of the parties would be defeated. Implications bear the same relation to the express provisions of a contract, that circumstantial does to positive evidence. Perhaps, nothing short of a necessary implication would create a total exemption from the taxing power. A fair and ordinary implication would be sufficient to qualify that power, by confining it to the usual modes. In the present case, we shall attempt to show, that there is a necessary implication, that the state should neither exercise nor possess the power of destroying any of the rights conferred by the contract. We do not confine the proprosition to one mode of destroying those rights; but we mean to contend, that all modes in which sovereign power can exert itself, were necessarily excluded. The taxing power is, undoubtedly, of vital importance, though not more so than many others. It is indispensable to the support of government, and so are nearly all the powers which sovereignty usually exercises. The power to constitute property, or to give to men the dominion over external objects; the power to transmit that dominion from hand to hand, by deeds, wills, descent, and the various other modes; is surely as necessary a power as any other can be. The one creates property; the taxing power operates upon it after it is created. The attempt to give to the taxing power an importance belonging to no other sovereign power, is reviving the dispute of the relative importance of the stomach and the lungs to animal life.

Before any aid, however, can be derived from the supposed importance of the taxing power, it must be shown, that this mode of exerting it is essential to the state. How can it be of vital importance to government, to possess the power to tax the money of one man, without at the same time taxing the money of others? How can the existence of government depend on its power to destroy its contracts? There is nothing, then, growing out of the peculiar importance of the power in question, which will rebut any presumption of an exemption from its exercise.

*Is the justice or fairness of this proceeding so very urgent? Is [*533
the equity of imposing one-third of all the expenses of the state on the banks, of such a nature, as to induce us to believe, that the parties proba-

bly had it in their minds? Suppose, the stockholders of the Providence Bank had been informed, in 1791, before they had advanced their money, that, instead of peculiar advantages, they were to be subjected to peculiar burdens—would they have accepted their charter? Suppose, they had been informed, that, instead of the long-established usage of uniform taxes, sovereignty intended to call up one of its dormant powers, and spend its whole force upon their money, and their money alone—would they have parted with the money? Did they mean or expect to pay a new consideration, differing from the one specified in the charter, and which the state acknowledged to have received? No very strong equity, therefore, and no pressing necessity, require the exercise, or the existence, of such a power. But such a power is necessarily excluded, because it is inconsistent with the main and leading intention of the parties; and it is inconsistent with the legal effect of a grant.

There is another mode by which it may be shown that the law impairs the contract, and that is, by ascertaining its legal effect. While upon this point, it may be expedient to notice an argument on the opposite side, which we have reason to believe has had some effect, even on professional minds It is this: Admitting that the charter is a contract; that it binds the parties; that it confers legal rights on one party and imposes legal obligations on the other; yet, that those legal rights are like the legal rights of all other persons, subject to the sovereignty of the state, and consequently, subject to taxation; that, in fact, the only difference between legal rights conferred by one individual upon another individual, and by a state upon an individual, is a difference of parties; that they are legal rights, when conveyed by an individual, and can be no more, when conveyed by the state; that if specific taxation is not inconsistent with legal rights conveyed by an individual, it is not inconsistent with legal *rights conveyed by the state; and that, if the contract is not violated in the one case, it is not violated in the other.

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This popular argument must be answered, and satisfactorily answered, or the case is against us. One moment's consideration of the legal effect of a grant will show the fallacy of this view of the subject, which supposes that the legal right to an acre of land, or to any other property or privilege, is not only of the same nature, but of the same extent, when conveyed by an individual, as when conveyed by a sovereign; whereas, in all cases of unrestricted grants, the extent of the legal rights of the grantee depends, mainly, if not entirely, on the extent of the legal rights of the grantor. An unrestricted grant passes to the grantee, or extinguishes all the grantor's interest in, and power over, the subject, which are inconsistent with the right intended to be granted. "A grant," say this court, in *Fletcher* v. *Peck*, "is, in its very nature, an extinguishment of all the rights of the grantor, and implies an obligation not to re-assert that right." It is no matter who the granting party is, or what he is; no matter in what capacity he acts; no matter how limited or how extensive is his interest or his power; all his power and all his interest, so far as they do not consist with the rights granted, are either transferred or extinguished by the grant. If he is an individual, individual interest and individual power are transferred or extinguished. If a corporation, corporate interests and cor-

porate powers. And, if a sovereign, sovereign interests and sovereign powers.

The question, then, arises, whether it can be shown that such a tax is necessary? Can it even be shown to be just? What necessity, or what justice, can require the money of one class of men to bear all the burdens of the state? Other governments exist, without such odious measures. Even Rhode Island did not discover the necessity of resorting to them, until 1822. How pressing must that necessity be, which it required two hundred years to discover.

The first case before this court was a direct tax upon the operations of the Bank of the United States, within the state of Maryland; and the second, a tax by the City Council of Charleston upon the six and seven per cent. stocks of the United States.

*The same principle prevailed in both cases. The first was a unanimous, the second a divided opinion; but divided upon the question, whether the tax was an income or a specific tax. The leading principle established by *McCulloch's Case* and confirmed by the case of the *City Council*, is this: that the constitution of the United States, having conferred upon the general government certain enumerated and specific powers, conferred all the means necessary to the execution of those powers; that the incorporation of a bank was a necessary and proper instrument of fiscal operations; that the law establishing the bank being a law authorized by the constitution, was supreme; and that the unavoidable consequence of that supremacy was, that no state could pass any law conflicting with it; and, that as the act of the state of Maryland imposing the tax involved the power of destroying the bank, it was inconsistent with the supremacy of the law establishing the bank. To suppose, that the Bank of the United States was declared by the court to be exempted from the action of state legislation, because it was the Bank of the United States, or because it was a means of power in the hands of the general government, would be taking but a narrow view of the principle of *McCulloch's Case*. That a bank was a necessary and proper instrument of power, constituted but a subordinate part of the splendid argument employed on that memorable occasion. It was necessary to take a step much farther in advance; to occupy much higher ground; to show, that, being a necessary instrument of power, the constitution intended to protect it from state legislation. Unless that ground had been occupied, there would have been an end to the bank. The whole case turned upon the intention of the constitution. The fact of its being an authorized means, in the hands of the general government, was used as an argument, to show that it was intended to be placed beyond the reach of the states. It was the protection afforded to these means, by the constitution; and not the character or inherent virtue of the means themselves, that called out the power and firmness of the court. Neither the bank nor the custom-house, the *navy nor the army, could plead sufficient merit of their own; but it was because they were sheltered behind the constitution, that state legislation could not reach them. [*535 [*536

Having established the proposition, that the constitution had impliedly prohibited the states from interfering with the machinery of the general government; the court proceeded to show, that the act of the state of Mary-

land involved the power of destroying what the states had no power to destroy. Not that the act, of itself, actually did or would destroy, but that it involved the power of destroying. We, therefore, repeat the assertion, that it was not because the Bank of the United States was an instrument of government, but because it was a prohibited subject, that the court declared the act of Maryland to be an unconstitutional act. The great principle is this: because the constitution will not permit a state to destroy, it will not permit a law involving the power to destroy. In order to show that the case turned entirely on that point, let us suppose, that the court had arrived at the conclusion, that the bank was an authorized instument of government; but that it was not the intention of the constitution to prohibit the states from interfering with those instruments; would it not have been necessary to have decided that the Maryland act was constitutional? Of what importance was it, that the bank was an authorized means of power, other than this, that it afforded a key to the meaning of the constitution? If the bank was a legitimate and proper instrument of power, then the constitution intended to protect it. If not, then no protection was intended. The question, whether it was a necessary and proper means, was auxiliary to the great question, whether the constitution intended to shelter it; and when the court arrived at the conclusion, that such protection was intended, they interfered, not in behalf of the bank, but in behalf of the sanctuary to which it had fled. They decided against the tax, because the subject had been placed beyond the power of the states, by the constitution. They decided, not on account of the subject, but on account of the power that protected it; they decided that a prohibition against destruction, was a prohibition against a law involving the power of destruction. The case of the *Providence Bank starts very far in advance of the Bank of the United States. It is not necessary to resort to implication, to prove that the rights of the former are protected by the constitution. There is an express clause to that effect, and the court will not forget, that it is the prohibition, and not the important or unimportant subject that stands behind it, that constitutes the shield against hostile legislation.

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"No state shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." "No state shall, without the consent of congress, lay any imposts or duties on imports and exports, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." To the framers of the constitution, some of the subjects here prohibited probably appeared to be more important than others. They probably thought it more important to deprive the states of the power of forming alliances with foreign nations, than of emitting bills of credit. The exercise of the one power by the states would merely incommode the general government; the exercise of the other, endanger its very existence. Yet are not these subjects, judicially, of equal importance? Equally important, because equally prohibited. Are not all the prohibited subjects of equal importance, and have the states any more power to violate one prohibition than another?

It may be said, that the Bank of the United States was established by a law of the general government; and that it was the supremacy of the law which rendered all conflicting laws of the states inoperative. The supremacy of the law was a reason, and a conclusive reason, to induce the court to imply a prohibition. It was not the supremacy of the law, but the implied constitutional prohibition, which induced the court to protect the bank. The rights conferred upon the Bank of the United States, by its charter, are inviolable *and supreme, as regards all the states. Are not the rights [*538
of the Providence Bank, and the law which conferred those rights, inviolable and supreme, as regards Rhode Island? Is not that law a contract; those rights, the fruit of that contract? What constitutes the supremacy of a law in regard to the states, if it is not their total want of power to interfere with its regular operation, or to destroy the rights which it confers? Can the legislature of Rhode Island repeal the law incorporating the Providence Bank? Can they alter any of its essential provisions? Is it not supreme, or, in homelier English, above their reach? The only difference between the law incorporating the Bank of the United States and the law incorporating the Providence Bank, as regards their character of supremacy, is, that the former is supreme as regards all the states, the latter, as regards Rhode Island only. The supremacy of both originates in contract. The fundamental contract of the Union, or the constitution, imparts supremacy to the laws of the Union, and binds all the states. The contract with the Providence Bank imparts supremacy to all the rights which it confers, and binds one of the states. The sphere of action is more limited, and the parties less numerous in the one case than in the other, and that is the only substantial difference between them.

To the legislature, say the court, in *Fletcher* v. *Peck*, all legislative power belongs. But the question, whether the act of transferring the property of an individual to the public is in the nature of legislative power, is well worthy of serious reflection. This language was used in relation to a law of Georgia, attempting to resume the subject of its own grants. Is it not equally applicable to the case before the court? The income of the capitals of the banks is the subject of the grants in this case; land, the subject of the grant in that. If a state cannot resume one subject of its grant, can it another? If it cannot resume it directly, can it indirectly? Is there any difference between a direct and a consequential interference with a prohibited subject? The uniform language of this court is in the negative. The warmest advocate for state power will find it difficult to discover any principle from which it can be implied, that one *party to a contract [*539
reserves to himself the power of destroying all the rights conferred by the contract.

In relation to individual parties, under the law, it will be conceded, that no such power can exist. In relation to sovereign parties, under the constitution, is not the rule necessarily the same? Is not the dominion of the constitution over the states the same, as to its nature and extent, as that of the law over individuals? If, in a contract between individuals, no illegal power can be implied, in a contract with a sovereign, can any unconstitutional power be implied? By becoming a party to a contract, a state imposes upon itself additional obligations and additional duties. To suppose, that these duties and these obligations do not qualify its rights, is

tantamount to denying that they are obligations and duties. To impose upon an individual, or a sovereign, an obligation, without an equivalent limitation of its legal and moral power, is as impossible, as to produce an effect without a cause. What is an obligation, but a limitation of previous power? What is a duty, but the abandonment of some corresponding right? The proposition, that a state has the same power over the rights conferred by its own contract, as over all other legal rights, is a denial that any obligation is created by its contract; for, if it creates any obligation, that obligation does not exist in relation to the legal rights of those with whom the state has made no contract. The necessary consequence is, that a limitation of state authority, to the extent of this superadded obligation, must be created; and a limitation which does not exist in relation to the legal rights of others.

Hazzard, for the defendants.—An act of the legislature of Rhode Island, passed in 1791, incorporating the Providence Bank, is said to be a contract between the legislature and that bank; and it is contended, that a general law, passed by the legislature in the year 1822, and the acts in amendment thereof, "imposing a duty upon licensed persons and others, and upon bodies corporate, within that state," are laws impairing the obligation of that contract, and violating the constitution of the United States. Whether this be so or not depends upon the question—*whether there is anything in the act incorporating the Providence Bank which exempts that bank from the taxing power of the state? Or, whether the corporate character of the bank exempts its operations from the action of the state authority?

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If the general assembly, by the incorporating act of 1791, or by the acts in addition thereto, did bind the state to exempt this corporation, in perpetuity, from the taxing power of the state, the obligation must either be express in those acts, or must be clearly implied from the terms of them; or the exemption must be one of the necessary incidents or immunities of a corporation.

It appears, by the preamble to the charter, that about a year after this bank had been established, its president and directors petitioned the general assembly for an act of incorporation. The prayer of the petition was granted, and an act passed in conformity to it. The act contains a detail of the ordinary properties and capacities of a corporation; such as are alike incident to every corporation, of whatever description, and as would appertain to, and be exercised by it, whether expressly granted or not. The act further approves of the private regulations adopted by the company; it exempts the several stockholders from personal liability, beyond the amount of their respective shares of stock; it gives to the company an exclusive, summary, legal process for the collection of debts due to them; and lastly, it makes provision for securing the bills of the bank from forgery. The three acts in amendment make some improvement in the bank process, as it is called; empower the directors to fill vacancies; and provide that the shares of the stockholders shall be held pledged to the bank for their debts due to it. In these provisions (which are the whole contents of the bank charter), there is no express grant of the exemption claimed, and I am not able to find anything in them, from which the most remote inference can be drawn, of an intention, on the part of the legislature, to make such a

grant. What was granted, and intended to be granted, has no connection with what is now claimed as part of the grant. All *that was done [*541
by the legislature, was, to convert a banking copartnership into a body politic; and their having done this, does not warrant the inference, that they meant to make to that company a further donation, either of money or immunities, other than such as necessarily appertains to all corporate bodies. If there is anything in that charter, from which such an inference can fairly be drawn, it is to be shown by the plaintiffs?

Is, then, an exemption from the taxing power of the state a necessary incident of this corporation? If it is, it must be an incident of all corporations, of every description; for so far as this exemption is the question, there is nothing to distinguish a banking corporation from any other; but if a distinction was to be made, it would not be in favor of banks, which, being moneyed, and money-making institutions, might be considered as the most appropriate objects of taxation. It is said by the writers on the subject of corporations, that such capacities and qualities as are necessary to the creation and legal being of a corporation, and such only, are incidents of the corporation. But it cannot be said, that an exemption from taxes is necessary to the existence of a corporation, especially, a moneyed corporation. A corporation is as competent to pay duties imposed upon it, as brokers, or retailers, or distillers, or auctioneers, or any other individuals or companies of any other trade, craft or profession; and its being required to pay them is, in no way, inconsistent wih its corporate existence, or its corporate character. Such duties have, in fact, been imposed upon them (the banking companies), by the government of the Union; and have been, for many years, and still are, imposed upon them, by many of the states, and no difficulty has been experienced in the collection of them. It is moreover admitted, that when the power of taxing is expressly reserved in the charters of banks, they may consistently be taxed. If this be so, there is nothing in the power of taxing which is inconsistent with the existence of such corporations, or with the full enjoyment of their franchises. It is plain, therefore, that an exemption from taxes is not one of the *necessary incidents or immunities of such a corporation. This [*542
being the case, and it being equally plain (as has already been shown), that the charter itself of the Providence Bank contains no express or implied relinquishment, on the part of the state, of the power of taxing, it seems to follow, that the acts of the legislature of Rhode Island, "imposing a duty upon licensed persons and others, and upon bodies corporate within that state," do not impair the obligation of any contract of the state with the plaintiffs, nor violate the constitution of the United States.

One of the breaches of contract with which the legislature of Rhode Island is charged by plaintiffs, is thus stated by them: their charter, they say, grants and secures to them for ever, "all the profits arising from the employment of their capital in banking business." And this grant, they contend, is impaired by the law of 1822, imposing a tax on the banks. The banks have, no doubt, a perfect right to all the profits to be derived from the corporate franchises granted to them. But no better right, surely, than other companies or individuals have to all the profits of their business, or to their estates, real and personal, and all the rents and income of them. And

it has not yet been discovered, that the exercise of the taxing power upon those subjects was inconsistent with the full enjoyment of those rights.

The power to tax banks for their corporate property, and to tax the stockholders for their stock, is not denied. But it is said, that this is a tax upon the franchise; a tax upon the thing granted. The law speaks for itself. It imposes a duty upon the several banks; equal to one-eighth of one per cent. of the amount of the capital stocks of each, actually paid in. If this is a duty on the franchises, why not? That those franchises are property, and valuable property, we know. Corporate franchises are thus described by Mr. Justice STORY, in the *Dartmouth College Case*, 4 Wheat. 700: "They are, properly speaking, legal estates, vested in the corporation itself, as soon as it is *in esse*. They are not mere legal powers granted
*543] to the corporation, but powers coupled with an interest. The *property of the corporation vests, upon the possession of its franchises. Whatever may be thought of the corporators, it cannot be denied, that the corporation has a legal interest in them." He speaks of them elsewhere, in the same case, as "valuable hereditaments or property." And says, "that a grant of them is not distinguishable, in point of principle, from a grant of any other property." And these remarks were made in reference even to eleemosynary corporations; and corporations for literary purposes; and apply much more forcibly to these trading or moneyed corporations.

The opening counsel will recollect, that one of these bank charters was sold in Rhode Island, a few years ago, for a large sum of money, by a company to whom it had been granted several years before, but who made no use of it. The plaintiffs tell us themselves, that their franchises are valuable; and their stock sells for from fifteen to twenty-five per cent. advance. And well may it be so. Their interest money is compounded every sixty days; and that too on loans of mere paper bills, which carry no interest. For, as the bills of the banks constitute the whole of the circulating medium, they gain, gratuitously, the interest on so much of their paper as is constaintly absorbed in circulation—the amount of which we know is immense.

It was the opinion of Mr. Justice Blackstone, and the soundness of that opinion has been fully tested by the experience of statesmen, that the revenues of a state may be derived from duties and imposts on objects prudently selected, with much less expense and burden to the community, than from direct taxation. What part is it, of the revenues of the United States, that is derived from the latter source? They have never resorted to direct taxation, but on the most pressing occasions, nor until the collection from indirect taxes had proved inadequate to the exigencies of government. From the year 1791 to 1798, and again from 1813 to 1815, laws were passed by congress laying duties on various commodities and trades. But the first direct tax was not laid until 1798, and the second and last, not until 1815. Among the objects then thought most appropriate for taxing, all incorpo-
*544] rated banks, as well as private bankers, *banking companies and money-dealers, were selected for duties; and those duties were regularly and readily paid, without any complaint from the banks of their being incompatible with their corporate existence, or their corporate rights.

There is no weight in the objection, that the duty does not bear equally upon the whole community. It is not possible, that taxes should be made to bear equally upon every member of the community, so as to draw from

each one precisely in proportion to his property. Nor, if this were practicable, would it be a wise or salutary system of taxation. It is certainly wiser and better, to draw revenue from surplus income, than from the immediate products of labor and industry; from commodities and trades which administer to the pleasures or the vices of men, from the luxuries and superfluities, than from the necessaries of life. And thus the United States government began with duties on distilled spirits, on stills, on venders of wines and spirits, on various articles of luxury, and on banks; and, as long as possible, avoided direct taxes and duties on the more necessary and useful articles, such as household furniture, farming utensils, and the various necessary articles of domestic manufacture.

The true question in this case is, whether the law complained of is a law impairing the obligation of a contract, in the sense those words bear in the constitution of the United States. The power of taxation is "an incident of sovereignty;" and the government in whom it resides is alone competent, within its own jurisdiction, to judge and determine how, in what manner, and upon what objects, that power shall be exercised. "That the power of taxation is one of vital importance," said the chief justice of this court in delivering the opinion of the court in *McCulloch's Case*, "that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied." 4 Wheat. 425. And again, in the same case, "it is admitted, that the power of taxing the people and their *property is essential to the very existence of government, and may be legitimately exercised on the objects to [*545 which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." 4 Wheat. 428.

It is admitted, that land or other property, granted by the state, becomes liable to taxes in the hands of the grantees; and that there is no distinction, in point of principle, between a grant of corporate franchises, and a grant of land, or any other property, is conclusively shown by Mr. Justice Story, in the *Dartmouth College Case*, 4 Wheat. 684. But land, it is said, exists, and is taxable before the grant. It exists, to be sure; but that circumstance is of no importance; since, as property of the state, it is not taxed, nor is taxable, until granted, any more than ungranted franchises are taxable. It may be said, that, as corporate franchises take their existence only from the grant of them, the legislature can annex to the grant whatever conditions or exemptions they please. If this were true, it would only show that the legislature has power to grant an exemption from taxes, in such cases as it may think proper; not that such exemption can be claimed, when not granted. As these franchises are, or may be, valuable property, the state has an interest in the grants of them; and in the exercise of the taxing and other legislative powers over them, when they are granted, do exist, and are property, as much as it has in the case of any other grants of any other property.

The doctrine contended for by the plaintiffs amounts fully to this, that the powers of legislation must not be exercised, nay, must be annihilated,

because they are liable to be abused. True, they would have this doctrine applied only in their own case ; but it will hardly be conceded to them, though they so strenuously urge the claim, that they have a right to better security for their franchises than the rest of the community have for their privileges. But *even if we adopt the plaintiff's application of the *546] doctrine, where will it lead and land us? The power to regulate the public revenue ; to fix the rate of interest ; to grant charters of incorporation ; and to raise revenue by taxation, are branches and incidents of that portion of sovereignty still retained by the states, and are necessary to the very existence of government. But according to the plaintiffs, all these powers are restrained and controlled, if not surrendered, by the granting of an ordinary act of incorporation to a private trading company ; for, if the legislature has power to regulate the currency, it may say, that bank-bills shall not make part of it ; it may say, that no bank-bills shall issue of a denomination lower than one thousand dollars, nor higher than one dollar. If it can fix the rate of interest, it may deprive the banks of their profits ; if it can create other banks, at pleasure, it may render those already granted of no value ; if it can tax the shares of stock in the hands of stockholders, it may effectually break up the business. They profess not to carry their doctrine so far ; they concede the exercise of such power to the state ; but concessions made to save a doctrine from its own tendencies to absurdity, do not alter the principle. The doctrine itself does go the whole length pointed out. The general legislative powers specified do involve in them the power of reducing the profits of the banks, and of affecting their operations and their charters, as fully as such a power is involved in the power of taxing.

The creation of a body politic is an exercise of legislative power ; but it does not imply the relinquishment of any portion of legislative power. The only obligation which the government imposes upon itself is, not unjustly and arbitrarily to defeat the grant contained in the charter : but it has no more right to defeat any other legal grant, than it has to defeat its own ; and no law which would not impair the obligation of a contract between individuals, would impair it, if the state is one of the contracting parties. It makes no difference, that individuals cannot grant franchises ; for it is already clearly shown, that, in principle, there is no difference between grants of franchises and grants *of other property. It is not whole- *547] some doctrine for private corporations to imbibe, that they are independent of the power that creates them ; and that they shall be protected in setting it at defiance. Not only are their franchises and other property subject to the taxing power of the states ; but, so far as the public interests are affected by the action of a corporation, so far those operations must be under the control of government, whose province and paramount duty it is, to provide for the public welfare. Thus, should the public good require the suppression of a paper currency, certainly, the government would have a right to suppress it, although, in doing so, they would destroy the banks whose paper composes that currency. It will not do, to say, that a chartered military company may not be put down, or, that a chartered company engaged in supplying a city with water, or any such corporations, may not be suppressed, if the government should see good cause for suppressing them ; and, in point of character, there is no difference between those corporations and banking corporations whose paper bills constitute the public

money currency of the country. In the case of the *Corporation of the Protestant Episcopal Church* v. *City of New York*, decided by the supreme court of the state of New York, and reported in 7 Cow. 584; and in a similar case, of another church congregation against that city, reported in 5 Cow. 538, it was decided, that a by-law of the city, forbidding the interment of the dead in the cemeteries and grounds appertaining to the churches, was valid and constitutional, although those grounds had been granted by the city itself, for that express use, and the grants contained covenants for quiet enjoyment, and although certain private rights and pecuniary interests of individuals were cut off by that law ; and it was decided in those cases, that the city corporation could not, by its agreement, abridge its legislative powers. In the case of *Brown* v. *Penobscot Bank*, 8 Mass. 445, it was decided, that a law, imposing a heavy penalty upon banks which did not punctually redeem their bills, was valid ; and in *Foster* v. *Essex Bank*, 17 Mass. 479, a law was decided to be valid, which, for the purpose of giving time for remedies against a bank, prolonged its corporate existence against *its wishes, for the space of three years after its charter had expired. [*548

There is another question, a most important one, which must always present itself in a case like the present. That question is, whether any legislature can, if it would, grant or surrender any portion of that power of which sovereignty itself consists ? No one can entertain a doubt, that the existing legislature must have full power to make all such grants of public lands or other property ; and to enter into all such contracts, as this court declared to be binding and valid in the cases of *Fletcher* v. *Peck*, *Terrett* v. *Taylor*, and other similar cases. But such grants and contracts, it appears, are very different from an alienation, in perpetuity, of a portion of the taxing power of the state; which, in another case, this court declared to be "an incident of sovereignty," and " essential to the existence of government."

There are certain powers which are inherent in the people, and cannot be alienated even by the people themselves, much less by their representatives, to whom those powers are intrusted for a time ; not to be annihilated, but to be exercised by them, until other representatives shall be appointed in their places. The present generation of men may sell or bind themselves to servitude ; but they cannot sell or bind their posterity. It is immaterial, whether the legislature is restrained by a written constitution or not. The absolute rights of the constituents are not to be encroached upon, because they may not think it necessary to attempt to guard them by such instruments, which, after all, but very indifferently answer the purpose for which they are intended ; but on the contrary, are too often made use of, by false and forced constructions, to justify the assumption of powers which the people never meant to grant. The power of self-government is a power absolute and inherent in the people. But that power cannot exist, distinct from the power of taxation. If the legislature can exempt for ever, all corporations from taxes ; they can exempt all merchants, all farmers, all manufacturers, or all of any other classes of the community. And in this way, they can cut *off the sources of future revenue ; and can fasten and entail for ever the whole burden of government upon any portion [*549 of the people they please. In the argument, the sentiments frequently expressed by this court, and by different members of it, on various occasions, seem to have been forgotten. "The question whether a law be void for its

repugnance to the constitution," said the chief justice of this court, in the case of *Fletcher* v. *Peck*, "is at all times a question of great delicacy; which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." "The opposition between the constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other." And in the *Dartmouth College Case*, 4 Wheat. 125, "on more than one occasion, the court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared, that in no doubtful case, would it pronounce a legislative act to be contrary to the constitution." In *Calder* v. *Bull*, 3 Dall. 386, it is said by the late Mr. Justice CHASE, "if ever I exercise the jurisdiction, I will never decide any law to be void, but in a very clear case." And by the late Mr. Justice IREDELL, in the same case, "the court will never resort to that authority, but in a clear and urgent case." And in *Cooper* v. *Telfair*, 4 Dall. 14, by the late Mr. Justice PATERSON, "to authorize this court to pronounce any law to be void, it must be a clear, unequivocal breach of the constitution; not a doubtful and argumentative implication."

Jones, in reply, argued, that the term "contracts," used in the constitution, comprehends as well those between two states, or between a state and private individuals, as those between two or more private individuals, citizens or not citizens of the state, the validity of whose law is drawn in question. It comprehends not only such as remain executory or in action, but all vested rights and interests in any species of property, corporeal or incorporeal; and among these, the franchises and property of private cor-
*550] porations, whether *created for any expressed consideration of definite value, or for any declared objects of public utility, or purporting to be merely gratuitous, as between grantor and grantee; the implied benefits of the community being the only compensation supposed to be given or received; even donations from the state, or individuals, to eleemosynary and religious institutions, or to others of public beneficence or utility, whether incorporate or unincorporate. It matters not, by what means, or in what form the contract is created, or the rights vested; whether by charter or grant from the state, after it became sovereign and independent; or during its colonial state from the crown; or by a law in the ordinary form of legislative enactment; they are all equally protected by the constitutional prohibition.

This constitutional sanction rests not on the good faith supposed, by the comity of sovereigns, to inform the breasts of each other; nor upon the dread appeal to that *ultima ratio*, which is ordinarily the only means of compulsory redress among themselves; but it acts, directly and practically, upon state power and jurisdiction; and enables the tribunals to set aside the obnoxious law, and to uphold and enforce, by judicial coercion, the rights it attempts to violate. It matters not, what the kind or degree of force exerted by the law upon the contract, or the vested right; whether it go directly and wholly to annul the one, or to destroy the other; or in any degree to impair or injure it; or to exert any authority over it, necessarily involving, and inseparably inherent to, an authority to annul, destroy or impair it; any compulsory change in the terms of the contract, or in the essential condition of the vested right, whether positively injurious or even

positively beneficial, is within the same reason, and equally prohibited to the states. The numerous decisions of this court, by which these principles have been judicially established, are too recent and familiar, to require any particular reference. Their authority precludes all judicial question, and dispenses with all proof of the axioms deduced from them.

"Taxes (as accurately classed by writers on political economy) are either direct or indirect; direct, when *immediately taken from income or capital; indirect, when taken from them, by making the owners pay for liberty to use certain articles, or to exercise certain privileges." When, therefore, the bank is made to pay for liberty to exercise the privilege of employing a certain capital in the trade of banking, or of exerting any other of its chartered faculties, doubtless, an indirect taxation of the capital itself, in what species of property soever consisting, results. But the converse of the proposition does not hold, that a direct tax, in the ordinary mode of taxation, upon the capital of individuals invested in bank-stock, or upon the product of the skill and labor bestowed in the employment of that capital, or upon the lands, ships, merchandise, or other specific property held by the bank, for the benefit of the individual stockholders, necessarily operates, directly or indirectly, any duty or burden whatever, on the corporate franchise itself, or the liberty to exercise the privileges conferred by the charter. The very material difference between the two modes of taxation, as they respectively affect the substantial terms of the charter, and the essential condition of the rights vested by it, will be presently considered. The simple proposition, that it is a duty imposed, specifically, on the corporate franchise, and the faculties and privileges with which the body corporate is endowed by its charter, is what is now to be proved. [*551

This is conceived to be clear, from the import of the law itself. The tax is laid directly on the bank, in its corporate capacity; and the stock belonging to individuals, is made the mere measure of the imposition on the aggregate body. This stock is not the property of the body taxed; but is divided into distinct and separate shares, which belong to the several owners, as their separate, individual estate, and subject to the independent disposal of each owner; as were the several capitals, represented by the stock, before they were subscribed to the stock, and while they subsisted in the original form of money. The capital paid in and represented by the stock, is intrusted to the custody and husbandry of *the corporation; but that artificial and transferrible commodity, brought into life by the charter, endued with all its faculties by the charter, and denominated bank-stock, is just as much the separate property, and at the disposal of the respective owners, clear of all corporate control, as their several lands, chattels and *choses in action*. This quality of the stock is just as disinctly guarantied to the stockholders individually, as is the corporate franchise, or any of its faculties, to the aggregate body. There is nothing of the social property or possession incident to partnership. Then, the property of one person is merely adopted as an arbitrary measure of the *quantum* of taxation on another. There is no more of indirect taxation upon the bank-stock held by individuals, and thus made the arbitrary measure of taxation, than upon the lands, ships, *choses in action*, or other property held by the aggregate body, for the benefit of the several corporators, but not comprehended in the rule of admeasurement for determining [*552

the mere *quantum* of taxation. The indirect effect upon all is precisely the same. But this indirect operation of the tax does not go, in the least degree, to relieve any one article of the property, nor any one of the proprietors affected by the operation from the general law of taxation operating upon them, in common with their fellow-citizens. Under that general law, all the property, of every species, held by the corporation, for the benefit of the stockholders, is rated, *qua* property, in the common process of taxation, just the same as if the franchise or chartered faculties of the corporation had not been taxed at all; so are the money capitals, invested in and represented by the shares of bank-stock, and the products received in the form of dividends; all being still liable to be rated in the general taxation upon capital and income, without the least allowance for what is indirectly abstracted by the duty on the corporate body. This duty, therefore, does not even affect to be a circuitous mode of more conveniently taxing property, in any form of fixed or of commercial capital, or of income. It is no part of any general system, either of a property tax, or an income tax; but
*553] is solely and exclusively directed to *the chartered liberty or privilege of a certain mode of artificial existence, and of exercising the peculiar faculties of that mode of existence. The tax is just as effective in terms and in obligation, whether the corporation, *qua* proprietor, owns millions, or nothing; whether the capital stock be at cent. per cent. advance, or the capital invested in it be utterly lost and sunk in the course of trade; whether the income, in the form of dividends, be large or small, or nothing. The amount of capital stock paid in, is the unvarying standard of the duty on the bank; the actual state and condition of the bank, or of the stockholders as proprietors, enters not at all into the scheme of the duty. Then, how can the bare contingency, that it may be one of the incidents and consequences of the scheme, indirectly, to burden the property of the bank, or of the stockholders, make this any the less a duty directed specifically, nay exclusively, to the continued enjoyment of the corporate franchise, to which it attaches itself, independent of every consideration of property?

The original grant of this franchise to the bank is admitted, it is presumed, to be in the nature of a contract between the state and the corporation, within the meaning of the constitution; and it is further presumed to be admitted, notwithstanding a good deal of ambiguity on this point in the opposite argument, that this contract, with all the peculiar rights and privileges vested under it, is of paramount obligation, and altogether irrevocable and indefeasible by any subsequent act of legislation. Admitted or denied, it cannot, at this day, be treated as a subject of controversy, unless this court should please to intimate a wish to review and reconsider the principles of former decisions. The obligation of the contract, if it means anything, means that the corporation shall always enjoy the franchise, with all the faculties, rights and privileges vested by the grant, upon the identical terms and conditions of that grant. The question then is a practical one. Does the law of 1822, against the consent of the grantee, materially change the original terms of the grant, or the condition of the rights vested by it? In either case, it equally impairs the obligation of the contract, within the meaning of the constitution.

*554] *One of the most material terms of a contract or grant is the consideration. The grant of a franchise is either in some sort gratuitous,

as if founded on the implied consideration of diffusive benefits to the community, or on the expressed consideration of public utility; or of some pecuniary or other equivalent, of definite value. In either case, it is equally binding and indefeasible, without the consent of both parties. If, being gratuitous, it be burdened with a price; or if, being for valuable consideration, the price be arbitrarily increased, who can doubt, that the terms of the contract are materially changed? And if this be done by the retrospective operation of a law, arbitrarily imposing such new terms, who can doubt, that the obligation of the contract is injuriously impaired, if not destroyed?

The case of land purchased from the state being liable to taxation, in common with the land of other individuals, is put as an argument, in point, against us. No one ever imagined, that a change in the condition of the land, from public to private domain, necessarily annexed any pre-eminent privileges to it. So we admit, without qualification, that all property held by the bank, by virtue of its charter, is taxable, in common with other property of the like description. So, this court admitted, was the condition of the property held by the Bank of the United States, though the bank itself, or its franchises and privileges were not so. But suppose, the legislature, by a retrospective law, instead of subjecting the land to the general law of taxation, tax the grant itself, the title to hold and enjoy the land, and exact from the grantee, over and above the original consideration, a new compensation for parting with the title of the public to an individual: or, what is the same thing, select his particular land from the mass of other taxable lands, and besides the general tax contributed for it by the proprietor, in common with other proprietors of lands, exact an additional tax on his, because his title or grant was derived from the state, so as, in effect, to tax the grant itself, or the right, before granted, to hold and enjoy the land: this would be a clear infringement of the contract, as being a material and *injurious change in its terms; in effect, the exaction of an additional compensation for the grant. [*555

Next, we are to examine the state and condition of the right vested by the grant, and see if that is subjected by the law in question to any material change from the state and condition in which the grant originally placed it. This must be determined by the nature and extent of the vested right, then and now. It is not, at this day, to be disputed, that the grant imports a contract that the grantees shall absolutely and fully enjoy the liberty to exercise all the privileges and faculties, either expressed in the grant, or incident to its nature, unrevoked and undiminished; in short, that these privileges and faculties shall continue while the corporation endures, of the same extent, and of the specific quality, as when originally conferred, without any hindrance, impediment or molestation on the part of the grantor. The implied covenants of the grant are just as strong and obligatory as those covenants of title in an ordinary bargain and sale, that go to tie up the hands of the bargainor himself, and of all claiming under him, or acting by his authority; for instance, the covenants against incumbrances, &c., and for quiet enjoyment, without the let, molestation, hindrance, &c., of the bargainor, &c. The granted liberties and franchises cannot be destroyed or taken away, in the whole or in part; consequently, they cannot be altered or diminished in kind or in degree; for he who has a discretion to alter or diminish, necessarily has a discretion to destroy, unless the limits

of his discretion be stipulated in the grant. It is not the mere *quantum* of the injury to the grantee, nor the degree in which the terms and conditions of the contract are transgressed, that determines the rightfulness of the act. Once admit a discretionary power, in any degree, as resulting from the relation of the parties, and not from the limitations of the contract, and it can be nothing but an unlimited discretion. The granted liberties and faculties cannot be afterwards clogged with any new conditions or incumbrances, that may either stop or retard their action; neither a mole-hill nor
*556] a mountain can be raised in their path. This is the *irresistible and universal conclusion of reason; and sanctioned, if it wanted sanction, by the reasoning and the decision of this court in *Green* v. *Biddle*, 8 Wheat. 84.

Then, is not the exaction of a tax, or, in other words, of an additional compensation to the state, for the chartered liberty, as efficient an instrument, either for the destruction or the diminution of the liberty, as any that could be devised? What is there that could more effectually stop or retard its chartered course? It depends entirely upon the weight of the burden, whether the party on whom it is imposed, sink under it, or be measurably impeded and retarded. In mercantile language, it may occasion a partial loss of one per cent., or a total loss of one hundred per cent.; and, in principle, does it matter which? The question is not, whether the tax be exorbitant or oppressive. Of that, no judicative tribunal can possibly be the judge. If the discretion to tax at all, rests with the legislature, the discretion is, in the nature of things, unlimited. It is impossible for any but the delegated depositaries or the power to tax, and their constituents, to judge and determine what tax is reasonable or exorbitant. What might be a light burden to one bank, might overwhelm another. Once determine that a discretionary power to impose the burden, in any degree, exists, and the judicial power is for ever gone, to control it in any degree. Then these postulates may be taken for granted.

1. That the imposition of a new tax or burden on the liberty, in any degree, measurably clogs and impedes the practical exercise of that liberty, and so diminishes it.

2. That such tax or burden is an instrument equally efficient to destroy as to diminish the liberty, according to the kind and degree of force with which the instrument is used.

3. That it rests in the absolute discretion of the legislature to use it, either for the one purpose or the other, if at all.

The conclusion is inevitable, that if it may be used at all, the exercise of the liberty, in any degree, and its very existence, rest upon sovereign discretion, not on the faith of a contract. This amounts either to a negation of the postulate with which we set out, that the grant of the liberty is
*557] *in the nature of a contract; or to an exclusion of all contracts from the sanction and protection of the constitution; or to an exception of this particular contract from the condition of contracts in general. The ground or reason of such exception is not stated, and is altogether beyond comprehension.

Then, if the law of 1822 be borne out in the imposition of this new burden on the liberty to exercise the privileges of the franchise, the change effected in the state or condition of the franchise, as it stood under the orig-

inal law of the contract, and as it stands under the subsequent modification of that law, is this: originally, the contract under which it was held was consummate and executed; now, one, at least, of its most material terms, the consideration, is executory and contingent, and, what is worse, discretionary with the other party: originally, the exercise of the franchise, within its chartered limits, was absolutely free and unrestrained; now, burdened with new impositions, and liable to be further burdened, *ad infinitum:* originally, the liberty and right so to exercise the privileges and faculties of the franchise were absolute, unconditional, and indefeasible; now, at the sovereign will and pleasure of the legislature.

The franchise is not, like the proper subjects of political power, intrusted to legislative discretion at all; but, to the positive sanction of public faith, tied down by the inviolable obligation of contract. Indeed, an abuse of legislative power, in oppressing the great mass of the community by exorbitant taxation, far less in confiscating all its property, is scarce an admissible supposition; the mass of the community holds, in its own hands, the remedy against its own oppression, and the abuses of its rulers. But the great conservative principle of political responsibility may act very feebly, or not at all, in protecting and enforcing the particular rights and obligations of contracts against violation by the government. It is, therefore, that political rights, and the vested rights of contract and property, are placed on different bases, and protected by different sanctions. The administration of any political power must, in the nature of things, be more or less discretionary; and can give no guarantee against abuse, but the responsibility inseparable from *delegated power: the rights and [*558 obligations of contracts, on the other hand, are no subjects of political trust or discretion at all; but just as positive and coercive upon the party that happens to be a sovereign state, as upon an individual.

An objection somewhat novel is started, which goes to limit and restrict, instead of enlarging, state power, by denying its competency to make such a contract as we say it has made in this case. The state cannot, it seems, alienate or part with its sovereign power, in whole or in part. Taxation is an incident of its highest sovereign power, and cannot be aliened by contract; therefore, a contract to exempt any particular person or species of property from taxation is void. To say nothing of the evident inconsequence of the conclusion from the premises, and of the inaccuracy of holding, that the constitutional incompetency of a state to lay new exactions upon its own contracts, and upon the mere abstract rights of contract, created by the state itself, is the same thing as a substantive stipulation to exempt property, in its nature an appropriate and legitimate subject of taxation; we may wonder why the axe was not applied to the root of the bank charter. For, surely, the principle of the objection goes that length; since the franchise itself is carved out of the eminent domain, or transcendental propriety of the state, and is a portion of it, aliened and bestowed upon every corporation; and no small portion of it is parted with, when municipal corporations are created.

But it should not have escaped the learned counsel, that the state legislature of New Jersey was held bound by a contract of its predecessor, the colonial legislature, divesting itself of a portion of this very incident of high sovereignty, taxation, as it applied to certain lands belonging

to citizens of the state, and constituting as appropriate a subject of taxation in general, as can be imagined. This, not as he supposes, because of any peculiar dignity or sanctity attached to a treaty, half a century before, between the former colony and the poor remnant of a broken tribe of Indians; but upon the ground of contract simply; which, indeed, is the only intelligible ground for the obligation of treaties, *upon the parties to them. It might also have been recollected, that the legislature of New Jersey, in the instance just stated, and of Georgia, in the case of the Yazoo lands, were held to have conclusively renounced by contract, and by its implied, not its express stipulations, the exercise of one of the highest and most indispensable prerogatives of legislation; that of repealing its own laws.

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Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered in the highest court for the state of Rhode Island, in an action of trespass brought by the plaintiff in error against the defendant.

In November 1791, the legislature of Rhode Island granted a charter of incorporation to certain individuals, who had associated themselves together for the purpose of forming a banking company. They are incorporated by the name of the "President, Directors and Company of the Providence Bank," and have the ordinary powers which are supposed be necessary for the usual objects of such associations. In 1822, the legislature of Rhode Island passed "an act imposing a duty on licensed persons and others, and bodies corporate within the state;" in which, among other things, it is enacted, that "there shall be paid, for the use of the state, by each and every bank within the state, except the Bank of the United States, the sum of fifty cents on each and every thousand dollars of the capital stock actually paid in." This tax was afterwards augmented to one dollar and twenty-five cents. The Providence Bank, having determined to resist the payment of this tax, brought an action of trespass against the officers, by whom a warrant of distress was issued against and served upon the property of the bank, in pursuance of the law. The defendants justify the taking set out in the declaration, under the act of assembly imposing the tax; to which plea, the plaintiffs demur, and assign for cause of demurrer, that the act is repugnant to the constitution of the United States, inasmuch as it impairs the obligation of the contract created by their charter of incorporation.

*Judgment was given by the court of common pleas in favor of the defendants; which judgment was, on appeal, confirmed by the supreme judicial court of the state; that judgment has been brought before this court by a writ of error.

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It has been settled, that a contract entered into between a state and an individual, is as fully protected by the tenth section of the first article of the constitution, as a contract between two individuals; and it is not denied, that a charter incorporating a bank is a contract. Is this contract impaired by taxing the banks of the state?

This question is to be answered by the charter itself. It contains no stipulation promising exemption from taxation. The state, then, has made no express contract which has been impaired by the act of which the plaintiffs

complain. No words have been found in the charter, which, in themselves, would justify the opinion, that the power of taxation was in the view of either of the parties; and that an exemption of it was intended, though not expressed. The plaintiffs find great difficulty in showing that the charter contains a promise, either express or implied, not to tax the bank. The elaborate and ingenious argument which has been urged amounts, in substance, to this. The charter authorizes the bank to employ its capital in banking transactions, for the benefit of the stockholders. It binds the state to permit these transactions for this object. Any law arresting directly the operations of the bank would violate this obligation, and would come within the prohibition of the constitution. But, as that cannot be done circuitously, which may not be done directly, the charter restrains the state from passing any act which may indirectly destroy the profits of the bank. A power to tax the bank may, unquestionably, be carried to such an excess as to take all its profits, and still more than its profits, for the use of the state; and consequently, destroy the institution. Now, whatever may be the rule of expediency, the constitutionality of a measure depends, not on the degree of its exercise, but on its principle. A power, therefore, which may in effect destroy the charter, is inconsistent with it; and is impliedly renounced, by granting it. Such a power cannot be exercised without *impairing the obligation of the contract. Whether pushed to its [*561
extreme point, or exercised in moderation, it is the same power, and is hostile to the rights granted by the charter. This is substantially the argument for the bank. The plaintiffs cite and rely on several sentiments expressed, on various occasions, by this court, in support of these positions.

The claim of the Providence Bank is certainly of the first impression. The power of taxing moneyed corporations has been frequently exercised; and has never before, so far as is known, been resisted. Its novelty, however, furnishes no conclusive argument against it. That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to re-affirm. They are acknowledged and asserted by all. It would seem, that the relinquishment of such a power is never to be presumed. We will not say, that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it, may not exist: but as the whole community is interested in retaining it undiminished; that community has a right to insist, that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear.

The plaintiffs would give to this charter the same construction as if it contained a clause exempting the bank from taxation on its stock in trade. But can it be supposed, that such a clause would not enlarge its privileges? They contend, that it must be implied; because the power to tax may be so wielded as to defeat the purpose for which the charter was granted. And may not this be said, with equal truth, of other legislative powers? Does it not also apply, with equal force, to every incorporated company? A company may be incorporated for the purpose of trading in goods, as well as trading in money. If the policy of the state should lead to the imposition of a tax on unincorporated companies, could those which might be incorporated claim an exemption, in virtue of a charter which does not indicate

such an intention? The time may come, when a duty may be imposed on
*562] *manufacturers. Would an incorporated company be exempted from this duty, as the mere consequence of its charter?

The great object of an incorporation is, to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist. If the power of taxation is inconsistent with the charter, because it may be so exercised as to destroy the object for which the charter is given; it is equally inconsistent with every other charter, because it is equally capable of working the destruction of the objects for which every other charter is given. If the grant of a power to trade in money to a given amount, implies an exemption of the stock in trade from taxation, because the tax may absorb all the profits; then the grant of any other thing, implies the same exemption; for that thing may be taxed to an extent which will render it totally unprofitable to the grantee. Land, for example, has, in many, perhaps, in all the states, been granted by government, since the adoption of the constitution. This grant is a contract, the object of which is that the profits issuing from it shall inure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases. And yet, if the proposition for which the plaintffs contend be true, it carries us to this point. That proposition is, that a power which is, in itself, capable of being exerted to the total destruction of the grant, is inconsistent with the grant; and is, therefore, impliedly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth, it may be supposed universal. But it is not universal; and therefore, its truth cannot be admitted, in these broad terms, in any case. We must look for the exemption, in the lan-
*563] guage of the instrument; and if we do *not find it there, it would be going very far, to insert it by construction.

The power of legislation, and consequently, of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government, as a part of itself, and need not be reserved, when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burdens; and that portion must be determined by the legislature. This vital power may be abused; but the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation; as well as against unwise legislation generally. This principle was laid down in the case of *McCulloch* v. *State of Maryland*, and in *Osborn* v. *Bank of the*

United States. Both those cases, we think, proceeded on the admission, that an incorporated bank, unless its charter shall express the exemption, is no more exempted from taxation, than an unincorporated company would be carrying on the same business.

The case of *Fletcher* v. *Peck* has been cited; but in that case, the legislature of Georgia passed an act to annul its grant. The case of the *State of New Jersey* v. *Wilson* has been also mentioned; but in that case, the stipulation exempting the land from taxation was made in express words The reasoning of the court in the case of *McCulloch* v. *State of Maryland* has been applied to this case; but the court itself appears to have provided against this application. Its opinion in that case, as well as in *Osborn* v. *Bank of the United States*, was founded expressly on the supremacy of the laws of congress, and the necessary consequence of that supremacy to exempt its instruments *employed in the execution of its powers, from the operation of any interfering power whatever. [*564
In reasoning on the argument that the power of taxation was not confined to the people and property of a state, but might be exercised on every object brought within its jurisdiction, this court admitted the truth of the proposition; and added, that "the power was an incident of sovereignty, and was co-extensive with that to which it was an incident." All powers, the court said, over which the sovereign power of a state extends, are subjects of taxation. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think not. So, in the case of *Osborn* v. *Bank of the United States*, the court said, "the argument" in favor of the right of the state to tax the bank, "supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object. If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, would certainly be subject to the taxing power of the state as any individual would be." The court was certainly not discussing the question whether a tax imposed by a state on a bank chartered by itself, impaired the obligation of its contract; and these opinions are not conclusive, as they would be, had they been delivered in such a case; but they show that the question was not considered as doubtful, and that inferences drawn from general expressions pointed to a different subject cannot be correctly drawn.

We have reflected seriously on this case, and are of opinion, that the act of the legislature of Rhode Island, passed in 1822, imposing a duty on licensed persons and others, and bodies corporate within the state, does not impair the obligation of the contract created by the charter granted to the *plaintiffs in error. It is, therefore, the opinion of this court, that there is no error in the judgment of the supreme judicial court for [*565
the state of Rhode Island, affirming the judgment of the circuit court in this case; and the same is affirmed; and the cause is remanded to the said supreme judicial court, that its judgment may be finally entered.

THIS cause came on to be heard, on the transcript of the record from the supreme judicial court of the state of Rhode Island and Providence Plantations, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said supreme judicial court in this cause be and the same is hereby affirmed, with costs.

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